Concerned Women for America

370 L'ENFANT PROMENADE, S.W., SUITE 800 WASHINGTON, D.C. 20024 (202) 488-7000

Beverly LaHaye
President

July 9, 1991

The Honorable John H. Sununu
Chief of Staff to the President
The White House
Washington, D.C. 20500

THE CHIEF of STAFF has seen

Dear Governor Sununu:

I have heard disturbing reports that President Bush is considering compromising on Title X regulations. Although I believe the President will keep his promise to "veto any legislation that weakens current law or existing regulations", I am concerned about these growing rumors. I am requesting a confirmation of President Bush's commitment to his promise.

I know the House vote on June 26 to allow Title X clinics to continue abortion counseling and referrals has caused much confusion. I was surprised to learn that a large pro-life organization had actually called members of Concerned Women for America to inform them a vote on The Health and Human Services Appropriation Bill (H.R. 2707) was not a pro-life vote. Unfortunately, I discovered this only a short time before the vote and was not able to undo most of the damage caused by this effort to deactivate the grassroots.

Although Concenred Women for America intially viewed a vote on H.R. 2707 as a pro-life vote, most pro-life groups did not. Many groups actually immobilized their members and members of other organizations. This is the reason for the weak vote on the H.R. 2707. Even the President of the Congressional Pro-Life Caucus, Representative Alan Mollohan, who strongly opposes changes to Title X regulations, voted for H.R. 2707. I am hopeful that President Bush realizes the nature of the confusion behind this vote.

I want to thank you for the strong pro-life stand the Administration has always taken. I urge President Bush to provide the necessary leadership and put an end to the rumors by making a public statement that he will veto any weakening of the Title X regulations.

With Best Regards,

Beverly LaHaye
President, Concerned Women for America

THE WHITE HOUSE

WASHINGTON

June 24, 1991

MEMORANDUM FOR KATIE WINKELJOHN

FROM: DANIEL CASSE DAC

SUBJECT: Press Statement by James Mason

Attached is a faxed copy of the statement that HHS Assistant Secretary of Health James Mason read this morning at his press conference.

Please let me know if you need any further material.

Attachment

Statement of James O. Mason, M.D., M.P.H.
Assistant Secretary for Health
June 24,1991

As the head of the United States Public Health Service, I appreciate this opportunity to underscore the importance of this regulation separating Title X family planning services from abortion related activities. This regulation, recently upheld by the Supreme Court, stops the practice of using Federal funds to promote and facilitate abortion as a family planning method. This regulation makes good public health sense. It restores the Title X family planning program to what it was originally intended to be, a source of pre-pregnancy family planning services. This regulation reflects the sound judgment that the Federal Government should not subsidize abortion as a back-up method of birth control. The Title X law enacted by Congress in 1970 specifically forbids the use of abortion as a means of family planning, and this regulation gives force and specificity to that prohibition.

Unfortunately, it is necessary to dispel misinformation about this regulation. For example, this regulation does not, in any way, deny women medical information. In fact, if a woman is found to have any medical problem, the regulation <u>requires</u> that she be assisted in receiving the complete and appropriate medical care even if the result is termination of pregnancy. What is often ignored in this debate is the fact that in all but a small number of cases, the decision to have an abortion is not a medical one, but an ethical one in which a physician or medical

practitioner is no better equipped to answer than a lay person. This regulation merely establishes a wall of separation between family planning and abortion. It is time to allow the program to focus on helping women avoid unplanned pregnancies and fighting sexually transmitted diseases.

Also, let me underscore the importance of this program as a key component in our Department's effort to reduce the national problem of infant mortality. I believe that an important and often overlooked aspect of this regulation is its requirement that if a client is pregnant she will be assisted to in obtain access to vital pre-natal care. From the point that pregnancy is confirmed, the public health role is to provide quality medical care for two patients, the mother and her unborn child.

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Calendar No. 125

102D CONGRESS
1ST SESSION

S. 323

[Report No. 102–86]

To require the Secretary of Health and Human Services to ensure that pregnant women receiving assistance under title X of the Public Health Service Act are provided with information and counseling regarding their pregnancies, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 31 (legislative day, JANUARY 3), 1991

Mr. CHAFEE (for himself, Mr. PACKWOOD, Mrs. KASSEBAUM, Mr. JEFFORDS, Mr. COHEN, Mr. SIMPSON, Mr. ADAMS, Mr. AKAKA, Mr. WIRTH, Mr. BINGAMAN, Mr. BRADLEY, Mr. BURDICK, Mr. CRANSTON, Mr. DODD, Mr. GLENN, Mr. GORE, Mr. HARKIN, Mr. HOLLINGS, Mr. KENNEDY, Mr. KERRY, Mr. KOHL, Mr. LAUTENBERG, Mr. LEAHY, Mr. LEVIN, Mr. METZENBAUM, Ms. MIKULSKI, Mr. MOYNIHAN, Mr. PELL, Mr. RIEGLE, Mr. ROBB, Mr. SIMON, Mr. WELLSTONE, Mr. BENTSEN, Mr. SANFORD, Mr. INOUYE, Mr. BIDEN, Mr. RUDMAN, Mr. BAUCUS, Mr. ROCKEFELLER, Mr. SEYMOUR, Mr. HATFIELD, Mr. LIEBERMAN, Mr. FOWLER, Mr. KERREY, Mr. SHELBY, Mr. DASCHLE, and Mr. SARBANES) introduced the following bill; which was read twice and referred to the Committee on Labor and Human Resources

JUNE 20 (legislative day, JUNE 11), 1991

Reported by Mr. KENNEDY, without amendment

A BILL

To require the Secretary of Health and Human Services to ensure that pregnant women receiving assistance under title X of the Public Health Service Act are pro-

102D CONGRESS
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[Report No. 102–86]

A BILL

To require the Secretary of Health and Human Services to ensure that pregnant women receiving assistance under title X of the Public Health Service Act are provided with information and counseling regarding their pregnancies, and for other purposes.

JUNE 20 (legislative day, JUNE 11), 1991

Reported without amendment

vided with information and counseling regarding their pregnancies, and for other purposes.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "Title X Pregnancy Counseling Act of 1991".

SEC. 2. PROVISION OF INFORMATION AND COUNSELING REGARDING PREGNANCIES.

Notwithstanding any other provision of law, the Secretary of Health and Human Services shall ensure that projects receiving assistance under title X of the Public Health Service Act offer pregnant women information and counseling concerning all legal and medical options regarding their pregnancies. Women requesting such information regarding the options for the management of an unintended pregnancy shall be provided with nondirective counseling, and referral on request, concerning alternative courses of action that shall include—

(1) prenatal care and delivery;

(2) infant care, foster care, or adoption services; and

(3) pregnancy termination.

AMENDMENT NO. ____ Calendar No. ____

Purpose: To ensure that certain information and counseling regarding pregnancies is available under programs receiving assistance under title X of the Public Health Service Act and to clarify the circumstances under which such counseling or referrals for such counseling must be provided.

IN THE SENATE OF THE UNITED STATES—102d Cong., 1st Sess.

• • •

S. 323

To require the Secretary of Health and Human Services to ensure that pregnant women receiving assistance under title X of the Public Health Service Act are provided with information and counseling regarding their pregnancies, and for other purposes.

Referred to the Committee on _____
and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. CHAFEE _____

Viz:

Strike out section 2 of the bill and insert in lieu thereof the following new section:

SEC. 2. PROVISION OF INFORMATION AND COUNSELING REGARDING PREGNANCIES.

Title X of the Public Health Service Act (42 U.S.C. 300 et seq.) is amended by adding at the end thereof the following new section:

"SEC. 1010. PROVISION OF INFORMATION AND COUNSELING REGARDING PREGNANCIES.

"(a) AVAILABILITY OF INFORMATION.—Notwithstanding any other provision of law, the Secretary shall ensure that projects make information or counseling services available to pregnant women concerning all legal and medical options regarding their pregnancies. Women requesting information or counseling under this section regarding the options for the management of an unintended pregnancy shall be provided with nondirective counseling, and referral on request, concerning alternative courses of action that may include—

"(1) prenatal care and delivery; and

"(2) infant care, foster care, or adoption services; and

"(3) pregnancy termination.

"(b) REQUIREMENT OF REFERRAL.—If a project does not provide counseling or referral services on any of the subjects described in paragraphs (1), (2) or (3) of subsection (a), such project shall advise the patient with respect to whom such information is related of that fact and refer

such patient to another project receiving assistance under this title that provides such counseling and referral.

''(c) RELIGIOUS BELIEFS OR MORAL CONVICTIONS.—

''(1) IN GENERAL.—No project, or individual employed or associated with such project, may decline to provide counseling or referral services on any of the subjects described in paragraphs (1), (2) or (3) of subsection (a), except where the provision of such counseling or referral services would be contrary to the religious beliefs or moral convictions of the project or individual.

''(2) FACILITIES AND PERSONNEL.—A project that, as provided for in paragraph (1), declines to provide counseling or referral services on any of the subjects described in paragraphs (1), (2) or (3) of subsection (a), may not be required to—

''(A) make its facilities available for the provision of such counseling or referral services; or

''(B) provide any personnel for the provision of such counseling or referral services.

''(d) PROHIBITION AGAINST DISCRIMINATION.—A project receiving assistance under this title after the date of enactment of this section shall not—

"(1) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel; or

"(2) discriminate in the extension of staff or other privileges to any physician or other health care personnel;

because such physician has provided counseling concerning the termination of a pregnancy or refused to provide such counseling on the grounds that such counseling would be contrary to the religious beliefs or moral convictions of the physician, or because of the religious beliefs or moral convictions of the physician with respect to such counseling.

"(e) NON-TERMINATION OF GRANT.—No project may be denied funding, or be terminated, under this title based on the decision of such project to provide or decline to provide counseling and referral services on any of the subjects described in paragraphs (1), (2) or (3) of subsection (a). The burden of proof shall be on the entity or official making the determination to deny funding or terminate the project to demonstrate that such denial or termination is not based solely on the decision by such project to provide or decline to provide such counseling or referral services.

"(f) ACCESSIBILITY OF SERVICE.—A grantee under this title shall ensure that information or counseling on each of

the subjects described in paragraphs (1), (2) or (3) of subsection (a) is available at an adequate number of projects assisted by such grantee under the grant within the geographic areas served.

"(g) DEFINITION.—For purposes of this section, the term 'project' means an entity that provides family planning services with funds received under this title under a negotiated, written agreement with a grantee.".

THE WASHINGTON POST FRIDAY, MAY 24, 1991

The Washington Post

AN INDEPENDENT NEWSPAPER

Forbidden Advice

IT IS NOW clear that there is no longer a majority on the Supreme Court dedicated to protecting abortion rights against the onslaughts of hostile legislators and retrogressive regulation-writers. Only a few years ago, the court spelled out its conviction that government actions designed to inhibit the exercise of the right—by requiring, for example, waiting periods and lectures on the perils of abortion—were unacceptable. There has been a gradual retreat in recent years, but yesterday the extent of the drift from that strong stand was apparent when the court approved federal regulations that bar doctors and health workers even from mentioning abortions in government-funded family planning clinics. Justice David Souter, whose first vote on the issue was eagerly awaited, cast the deciding vote.

At issue were regulations promulgated in 1988 that changed a practice at the 4,000 family planning clinics funded, in part, under Title X of the Public Health Services Act. One section of that law provides that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." So from its inception the program never funded abortions. But staff routinely *discussed* abortion as an option and referred women to providers when appropriate. The Reagan administration regulations banned this counseling and referral and, where Title X recipients used their own money to provide abortion services, required that these services be separated both physically and financially from the family planning operations. The regulations have not been enforced during the time they have been challenged in court, but now they will go into effect.

The four dissenters on the court, Justices Marshall, Stevens, Blackmun and O'Connor, write that the regulations go far beyond the plain meaning of the statute. One dissenting appeals court judge styled them "arbitrary and capricious," which they certainly are. They are also an unconstitutional restriction on free speech and on a woman's ability to exercise her right to abortion. But the persuasive arguments of dissenters are now history, and the task ahead is to plan an alternative challenge.

President Bush, who did not propose the regulations, could, of course, tell Secretary of Health and Human Services Louis Sullivan to revoke them. But he won't, and so the task falls to Congress. The votes are there. Last year, the Senate voted 62 to 36 to overturn the regulations, and House leaders believe that body could do the same. But veto-proof majorities are probably needed, and that measure of support will be much more difficult to organize. Yesterday's decision, allowing the government to prohibit recipients of federal funds from even mentioning the option of abortion to poor women seeking advice, should cause a backlash sufficient to mobilize Congress.

THE NEW YORK TIMES, May 24, 1991

Bad Abortion Advice, Court-Approved

The Supreme Court has now ruled that the Government has the power to pressure clinics to hide information or even mislead poor pregnant women about their right to choose whether or not to bear a child. That's bad enough as a moral and constitutional matter, but the Court did more. It held that Congress has actually authorized the Department of Health and Human Services to promote this coercive, unprofessional assault on a woman's rights.

By a 5-to-4 vote the Court upheld regulations of the Reagan and Bush Administrations claiming to implement Congress's program subsidizing family planning clinics. Those rules forbid even the mention of abortion in such clinics. If a woman directly asks whether abortion is an option for her unintended pregnancy, she must be told that "the project does not consider abortion an appropriate method of family planning," even if the doctors in fact believe it is an option.

Surely Congress had no intention, when it passed the 1970 Family Planning Act or any time since, of forcing doctors and clinics to give such skewed advice. Even when it denied funding for poor women's abortions, Congress never contemplated gagging doctors from giving full, honest answers to trusting women.

Justice David Souter, the newest member on the Court and yesterday's swing vote, had it right during oral arguments last fall when he asked whether the H.H.S. regulations didn't interfere with a doctor's professional advice. Yet he joined Chief Justice William Rehnquist's opinion that denied any such interference. Their captious reasoning: Since the patient has no reason to rely on the clinic for *complete* medical advice, she will not be misled. Nor is the doctor forced to say anything he does not believe because he is only stating clinic policy.

Is the Court countenancing a two-tier system of health care, one for the rich, who use private doctors, and one for the poor, who rely on the clinics?

The Chief Justice argues defensively, cynically and contrary to experience, that poor women are no worse off under the H.H.S. rules than if Congress had never supported any clinics at all. Tell that to the patient who sees the clinic as her only source of information or help.

Congress now must respond with legislation so clear that the Supreme Court will honor its intention to provide honest information with family planning services for the poor. A simple bill negating the H.H.S. rules is the right place to start.

THE WASHINGTON POST, May 28, 1991

David Cole

Get Government Out of the Doctor's Office

The Supreme Court decided last Thursday that the government violates no constitutional rights when it invites a poor, uneducated, pregnant woman into a publicly funded counseling program and provides her with one-sided information about her options. Under the Title X regulations upheld by the court, government-funded family planning counselors cannot tell pregnant women about the option of abortion but must tell them about prenatal care, and cannot refer them to an abortion provider but must refer them to a prenatal care provider. If a woman knows enough to ask about abortion, the counselor is directed to say that "abortion is not an appropriate method of family planning," and to refer her for prenatal care.

For the moment, then, our nation has two standards of medical counseling. Those who can afford to pay for medical care will receive nondirective counseling about all of their medical options and will thereby be free to make informed, autonomous decisions about their health. But the millions of poor women who are dependent on government-funded family planning counseling will receive one-sided information that steers them toward the administration's political choice about what they should do with their bodies.

The Supreme Court's ruling, however, is not the end of the matter. Congress can and should put an end to the double standard that the Reagan administration created and the court has now sanctioned. It nearly did so last year, when the Senate initially adopted Sen. John Chafee's (R-R.I.) bill requiring Title X programs to provide a pregnant woman with nondirective counseling and referral on all her options: childbirth, adoption and abortion. The bill died on the floor, but Chafee has reintroduced it this year.

Whatever view one takes on the constitutionality of one-sided family planning counseling, there are strong ethical reasons for forbidding it as a legislative matter. To allow one-sided counseling is to violate the first principle of medical counseling: the patient, not the counselor, must be free to make the final decision about his or her physical well-being.

This principle dates back at least to Plato, who distinguished "the slave doctor," who "prescribes what he thinks good, out of the abundance of his experience, as if he had no manner of doubt," from the free doctor, who "enters into discourse with the patient, and will not prescribe for him until he has first convinced him." It is reflected to this day in all current medical codes of ethics. Thus, the American College of Obstetricians & Gynecologists has dictated that when a physician counsels a pregnant woman, he must discuss all options: "Counseling directed solely toward either promoting or preventing abortion does not sufficiently reflect the full nature of the problem or range of options to which the patient is entitled."

Moreover, this ethic of full disclosure and nondirective counseling is not limited to medical counseling, but governs every conceivable professional relationship. Similar mandates can be found in the ethical codes that govern the legal profession, accounting, advertising, architecture, engineering, financial planning, insurance and even real estate. These guidelines recognize what the Supreme Court did not: that professional relationships are not equal and therefore require regulation to preserve the client's autonomy. Nondirective counseling is designed to ensure that the client is able to make his or her own decision with the

assistance and advice of the professional but without the professional's intrusion on the client's individual autonomy and free will.

The concern about preserving autonomy is especially great in the Title X context for three reasons. First, Title X clients are for the most part young, indigent—most come from families living below the poverty line—and uneducated. As a class, therefore, they are particularly susceptible to being misguided by one-sided, partial information.

Second, doctors are the paradigmatic example of a professional in whom we need to trust. While we might be inclined to treat real estate salesmen at arm's length, we are all at our most vulnerable when speaking to a doctor or medical counselor about our own health. Here more than anywhere else a strict regimen of full information must be maintained.

Third, the fact that the government is funding the Title X program heightens concerns about autonomy. The Bill of Rights reflects an understanding that the greatest threat to autonomy is posed by unlimited government. If the government is free to establish counseling programs for the citizenry that subtly and not so subtly impose the current majority's political views on the country's neediest, we will be a long way from the principles of autonomy and individual liberty upon which this country was founded.

The dangers posed by the Title X regulations are probably apparent to those who favor protecting a woman's free choice about her reproductive destiny. For those who oppose abortion, however, those dangers can best be demonstrated by hypothesizing the reverse situation. Imagine the same sort of regulations drafted by a government that favored abortion over childbirth. Under such a regime, the Title X program would mandate counseling and referrals only about abortion. It would bar counseling about prenatal care and instruct counselors when asked about childbirth to say that it is not "appropriate." This example makes clear that the only safe and honorable course for government is to leave these decisions to the clients by mandating the provision of complete, neutral information on all of a pregnant woman's lawful options.

The writer is a professor at Georgetown University Law Center and a volunteer attorney at the Center for Constitutional Rights.

THE WALL STREET JOURNAL, Wednesday, June 26, 1991

TECHNOLOGY & MEDICINE

AMA Opposes Government Interference With Doctors' Counseling of Patients

By THOMAS M. BURTON
Staff Reporter of THE WALL STREET JOURNAL

CHICAGO—The American Medical Association, signaling its opposition to a ban on abortion counseling at federally funded clinics, voted to condemn all government interference with doctors' ability to provide counseling to patients.

The unanimous vote by the AMA's 483-member House of Delegates has the practical effect of spurring the association toward heightened lobbying efforts on Capitol Hill concerning abortion conseling. The U.S. House of Representatives is scheduled to vote today on a bill that would overturn the existing ban on such counseling.

The AMA-approved resolution says the medical group will both lobby Congress on that bill and "vigorously" oppose any government attempt to "interfere with the physician-patient relationship."

Nancy Dickey, a member of the AMA's governing board of trustees, contended that existing federal regulations banning abortion counseling could lead to other government interference with medicine that would be "much more pervasive than just dealing with abortion."

For instance, said Dr. Dickey, AMA members are concerned the government might enter other areas of medical treatment that have become political. One possibility, she suggested, was interference with doctors' ability to inform patients about the existence of high-cost technology that could treat their ailments.

The Bush administration supports existing federal rules—written by the Reagan administration in 1988—that preclude doctors at federally funded facilities from advising poor women about the availability of abortions.

The U.S. Supreme Court upheld those regulations in a decision in May. The court, through Chief Justice William Rehnquist, concluded that the restrictive regulations are consistent with federal law and don't violate constitutional rights, such as the right of free speech.

That ruling was considered an important victory for the Bush administration. Abortion-rights groups maintained the decision would make it more difficult to obtain abortions for poor women and for young women who lack information about abortion and have no access to other medical counseling.

The regulations are part of what is known as Title X of the federal Public Health Service Act. Recent estimates indicate government money goes to some 3,900 clinics serving nearly five million women.

The AMA, taking pains to ensure that its action isn't limited to the abortion debate, didn't even mention abortion in the measures passed at its convention here. Instead, the association denounced "any interference by the government" causing a doctor to "compromise his or her medical judgment as to what information or treatment is in the best interest of the patient."

Dr. Dickey and other AMA officials, though, make it clear that they will lobby Congress for the current abortion counseling legislation. That bill will require the two-thirds congressional majority necessary to override the expected veto of President Bush.

The AMA resolution speaks of the "dangers inherent" in laws or regulations that "restrict communication between physicians and their patients."

"We have seen over the last decade more willingness by the government to intercede in medical decisions," said Dr. Dickey. "But my patients expect that they will get the full information about the treatments available."

Thus, the thrust of the AMA's vote, supported by doctors from 50 states, was to condemn government prohibitions on any treatment that becomes a political issue. Dr. Dickey, as a further example, cited concerns by doctors that the government might seek to limit the medical measures made available to prolong the life of a dying, elderly patient.

THE NEW YORK TIMES, June 27, 1991

A.M.A. Condemns U.S. Curbs on Medical Advice

CHICAGO, June 25 (Reuters) — Delegates to the annual convention of the American Medical Association condemned today any Federal interference with doctors who provide advice about abortion or any other medical matter.

On a voice vote and without debate, the House of Delegates, the A.M.A.'s policymaking body, urged repeal of all laws and regulations that "prevent physicians from freely discussing with or providing information to patients about medical care and procedures or interfere with the physician-patient relationship."

The policy statement came partly in response to a Federal rule, upheld last month by the United States Supreme Court, that prohibits Government-financed family-planning clinics from telling women of their legal right to abortion.

No Mention of 'Abortion'

The resolution that passed today does not mention the word "abortion." But it says the association "strongly condemns any interference by the Government or other third parties that causes a physician to compromise his or her medical judgment as to what information or treatment is in the best interest of the patient."

Doctors react to a Federal ruling on abortion counseling.

The language was a compromise worked out by a committee that considered several proposals specifically commenting on the Supreme Court ruling and on Government regulations involving abortion.

Officially the medical association is neutral on the legal, moral and ethical issues surrounding the abortion debate, as opposed to the medical issues surrounding that debate. The delegates reiterated that neutrality today when, in a separate resolution, they urged the association's leadership to "precisely state" A.M.A. policy in public pronouncements so as to "minimize public misperception."

Vote Against Tobacco Ads

In other actions today, the delegates took these steps:

¶Reaffirmed the association's existing policy calling for a total ban on the promotion of all tobacco products. But a proposal that had singled out outdoor tobacco billboard advertisements for specific criticism was not considered.

¶Ordered the association to develop model state legislation prohibiting anyone from riding in the back of a pickup truck without a seat belt.

¶Urged President Bush to establish a Cabinet-level entity, with the Department of Health and Human Services as coordinator, to develop dietary guidelines for the country.

This statement was a compromise of a policy statement that had called for stripping the Agriculture Department of the dietary guideline work it now does, and transferring it to Health and Human Services.

S.323 by CHAFEE (R-RI) -- Title X Pregnancy Counseling Act of 1991
Official Title (Caption):
A bill to require the Secretary of Health and Human Services to ensure that pregnant women receiving assistance under Title X of the Public Health Service Act are provided with information and counseling regarding their pregnancies, and for other purposes.

CURRENTLY: 39 Democrats
8 Republicans
---
47 Cosponsors As of June 27

ADAMS (D-WA)	As Introduced 01/31/91
AKAKA (D-HI)	As Introduced 01/31/91
BAUCUS (D-MT)	Added 06/03/91
BENTSEN (D-TX)	Added 02/06/91
BIDEN (D-DE)	Added 05/24/91
BINGAMAN (D-NM)	As Introduced 01/31/91
BRADLEY (D-NJ)	As Introduced 01/31/91
BURDICK (D-ND)	As Introduced 01/31/91
COHEN (R-ME)	As Introduced 01/31/91
CRANSTON (D-CA)	As Introduced 01/31/91
DASCHLE (D-SD)	Added 06/12/91
DODD (D-CT)	As Introduced 01/31/91
FOWLER (D-GA)	Added 06/06/91
GLENN (D-OH)	As Introduced 01/31/91
GORE (D-TN)	As Introduced 01/31/91
HARKIN (D-IA)	As Introduced 01/31/91
HATFIELD (R-OR)	Added 06/04/91
HOLLINGS (D-SC)	As Introduced 01/31/91
INOUYE (D-HI)	Added 03/12/91
JEFFORDS (R-VT)	As Introduced 01/31/91
KASSEBAUM (R-KS)	As Introduced 01/31/91
KENNEDY, EDWARD (D-MA)	As Introduced 01/31/91
KERREY, BOB (D-NE)	Added 06/06/91
KERRY, JOHN (D-MA)	As Introduced 01/31/91
KOHL (D-WI)	As Introduced 01/31/91
LAUTENBERG (D-NJ)	As Introduced 01/31/91
LEAHY (D-VT)	As Introduced 01/31/91
LEVIN, CARL (D-MI)	As Introduced 01/31/91
LIEBERMAN (D-CT)	Added 06/05/91
METZENBAUM (D-OH)	As Introduced 01/31/91
MIKULSKI (D-MD)	As Introduced 01/31/91
MITCHELL, GEORGE (D-ME)	Added 06/21/91
MOYNIHAN (D-NY)	As Introduced 01/31/91
PACKWOOD (R-OR)	As Introduced 01/31/91
PELL (D-RI)	As Introduced 01/31/91
RIEGLE (D-MI)	As Introduced 01/31/91
ROBB (D-VA)	As Introduced 01/31/91
ROCKEFELLER (D-WV)	Added 06/03/91
RUDMAN (R-NH)	Added 06/03/91
SANFORD (D-NC)	Added 02/20/91
SARBANES (D-MD)	Added 06/17/91
SEYMOUR (R-CA)	Added 06/03/91
SHELBY (D-AL)	Added 06/06/91
SIMON (D-IL)	As Introduced 01/31/91
SIMPSON (R-WY)	As Introduced 01/31/91
WELLSTONE (D-MN)	As Introduced 01/31/91
WIRTH (D-CO)	As Introduced 01/31/91

AMENDMENT NO. ____ Calendar No. ____

Purpose: To ensure that certain information and counseling regarding pregnancies is available under programs receiving assistance under title X of the Public Health Service Act and to clarify the circumstances under which such counseling or referrals for such counseling must be provided.

IN THE SENATE OF THE UNITED STATES—102d Cong., 1st Sess.

• • •

S. 323

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Referred to the Committee on _____
and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. CHAFEE _____

Viz:

Strike out section 2 of the bill and insert in lieu thereof the following new section:

SEC. 2. PROVISION OF INFORMATION AND COUNSELING REGARDING PREGNANCIES.

Title X of the Public Health Service Act (42 U.S.C. 300 et seq.) is amended by adding at the end thereof the following new section:

"SEC. 1010. PROVISION OF INFORMATION AND COUNSELING REGARDING PREGNANCIES.

"(a) AVAILABILITY OF INFORMATION.—Notwithstanding any other provision of law, the Secretary shall ensure that projects make information or counseling services available to pregnant women concerning all legal and medical options regarding their pregnancies. Women requesting information or counseling under this section regarding the options for the management of an unintended pregnancy shall be provided with nondirective counseling, and referral on request, concerning alternative courses of action that may include—

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such patient to another project receiving assistance under this title that provides such counseling and referral.

"(c) RELIGIOUS BELIEFS OR MORAL CONVICTIONS.—

"(1) IN GENERAL.—No project, or individual employed or associated with such project, may decline to provide counseling or referral services on any of the subjects described in paragraphs (1), (2) or (3) of subsection (a), except where the provision of such counseling or referral services would be contrary to the religious beliefs or moral convictions of the project or individual.

"(2) FACILITIES AND PERSONNEL.—A project that, as provided for in paragraph (1), declines to provide counseling or referral services on any of the subjects described in paragraphs (1), (2) or (3) of subsection (a), may not be required to—

"(A) make its facilities available for the provision of such counseling or referral services; or

"(B) provide any personnel for the provision of such counseling or referral services.

"(d) PROHIBITION AGAINST DISCRIMINATION.—A project receiving assistance under this title after the date of enactment of this section shall not—

"(1) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel; or

"(2) discriminate in the extension of staff or other privileges to any physician or other health care personnel;

because such physician has provided counseling concerning the termination of a pregnancy or refused to provide such counseling on the grounds that such counseling would be contrary to the religious beliefs or moral convictions of the physician, or because of the religious beliefs or moral convictions of the physician with respect to such counseling.

"(e) NON-TERMINATION OF GRANT.—No project may be denied funding, or be terminated, under this title based on the decision of such project to provide or decline to provide counseling and referral services on any of the subjects described in paragraphs (1), (2) or (3) of subsection (a). The burden of proof shall be on the entity or official making the determination to deny funding or terminate the project to demonstrate that such denial or termination is not based solely on the decision by such project to provide or decline to provide such counseling or referral services.

"(f) ACCESSIBILITY OF SERVICE.—A grantee under this title shall ensure that information or counseling on each of

the subjects described in paragraphs (1), (2) or (3) of subsection (a) is available at an adequate number of projects assisted by such grantee under the grant within the geographic areas served.

"(g) DEFINITION.—For purposes of this section, the term 'project' means an entity that provides family planning services with funds received under this title under a negotiated, written agreement with a grantee.".

VOTE IN SENATE LABOR AND HUMAN RESOURCES COMMITTEE ON S. 323

YES	NO
Kennedy	Hatch
Pell	Coats
Metzenbaum	Thurmond
Dodd	Durenberger
Simon	Cochran
Harkin	
Adams	
Mikulski	
Bingaman	
Wellstone	
Kassebaum	
Jeffords	
TOTAL: 12	TOTAL: 5

VOTE ON CHAFEE PREGNANCY COUNSELING AMENDMENT TO TITLE X
September 25, 1990

YEAS (62)

Republicans	Democrats		
Bond	Adams	Kerrey	
Chafee	Akaka	Kerry	
Cohen	Baucus	Kohl	
Gorton	Bentsen	Lautenberg	
Hatfield	Biden	Leahy	
Heinz	Bingaman	Levin	
Jeffords	Bradley	Lieberman	
Kassebaum	Bryan	Metzenbaum	
Murkowski	Bumpers	Mikulski	
Packwood	Burdick	Mitchell	
Roth	Byrd	Moynihan	
Simpson	Cranston	Nunn	
Specter	Daschle	Pell	
Stevens	Dixon	Pryor	
Thurmond	Dodd	Riegle	
Warner	Fowler	Robb	
	Glenn	Rockefeller	
	Gore	Sanford	
	Graham	Sarbanes	
	Harkin	Sasser	
	Hollings	Shelby	
	Inouye	Simon	
	Kennedy	Wirth	

NAYS (36)

Republicans	Democrats
Armstrong	Boren
Boschwitz	Breaux
Burns	Conrad
Coats	DeConcini
Cochran	Exon
D'Amato	Ford
Danforth	Heflin
Dole	Johnston
Domenici	Reid
Durenberger	
Garn	
Gramm	
Grassley	
Hatch	
Helms	
Humphrey	
Kasten	
Lott	
Mack	
McCain	
McClure	
McConnell	
Nickles	
Pressler	
Symms	
Wallop	

NOT VOTING: Rudman, Wilson

PART II

7.0 Client Services

Projects funded under Title X must provide medical, social, and referral services relating to family planning to all eligible clients who desire such services [59.5(b)1, 2, 8]. Part II of this document has been developed to provide guidance to grantees as to those services which are *required, recommended,* or *related* to fulfill the mission and intent of Title X. The *required* services are those services which are stipulated either in the law or the regulations, or which are otherwise considered essential to the provision of family planning services of high quality. The *recommended* services are those services intended to promote the reproductive and general health care of the family planning client population. The *related* services are those services which are not authorized under Title X but which may be provided by projects in order to meet the specific reproduction-related health needs of the family planning client.

7.1 SERVICE PLANS AND PROTOCOLS

The service plan is the component of the grantee's health care plan which is developed by the medical director and clinical staff and which identifies those services to be provided to clients under Title X by the project. As part of the service plan, all delegates and/or service sites must have written protocols, approved by the grantee, which detail specific procedures for the provision of each service offered. Plans must be written in accordance with Title X program guidelines and current medical practice and must cover the services provided at initial visits, annual revisits, and other revisits, including supply and problem revisits (see chart 7.1).

Under exceptional circumstances, a waiver from a particular requirement in the guidelines may be obtained from the Regional Office upon written request from an individual project. For example, the hemoglobin or hemotocrit requirement may be waived if a project's medical director determines that routine anemia screening is unwarranted in the client population served. In submitting a request for such an exception, the project must provide epidemiologic, clinical, and other supportive data to justify the request and the duration of the waiver.

7.2 PROCEDURAL OUTLINE

The services provided to family planning clients, and the sequence in which they are provided, will depend upon the type of visit and the nature of the service requested. However, the following components should be offered to all clients at the initial visit: Presentation of relevant educational materials; initial counseling; explanation of all procedures and signing of an informed consent covering examination and treatment; obtaining of a personal and family history; performance of a physical examination; performance of routine and other laboratory tests; individual counseling; performance of any necessary medical procedures; provision of medications and/or supplies; exit counseling. Return visits should include an assessment of the client's health status and an opportunity to change methods.

For clients electing nonprescription methods of contraception or fertility awareness methods including natural family planning, the initial required medical work-up may be deferred at their request, with appropriate documentation in the medical record. Such clients should be encouraged to have health screening at return visits.

7.3 EMERGENCIES

Emergency situations involving clients and/or staff may occur at any time. All projects should therefore have written plans and procedures for the management of on-site medical emergencies (e.g., cardiac arrest, shock, hemorrhage, and respiratory difficulties) with which project staff are familiar. Written plans and procedures should also be available for emergencies requiring ambulance services and/or hospital treatment. Information and instructions on dealing with fire, natural disaster, robbery, power failure, harrassment, and other emergency situations should also be available, and appropriate training in these areas should be provided to staff.

7.4 REFERRALS AND FOLLOW-UP

Grantees must provide all family planning services listed under "Required Services" either on-site or by referral. When required services are to be provided by referral, the grantee must establish formal arrangements with a referral agency for the provision of services and reimbursement of costs, as appropriate. Title X funds may be used to cover the cost of these referred services only if no other sources of funds are available.

For other than required services, that is services which are determined to be necessary but which are beyond the scope of the program, clients should be referred to other providers for care. Examples of such referrals are: treatment for gynecologic dysplasia or malignancy, pregnancy management, family or general medical practice, general surgery, genetic testing, dentistry, mental health services, marriage/sexual counseling, services related to

abortion, and other social services. Grantees should maintain a list of health care providers, local health and welfare departments, hospitals, voluntary agencies, and health services projects supported by other Federal programs [59.5(b)2] to use for referral purposes. Projects must select referral providers according to procedures which assure fairness in the referral practice and which identify providers of acceptable quality. Whenever possible, clients should be given a choice of providers from which to select.

Projects should have written referral and follow-up procedures. The timing and manner of referral and follow-up depend upon the nature of the problem for which the referral was made. For example:

- *Emergency referrals (e.g., possible ectopic pregnancy) should be made immediately with the provider.*
- *Urgent referrals (e.g., solitary breast nodule) should be followed up within two weeks with the client.*
- *Essential referrals (e.g., hypertension) should be followed up with the client, the timing to depend on professional judgment.*
- *Discretionary referrals (made at the request of the client) should be followed up with the client at the next clinic visit. Further follow-up may not be necessary but should be based on professional judgment.*

Projects should make arrangements for the transfer (with client consent) of pertinent client information to the referral provider. In addition, internal systems should be developed to document (1) that recommended referral appointments are made within an appropriate period of time, (2) that these appointments are kept, (3) that providers return complete pertinent client information to the referring center, (4) action taken in response to recommendations received from the referral provider, and (5) any comments the client makes about the referral provider. Efforts may be made to aid the client in identifying potential resources for reimbursement of the referral provider, but projects are not responsible for the cost of this care.

When family planning services are provided by the project to clients referred from other agencies, the project has a responsibility to share client information with the referring agency. Such information may only be given with the written permission of the client.

When family planning clients are referred for services, projects have a responsibility to assure that clients obtain the appropriate services, and referred clients should be contacted to assure that the services are obtained. However, follow-up of family planning clients must be sensitive to the client's concerns for confidentiality and privacy. Therefore, mechanisms for follow-up must be negotiated with the client on the first visit, and the negotiated method of follow-up should be noted on the follow-up card and the client's medical record.

8.0 Required Services

The services contained in this section *must* be provided by all projects funded under Title X.

8.1 CLIENT EDUCATION

Education services should provide clients with the information they need to make informed decisions about family planning, to use specific methods of contraception, and to understand the procedures involved in the family planning clinic visit. On an initial visit clients should be offered information about basic female and male reproductive anatomy and physiology and the value of fertility regulation in maintaining individual and family health. The range of available services and the purpose and sequence of clinic procedures should also be explained. Clients must be given information about all contraceptive methods in order to make an informed choice. This instruction should be documented in the client record. Additional education, particularly at subsequent visits, should include information on reproductive health and health promotion/disease prevention, as appropriate.

The project's education component should include written goals, content outlines and procedures, and an evaluation strategy. The educational approach used should be appropriate to the patient's age, situation, and previously acquired information on the various methods. Providers of education should have a mechanism to determine that information given has been understood.

- Informed Consent
  For ethical, medical, and legal reasons, an informed consent documenting the client's voluntary consent to receive the project's services must be signed by the client prior to his or her receiving any medical services. The form should be written in the primary language of the client or witnessed by an interpreter. It should cover all procedures and medications to be provided. To give informed consent for contraception, the client must receive education on the benefits and risks of the various contraceptive alternatives and details on the safety, effectiveness, potential side effects, complications, and danger signs of the contraceptive method(s) of choice. Forms for each contraceptive method, including sterilization, should be part of the project's service plan.

All forms should contain a statement that the client has been counseled, has read the appropriate informational material, and has understood the content of both. The signed informed consent should be part of the client's record. It should be renewed and updated when there is a major change in the client's health status or a change to a different prescriptive contraceptive method.

When sterilization services are provided or arranged for with Government funding, Federal sterilization consent guidelines must be followed *(see Attachment C).*

8.2 COUNSELING

The primary purpose of counseling in the family planning setting is to assist clients in reaching an informed decision regarding the choice and continued use of family planning methods and services. The counseling process is designed to help clients resolve uncertainty, ambivalence, and anxiety in relation to reproductive health and to enhance their capacity to arrive at a decision that reflects their considered self-interest.

The counseling process involves mutual sharing of information. Persons who provide counseling should be knowledgeable, objective, non-judgmental, sensitive to the rights and differences of clients as individuals, and able to create an environment in which the client feels comfortable discussing personal information. The counselor's knowledge should be sufficient to provide ample information regarding the risks, benefits, contraindications, and effective use of any method, procedure, treatment, or option being considered by the client. Documentation of counseling must be included in the client's record.

- Method Counseling
  Post-examination counseling should be provided to assure that the client knows results of the history, physical examination, and laboratory studies that may have a bearing on the choice of method(s); knows how to use and is comfortable with the contraceptive method selected and prescribed; knows the common side effects and possible complications of the method selected and what to do in case they occur; knows the planned return schedule and has a next appointment at an appropriate interval; knows an emergency 24-hour telephone number and a location where emergency services can be obtained; and receives appropriate referral for additional services as needed.

- Special Counseling
  Clients should receive special counseling regarding future planned pregnancies, management of a current pregnancy, sterilizaiton, and other individual problems (e.g., genetic, nutritional, sexual) as indicated.

8.3 HISTORY, PHYSICAL ASSESSMENT, AND LABORATORY TESTING

- History
  A comprehensive personal history and pertinent history of immediate family members must be obtained on all female clients. This should be done at the initial medical visit. The history should be updated at subsequent visits. Histories are recommended for all male clients and are required for those requesting medical services. The initial history should address the following areas:
  —*Allergies; immunizations, especially rubella; current use of prescription and over-the-counter medications; significant illnesses; hospitalizations; surgery; review of systems; extent of use of tobacco, alcohol, and drugs.*
  Histories of reproductive function in female patients should include:
  —*Menstrual history; sexual activity; sexually transmitted diseases; contraceptive use; pregnancies; in utero exposure to DES.*
  On medical revisits, oral contraceptive users must be asked about symptoms of embolic disease and other major complications and side effects. IUD users must be asked, in particular, about symptoms of pelvic infection.
  The male reproductive history should include:
  —*Sexual activity; sexually transmitted diseases; fertility; in utero exposure to DES.*

- Physical Assessment
  Female clients requesting prescriptive methods of contraception (e.g., oral contraceptives, IUDs, diaphragms) must have a general physical examination at the initial medical visit. The initial examination should include at least the following:
  —*Height; weight; blood pressure; thyroid; heart; lungs; extremities; breasts, including instruction in self-exam; abdomen; pelvic examination, including visualization of the cervix and bimanual exam; rectal exam, as indicated.*
  For oral contraceptive users, initial and annual physical examinations must include evaluation of weight, blood pressure, extremities, breasts, and pelvic organs. For IUD users, initial and annual physical exam, blood pressure, and pelvic exam are required, and a more complete exam is recommended.
  Female clients using nonprescriptive methods or diaphragms should have a general physical examination at least every two years. This exam is particularly important for clients who are not receiving gene health care elsewhere.

Male clients requesting temporary methods of contraception are not required to undergo physical examination, but should be offered this service, to include:

—Height; weight; blood pressure; thyroid; heart; lungs; abdomen; examination of the genitals and rectum, including palpation of the prostate and instruction in self-exam of the testes.

- Laboratory Testing

The following laboratory procedures should be done on-site for all female clients at the initial visit and must be done for those receiving prescription methods. They may be waived if written results of these tests done within six months at another facility are available.

—Hemoglobin (Hgb) or hematocrit (Hct)
—Pap smear
—Gonorrhea culture for clients requesting IUD insertion

In addition, pregnancy testing and gonorrhea screening must be available and provided upon request.

Initial laboratory procedures should be repeated annually or as indicated. Oral contraceptive users must have annual pap smears, and IUD users must have annual hemoglobins or hematocrits and pap smears.

Gram stains and cultures for gonorrhea, and other laboratory tests as indicated, should be available for male clients.

Every effort should be made to assure that laboratory tests performed by or for the clinic are of high quality. This means that the grantee should assess the credentials of laboratories with which it contracts. If laboratory testing is performed on-site, written protocols for quality control and proficiency testing are necessary.

- Notification of Abnormal Lab Results

A procedure must be established to allow for client notification and adequate follow-up of significantly abnormal laboratory results. This procedure must respect the client's request to maintain confidentiality. When initial contact is not successful, a reasonable further effort should be made, consistent with the severity of the abnormality.

- Other Laboratory Services or Procedures

The following procedures and lab tests should be provided by the project when medically indicated:

—Screening for non-gonococcal sexually transmitted diseases, e.g., syphilis
—Microscopic examination of vaginal smears and wet mounts for diagnosis of vaginitis
—Microscopic examination and/or culture and sensitivity of urine
—Selected laboratory tests, e.g., blood sugar or cholesterol test for women who are potentially at high risk for oral contraceptive use
—Hemagglutination test for rubella

Other procedures and lab tests may be indicated for some clients and may be provided on-site or by referral.

- Revisits

Revisit schedules should be individualized, based upon the client's need for education, counseling, and medical care beyond that provided at the initial visit. Younger clients and clients initiating a new contraceptive method may need special opportunities for reassurance and clarification. On the other hand, projects should avoid antagonizing well-informed clients who are comfortable with the method being used; such clients should not be required to return for unwanted counseling or frequent supply visits.

Clients selecting oral contraceptives, IUDs, or diaphragms should be scheduled for a revisit within three months after initiation of the method to reinforce its proper use, to check for possible side effects, and to provide additional information as needed. A new client who chooses to continue a method in use upon entry to the program need not return for this early revisit unless a need for reevaluation is determined on the basis of the findings at the initial visit.

Annual revisits are mandatory for clients using oral contraceptives or intrauterine devices and must include at a minimum the components of the history, physical examination, and laboratory procedures as specified for such clients. Annual history updates, exams, and laboratory tests are recommended for all clients. The frequency with which specific procedures are to be routinely repeated should be determined by the medical director and documented in the health care plan.

8.4 FERTILITY REGULATION

Projects must make available, either directly or through referral, all of the DHHS approved methods of contraception. *For recommendations on the management of each method, see Related Documents—Fertility Regulation.*

- Temporary Contraception

Currently, the temporary methods of contraception include barrier methods (female and male), IUDs, fertility awareness methods including natural family planning, and hormonal contraceptives. More than one method of contraception can be used simultaneously by a client and should be offered if the client requests it, e.g., the use of two barrier methods, the use of a

barrier method with an IUD, or the combination of a barrier method with techniques of ovulation detection. Current FDA guidelines as to relative and absolute contraindications, e.g., package inserts, should be followed.

- Permanent Contraception
  Projects must ascertain that the counseling and consent process assures voluntarism and full knowledge of the permanence, risks, and benefits associated with female and male sterilization procedures. Federal regulations must be met if the sterilization procedure is performed or arranged for by the project (see *Attachment C*). For further guidance, see also *Appendices—Permanent Contraception.*

- Emergency Contraception
  Projects must comply with FDA recommendations for the administration of drugs or devices for postcoital contraception.

  The use of diethylstilbestrol (DES) within 72 hours of unprotected sexual intercourse around the time of presumed ovulation has been found to be highly effective in preventing pregnancy. However, this drug has been implicated in the development of reproductive abnormalities and fertility-related risks in the offspring of women who took DES during pregnancy. Although the doses and duration of DES use for postcoital contraception are less than those commonly used when DES was prescribed for pregnancy complications, health risks may be similar. It also is possible that women may take the drug as a postcoital contraceptive when already pregnant from a previous intercourse. In such cases, the potential offspring of such pregnancies would be exposed to the risks previously described. In light of these considerations, the following recommendations are made:

  —*Postcoital contraception with DES in any woman should be restricted to situations where no alternative is judged acceptable by a fully informed patient and her physician.*

  —*Thorough birth control counseling should accompany or follow any prescription of DES for postcoital purposes. A principal objective of such counseling should be to discourage women from considering it as a routine method of contraception.*

8.5 INFERTILITY SERVICES

Grantees are required by law to make basic infertility services available to clients desiring such services. Infertility services which may be supported by Federal funds are categorized as follows:

—*Level I* Includes initial infertility interview, education, examination, appropriate laboratory testing (hemoglobin or hematocrit, pap smear, and culture for gonorrhea), counseling, and appropriate referral.

—*Level II* Includes semen analysis, assessment of ovulatory function through basal body temperature and/or endometrial biopsy, and postcoital testing.

—*Level III* More sophisticated and complex than Level I and Level II services.

Grantees must provide Level I infertility services as a minimum. Those with infertility programs supervised by physicians with special training in infertility can offer Level II services. However, when considering the scope of the infertility services to be offered to clients, grantees must be aware that such services are expensive, not necessarily successful, and may be high risk from medical and legal points of view. It is therefore important that the proportion of the grantee's budget which is to be used for infertility services be determined very carefully.

The grantee's health care plan must have an infertility service component that identifies those services to be provided by each delegate at individual service sites or by referral. The infertility plan must address how services will be provided, including the criteria for diagnosis of infertility, the scope of services, identification of referral sites, follow-up, fee schedules, and payment mechanisms. When referring for Level II or Level III infertility services, efforts should be made to help the client identify sources of funding for these services.

Since infertility may be due to male factors, female factors, or a combination of the two, both partners need to be involved in the infertility evaluation. Adequate education should be provided so that clients understand human reproduction and sexuality as it relates to their particular problem. The benefits and risks of proposed diagnostic and therapeutic measures to be provided on-site must be clearly explained and informed consent obtained.

For further guidance, see Appendices—Infertility Services.

8.6 PREGNANCY DIAGNOSIS AND COUNSELING

Grantees must provide pregnancy diagnosis and counseling to all clients in need of this service. Pregnancy testing is one of the most frequent reasons for an initial visit to the family planning facility, particularly by adolescents. It is therefore important to use this occasion as an entry point for providing education and counseling about family planning.

Pregnancy cannot be accurately diagnos

and staged through laboratory testing alone. Pregnancy diagnosis consists of a history, pregnancy test, and physical assessment, including pelvic examination. Projects providing pregnancy testing on-site should have available at least one test of high specificity and one of high sensitivity. If the medical examination cannot be performed in conjunction with laboratory testing, the client must be counseled as to the importance of receiving a physical assessment as soon as possible, preferably within 15 days. This can be done on-site, by a provider selected by the client, or by a provider to which the client has been referred by the project. For those clients with positive pregnancy test results who elect to continue the pregnancy, the examination may be deferred, but should be performed within 30 days. For clients with a negative pregnancy diagnosis, the cause of delayed menses should be investigated. If ectopic pregnancy is suspected, the client must be referred for immediate diagnosis and therapy.

Pregnant women should be offered information and counseling regarding their pregnancies. Those requesting information on options for the management of an unintended pregnancy are to be given non-directive counseling on the following alternative courses of action, and referral upon request:

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

Clients planning to carry their pregnancies to term should be given information about good health practices during early pregnancy, especially those which serve to protect the fetus during the first three months (e.g., good nutrition, avoidance of smoking, drugs, and exposure to x-rays) and referral for prenatal care.

Clients who are found not to be pregnant should be given information about the availability of contraceptive and infertility services.

For further information, contact the National Clearinghouse for Family Planning Information, as listed in Attachment D.

8.7 ADOLESCENT SERVICES

Adolescent clients require skilled counseling and detailed information. Appointments should be available to them for counseling and medical services on short notice.

It is important not to assume that adolescents are sexually active simply because they have come for family planning services. Many teenagers are seeking assistance in reaching this decision. Abstinence is a valid and responsible option and should be discussed. Adolescents must be assured that the sessions are confidential and that any necessary follow-up will assure the privacy of the individual. However, counselors should encourage young clients to discuss their needs with parents or other family members.

Adolescents seeking contraceptive services should be informed about all methods of contraception. As their needs frequently change, counseling should prepare them to use a variety of methods effectively. In addition, teenagers and their partners should be encouraged to participate fully in project medical services, including physical examination and laboratory studies. However, as some teenagers may fear the medical procedures usually performed at the first clinic visit, projects may defer them for those teenagers who request deferral and elect nonprescription methods.

Because there is a high incidence of sexually transmitted diseases (STD) among teenagers, it is appropriate to ask them about symptoms or possible exposure to these infections. Teens at particularly high risk of STD should be urged to undergo examination and treatment as indicated, either directly or by referral.

For further recommendations, see Appendices—Adolescent Services.

8.8 SEXUALLY TRANSMITTED DISEASES (STD)

Projects must provide an initial gonorrhea culture for women requesting IUD insertion. Gonorrhea cultures should also be provided for clients with probable or definite exposure to gonorrhea and those with symptoms and signs suggesting gonococcal infection. Projects must comply with State and local STD reporting requirements.

Treatment of a client and partner(s) for gonorrhea should be provided through the project. When treatment is provided on-site, appropriate follow-up measures must be undertaken to ensure cure of all persons treated. If parenteral antibiotics are administered, personnel capable of handling an anaphylactic reaction must be in attendance, and appropriate resuscitation drugs and equipment must be available.

For further information, see Appendices—Sexually Transmitted Diseases.

8.9 IDENTIFICATION OF ESTROGEN-EXPOSED OFFSPRING

The daughters and sons of women who received DES or similar hormones during pregnancy may have abnormalities of their reproductive systems or other fertility-related risks. As part of the history, clients born between 1940 and 1970 should be asked to find out whether or not their mothers took estrogens during pregnancy. Clients prenatally exposed to estrogens should receive special screening

either on-site or by referral. Female clients should be made aware that they are at risk for developing a rare cervico-vaginal tumor and for a number of complications of pregnancy. Male clients should be made aware that they are at risk of certain lesions of the genital tract and for decreased fertility.

For further recommendations, see Appendices—Estrogen-Exposed Offspring.

9.0 Recommended Services

Since the services contained in this section are important to reproductive health care, it is recommended that they be provided at individual service sites.

9.1 GONORRHEA SCREENING

In community or client populations with a high incidence of gonorrhea, endocervical cultures for gonorrhea should be performed on each female client at the time of the initial pelvic examination and repeated as indicated. A yield of equal to or greater than 4 percent positive cultures merits universal screening.

For additional guidance, see Appendices—Sexually Transmitted Diseases.

9.2 MINOR GYNECOLOGIC PROBLEMS

Family planning programs should provide for the diagnosis and treatment of minor gynecologic problems so as to avoid fragmentation or lack of medical care for clients with these conditions. Problems such as vaginitis or urinary tract infection may be amenable to on-the-spot diagnosis and treatment, following microscopic examination of vaginal secretions or urine.

9.3 GENETIC SCREENING AND REFERRAL

For clients at risk for transmission of genetic abnormalties, some basic effort to define this risk is a logical component of family planning services. Initial genetic screening and referral services should be offered to clients who are in need of such services.

Initial screening consists of a careful family history of the client and the client's partner. More complete genetic screening and counseling may be offered *directly* (by a genetic counselor who functions in association with a clinical genetics team capable of providing comprehensive services for a broad range of genetic disorders) or *indirectly* (through referral to a comprehensive genetic service program or programs which may be federally, State, or privately funded). In either case, linkages with a comprehensive genetic service program should be established, specifically with clinical genetic services centers.

Where feasible, in-service training in genetics should be arranged for project staff to enable them to provide simple genetic screening. Training may be appropriately provided by a genetic service program to which the project is linked. The purpose of training is to familiarize staff with the indications for genetic services, referral mechanisms, and resources. Literature and informational materials regarding the availability of genetic services, including but not limited to prenatal diagnosis, should be available in the appropriate language to all clients on request.

When genetic screening services are offered by a project, they must (1) be supported by a program of public information and education which is sensitive to the concerns of local ethnic and religious groups and upholds the dignity of individuals with congenital physical or mental limitations, (2) include education and counseling to all clients on a voluntary basis, and (3) include referral for testing or further screening if indicated.

For additional guidance, see Appendices—Genetic Screening.

9.4 HEALTH PROMOTION/DISEASE PREVENTION

For many clients, family planning programs are their only continuing source of health information and medical care. Therefore, while most of the client services will necessarily relate to fertility regulation, family planning programs should, whenever possible, provide health maintenance services such as screening, immunization, and general health education and counseling directed toward health promotion and disease prevention. These additional services should promote the clients' general state of health and, in turn, the health of their infants and children. Programs are therefore encouraged to assess the health problems prevalent among the populations they serve and to develop services to address them.

Nutrition services are an example of an important activity directed toward promoting health and preventing disease which can be integrated into the existing family planning services. Projects should provide nutritional problem identification, basic nutrition information, screening, and medical care to clients at high risk of nutrition problems or those requiring nutritional management of disease. These services can be provided without the resources of a full-time nutritionist. Project staff can deliver such services with nutrition training and consultation with a qualified nutritionist.

For further information, see Appendices—Health Promotion/Disease Prevention.

10.0 Related Services

There are some reproduction-related health services that projects may offer if skilled personnel and

equipment are available, since to send clients elsewhere for diagnosis and treatment could contribute to fragmentation of medical care or result in no care. If such services are to be offered, however, projects should seek funds from appropriate agencies (e.g., a Title V agency for prenatal care) or arrange to cover the cost for care through third-party payments (including government agencies) or patient fees.

If a project plans to provide any related services, the following conditions must be met:

- *The project must assure that skilled personnel, equipment, and medical back-up services are available, and*
- *The project must receive approval from the Regional Office.*

10.1 PRENATAL CARE

Clients with confirmed pregnancies who wish to continue them to term must receive counseling and continuing care. Projects must therefore refer pregnant clients for adequate prenatal care. However, projects may provide prenatal care if the following conditions are met:

- *Documentation shows an unmet need and lack of other adequate sources of prenatal care;*
- *The project has the capability to provide prenatal care for non-high risk clients in accordance with standards developed by The American College of Obstetricians and Gynecologists;*
- *Sources for newborn care are identified prior to delivery;*
- *The institutions to which clients will be referred for delivery and management of complications have been involved in the establishment of the prenatal care service and assure continuity of care;*
- *The project has appropriate linkages for referral of high risk clients or those who become high risk during the course of pregnancy;*
- *Specific prior approval has been obtained from the Regional Office.*

Projects offering prenatal care must utilize all other sources of funding for such services before applying Title X funds for this activity.

For further information, see Appendices and Related Documents—Maternity Services.

10.2 POSTPARTUM CARE

Family planning programs may provide postpartum care for uncomplicated cases in collaboration with local agencies or institutions which provide prenatal and/or intrapartum care. If a family planning program undertakes responsibility for postpartum care, such care should be directed toward assessment of the woman's physical health, initiation of contraception if desired, and counseling and education related to parenting, breast feeding, infant care, and family adjustment.

For further information, see Appendices and Related Documents—Maternity Services.

10.3 SPECIAL GYNECOLOGIC PROCEDURES

Procedures such as colposcopy, biopsy, and cryosurgery are useful in the diagnosis and management of gynecologic abnormalties. Since such procedures and management require specialized training, they may be provided only under the supervision of a specially qualified physician who has had appropriate training and experience in the colposcopic diagnosis and management of cervical disease. Provision of this service must be limited to the treatment of benign cervical disease. Care must be taken to assure that provision of these procedures does not direct either professional or financial resources from the provision of basic family planning services.

11.0 Clinic Management

11.1 EQUIPMENT AND SUPPLIES

Equipment and supplies shall be safe, adequate, and appropriate to the type of care offered by the project. It is the responsibility of the medical director to assure proper selection and maintenance of equipment and supplies.

11.2 PHARMACEUTICALS

Projects must be operated in accordance with State and Federal laws relating to security and record keeping for drugs and devices. The prescription of pharmaceuticals must be done under the direction of a physician. However, inventory, supply, and provision of pharmaceuticals may be delegated by the medical director to appropriately qualified health professionals in accordance with State laws regarding such delegation.

It is essential that each facility maintain an adequate supply and variety of drugs and devices to meet the contraceptive needs of its clients. If special services are offered that require the dispensing of additional medications, these should also be part of the inventory. Each facility must maintain emergency resuscitative drugs, supplies, and equipment appropriate to the complexity of the program. These should be in a location readily accessible to the examination and treatment rooms. Facilities providing medical services shall, as a

minimum, have readily available those elements needed for the treatment of vasovagal shock.

Contraceptive and therapeutic pharmaceuticals must be kept in a secure place, either under direct and continuous observation or locked. Clinics which stock narcotics and tranquilizing drugs must keep records proving count of the medications at the beginning and end of each day during which drugs are used. State laws with regard to accountability must be followed. If Federal or State statutes pertaining to record keeping, inventory, and dispensing cannot be met by the program, or if community standards of good medical care in the performance of the above activities cannot be met, projects should contract for such services.

11.3 MEDICAL RECORDS

Projects must establish a medical record for every client who obtains medical services. These records must be maintained in accordance with accepted medical standards. Records must be:

—*Complete and accurate, including documentation of telephone encounters of a medical nature;*

—*Signed by the physician or other appropriately trained health professional making the entry, including name and title;*

—*Readily accessible;*

—*Systematically organized to facilitate retrieval and compilation of information;*

—*Confidential;*

—*Safeguarded against loss or use by unauthorized persons;*

—*Secured by lock when not in use;*

—*Available upon request to client.*

- Content of the Client Record

The client's medical record must contain sufficient information to identify the client, indicate where and how the client can be contacted, justify the clinical impression or diagnosis, and warrant the treatment and end results. The required content of the medical record includes:

—*Personal data*

—*Medical history, physical exam, laboratory test orders, results, and follow-up*

—*Treatment and special instructions*

—*Scheduled revisits*

The record must also contain reports of clinical findings, diagnostic and therapeutic orders, and documentation of continuing care, referral, and follow-up. The record must allow for entries by the counseling and social service staff. Projects should maintain a problem list at the front of each chart listing identified problems to facilitate continuing evaluation and follow-up.

- Confidentiality and Release of Records

A confidentiality assurance statement must appear on the client's record. The written consent of the client is required for the release of personally identifiable information, except as may be necessary to provide services to the patient or as required by law, with appropriate safeguards for confidentiality [59.11]. When information is requested, projects should release only the specific information requested. Information collected for reporting purposes may be disclosed only in summary, statistical, or other form which does not identify particular individuals. Clients transferring to other providers should be provided with a copy of their record to exepdite continuity of care.

For more information, see Appendices—Medical Records.

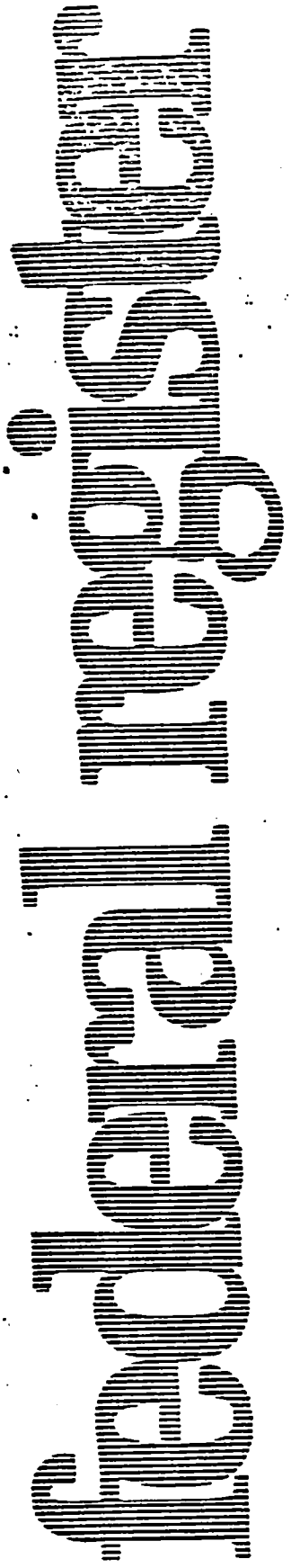
11.4 QUALITY ASSURANCE AND AUDIT

Projects must develop a quality assurance system that provides for the continued development and evaluation of their services. The quality assurance system should include:

- *A health care plan based on community needs assessment which specifies all services to be provided routinely by the project and which may also include additional services for specific population groups;*
- *A tracking system to identify clients in need of follow-up and/or continuing care;*
- *Quality review procedures to evaluate project performance, to provide feedback to providers and clients, and to initiate corrective action when deficiencies are noted.*

Medical audits to determine conformity with standards must be an ongoing activity. Monthly review of a reasonable number of client records is an essential part of quality assurance.

For further information, see Appendices—Quality Assurance/Audit.



Tuesday
February 2, 1988

Part IV

Department of Health and Human Services

Public Health Service

42 CFR Part 59

Statutory Prohibition on Use of Appropriated Funds in Programs Where Abortion is a Method of Family Planning; Standard of Compliance for Family Planning Services Projects; Final Rule

Mr. Speaker, I support the legislation before this body. I set forth in my extended remarks the reasons why I offered to the amendment which prohibited abortion as a method of family planning * * *. With the "prohibition of abortion" the committee members clearly intended that *abortion is not to be encouraged or promoted in any way* through this legislation. Programs which include abortion as a method of family planning are not eligible for funds allocated through this Act.[3]

Thus, as clearly contemplated by Title X and its legislative history, "family planning" as circumscribed by section 1008, permits only activities related to facilitating or preventing pregnancy, not for terminating it.

Initital Implementation Through Advisory Opinions

Critical to an understanding of the rules below is an understanding of the past history of the Title X program. The Department has, since 1972, interpreted section 1008 not only as prohibiting the provision of abortion but also as prohibiting Title X projects from in any way promoting or encouraging abortion as a method of family planning. Further, based on the legislative history, the Department has also, since 1972, interpreted section 1008 as requiring that the Title X program be "separate and distinct" from any abortion activities of a grantee.

Initially, the Department's interpretation of the language of section 1008 was limited to opinions of its Office of General Counsel (OGC). After quoting the passage from the Conference Report and the statement of Congressman Dingell, cited above, the first such OGC opinion concluded that "it is apparent that the Congressional intent was to prohibit a broader scope of activity than a literal reading of section 1008 would require."[4] In these opinions, however, the Department generally took the view that activity which did not have the immediate effect of promoting abortion or which did not have the principal purpose or effect of promoting abortion was permitted.

The 1981 Guidelines

In 1981, the Department issued revised Title X program guidelines, "Program Guidelines for Project Grants for Family Planning Services." As with previous editions of the guidelines, they did not incorporate prior OGC opinions providing guidance on abortion counseling, referral and program separation. However, while the pre-1981 OGC opinions had been directed to provision of guidance on which abortion related activities were *permissible* within the section 1008 prohibition, the guidelines went a step further and *required* Title X projects to engage in abortion-related activities under certain circumstances. These guidelines for the first time required nondirective "options counseling" on pregnancy termination (abortion), prenatal care, and adoption and foster care when a woman with an unintended pregnancy requests information on her options, followed by referral for these services if she so requests. These guidelines were premised on a view that "non-directive" counseling and referral for abortion were not inconsistent with the statute and were justified as a matter of policy in that such activities did not have the effect of promoting or encouraging abortion. It should be noted that although OGC opinions continued to interpret section 1008 as prohibiting any abortion referrals beyond "mere referral," that is, providing a list of names and addresses without in any further way assisting the woman in obtaining an abortion (such as by providing transportation or arranging appointments), this policy was not reflected in the 1981 program guidelines, thereby creating an appearance of treating each option identically.

Upon review of the guidelines, however, the Department for serveral reasons no longer believes that these approaches were correct. First, with regard to the consistency of the guidelines with the statute, counseling and referral for abortion are prohibited by section 1008. The Department does not believe that the current guidelines can be viewed as consistent with section 1008 on the ground that they only involve counseling and referral, not the actual performance of abortions. Counseling and other informational services are some of the principal family planning services provided by Title X programs, and section 1008 is applicable to all aspects of the program. Because counseling and referral activities are integral parts of the provision of any method of family planning, to interpret section 1008 as applicable only to the performance of abortion would be inconsistent with the broad prohibition against use of abortion as a method of family planning. As discussed above, "family planning," as clearly contemplated by Title X and its legislative history, refers to activities relating to facilitating or preventing pregnancy, not to terminating it. The current guidelines, however, require grantees to involve themselves in activities specifically related to the termination of pregnancies. This creates a conflict between the guidelines and the statutory prohibition on Title X programs using abortion as a method of family planning.

In addition, the Department does not believe that the requirement that the counseling must be "nondirective" is sufficient to render the guidelines consistent with the statute. Counseling in a Title X program, whether directive or nondirective, which results in abortion as a method of family planning simply cannot be squared with the language of section 1008, regardless of whether the actual abortion occurs in another program operated by the grantee or in an unrelated program.

Finally, the 1981 guidelines are highly questionable simply as a matter of statutory policy. The policy that section 1008 reflects is that abortion is not to be encouraged or promoted in any way: nowhere in the statute is any countervailing policy reflected. Nonetheless, the current guidelines require Title X programs to counsel and refer regarding abortion. Whether or not such a requirement is consistent with the express prohibition is section 1008, it is less sound as a matter of policy than the rules being promulgated today. In sum, upon reexamination of the issue, the Department is unable to conclude that the current guidelines are consistent with the statute. Thus, one basis for the regulations being promulgated today is to bring program practices into conformity with the language of the statute.

Rational Basis for the New Regulation

Even if the abortion counseling and referral provided for by the current guidelines were not prohibited by the express language of section 1008, the Department has concluded, as a matter of its experience with Title X, its responsibility to administer the program as provided by Congress, and its general administrative discretion, that the provisions of the current guidelines do not faithfully and effectively maintain the prohibition contained in section 1008. In the first place, the language of the guidelines pertaining to section 1008 is so brief and so broadly worded that it fails to offer "clear and operational guidance" to grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning. Second, in 1982, both the Department's Office of the Inspector General (OIG) and the General Accounting Office (GAO) urged the Department to give more specific, formalized direction to programs about

[3] 116 Cong. Rec. 37373 (1970).

[4] "Abortions as a Method of Family Planning—Section 1008 of the Public Health Services Act" (April 20, 1971).

the extent of prohibition on abortion as a method of family planning.

The OIG, after auditing thirty-two Title X clinics, found that the Department's failure to provide specific program guidance regarding the scope of section 1008 had created confusion about precisely which activities were proscribed by the section, and had resulted in variations in practice by grantees. In particular, the GAO, in a report based on an audit of fourteen Title X clinics, found that the clinics were relying on the Department's policy of permitting both Title X family planning services and separately funded, abortion-related activities to be provided at a single site.[5] In the report, GAO found that some of these providers had engaged in a number of practices that were questionable in light of section 1008. These included clinic counseling practices which did not present alternatives to abortion,[6] clinic referral practices which went beyond HHS referral policy,[7] and clinic literature promoting abortion as a back-up method of family planning.[8] Further, the GAO found "questionable" lobbying expenses, including some instances where clinics had used Title X funds to pay dues to organizations that lobbied and two instances where small amounts of programs funds has been used directly for lobbying. GAO observed that the specifics of the Department's abortion policy were contained only in legal opinions issued by its Office of General Counsel:

> In effect, HHS' regulations that spell out overall policy and implement provisions of the law and corresponding program guidelines that elaborate on the law and regulations in operational terms do not contain the specific policy guidance concerning section 1008 needed by title X recipients.[9]

Accordingly, GAO stated that,

> We recommend that the Secretary establish clear operational guidance by incorporating into the title X program regulations and guidelines HHS' position on the scope of the restriction in section 1008.[10]

Public comments received by the Department on the proposed regulations further demonstrate the problems inherent in "nondirective counseling" and lend weight to concerns raised by the OIG audit and GAO report. Many comments argued that the practice or nondirective counseling has been the subject of widespread abuse, with many providers foregoing any balanced discussion of options in favor of pressuring women, particularly teenagers, into obtaining abortions. Numerous comments were received from women who said that they were never presented with any favorable or neutral information on any other option. Many of these commenters specifically mentioned experiences with particular Title X grantees or projects. A typical complaint was that the counseling that they had received was one-sided, with the fetus dehumanized as a "lump of tissue," "fetal tissue," or "uterine contents," and with no information presented as to gestational characteristics and stage of development, so that they were not given adequate information on which to make an informed choice regarding abortion. These commenters typically stated that they had experienced severe and long-lasting regret over the decision to abort, and also stated that they were given no counseling at the time they made their decision to abort as to the remorse and guilt they might later feel:

> I have experienced the one-sidedness of * * *'s "counseling" and have seen the consciences of friend's (sic) shattered by what they now know was the wrong choice. Too many people are literally encouraged to use abortion as a birth control device because of its availability. * * * has never discussed the alternative side with anyone I know. I don't feel guilty or presumptive calling their efforts exploitive.
>
> These clinics do not provide adequate information to pregnant women. There is no "choice" involved in regard to abortion. It is the *only* solution offered. I know this from experience and have spoken to many women who have shared that experience.
>
> Please indulge me a little longer to say this. *they lied to me.* My third abortion required hospitalization and this was not done for the others. So I pointedly asked *why?* Her response, "No—well, yes—it's the same." Now I have learned I submitted to a *dilitation* (sic) and *evacuation—second trimester abortion.* I never knew this until three years ago. *But I asked and she lied to me.* * * * The family planners holler about—(and I quote from their Action Alert here in * * * N.Y.) "Medical professionals have an *obligation* to give patients information and referrals on *all* options, and patients have a right to make an informed decision. (fully informed)" *Where was mine?*
>
> Since Planned Parenthood is the foremost abortion provider in the U.S., they have a responsibility to tell women the truth about fetal development and subsequent risks involved in pursuing abortion as an option. I know for a fact that they do not. The baby is dehumanized as much as possible by being termed a "blob," "products of conception," or "uterine contents." Not even the term fetus is used by the counselors. The very risky surgery is then passed over as safe [and] harmless [and] there is no mention of emotional or physical after affects. The counselors are told that any information on fetal development is distasteful [and] should not be used to avoid making the woman feel guilty. * * * Since my abortion, I have had 2 miscarriages.
>
> If I had been given proper information as to the development of my 12 week old child and if I had been presented with options to abortion rather than just abortion (given by the *F.P. clinic*) I would have had my baby.
>
> I had an abortion at the age of 16 years with the full encouragement of * * * in * * *, CA. They even called and made my first appt. to see the Dr. who would perform my abortion. There was no encouragement to consider adoption or to keep my baby. They helped me to get rid of my baby as quickly as possible.
>
> I was not given a complete picture of my situation. Therefore the decision I made for abortion was no decision at all. It was a coercion. Sixteen year old girls do not have the where-with-all to make such a life threatening, life changing decision *especially* when the choices given are so deceitfully incomplete. If I had known the reality of what I chose I would not have chosen an abortion. I killed my baby! How would *you* feel/react if someday several years after abortion you saw pictures of a 12 week old fetus and learned this was the picture of a perfectly formed human being. Hmmm—* * * [they] told me it was a "blob!" I was devastated beyond all description.
>
> I was a seventeen year old who had just found out I was pregnant. * * * I couldn't get out of school to visit * * *, so they sent a nurse to see me. She blew my spirit down so much. * * * I expected her to help me and she wanted to destroy a little, innocent baby for convenience. She said, "There's no way you can bring a child into this world and take

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

[6] At one clinic discussed in the report, women were required to complete paperwork before their pregnancy tests and preselect how they intended to deal with their pregnancy. If they chose to continue the pregnancy, they were counseled on that option. If they checked abortion, they were counseled only on that choice. Six other clinics, which did not require prepregnancy test decisions, did not routinely counsel women on other alternatives if they had decided on abortion.

[7] Four clinics provided clients with brochures prepared by abortion clinics. At two clinics, clients seeking abortions were allowed to use the telephone to make appointments for abortions. At one clinic, appointments for abortion were made for clients who did not speak English. At one clinic, the Title X recipients provided women loans for abortions for nonprogram funds; however, administrative costs associated with the referral and loans were charged to Title X program costs. The GAO Report also noted OIG's discovery that several Title X clinics in Indiana had provided and witnessed the signing of consent forms required by an abortion clinic.

[8] One Texas clinic showed all clients a film about birth control methods and sterilization that included a section that presented abortion as a legal alternative in the event of an unwanted pregnancy. Four clinics provided or made available to all clients entering the family planning program handout material that discussed abortion. Typically this material listed various birth control methods with the barrier method and early abortion in the event of a failure as an alternative method.

[9] The GAO Report, p. 14–15.

[10] The GAO Report, p. 22.

care of it on your own. It isn't fair to the baby. People will speak badly of you. How can you let a baby be born with no father and no name? What about school? You can't finish 12th grade walking around pregnant. What kind of life would that be? * * *" Then she suggested an abortion. I started crying. All I could feel was why would anyone want to kill * * * her own flesh and blood * * * and why was she urging me to do this?

The Department, accordingly, concludes that there is an adequate basis for this rule since it is reasonable in light of all the circumstances. See *Chevron, U.S.A., Inc.*, v. *Natural Resources Defense Council, Inc.*, 476 U.S. 837 (1984).

The New Regulation

The rules below, which are issued pursuant to the Secretary's rulemaking authority at 42 U.S.C. 300a-4(a), establish far more specific and clearer standards for compliance with section 1008. They focus the emphasis of the Title X program on its traditional mission: The provision of preventive family planning services specifically designed to enable individuals to determine the number and spacing of their children, while clarifying that pregnant women must be referred to appropriate prenatal care services. H. Rep. No. 91-1472, 91st Cong., 2nd Sess. (1970), reprinted at 3 U.S. Code Cong. & Adm. News 5071 (1970). In addition, they require that grantees maintain program integrity and separation. The regulations, however, do not restrict the use of funds outside the Title X program or impose restrictions on funds provided under other federal programs. Nor do they prevent a woman from seeking and obtaining an abortion outside the Title X program. They thus make no attempt to establish abortion restrictions beyond the parameters of a Title X project.

Although the rules below thus adhere to the broad policies laid out in the proposed rules, a number of changes in particular provisions have been made in response to concerns raised by the public comments. A summary of these comments, an explanation of the changes to the final rules, and the Department's responses to the remainder of the comments are set out below.

Discussion

I. Definitions

The proposed rules set out a series of definitions to be added to the regulatory definitions at 42 CFR 59.2. The additional definitions proposed were of the terms "family planning", "grantee", "organization", "program" and "project", and "Title X". While the suggested definitions of the terms "grantee," "organization," and "Title X" elicited very little comment, the remaining definitions were the subject of extensive debate. In addition, a few comments suggested that other terms be defined to clarify the proposed rules.

A. Comments.

1. "*Family planning*": As proposed, this term was defined as—

> the process of establishing objectives for the number and spacing of a family's children, and selecting the means (including natural family planning methods, adoption, infertility services and general reproductive health care, abstinence and contraception) by which those objectives may be achieved. As such, family planning does not include medical services or counseling after pregnancy is diagnosed (including prenatal or postpartum care or counseling), or abortion-related services. As it relates to the statutory prohibition on the inclusion of abortion as a method of family planning, proper family planning should reduce the incidence of abortion.

Numerous providers and provider organizations objected to this definition. A large number of comments took issue with the first sentence of the definition. First, some commenters pointed out that by limiting the definition of "family planning" to services provided to "families," the Department would be excluding from coverage single individuals, whom Congress intended to be served. Other comments objected to the items included in the parenthetical expression in the first sentence of the definition. Many providers argued that listing "contraception" at the end of the list of family planning methods de-emphasizes its importance in Title X, and converts Title X into a program that is principally designed to encourage abstinence and promote adoption, contrary to Congress's intent. The inclusion of "adoption" as a method of family planning elicited a mix of comments. Some providers thought its inclusion inappropriate and inconsistent with the overall mission of Title X, while others favored its inclusion. A few comments pointed out that adoption and infertility services do not fit in conceptually with preventive methods of family planning. A few commenters were concerned that the reference to infertility services in the parenthetical expression not be construed as connoting approval of *in vitro* fertilization, surrogate motherhood, and the like. Finally, concern was expressed that the definition in general and the first sentence in particular would preclude Title X projects from continuing to provide the range of health services— such as physical examinations, gynecological services, screening and treatment for sexually transmitted diseases, screening for breast cancer— that they have traditionally provided.

A common objection was to the exclusion of prenatal care from the range of services offered by Title X clinics. Citing the 1970 Senate committee report, they argued that Title X projects were intended to be providers of comprehensive family planning services and that family planning involves more than birth control. Many providers argued that the time at which pregnancy is diagnosed is the optimal time to educate pregnant clients as to proper nutrition and the importance of avoiding high-risk behavior—such as smoking, consumption of alcohol, drug abuse, and management of weight gain—as early pregnancy is when organogenesis is proceeding most rapidly. These comments asserted that terminating the Title X project's involvement with the client at this point would have significant adverse public health consequences (such as an increase in low birth weight, maternal and infant health complications, and infant mortality), as the disadvantaged status (*i.e.*, youth, poverty, low education) of most of the program's clientele makes it unlikely that they will obtain adequate prenatal care from other sources in a timely fashion. A number of providers argued that for many Title X clients, the Title X project constitutes their only source of health care due to factors such as geographic isolation, unwillingness of other providers to accept non-paying clients, or the inability of the clients to arrange for care themselves. It was argued that the effect of the definition will be to create a dual system of health care in which the poor served by Title X clinics are relegated to inferior health care, while the population that can afford to pay for care will continue to obtain prenatal care.

Similar concerns were noted with respect to the exclusion of postpartum care from the definition of family planning. In addition, some commenters contended that the exclusion of postpartum care is inconsistent with the statute. First, many health professionals and providers argued that proper medical practice dictates that family planning counseling and selection of a family planning method be done postpartum, as that is when it is most likely to be effective; exclusion of services at that point, they argued, would be thus inconsistent with the statutory emphasis on the provision of "comprehensive * * * and effective family planning services * * *". Second, several comments argued that the legislative history itself indicates

that projects are supposed to provide family planning services to women "shortly after childbirth," quoting the 1970 House and Conference Reports.

Numerous comments objected to the use of the phrase "abortion-related services" in the exclusionary portion of the definition of "family planning" on the ground that the former term was vague and overbroad. In addition, it was argued that the exclusion of "abortion-related services" makes the definition inconsistent in that abortion is excluded as a method of family planning, while there are repeated references in the remainder of the regulation to "abortion as a method of family planning."

Supporters of the regulations generally favored adoption of the definition as proposed. However, a few reservations were expressed concerning its coverage. It was suggested that the limitation on the provision of abortion-related services and prenatal and adoption services for pregnant women be explained to clarify that although prenatal and adoption services are not preventive family planning services, they are not subject to the same stigma as abortion services, which are specifically prohibited by the statute. It was therefore suggested that the regulations should permit and support efficient and formalized referral processes to assure access to prenatal and adoption services. It was also suggested that the proposed definition was still inadequate, in that it would not permit crisis pregnancy centers to be funded as Title X grantees, since abortion counseling which discourages abortion is not within the definition.

2. *"Program" and "project":* This proposed definition elicited a number of comments, primarily from supporters of the proposed rules. In general, these comments objected to equating the terms program and project, contending that the definition of "program" as applied to receipt of Title X funds was not consistent with the ordinary usage and meaning of the term and allowed grantees artificially to manipulate compliance. The commenters argued that the Department's longstanding interpretation of the terms as being interchangeable for the purposes of administration of section 1008 is wrong and permits projects funded under Title X to evade the restrictions of section 1008 by simple bookkeeping maneuvers. Proponents wanted to strengthen the regulation to prevent grantees from simply omitting certain items from their grant proposal while in fact including prohibited activities within the program.

3. *Other definitions:* In addition, a few comments suggested that other terms used in the proposed regulations should be defined in order to clarify the scope of the regulatory policies. Among the terms that were suggested for definition were "abortion," "abortion-related services," "prenatal services," "low-income family," and "medically indicated." With respect to the term "abortion," questions were raised about its meaning, and it was suggested that procedures such as "menstrual regulation," "menstrual extraction," and "endometrial aspiration" be included in any definition of abortion since these are euphemisms for procedures which are actually abortions. The term "abortion-related services" was widely criticized as vague: comments asserted that it could include services such as housekeeping or laundry if shared by the abortion component of a medical facility. With respect to the term "prenatal services," it was suggested that the term be defined to include services to protect both maternal and fetal health and that referrals not be allowed where the provider is primarily a provider of abortion services. It was suggested that the current regulatory definition of "low-income family" be changed to delete the provision which requires that unemancipated minors who wish to receive services on a confidential basis be considered on the basis of their own resources. It was suggested that the term "medically indicated" be clearly defined to prohibit referral for abortion or abortion-related services except where the life of the mother is in imminent danger as in the case of an ectopic pregnancy, or defined to prohibit any referral for abortion. With respect to the term "organization," proponents of the regulation argued that it was unclear and appeared to treat as separate organizations an organization's activities in several States, creating a cumbersome situation for the grantee. They suggested that the definition be clarified to cover a legal entity chartered in one State and authorized to do business in several States.

B. Response

1. *"Family planning":* The Department acknowledges that the definition has caused misunderstanding in several respects and has revised the proposed definition of this term accordingly. First, it was never the Department's intention to suggest that contraception is to be deemphasized in the Title X program; to make that perfectly clear, it has placed the term "contraception" at the beginning of the list of services to be provided in the second sentence of the definition. In addition, it agrees that exclusion of postpartum services was inappropriate to the extent that it appeared to exclude provision of preventive methods of family planning in the postpartum period, and has accordingly eliminated the exclusion from the definition. With respect to the comments criticizing the use of the word "families," the definition has been conformed more closely to the language of Title X, clarifying that the eligibility of individuals will not be affected by the regulation. Finally, with respect to the argument that the definition of family planning was logically inconsistent with the rest of the regulation because of the exclusion of "abortion-related services," it has modified the definition of the term to make clear that while abortion may, in a statutory sense, constitute "a method of family planning," it is an impermissible method in programs supported by funds appropriated under the title.

Although the Department has not accepted the suggestions that it delete the references to "adoption" and "infertility services" in their entirety from the definition of "family planning," it has modified the definition in response to the concerns raised. Both approaches constitute legitimate means of determining family size and spacing, but adoption is simply one means of addressing the broader problem of infertility. Thus, the term "infertility services" in the definition has been changed to make this relationship clear. With respect to the criticism that the definition should be limited to preventive methods of family planning only, it is clear that Congress intended the term "family planning" to be broader in scope than simply contraception, as infertility services are included as one of the mandatory services listed in section 1001(a) of the Act. With respect to the comments suggesting that inclusion of infertility services should not permit funding of in vitro fertilization, surrogate motherhood and similar methods of providing children to childless couples, the Department continues to construe the term, as it has in the past, as requiring only the provision by the Title X project of what are known as "Level I" services (*i.e.*, initial infertility interview, education, examination, appropriate laboratory testing, counseling and appropriate referral).

The Department notes that a number of the objections to the proposed definition were premised on a misinterpretation of its scope. The Department agrees that family planning is broader than just the provision of contraceptive services, but it disagrees that either the proposed definition or the definition below so restrict the term: see, in particular, the inclusion of "general reproductive health care" and

"infertility services" in the definition. Moreover, it is not correct that the proposed definition would exclude physical examinations, screening for breast cancer or treatment of gynecological problems. All of these services continue to be authorized under the definition, either concomitant to providing contraceptive services or as "general reproductive health care." In addition, services not related to pregnancy which are necessary to general reproductive health care, such as treatment for sexually transmitted diseases, continue to be authorized under the definition.

While the Department concurs in comments regarding the importance of early access to high quality prenatal care, it does not believe that Title X was intended to provide prenatal care, and therefore does not accept the suggestion that the exclusion of prenatal care from the definition of "family planning" be dropped. It disagrees with the argument that the exclusion is inconsistent with the statute. The 1970 Conference Report to Pub. L. 91-572 makes it abundantly clear that while medical services are clearly permitted under Title X, they are authorized only when related to population research, infertility services of preventive family planning services. The exclusion of prenatal care is consistent with this concept.

In addition, provision of prenatal services, like the requirement for pregnancy options counseling, was not included in program guidelines prior to 1981. Moreover, under the 1981 program guidelines, prenatal services (other than initial diagnosis and counseling) may only be provided by Title X projects in very specific and limited circumstances and with prior approval from the relevant regional office of the Department. Since 1981, very few Title X projects have requested or received this authority. At the present time, for instance, we are aware of only two grantees in one region that have received approval to provide extended prenatal services as part of their Title X projects. Thus, it is not correct, as contended by some commenters, that prenatal services have traditionally been a major component of the Title X program. Nor does the Department agree with the commenters that the exclusion represents unsound public health policy, so long as it is clear that the Title X project must facilitate obtaining the prenatal care necessary for a healthy pregnancy. Because Title X has never funded substantial amounts of prenatal care and thus availability of prenatal services would be unaffected by these provisions, the Department does not agree that low income clients will receive inferior care to what they are now receiving. Indeed, the provisions emphasize the importance of helping clients to receive appropriate prenatal care through referral.

The Department concurs in comments that the regulations should clarify that, although beyond the scope of Title X, prenatal services and adoption services for pregnant clients do not fall under the same statutory prohibition that abortion services do. The regulation thus clarifies that, while Title X does not fund prenatal care, Title X projects are required to facilitate access to prenatal care and social services, including adoption services, that might be needed by the pregnant client to promote her well-being and that of her child, while making it abundantly clear that the project is not permitted to promote abortion by facilitating access to abortion through the referral process. See the definition of "prenatal care" at §§ 59.2 and 59.8 below.

Finally, the Department rejects the argument that these regulations are objectionable because they create a "two-tier" system of health care, *i.e.*, clients of Title X programs, many of whom are low-income, are prohibited from receiving abortion counseling and referral, while wealthy women can obtain these services from their own physicians. In section 1008 Congress chose to prohibit the provision of abortion services by Title X programs. This choice—like any choice to impose restrictions on the use of federal funds—necessarily creates a "two-tier" system to the extent that any legally obtainable service is available in the marketplace and unavailable in the federal program where such services are prohibited by law. Commenters may believe that this is unsound as a matter of social policy because they believe the federal government should fund all medical care. If so, however, their remedy lies with Congress, not with the Department which manifestly lacks the legal authority to implement such a social policy.

2. *"Program" or "project":* The Department believes that it is not supportable, in light of the legislative history in the 1970 Conference Report, to read the term "program" in section 1008 as relating to the funded organization as a whole, as urged by some comments. The Department agrees that a Title X project must be separate and distinct from abortion activity and that "simply omitting offending items from their grant proposals" does not constitute sufficient compliance with this precept. Indeed, this is the rationale for promulgation of § 59.9 below.

However, in response to the confusion expressed by many commenters on this issue, the Department has changed the rules below to provide a separate definition of the term "program" and "project" that recognizes the generic meaning of those terms as use in the statute and their commonly understood usage in the grantee community. Two new terms, "Title X program" and "Title X project," have been added corresponding to the original definition of program and project in the proposed rules. These latter terms, as defined below, carry substantially the same meaning as originally proposed and clarify the scope of the regulatory requirements. However, to clarify a point that apparently confused many commenters, a sentence has been added in the latter definition relating to what constitutes Title X project funds. The Department's concern is that all funds allocated to the Title X program or project—whether they are direct Title X grant funds, program or grant-related income, or matching fund—be spent in compliance with section 1008 and that the program be separate and distinct from prohibited abortion activities. The definition in the final regulation accomplishes this statutory mandate.

The above definitional changes necessitated minor conforming changes to the existing regulations. These changes are set out at items 4 and 6 in the rules below.

3. *Other definitions:* The Department has defined the term "prenatal care" in response to the public comments on this issue. It has not included any other definitions as it does not agree that they are needed or appropriate here. It has deleted the definition of the term "organization" because it believes the definition is self-evident and unnecessary. The Department has not defined the term "medically indicated" because, as used in § 59.5(b)(1), it refers to an infinite variety of physical conditions aside from pregnancy, making further definition infeasible. As the proposed rules did not address the issue of defining the term "low income family," the definition remains unchanged. The term "abortion-related services" has not been defined because it is no longer employed in the text of the rules below. The Department has not defined the term "abortion" because it believes the meaning is clear.

II. Standards of Compliance

The proposed rules provided that a project may not receive funds unless it provides assurances satisfactory to the

Secretary that it does not include abortion as a method of family planning. Such assurances must include representations (supported by documentary evidence where the Secretary requests) as to compliance with each of the requirements of the proposed regulations.

A. Comments

Some commenters suggested that provisions be added which would prohibit the funding of a program where there are special risks that Title X funds will be used for abortion-related activities due to abortion advocacy activities of the organization. They maintained that recognition of organizations having special risks, and denial of funding where such risks exist, will facilitate the implementation of the Title X program as Congress originally intended. Commenters then went on to list several examples of special risks associated with grants to advocacy organizations, including situations which would place an abortion advocacy organization in a government-sponsored position of great influence with persons of special vulnerability, facilitate abortion in conflict with the purpose of the Title X program, or make personnel choices for reasons foreign to the purpose of the grant.

B. *Response*

The Department notes that the suggested provisions relating to advocacy organizations were derived from the Public Health Service's (PHS) Grants Administration Manual policy relating to "Exceptional Organizations," a policy which has recently been revised by the Department. While the Department agrees with the concept behind the proposed provision, it believes that it is more appropriate to deal with the issue on a broader PHS-wide level. Furthermore, the Department believes that the risks associated with funding advocacy organizations will be substantially mitigated through implementation of the requirement of separation between Title X programs and activities prohibited under section 1008 and the rules pursuant thereto.

III. Counseling

Section 59.8 of the proposed rules provided, among other things, that a project which

> provides counseling * * * for abortion services as a method of family planning is not eligible to receive funds under this subpart. In addition, because Title X funds are intended only for family planning, services related to pregnancy care after pregnancy is diagnosed may not be provided with Title X funds.

Proposed § 59.8(a). In addition, proposed § 59.8(b) set out three examples interpreting the regulatory language relating to counseling: proposed § 59.8(b)(1) related to the provision of prenatal services by the Title X project, which was termed impermissible; proposed § 59.8(b)(3) related to counseling for infertility and adoption for an infertile couple, which was termed permissible; and proposed § 59.8(b)(4) related to the provision by the project of a brochure and a film that include sections on abortion, which was deemed to render the project ineligible for Title X funds.

A. *Comments*

These provisions elicited the most extensive comments of any provisions of the proposed rules. Thousands of comments were received in opposition to the proposed provisions, while thousands likewise were received supporting the proposed policies. The main issues addressed by opponents and proponents are summarized below.

Opponents of the counseling provisions advanced the following objections: (1) They would require providers to engage in unethical and unprofessional conduct; (2) they would require providers to treat Title X patients, both for contraceptive services and at the point of pregnancy diagnosis, without informed consent; (3) because of the two preceding factors, Title X projects would be exposed to increased risk of tort liability, an increase in insurance costs or inability to obtain insurance, and a decreased ability to hire or retain competent family planning professionals; (4) these factors would in turn mean that, as a practical matter, present Title X projects would be forced to relinquish their title X funds, resulting in a net loss of services to the Title X client population; (5) there is no evidence to show that the proposed provisions are needed; (6) the proposed provisions are inconsistent with Title X; (7) the proposed provisions violate the First Amendment rights of providers and health professionals in that they constitute viewpoint discrimination and restriction of free speech; and (8) the proposed provisions impermissibly burden women's exercise of their right to an abortion and violate the due process rights of physicians and other health professionals to practice their profession.

Proponents of the regulations, on the other hand, argued that the proposed provisions are needed to strengthen the implementation of section 1008. They contended that Title X is in effect promoting abortion through current guidelines and practice, and the provisions would substantially correct this. They also contended that the counseling requirements in current guidelines wrongfully require organizations to engage in abortion-related activities in order to become a Title X grantee. Further, they maintained that such guideline requirements have been abused by Title X providers, who have in fact pressured pregnant women, particularly teenagers, to choose abortion. They maintained that the consequent loss of life involved, together with the emotional and physical effects on the women who aborted, are unacceptable in a program which was intended to have no connection with abortion at all, much less with the promotion or facilitation of abortion.

1. *Medical ethics:* Numerous providers, provider organizations, and health professionals argued that the proposed restriction of abortion counseling is contrary to sound medical practice and the canons of medical ethics. Basically, they contended that medical ethics require that a physician provide his patient with a full discussion of his view of her medical circumstances in order to enable her to make an informed choice as to treatment; nurses and social workers stated similar concerns. In this regard, a number of comments quoted the following statement from the 1982 Report of the President's Commission for the Study of Ethical Problems in Medicine and in Biomedical and Behavioral Research:

> a physician is obligated to mention all alternative treatments, including those he or she does not provide or favor, so long as they are supported by respectable medical opinion.

Also cited were the American Medical Association's (AMA) principles of medical ethics, which state that patients "are entitled to accept or reject a health care intervention on the basis of their own personal values," and the *Standards for Obstetric-Gynecologic Service*, Sixth Edition, (*Standards*) of the American College of Obstetricians and Gynecologists, which state:

> It is the physician's responsibility to inform the patient of the surgical or medical procedure being recommended. In most cases, the explanation should include the necessity of the treatment, the management alternatives, the reasonably foreseeable risks and hazards involved, the chances of recovery and the likelihood of desired outcome. Adequate opportunity should be provided to encourage and answer questions.

It was asserted that the proposed provisions would require providers to violate the canons of ethics governing

their professions and thereby expose them to liability for malpractice. In this regard, opponents of the provisions stated that the provisions would require them to treat women differently depending on their medical circumstances. For example, the provision was commonly interpreted as meaning that a nonpregnant woman who has a severe diabetic or hypertensive condition could, under the provision, be counseled with respect to management of the condition, while a pregnant woman could not be.

It was also argued that the provision would require physicians to remain silent when confronted with a pregnant patient with medical conditions which may be exacerbated by pregnancy, such as diabetes, multiple sclerosis, lupus, or AIDS. These commenters apparently interpreted the provision as precluding any further discussion of medical symptoms or any other matter once pregnancy is diagnosed. Other commenters maintained that since the risks associated with both pregnancy and abortion increase substantially once the eighth week of pregnancy has passed, it is unethical to withhold information about both at the time pregnancy is diagnosed.

Proponents of the provisions, however, disputed that prohibiting discussion of abortion is unethical and instead contended that the requirements for "options counseling" in current guidelines are the ethical problem. It was noted, for example, that the House of Delegates of the AMA has consistently confirmed the right of practitioners to abstain from involvement in abortions. In this regard, it was argued that the ethical standard inherent in the AMA standards and elsewhere is not that a physician must counsel or refer, but rather that the physician *need not* counsel or refer for abortion. It was noted that laws in approximately 40 states protect the right of medical personnel not to participate in medical procedures such as abortion on the basis of conscience. Some maintained that as providers in a preventive family planning program, Title X providers are not qualified to provide services after pregnancy is confirmed.

Numerous commenters argued that the policy of requiring Title X providers to perform nondirective counseling that has been applicable in the past violates medical ethics by excluding from the program organizations which, for moral or religious reasons, refuse to counsel or refer women for abortions. In addition, many comments argued that the practice of nondirective counseling has been subject to widespread abuse, with many providers foregoing any balanced discussion of options in favor of pressuring women, particularly teenagers, to obtain abortions.

Other comments argued that by requiring "options counseling," the Title X guidelines promote a moral relativism which holds that all options are equally valid morally, without providing for the expression of moral arguments opposed to abortion or discussion of potential psychological consequences of abortion. This, it is argued, results in abortion being presented as the easiest, quickest, and least harmful solution when in fact it may not be, and when it should in any event not be so presented in a program that has a statutory bias against abortion as a method of family planning.

2. *Informed consent:* Opponents of the proposed provisions expressed similar concerns relating to the issue of obtaining informed consent so as to minimize the likelihood of malpractice claims. While most of the comments relating to the issue of informed consent raised the liability concerns discussed in the preceding section, a number of additional concerns were also raised. A number of grantees and provider organizations argued that prohibiting provision of information relating to abortion precludes obtaining an informed consent from the patient, either with respect to continuation of pregnancy or with respect to selection of a method of birth control. This, it was argued, would place grantees in the position of violating laws relating to informed consent of over 40 states; specifically mentioned were California, Maryland, Michigan, Massachusetts, New York, and Wisconsin.

Proponents of the regulations, on the other hand, argued that the requirement of informed consent, in jurisdictions where it applies, applies only to medical treatment, not to counseling which leads to referral. Since the proposed rules provided that pregnant women would not receive treatment for pregnancy in the Title X project, the requirement to obtain informed consent for services relating to pregnancy does not arise. They also argued that the informed consent laws of various states would not present a problem for Title X providers, as they would be superseded, pursuant to the Supremacy Clause of the Constitution, to the extent they imposed requirements inconsistent with Federal regulation. Those who stated that they had an abortion and had not been counseled about its effects argued that they could not have informed consent because they had not been given complete information.

3. *Liability and licensure risks:* Because of the foregoing factors, many providers and provider organizations argued that the proposed provisions present unacceptable risks for providers. Specifically, they argued that failure to disclose relevant risks and considerations to individuals, either in the process of counseling regarding the selection of a method of birth control or concerning pregnancy once pregnancy is diagnosed, would subject them to liability for malpractice on several possible tort grounds: defective consent, abandonment, negligent failure to disclose, "wrongful birth"/"wrongful life". Cases such as *Canterbury* v. *Spence*, 464 F. 2d 772 (D.C. Cir., 1972), *Scott* v. *Bradford*, 606 P. 2d 554 (Okla., 1979), *Betesh* v. *U.S.*, 400 F. Supp. 238 (D.D.C., 1974) were cited as examples of the types of tort liability to which the proposed provisions would expose providers.

Accordingly, some commenters asserted that they would probably face suit if they complied with the proposed provisions, and, moreover, might find that they were uninsurable. It was also argued that compliance with the proposed provisions would place health professionals (particularly physicians) in many jurisdictions at risk of losing their licenses. For example, the Attorney General for the State of Massachusetts stated that physicians could lose their licenses in Massachusetts if they complied with the regulations. It was argued that health professionals would find these risks unacceptable. Thus, it was claimed that the regulations would mean that Title X providers would be unable to attract or retain competent professional staff.

Proponents of the regulations, on the other hand, argued that the same Supremacy Clause considerations described in the preceding section would protect providers from successful suit. They accordingly argued that the proposed regulations should not increase providers' liability and licensure risks.

4. *Impact on Title X client population:* Opponents of the proposed provisions thus argued, based on the above reasons, that the net effect of the proposed provisions relating to counseling would be to force current Title X providers to reject Title X funds entirely. A number of comments argued that the proposed provisions are inconsistent with requirements applicable under other State and federal programs (such as the programs of grants to migrant and community health centers under sections 329 and 330 of the Public Health Service Act and block

grants to States for maternal and child health programs under Title V of the Social Security Act). Commenters making this point contended that they would have to elect between sources of funding; they typically stated that they would reject Title X funds. Thus, it was argued, a net loss of services to the population currently served by Title X would result. Planned Parenthood of Pierce County, Washington, for instance, said that if it rejected Title X funds, approximately 5,000 low income women in that county would be placed at risk of unwanted pregnancies; Planned Parenthood of Chicago said that if it rejected Title X funds, "tens of thousands" of teenage and low income women would be placed at risk. Proponents, however, asserted that the regulations would have a positive impact on Title X clients and their babies by helping protect pregnant clients, particularly adolescents, from receiving incomplete counseling that in effect promoted abortion and facilitated obtaining an abortion, to the client's (and, obviously, the unborn child's) long-term emotional and physical detriment. Some commenters noted that privacy and confidentiality requirements surrounding counseling make it difficult, if not impossible, to reflect the substance of counseling in auditable records in order to discern whether or not in fact clients, especially highly vulnerable and impressionable teens, are being coerced into abortion decisions. Other proponents argued that the regulations would protect women from pregnancy counseling by unqualified personnel since most Title X programs do not have the time to provide the intense support required during the early stages of a problem pregnancy. Proponents noted that decisions about families involve more than just medical counseling and that given the potentially serious consequences of abortion, women are best served by providers outside the Title X program who may counsel in greater depth about pregnancy.

5. *Rational basis for regulations:* Related to the above concerns was the criticism articulated in many comments that the proposed provisions are irrational or are simply not needed. Some comments contended that the theory advanced to justify the proposed prohibition of counseling—that counseling and referral "encourage or promote" abortion—is incorrect. In particular, many of these comments took issue with the statement that the provision of information on abortion is pointless absent the expectation that some of those informed will act upon the information and that the purpose of counseling programs is to provide information upon which a course of action will be based on the ground that it equated the provision of information on mutually exclusive choices with promotion of a particular choice. It was argued that, under the theory advanced in the proposed rules, counseling teenagers about contraceptive methods or suicide would never be appropriate. Furthermore, with respect to the issue of evidence, numerous grantees stated that they have always been and are presently in compliance with the requirement to separate their Title X projects from their abortion-related projects. A number of these comments challenged the evidentiary basis for the Department's action, arguing that the 1982 GAO and Inspector General reports cited in support of the proposed rules in fact established that the audited grantees had not spent Title X funds in contravention of section 1008.

Proponents of the proposed rules, on the other hand, overwhelmingly thought that the proposed restrictions were needed. As noted in the Rational Basis Section and in section IIIA1 above, many individuals wrote in relating personal experience of abuse of the counseling process. Numerous other individuals and groups argued that nondirective counseling is inappropriate in a program in which abortion is a prohibited method of family planning and in which it is clearly viewed as an undesirable alternative to childbirth. Others argued that these counseling practices promote the use of abortion as a method of family planning by helping a pregnant woman obtain an abortion. They expressed the opinion that safeguards were needed to ensure that pregnant women are not pressured into having abortions by Title X-funded projects. Others argued that Title X projects should actively discourage women from obtaining abortions by providing full information describing the abortion procedure and its potential physical, emotional and psychological effects, as well as providing full information on fetal development.

6. *Statutory authority:* Hundreds of comments questioned the statutory authority for the proposed prohibition of abortion counseling. Numerous comments suggested that the provisions would prevent informed consent and are, therefore, inconsistent with the requirement of sections 1001 and 1007 of the Act that services be "voluntary." It was also argued that section 1008 itself defines abortion as a method of family planning (albeit one for which funds under the title are not available) and that therefore the statement in the legislative history of the 1970 act that "information would be provided on the full range of family planning methods," means that abortion counseling must be provided notwithstanding the prohibition. Representative Dingell criticized the use of his 1970 floor statements as support for the proposed restrictions on counseling and referral. His comments focused in particular on what he saw as the failure of the Department to take account of the evolution of the law, that is, the Supreme Court's decision in *Roe* v. *Wade*, 410 U.S. 113 (1973), and its progeny. It was also argued that the proposed provision is inconsistent with the Department's own regulations in the food and drug area, which the comments contend require manufacturers of oral contraceptives and intrauterine devices to provide patient package inserts explaining the risks of the respective contraceptive methods, including some information on abortion. Numerous providers contended that, under the regulations, they would be prohibited from prescribing or dispensing contraceptives containing such inserts which would, as a practical matter, have the effect of restricting the methods available under Title X to barrier methods, foams, and natural family planning. Therefore, it was argued, such a restriction is contrary to the mandate of Title X that projects offer a "broad range" of family planning methods. Finally, it was argued that there is no legal authority for changing the current Title X guidelines, which require that counseling on abortion, prenatal care, adoption and foster care be provided to pregnant women.

These comments maintained that the guidelines are clearly known by Congress, which has implicitly approved of them in successive reauthorizations of the program and explicitly approved them in language in the Conference Report on Departmental appropriation for FY 1987, Pub. L. 99–1005.

Proponents, on the other hand, generally argued that the policies embodied in the present Title X guidelines contravene section 1008, and that the proposed restrictions on counseling are statutorily required or at a minimum would better effectuate the section 1008 prohibition. As noted above, they expressed the view that abortion or options counseling results in the promotion of abortion, and is therefore inappropriate in a preventive family planning program which its authors clearly intended to have no connection with abortion other than to reduce the incidence thereof. The

guidelines, it was argued, had converted Title X from a program in which abortion was supposed to be prohibited into a program which in fact promotes abortion as a method of family planning. It was also noted that during the 1978 reauthorization of the program, an amendment to prohibit abortion counseling and referral was rejected as unnecessary given the prohibition of section 1008. Further, the primary purpose of Title X as being a preventive family planning program was reiterated.

7. *First Amendment:* A common argument against the proposed provisions were that they constitute unconstitutional viewpoint-based discrimination. According to the comments, under cases such as *F.C.C.* v. *League of Women Voters*, 468 U.S. 364 (1984), *Perry* v. *Sindermann*, 408 U.S. 593 (1972), and *Speiser* v. *Randall*, 357 U.S. 513, 518 (1958), the government may not interfere with the exercise of the right of free speech. The comments argued that this principle applies not only to direct interference, but also to indirect interference, such as attaching unconstitutional conditions to a governmental benefit, penalizing advocacy of a certain viewpoint, or selectively granting benefits only to those advocating particular viewpoints. The comments contended that the proposed provisions contravene this principle by prohibiting Title X funds from going to organizations that seek to provide all viewpoints about potential options, including the abortion option, while permitting funding under Title X of organizations that have or express solely the viewpoint that abortion is not an option in the management of pregnancy.

A related argument was that the proposed provisions violate the First Amendment rights of Title X health care professionals to express their views and the rights of their clients to obtain information from their doctors. *Perry* v. *Sindermann*, *supra*; *Lamont* v. *Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring). Citing *Board of Education (Island Trees)* v. *Pico*, 457 U.S. 853 (1982) and *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), some comments took the position that the proposed provisions represent an impermissible attempt by the government to "restrict the spectrum of available knowledge" about family planning and abortion.

Proponents of the proposed restrictions generally argued that they were fully constitutional and in no way violated the First Amendment as interpreted by the Supreme Court's decision in *Regan* v. *Taxation Without Representation*, 461 U.S. 540 (1983). In *Regan* the Court upheld as constitutional an internal revenue statute granting tax exemption for certain nonprofit organizations that do not engage in substantial lobbying activities. It was argued that the *Regan* decision establishes the principle that a governmental decision not to subsidize the exercise of a fundamental right does not infringe upon the right and that the government may adopt classifications with respect to subsidizing the exercise of First Amendment rights, so long as the classifications bear a rational relationship to a legitimate governmental purpose. Since the decision in *Harris* v. *McRae*, *supra*, establishes that the government may choose to promote childbirth, the proposed policies are constitutional.

8. *Unconstitutional interference with right to abortion, right to practice medicine:* A number of comments argued that the proposed provisions prohibiting counseling regarding abortion are unconstitutional in that they impermissibly burden a woman's right to obtain abortion and interfere with the doctor-patient relationship safeguarded by *Roe* v. *Wade*, *supra*. It was argued that the proposed provisions are invalid on the same basis as the Akron, Ohio ordinance struck down in *City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), in that both limit the presentation of information to pregnant women relative to the abortion decision so as to discourage them from choosing abortion. Thus, under the rationale of *City of Akron*, it was claimed that the proposed provisions both impermissibly interfere with the woman's right to make an informed choice and impermissibly intrude upon her physician's right to provide medical advice and treatment. It was asserted, in connection with this line of reasoning, that the Supreme Court's decision in *Harris* v. *McRae* does not insulate counseling restrictions from constitutional attack, as that decision only relates to a governmental decision to subsidize the operation itself; restrictions on counseling, by contrast, were said to directly interfere with the freedom of choice protected under *Roe* v. *Wade*. The decision in *Planned Parenthood Ass'n./ Chicago Area* v. *Kempiners*, 531 F. Supp. 328, 328 (N.D. Ill. 1981), vacated and remanded on other grounds, 700 F.2d 115 (7 Cir. 1983), *aff'd on rehearing*, 568 F. Supp. 1490 (N.D. Ill. 1983) was cited in support of this proposition. Many comments noted, in this regard, the recent decision in *Reproductive Health Services* v. *Webster*, 662 F. Supp. 407 (W.D. Mo., March 17, 1987), in which a Federal district court concluded that restrictions on a state-supported clinic counseling and referring for abortion were unconstitutional insofar as they applied to women who paid the full cost of their treatment:

> Patients who fully pay for their services would be denied access to medical information which may affect their decision whether to continue the pregnancy, perhaps enduring health risks. Here the State is not asked to subsidize abortions or the exercise of First Amendment rights. 662 F. Supp. at 427.

These comments contended that this reasoning applies to Title X clinics, as a significant percentage of the clients served by Title X projects are full-pay.

Proponents of the regulations took the position that the proposed provisions on counseling are constitutional. According to the proponents, the Supreme Court ruled in *Harris* v. *McRae*, *supra*, that the government may constitutionally decide to subsidize childbirth over abortion, and the mere denial of government subsidy for abortion does not constitute a constitutionally impermissible obstacle to the exercise of the right to abortion. Thus, they argued, this necessarily means that the government may likewise subsidize speech and actions designed to further childbirth and decline to subsidize speech and actions that facilitate abortion. Such remedies are necessary to end the confusion which exists where clients, especially adolescents, may see the interaction between federally funded projects and abortion services. Proponents wanted to sever the "symbolic union" between the federal program and private programs which promote or provide abortions.

B. Response

The Department recognizes the problems created by the proposed provision with respect to patient package inserts for contraceptives and otherwise limiting the provision of information which is medically necessary to understanding the relative risks of different methods of contraception in the course of selecting a method of family planning; it has therefore modified the requirements and examples accordingly. See 42 CFR 59.8(a)(4) and 59.8(b)(6) below. However, it disagrees with the remaining comments opposing the proposed restrictions on counseling and therefore the provisions otherwise remain substantially as proposed. The Department notes that many of the objections stated appear to be based on a misinterpretation of the scope and

application of the counseling restriction. It has accordingly clarified the provisions. The explanation below likewise attempts to clarify the provisions, and also sets out the Department's reasons for rejecting the remaining comments opposing the provisions.

1. *Medical ethics:* The Department believes that much of the opposition to the proposed restriction on counseling proceeds from a misunderstanding as to what is prohibited by the provision and what is not. It was not the intent of the provision to restrict the ability of health professionals to communicate to a patient any information they discover in the course of physical examination or otherwise about her medical condition. Contrary to the assumption of most commenters, doctors would not be precluded by the provision from informing a woman, pregnant or nonpregnant, that she has a tumor, AIDS, a diabetic or hypertensive condition, lupus, and so on. The provision thus does not preclude a health professional from disclosing to the woman any physical findings he or she has made regarding her condition and communicating his or her assessment of the urgency of the need for treatment, consistent with the exercise of his or her professional judgment. By the same token, however, there would appear to be no ethical imperative for a health professional at a Title X clinic which will, by definition, not be providing treatment services to counsel a woman who displays a medical condition unrelated to family planning as to the medical management of that condition. Nor, it should be noted, is Title X money available for the treatment of medical conditions unrelated to family planning. The same considerations apply where pregnancy is diagnosed. See §§ 59.8(a)(2) and 59.8(a)(3) below. Rather, as has traditionally been the case in the Title X program and as is required by 42 CFR 59.5(b)(1) and 59.8(a)(2) below, the medically responsible course is to ensure that the woman is referred to the appropriate specialist for treatment of the condition, with adequate followup provided.

In the Department's view, the foregoing considerations address the ethical objections to the proposed provisions. The Department notes that if any requirement is established with regard to abortion counseling, it will conflict with someone's ethical beliefs. The approach of the proposed regulations, however, is more consistent with section 1008. Moreover, it is apparent that there is no absolute ethical imperative upon physicians to counsel or refer for abortion, as evidenced by the "conscience" exceptions cited by proponents of the provision. Opponents contend that the proposed rules are contrary to the findings of the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research. However, the Commission also found that:

> Patients are not entitled to insist that health care practioners furnish them services when to do so would breach the bounds of acceptable practice or violate a professional's own deeply held moral beliefs or would draw on a limited resource to which the patient has no binding claim. (*Making Health Care Decisions*, Vol. 1, p. 3.)

Although abortion may be considered to be within the bounds of acceptable medical practice, it may potentially conflict with the professional's deeply held moral beliefs. Moreover, since Title X resources are clearly limited, the patient has no claim to the services relating to the provisions of abortion. The Commission went on the say that:

> Similarly, a professional who has been flexible about possible avenues of treatment as his/her standards allow is not generally obligated to accede to the patient in a way that violates the bounds of acceptable medical practice or the provider's own deeply held moral beliefs. *id.* (Vol. 1, p. 38.)

Similarly, the American College of Obstetricians and Gynecologists support the physician is right "[t]o refuse to render treatment which is inconsistent with the Fellow's own moral code." (*Standards*, p. 99.)

2. *Informed consent:* The Department disagrees with the numerous comments objecting to the proposed restriction on counseling for abortion as restricting a pregnant woman's ability to give informed consent. As a general matter, a requirement for informed consent only arises where a course of treatment is proposed. See, *Canterbury* v. *Spence*, *supra*. Section 59.8(a) below makes clear that where a woman is diagnosed as pregnant, the only appropriate action is a referral for appropriate treatment (which, as noted above, would include treatment for other conditions unrelated to pregnancy). Since the Title X project is not providing treatment related to pregnancy (or, indeed, for other conditions unrelated to family planning), it has no need to obtain consent to such treatment. Rather, it becomes the responsibility of the provider to whom the woman is referred to obtain appropriate consent to services: as the *Standards* of the American College of Obstetricians and Gynecologists state, "[i]t is the physician's responsibility to inform the patient of the nature of the surgical or medical procedure being recommended. In most cases, the explanation should include the *necessity* of the *treatment* . . ." (emphasis added) (*Standards*, p. 84). This situation is in essence no different than the situation that currently exists in the Title X program with respect to services that are not offered by the project. In the Department's view, this issue is thus not a problem, and the concerns expressed by providers regarding violating State laws requiring informed consent with respect to their treatment of pregnant women are therefore misplaced.

A conceptually different issue is presented with respect to the issue of informed consent to family planning services, since in the context the Title X project is the provider of treatment services. However, as noted above, the Department has modified the rule to make it clear that projects are not prohibited from providing the factual information necessary to assess the risks and benefits of various methods of family planning which is provided by means of the patient package inserts accompanying various forms of contraception. Thus, the projects remain in substantially the same posture they have always been in with respect to the provision of information at this stage: they may provide the factual information necessary to assess risks of a particular contraceptive method as set out in the patient package inserts, but may not promote or encourage abortion as a method of family planning. Indeed, the Department notes and concurs in Congressman Dingell's floor statement of November 18, 1970, in which he stated, "the prevalence of abortion as a substitute or backup method of family planning can reduce the effectiveness of family planning programs." Cong. Rec., daily ed., p 37375 (Nov. 18, 1970). This clarification thus responds to the concerns raised regarding provision of complete information on the risks of various forms of contraception. At the same time, it ensures that the project in no way promotes abortion and that, at the point at which abortion becomes more than a hypothetical issue (pregnancy), the project refers the woman for prenatal pregnancy care rather than providing "options counseling," which could violate section 1008 by influencing her choice toward abortion.

3. *Liability and licensure risks:* For the reasons stated in the preceding sections, the Department is of the view that the "parade of horribles" depicted in many of the comments with respect to

the risk of tort liability and loss of licensure is invalid. In fact, physicians are excepted from disclosing common, known or usual information or risks to treatment. See, *Bly* v. *Rhoads*, 222 S.E. 2d 783 (Va. 1976). Abortion is clearly a common and known procedure, and Title X is not the sole source of information about it. Indeed, since Title X projects are already prohibited under the present regulations and guidelines from taking any affirmative action to facilitate abortion, many of the "risks" attributed to the asserted failure of the provisions to make abortion available have already been assumed. Moreover, the *Canterbury* case cited by many of the opponents does not presuade the Department that the rules below significantly increase the risk of liability: the court in *Canterbury* held that liability will not lie unless a plaintiff can establish that a reasonable person would have taken a different course of action had full disclosure been made, an extremely difficult burden under the rules below, given the referral requirements. In addition, to the extent these regulations are inconsistent with the provisions of State law regarding counseling and informed consent, they may, in some circumstances, supersede State law under the Supremacy Clause of the Constitution. See, for example, *Leslie Miller, Inc.* v. *State of Arkansas*, 352 U.S. 187 (1956); *Planned Parenthood of Billings, Inc.* v. *The State of Montana*, 648 F. Supp. 47 (D. Mont. 1986). Thus, provider preceptions notwithstanding, the Department does not anticipate that the regulations below will place Title X providers at risk.

4. *Impact on Title X client population:* The Department recognizes that the regulations below may result in some realignment of Title X providers, as providers who disagree with the regulations drop out of the program and other providers enter it. However, it notes that most of the comments taking this position appeared to be concerned principally with what was perceived to be a prohibition on providing patient package inserts for oral contraceptives and IUDs, a policy which, as explained both above and below, is not contained in the rules below. The Department is thus unpersuaded that such a realignment will occur, or if any realignment in fact occurs, that it will have a significant negative impact on the Title X client population. Indeed, the Department intends that the rules have a positive impact on the Title X population by helping to assure that scarce resources are allocated to preventive family planning and infertility services, not to assisting pregnant clients to obtain an abortion.

5. *Rational basis for regulations:* With respect to the comments criticizing the theoretical basis for the restriction on counseling, the Department thinks they are misplaced. Indeed, the comments concerning contraceptive counseling support the Department's point, as both the purpose of and the demonstrated effect of contraceptive counseling is to promote the use of contraception. Some commenters attempted to apply the Department's analysis on counseling to a hypothetical example of preventing teen suicides. The hypothetical example in fact reveals the flaw in the critics' arguments. Given the state's interest in protecting life, Congress might well establish programs to provide teenagers or others with "directive" counseling on suicide—that is, counseling that encourages teenagers not to commit suicide. However, if Congress enacted a statutory grant program to provide mental health services to reduce the incidence of mental illness, including suicide, and included a provision that "none of the funds appropriated under this title shall be used in programs where suicide is a method of alleviating mental illness," the Department assumes that no one would argue that such a statute permitted—much less required—that the provision of "nondirective" counseling to the depressed adolescent would include suicide as one of the options followed by "mere referral" to organizations such as the Hemlock Society for those who indicated that they wanted to choose the suicide option. If the Department is correct as to the interpretation that would be given such a hypothetical statutory prohibition on suicide, it cannot see why the same statutory language acquires a different meaning when "abortion" is substituted for "suicide."

It may well be that, based on differing assessments of the relative morality of abortion and suicide, some might find nondirective options counseling concerning abortion morally acceptable while they would find nondirective options counseling concerning suicide unacceptable. Such a distinction, however, would reflect their moral choice, not their interpretation of statutory language—it certainly would not be based on any belief that nondirective options counseling would be any less likely to promote or encourage abortion that it would be to promote or encourage suicide.

The Department's responsibility, however, is not to make moral choices of this sort—it is to implement the choice that Congress made in enacting section 1008. As indicated earlier, upon reexamination of the statutory language, the Department is simply unable to conclude that the type of counseling and referral that has been required by the program guidelines has not had the effect of promoting or encouraging abortion in violation of the statutory prohibition in section 1008.

In addition, the Department disagrees with the contention that the 1982 GAO Report does not substantiate the need for the provisions below. As noted above, GAO found that grantees were engaging in questionable activities relating to counseling and referral and ascribed this in major part to the lack of concrete guidance from the Department. The comments from women who have received abortions quoted above embody the concern articulated by GAO and indicate that the policy of the present guidelines requiring Title X grantees to provide nondirective counseling on all options on request may have been violated. Moreover, given that the Title X projects do not provide pregnancy services, it is unnecessary for them to provide counseling with respect to such services. In light of these concerns, the Department has concluded that the best way to safeguard Title X funds from being used to promote or facilitate abortion as a method of family planning is to prohibit counseling regarding abortion and ensure that pregnant clients are referred for prenatal services for the care of the pregnancy.

6. *Statutory authority:* After considering the comments relating to the provision of factual information relative to the choice of a birth control method, the Department has modified the regulation. See § 59.8(a) (4), below. As noted in the discussion at IB1 above, it was never the Department's intention to restrict the range of contraceptives available from Title X projects, and the modification of § 59.8(a) makes clear this intent. Nor are the criticisms on informed consent grounds pertinent, particularly in light of the changes discussed above. As noted in the discussion at IIIB2 above, the issue of informed consent as it relates to pregnant women is beside the point, because Title X does not provide treatment for pregnancy. With respect to the provision of services to nonpregnant women, the policy remains unchanged from that which has previously applied. These changes eliminate any concern that regulations might be inconsistent with the statutory requirements relating to the provision of services on a voluntary basis.

The Department dissagrees with the contention that the provisions consutute

an additional and unlawful condition on eligibility for grants. Since, in the Department's view, section 1008 authorizes the provisions, they by definition do not impose conditions that are inconsistent with the statute.

The Department also disagrees with the comments criticizing the restrictions on counseling (as well as referral) as not supported by the legislative history of the 1970 Act. With respect to the reference to "information * * * activities" in the Conference Report, cited by many opponents of the provisions, it notes that the precise reference is to information activities that are "related" to, among other things, "preventive family planning services." Conf. Rep. No. 91-1667, 91st Cong., 2nd Sess. 8-9 (1970). Counseling concerning abortion is manifestly not related to preventive family planning services. Furthermore, regarding Representative Dingell's challenge to the Department's interpretation of his floor statements as made in 1970, that challenge appears to be based principally on the asserted failure of the proposed regulations to take account subsequent developments in the medico-legal environment. While the Department recognizes that there have been developments in both the medical and legal communities regarding abortion that could lead legislators to change their minds as to what restrictions are appropriate on federally funded programs, it disagrees with Representative Dingell as to what legal conclusions flow from those developments. Section 1008 remains in force precisely as enacted in 1970. If Congress believed that subsequent developments have rendered its restrictions obsolete, it could have amended it it has not done so.

Moreover, the Department does not agree that congressional actions subsequent to 1970 constitute a form of legislative ratification of its policy of requiring abortion counseling and referral by Title X grantees such that it is now required by law to maintain that policy in force. Although Congress has enacted several unrelated amendments to the family planning provisions of Title X and has authorized funding six times, the relevant provisions of Title X have remained unchanged since 1970. Thus, the commenters' agruments that the Department is now required as a matter of law to maintain its policy of requiring abortion counseling and referral appears to rest largely on inferences drawn from Congress' failure to enact a statutory amendment affirmatively rejecting that policy.

Aside from the factual errors of this argument, discussed below, this argument rests on the mistaken legal premise that Congress' failure to enact a statutory amendment affirmatively rejecting this policy constitutes a ratification of the policy. In general, the courts have been reluctant to permit such an inference to be drawn from the legislature's failure to act. See, *e.g.*, *Motor Vehicle Manufacturers Ass'n* v. *State Farm Automobile Insurance Co.*, 463 U.S. 29 (1983). Indeed, even where Congress has acted affirmatively to the extent of publishing a committee report to subsequent legislation which interprets prior law, the Court has been unwilling to accord it great weight. As the Supreme Court observed in *Consumer Product Safety Comm'n.* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118, n. 13 (1980), "even when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment."

Moreover, the factual premise of this argument—that Congress has adopted the policy requiring abortion counseling and referral—is wrong. Many commenters described the history of Title X as reflecting seventeen years of consistent administrative policy which was well known and accepted by Congress. The facts, however, are quite different. Initially, it should be noted that the Department's policy on abortion counseling and referral developed in an evolutionary manner during the 1970s. Only in 1981 was that policy incorporated and indeed expanded in guidelines. The available evidence regarding Congress' knowledge and reaction to those policies does not reflect full knowledge and acceptance of them. Rather, in the Department's view, the available evidence indicates—in the earlier years—considerable congressional confusion as to what the Department's administrative policies were, and, thereafter, as those policies became more well known, considerable political controversy as to their correctness both as a matter of law and as a matter of social policy.

The Department does not believe it is appropriate to provide a comprehensive analysis of the legislative history of Title X subsequent to 1970 in this preamble. However, by way of illustration, the Department does think it would be useful to focus on one event that was probably given the most emphasis by the commenters who argued that the subsequent legislative events preclude the promulgation of these regulations—the 1978 defeat, by a 232-137 vote in the House of Representatives of an amendment to Title X proposed by Representative Dornan. 124 Cong. Rec. 37048 (1978).

The defeated amendment provided that: "No grant or contract authorized by this Title may be made or entered into with *an entity* which directly or indirectly provides abortion, abortion counseling, or abortion referral services." *Id.* (emphasis added). As the underscored language indicates, Rep. Dornan's amendment would have done much more than reverse HHS' then current policy of permitting abortion counseling and referral by Title X grantees in the Title X program: in addition to that, it would have banned entities that provided abortion counseling and referral with non-Federal funds in separate programs from participating in Title X. Indeed, in initially introducing this amendment, Rep. Dornan stressed the fact that it provided a ban on participation of entities—such as Planned Parenthood—which provided the described abortion-related services. See Cong. Rec. 31241-2 (1989).

Subsequently, however, when Rep. Dornan again offered his amendment, he did raise the issue of HHS' abortion counseling and referral policy, stating "it has come to my attention there are at least 117 hospitals and clinics receiving Title X family planning money where abortion is a method of family planning * * *". *Id.* at 37046. A colloquy then ensued in which Rep. Rogers—who was the sponsor of the reauthorization of Title X—vehemently rejected the statement that Title X clinics were providing abortion counseling and referral.

> Abortion is not a method of family planning. Abortion comes after pregnancy—after pregnancy. And the gentlemen misses the point of what we are doing in Title X. It is before—before. It is to let people know how to avoid pregnancy. We cannot use any funds for abortion. The amendment is not needed. I urge its defeat. *Id.*

When Rep. Dornan again referred to the 117 Title X clinics that he was informed were providing abortion counseling and referral, Rep. Rogers again denied the truth of this statement, suggesting, among other things, that "you may have a hospital that may be running a family planning section in one wing and maybe they do an abortion in that hospital to save the life of the mother." *Id.*

Thus, what occurred in 1978 was: (1) The House defeated an amendment that would have done something far different and far more sweeping than the prohibition on abortion counseling and referral contained in the regulations being promulgated today, and (2) did so

after having been emphatically misinformed by the sponsor of the reauthorization legislation that the amendment was unnecessary.[4] The Department does not believe that this episode can be construed as evidence of an adoption by the House of Representatives (much less Congress as a whole) of the Department's policy at that time. Indeed, what it appears to reflect is congressional confusion as to what was occurring in the Title X program. At the very least, it simply provides support for the view that an administrative agency or a court should look to legislation enacted by Congress to determine what Congress' intent is, and not try to draw inferences about that intent from other sources.

Congress, of course, recently did enact in the Continuing Resolution for fiscal year 1987 legislation arguably bearing on the Title X guidelines. Specifically, a Conference Report to an unenacted HHS appropriations bill was incorporated by reference into the continuing resolution for fiscal year 1987 (Pub. L. No. 99-464, section 101(b)(4)(e), 100 Stat. 1187 (1986)). Some commenters asserted that the "incorporated" Conference Report contains a restriction on administrative change in the Title X guidelines during fiscal year 1987. The Department disagrees with that interpretation of the Conference Report.

Even assuming, however, that the Continuing Resolution, in effect, "codified" the current Title X guidelines for fiscal year 1987 by forbidding the Department from changing them during that period (*i.e.*, until October 1, 1987), the Department does not believe that that fact would lead to the conclusion advanced by several commenters opposed to the proposal—that the legislation represents a definite manifestation of congressional intent to permanently adopt HHS' current Title X abortion counseling and referral guidelines. Indeed, it seems to the Department that such an interpretation would contravene the asserted meaning of the legislation by converting what was purportedly intended as temporary, one-year delay in amendment of the guidelines into a permanent incorporation of them into the statute. In this connection, the Department notes that language analogous to the language of the 1987 Continuing Resoluation was dropped in the 1988 Continuing Resolution.

[4] That Rep. Rogers was so mistaken as to the Department's interpretation of section 1008 strongly suggests that this interpretation was not widely known in Congress—at least in 1978—as some commenters have claimed.

There is no question, of course, that Congress has now become acutely aware of Title X. The treatment of abortion in connection with Title X has become a matter of sharp political controversy in recent years. Some members of Congress believe that the policies set out in the current guidelines are correct as a matter of statutory interpretation and administrative policy; other members of Congress believe that the current Department guidelines are incorrect as a matter of law and policy. Unless and until Congress enacts new legislation, however, Title X remains in effect as law, and the Department's obligation is to interpret existing law and—based on its experience in administering the program—to exercise its delegated administrative authority by adopting the policies that best effectuate the statute.

7. First Amendment: The Department disagrees with the comments challenging the proposed limitations on counseling on First Amendment grounds. To begin with, it should be noted that Congress has broad authority to determine the purpose, terms, and conditions under which grants are made. *Buckley* v. *Valeo*, 424 U.S. 1, 90-91 (1976). In particular, Congress, under the *McRae* case, *supra*, and under *Maher* v. *Roe*, 432 U.S. 464 (1977), may make a choice favoring childbirth over abortion and may implement that choice through the allocation of public funds. The fact that speech in the form of counseling is involved in a program such as Title X does not disable Congress from making that choice. Thus, no issue of viewpoint discrimination is posed here such as might be presented were the government to fund a widespread public relations campaign taking one view.

The *League of Women Voters* case, which was frequently cited by critics of the proposed rules, does not change this analysis. In *League of Women Voters*, the Supreme Court found unconstitutional a statute that prohibited editorializing by any broadcast station that received Federal funds. The Court expressed concern that all editorializing was prohibited, even that financed by private funds; it stated, however, that if a statute allowed a station to establish an affiliate which could editorialize with nonfederal funds, it would satisfy constitutional scrutiny. 468 U.S. at 400, n. 27. The result reached by the Court in the *Regan* case, cited by many supporters of the proposed rules, confirms this position. In *Regan*, the court upheld the constitutionality of a section of the tax code prohibiting taxpayers from deducting as charitable contributions gifts to nonprofit organizations that engage in lobbying. The Court upheld the tax statute because nonprofit organizations had available an alternative avenue for conducting lobbying activities through formation of affiliate organizations under a separate section of the code. The rules below clearly meet the tests of these cases. Indeed, as discussed both above and in the following sections, the rules below do not go as far as the statutes at issue in those cases, as they do not require the formation of a separate organization to conduct various abortion activities; they merely restrict what an organization may do, with Title X project funds, within the confines of its Title X project activities.

With respect to the claim of many comments that the counseling restrictions of the proposed rules would violate the First Amendment rights of health care professionals and their patients, the Department disagrees that the cases cited in support of this claim bear on the case at hand. The proposed rules, and the final rules below, do not establish universally applicable penal provisions which interfere with an individual's right to free speech, as was the case in *Griswold*, *supra*. They place no restrictions on the dissemination of information by health professionals about abortion, except in the context of the federally funded project. This distinguishes the instant rules from the Illinois law declared unconstitutional in *Kempiners*, *supra*, which created a total ban on funding to organizations that did abortion counseling or referral. Nor is this a case like those involved in *Sherbert* v. *Verner*, 374 U.S. 398 (1963) and *Speiser* v. *Randall*, *supra*, in which a governmental benefit that is available to all other similarly situated persons is denied solely because of the exercise of their First Amendment rights. Title X confers no entitlement to benefits upon individual organizations; it is a discretionary grant program. Moreover, the fact that an organization's grant application does not include abortion activities will not automatically entitle it to receipt of grant funds. In any event, as noted by Judge Cudahy in his concurring opinion in the remand by the Court of Appeals for the Seventh Circuit in *Kempiners*, the Constitution does not require "equal time" on the payment of public funds to subsidize a point of view. 700 F. 2d 1115, at 1128.

8. Unconstitutional interference with right to abortion, right to practice medicine: The Department disagrees with the contention of numerous critics of the proposed rules that the proposed restrictions on counseling (as well as the other restrictions of proposed § 59.8 and

§ 59.10) impermissibly burden a woman's right to obtain an abortion, as well as a physician's right to practice. It notes, as an initial matter, that there is no significant difference in constitutional principle between a physician's right to practice and a patient's right to his services. See, *Harris* v. *McRae*, 448 U.S. at 318, n. 21; *Whalen* v. *Roe*, 429 U.S. 589, 605, n. 33 (1977). The regulations below are not like the statutes struck down in *Colautti* v. *Franklin*, 439 U.S. 379 (1979), *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976), and *City of Akron*, *supra*. In each of these cases, the law at issue imposed mandatory disclosure and informational requirements upon physicians counseling in the abortion context, requirements that were enforced through criminal and administrative sanctions. Even the Illinois statute at issue in *Kempiners*, *supra*, was considered by Judge Cudahy not to impermissibly burden a woman's right to an abortion, as she remained free, under that statute, to seek the services of organizations not funded by government funds or to seek counseling from friends, family, and so on. *Kempiners*, 700 F.2d at 1127. Similarly, the statutes that were struck down in *Reproductive Health Services* v. *Webster*, *supra*, prohibited not only the use of *any* public funds for abortions and abortion counseling but also the performance of such activities by *any* public employees or in *any* public facilities. 662 F. Supp. at 424. The rules below are far less broad. The rules below, in fact, do not prevent a health professional or a provider organization from discussing, promoting, or otherwise encouraging a woman to have an abortion as a general matter; they simply do not permit them to do so within a Title X project. As such, they do not suffer from the constitutional infirmities of the laws at issue in the cases relied upon by the opponents of the proposed rules.

IV. Referral

Section 59.8(a) of the proposed rules provided, among other things, that a project which—

> provides * * * referral for abortion services as a method of family planning is not eligible to receive funds under this subpart * * *. Where appropriate, medical or social service referrals for non-Title X supported services shall be made by providing a full list of available health care providers or appropriate prenatal medical care and delivery services from which a family planning client may select. Such referrals may not, however, be used as an indirect means to encourage or promote abortion in violation of section 1008, such as consciously weighting the list of referrals in favor of health care providers and/or facilities which provide abortions.

The example provided in proposed § 59.8(b)(2) to illustrate this requirement concerned the case of a pregnant woman whom the project diagnoses as having an ectopic pregnancy; it was stated that she should be immediately provided with a list of appropriate hospitals and physicians, and that such a referral would be permissible under the statute.

A. Comments

As with the provisions on counseling, the proposed provisions relating to referral were the subject of numerous comments. Opponents criticized the provisions on the ground that a prohibition on referral for abortion would prevent projects from insuring that women confronted with life-threatening conditions received proper emergency treatment, that it violated medical ethics, that it would slow access to abortions and to prenatal care, that it was vague and unclear, and that it was illegal. Proponents, on the other hand, argued that the provisions would correct the ethical problems presented by the 1981 guidelines and bring them into conformity with section 1008.

1. *Emergency referrals:* Opponents of the proposed provisions uniformly objected to these proposed policies. A major objection, based in large part on the ectopic pregnancy example, was that the provision was far too broad. Numerous providers contended that, as drafted, the provision would place them in the untenable position of not being able to provide appropriate treatment or referrals for life-threatening conditions. It was repeatedly stated that the medically appropriate response, where an ectopic pregnancy or other life-threatening condition is diagnosed, is to make immediate arrangements for appropriate emergency treatment. These comments stated that simply providing a list of referrals would be improper, as well as subject the provider to various tort actions.

2. *Referrals for prenatal care:* A related and very common criticism of the proposed provision was that it would subject pregnant women to a standard of care inferior to that available to nonpregnant women. The example typically cited was of the woman who is diagnosed as having a breast lump; it was asserted that if she is not pregnant, she can be referred to an oncologist for examination and treatment if it proves to be malignant; on the other hand, it was asserted that if she is pregnant, under the proposed provision she could only be referred for prenatal care, thereby building in a possibly critical delay in the treatment of a cancerous condition. The same argument was made by various commenters with respect to a range of other conditions, such as cervical cancer, breast cancer, AIDS, minor gynecological problems, and so on. According to the providers, such a disparity in the standard of care is medically indefensible and would create major liability risks for them. In addition, several comments argued that such a policy is inconsistent with the legislative history of the 1970 act, which indicates that Title X projects were intended to be providers of comprehensive health care and not simply dispensers of contraceptives.

The proposed change in policy regarding referral for abortion itself was also attacked as constituting unsound public health policy. It was argued that the requirement that women desiring abortions be given a list of providers of prenatal care and delivery services would build in a delay in obtaining services. It was asserted that this would result in an increase in later, riskier abortions, an increase in prenatal complications and infant mortality due to the delay in prenatal care, and an increase in women (particularly teenagers) being effectively deprived of the choice to elect abortions because of the time limits on availability and their own comparative inability to negotiate the health care system. A few providers suggested that the provision would have the counterproductive result of wasting valuable time for those few Title X clients who need generic counseling and for whom *in utero* treatment of the fetus is a possibility.

Proponents of the proposed provisions, on the other hand, thought they were needed. They stated that under the 1981 guidelines, a Title X grantee must make abortion referrals, which they contended fosters a policy of encouraging abortion since, under the guidelines, projects must identify providers of acceptable quality, ensure that the services are obtained by the client and in some instances, aid the client in identifying potential resources for reimbursement. Such activities, it was argued, entangle the program with abortion and therefore require projects to indirectly support what the Federal government cannot directly support. Some maintained that the requirement to refer for abortion has resulted in the implementation of a pro-abortion program, because groups which refuse to refer for abortion are excluded, thereby causing an overall bias toward abortion.

Proponents also argued that the proposed provisions do not threaten the ethical responsibilities of family planning providers to render high quality care to their clients. They maintained that claims that health care providers have an ethical obligation to counsel clients on abortion and to arrange abortions is a novel interpretation of the canons of medical ethics, as evidenced by the fact that the House of Delegates of the AMA has consistently affirmed the right of physicians to abstain from any involvement in abortion. In support of the argument that there is no legal or ethical requirement to refer for abortion, proponents pointed to various "conscience clauses" established by various state and Federal statutes, which generally provide that physicians and other medical personnel may not be required to provide, counsel or refer for abortion if contrary to the individual's moral beliefs. It was pointed out that if there were an absolute ethical duty to refer for abortions, thousands of physicians would be unable to practice ethically, as they refuse to refer for abortion; the fact that such physicians can practice was cited as evidencing the lack of an ethical imperative to refer for abortion.

3. *"Conscious weighting".* Numerous comments also questioned the scope and advisability of the provision prohibiting "conscious weighting" of the referral list. Both proponents and opponents of the proposed rules questioned whether they would permit or require a facility to provide a referral list that entirely omitted any abortion providers. In this regard, a number of providers, particularly from rural areas, asked whether the provision would preclude inclusion on the list of facilities such as hospitals which perform abortions; it was pointed out that in many areas of the country (Michigan and Tennessee were cited as examples), hospitals are often the main or only source of prenatal care for indigent women, so that if the provision requires excluding them, such women would be left without a source of prenatal care. Questions were also raised as to whether the list could be specifically tailored to indicate providers' specialties (such as genetic screening and counseling, experience in handling certain types of high-risk pregnancies) or their willingness to accept low-income clients and clients on welfare, so as to reduce the delay in obtaining services. With respect to indigent women, a number of providers argued that the only medically responsible course is to provide preliminary prenatal care until the woman has lined up another provider who will accept her for prenatal care; to fail to do so would constitute the tort of "abandonment."

4. *Legal authority.* The proposed provisions relating to referral were also opposed as illegal. Opponents of the provision suggested that it is inconsistent with the decision of the U.S. Court of Appeals for the Eighth Circuit in *Valley Family Planning* v. *State of North Dakota*, 661 F. 2d 99 (8 Cir. 1981), asserting that that decision relied on and upheld an earlier Departmental opinion construing 42 CFR 59.5(b)(1) as requiring, and section 1008 of the statute as not precluding, referral for abortion where "medically indicated." Opponents also argued that the proposed provisions are unconstitutional, both as a restriction on the free speech of providers and as placing another obstacle in the path of a woman's exercise of her right to abortion.

Proponents of the proposed provisions, on the other hand, argued that they are legal. It was argued that the restrictions regarding referral are essential to ensure that the statutory purpose that abortion not be promoted with Title X funds be met, and the GAO findings were cited as evidence of abuse of the referral process. In this regard, several took the position that *Valley Family Planning* would be irrelevant under the proposed regulatory scheme, since that decision simply relied on an opinion construing the prior requirements. They also maintained that the arguments supporting the constitutionality of the counseling provisions likewise support the constitutionality of the referral provisions.

B. Response

The Department agrees with and has accepted several of the points raised by the comments on this issue, as reflected in the revised provisions appearing at § 59.8 (a)(2) and (3) and § 59.8(b)(2) below.

1. *Emergency referrals.* The ectopic pregnancy example has been amended to provide for immediate provision of appropriate referral for emergency treatment, to make clear that Title X providers are in fact obligated to provide referrals for immediate and appropriate medical care when confronted with a life-threatening medical condition. See § 59.8(b)(2) below. In any cases in which emergency referrals are needed, the Title X project must expedite the referral and take whatever steps are necessary and appropriate to insure that the client receives the services needed quickly. See § 59.8 (a)(2) below.

2. *Referral for prenatal care.* In addition, the provisions below have been modified to make clear a point that was apparently misunderstood by many commenters, *i.e.*, that Title X providers are not precluded from making—and indeed are obligated to make—appropriate referrals with respect to treatment of conditions that are diagnosed in the course of examining pregnant Title X clients. Thus, in general, clients with medical conditions requiring treatment—whether pregnant or not—must be referred under the rules below to an appropriate provider of the needed medical care. If the condition is one that is related to pregnancy, the requirements of § 59.8(a) apply; if the condition is one that is not related to pregnancy, § 59.5(b)(1) continues to apply. See, in this regard, the discussion at sections IB1 and IIB1 above.

These changes and clarifications of the proposed policies thus respond to most of the comments on the referral issue. As for the comments arguing that the policy builds an unacceptable delay into the process of obtaining both prenatal care and abortion, where chosen, the Department does not agree that substantial delays will result under the rules below. It has addressed the issue of delay in prenatal care by requiring that projects provide information designed to protect maternal and fetal health until a provider of prenatal care is secured for the client. This will permit information regarding good health practices during pregnancy (*e.g.*, warning the pregnant woman about the risks of substance abuse, counseling regarding proper nutrition, rest, and so on) to be provided by the project.

However, the Department rejects the contention of many comments that the policies below will expose poor and young women to substantially greater risk or delay in obtaining services related to pregnancy outcome. This contention is based on the assumption of delay or client loss in the referral process. However, such a risk has always existed in the Title X program, as it has never provided *any* pregnancy outcome services, whether abortion services or delivery services. All that the referral requirements below do is move what has always been, where pregnancy is diagnosed, an inevitable referral slightly ahead in time. Moreover, there is no *a priori* reason why a properly operating referral process cannot operate just as efficiently if it refers at the time pregnancy is diagnosed as it can if it

first provides options counseling and then refers.

Because Title X projects do not offer the complete continuum of care from pregnancy diagnosis to childbirth, there may have been and may continue to be some unavoidable delays in individual cases. The only certain way to eliminate any gap in time would be to award Title X funds only to organizations which provide the entire spectrum of obstetric and gynecological services including delivery services.

With respect to an abortion, moreover, these comments evidence a substantial misunderstanding of (and to the extent they come from Title X providers, probable noncompliance with) the Title X requirements. Contrary to the claims of many providers, Title X has never permitted more than "mere referral," that is, the provision of the name and telephone number of a provider for abortion; the extensive facilitation of abortion (such as setting up appointments, making transportation arrangements, making arrangements for payment of the abortion) that so many of these comments assume to be common practice have never been permissible in the Title X program. While the rules below no longer permit "mere" referral for abortion, this is consistent with the statute which clearly intended that abortion not be facilitated through the Title X program. Those who seek abortions must do so outside of the program. The Title X program has never been involved in ensuring rapid and easy access to abortion services so that a later term abortion could be avoided. Some delay in an individual decision choosing abortion is not unusual in medical practice, nor is it in all cases inadvisable. ACOG, for example, recommends that a woman "should be allowed sufficient time for reflection prior to making an informed decision." (*Standards*, p. 83.)

For the reasons above, the Department does not believe that access to abortions will be affected as a result of the change in policy. Nevertheless, it should be clear that given the prohibition of section 1008, the Department cannot now nor ever has been able to facilitate the selection or obtaining of abortion as a method of family planning. Therefore, to the extent abortions are not selected as a consequence of this policy, it believes such a result is consonant with the congressional purpose underlying section 1008, which clearly disfavors the choice of abortion as a method of family planning.

3. *"Conscious weighting"*: With respect to the comments questioning the meaning of the prohibition on "conscious weighting" of the referral lists, the Department thinks that most of the provider concerns are misplaced. As proposed, the prohibition was very narrow: It precluded only conscious weighting of the list in favor of abortion providers. As such, it was silent with respect to other characteristics of the list such as breakdown by area of specialty, acceptance of Medicaid and other relevant variables and such breakdowns were therefore not precluded. Indeed, section 59.8(a)(2) requires referral to "available" providers of prenatal care, including providers appropriate to the Title X clientele, who are primarily low income. Nor does the Department view the "conscious weighting" provision as prohibiting the inclusion of facilities, such as hospitals, in which abortions are performed if they are also major providers of prenatal care and other services and the referral is specifically made to the providers of prenatal care services. Rather, what is prohibited is inclusion on the list of providers that, as their main function, provide abortions and the deliberate exclusion in the composition of the list of providers that do not provide abortions or referrals for abortion. However, to make clear that the requirement relates solely to the actual composition of the list and does not relate to the project's intent, it has deleted the word "conscious" from § 59.8(a) below. In addition, the Department has added language to make clear that the project may not direct clients to prenatal providers on the referral list who also perform abortions.

4. *Legal authority*: The Department also rejects the contention that the referral requirements are illegal. As regards the *Valley Family Planning* decision, it notes that the Court of Appeals for the Eighth Circuit did not purport to limit the Secretary's authority to prescribe standards implementing section 1008; rather, pursuant to the Supremacy Clause of the Constitution, it simply applied the regulatory standards then in effect to supersede contrary State law. Moreover, the basic premise of that regulatory standard—that referrals where a life-threatening condition is diagnosed are not prohibited by section 1008 and are regulatorily required whether or not the treatment ultimately is abortion—is unaffected by the rules below, as the discussion at the first paragraph of this section makes clear. The Department interpretation upon which *Valley Family Planning* was partially based did not state that referral is required on demand, neither did it find that referral is always required; rather, it held only that it was required under the regulations when medically necessary, such as when the life of the mother is endangered.

Nor does the Department agree that the referral provisions of the rules below are constitutionally infirm. With regard to the First Amendment problems which many comments asserted exist, there is analytically no difference in First Amendment terms between the restrictions on counseling and the restrictions on referral. Thus, the points made at IIIB7 above apply to these claims as well. As to the claim that prohibiting projects from making referrals for abortion constitutes an unconstitutional interference with the woman's right to obtain and the doctor's right to refer for abortion, the points made at IIIB8 apply to this claim also.

V. Program Integrity

Section 59.9(a) of the proposed rules provided that a Title X project must—

be kept entirely separate and distinct, financially and physically, from any abortion-related activities. This requirement includes maintaining separate financial, accounting personnel and medical record systems and separately maintaining other project functions and physical facilities (including office space, equipment, stationary and the like) in such a manner as to clearly separate Title X-funded activities from abortion-related activities. This requirement prohibits, by way of example, common waiting, consultation, examination and treatment areas; shared telephone numbers and receptionists; common names for eligible and ineligible programs; and common office entrances and exists. Although common street or mailing addresses will presumptively constitute a failure to separate adequately Title X-funded programs from other programs which include abortion as a method of family planning, grant applicants may seek to establish the reasonableness of such arrangements in exceptional cases where, as in the example of a large metropolitan hospital with abortion and family planning services located in different wings, the fact of physical separation is otherwise established and no use of appropriated funds in an ineligible program is likely.

Proposed § 59.9(b) set out four examples of fact patterns which failed to comply with the proposed requirements and one example of a fact pattern that complied.

A. Comments

1. *Cost*: The most common objection to the proposed co-siting restrictions was cost. Many comments, particularly those from State and local governmental organizations, argued that the proposed restrictions would require a substantial investment in duplicate facilities, personnel and so on, which would

render Title X funds uneconomic to accept. The particular concern in this regard was typically stated to be the phrase "abortion-related services." The comments typically criticized this phrase as extremely vague, but assumed that the phrase covered any services in which abortion is mentioned, such as genetic screening and counseling or the provision of handouts mentioning abortion, and not just the actual performance of abortions. One State health department questioned whether the term "abortion-related services" covered such services as laundry, housekeeping, security, and data processing services that are shared by the abortion component of, for example, a large metropolitan hospital.

A number of public organizations stated that the practical effect of the requirements would be to bar them from participating in the Title X program. They contended that they do not have the financial ability to establish duplicate clinical facilities, provide separate parking lots (as appeared to be required in the example at proposed § 59.9(b)(1)), or even establish separate entrances and exits. Moreover, many stated that they are required by law to provide services through existing public hospitals and clinics, in which they also conduct a variety of activities in which abortion is mentioned, abortion counseling is done, or abortions are provided, frequently because of court orders mandating such activity. Several public organizations argued that the only organizations that would be able to remain in the program under the proposed requirements are the single or dual-purpose private organizations, such as Planned Parenthood affiliates, which would have the financial capability and legal flexibility to establish separate facilities. The requirements were seen as impacting particularly severely on rural areas, where existing resources are scarce and where distance is a major barrier to service. Because of such considerations, it was argued, the emphasis has been on establishing multi-purpose sites of rural health care, with which the requirements would be at odds.

Private providers likewise criticized the proposed provisions as too costly. A number argued that the net effect of separating their Title X operations from any abortion-related activities they conduct would be an increase in cost for *both* operations. These comments took the position that a cross-subsidy existed, with Title X benefitting from economies of scale due to bulk purchasing of supplies, sharing of overhead costs, and so on. A few providers and provider organizations submitted estimates of the cost of complying with this provision, which ranged up to $150 million for the program as a whole. Based on such cost estimates, a number of comments argued that the Department did not comply with Executive Order 12291 in that it did not conduct a regulatory impact analysis of the proposed requirements, and maintained that the proposed requirements exceeded the impact threshold of the Executive Order. It was argued, moreover, that it is inappropriate as a matter of public policy to require Title X funds to be spent on such items as paving parking lots, which some assumed the proposed provisions to require, and constructing new doorways and lobbies rather than on the provision of direct health care services.

2. *Continuity of care:* The co-siting requirements were also criticized on public health grounds, principally on the basis that they would impact negatively on continuity of care between family planning and abortion. Numerous comments, particularly from public providers, argued that the trend in public health has been to locate related services together, to facilitate full utilization by clients of needed services. For this reason, it was stated, even in "large, metropolitan hospitals," abortion counseling services are frequently located in the same corridor or wing as family planning services. Such arrangements also decrease the rate of repeat abortions, it was argued, by making contraceptive counseling and services readily available to women who have had or are about to have abortions. As a practical matter, therefore, it was asserted that it will often not be possible to relocate Title X services and, in any event, doing so would not be consistent with contemporary public health thinking. It was also argued that the proposed requirements, if complied with, would have at least a short-term impact on continuity of care, occasioned by the change attendant on moving to new facilities, hiring new personnel, and so on. A public agency in New York for instance, indicated that family planning providers in that state would have to seek approval under New York's certificate of need law to establish duplicative services, which could temporarily impair the ability of the Title X projects to provide services or close them down permanently, if the certificate of need were not obtained. Several commenters expressed concern that the requirement of proposed § 59.9 would interfere with the activities of other federally funded programs in which abortion information may be provided.

3. *Separation of medical personnel and financial systems:* A related criticism was frequently expressed with regard to the proposed requirement to establish separate "medical records systems." Many providers and provider organizations argued that the requirement would be impractical for multifunction health care facilities, such as hospitals or county health departments, which maintain centralized medical records systems. They also maintained that such a requirement would interfere with continuity of care by fragmenting a patient's medical records. They stated that this could lead to poor medical management of the patient's care by the project or elsewhere in the organization if complete records are not obtained. The proposed requirement was thus generally criticized as inconsistent with proper medical procedure.

The requirement for separate personnel systems was attacked on similar grounds. Public organizations generally argued that they could not comply with the proposed requirement, given the legal structure of most governmental personnel systems in which employees of many governmental agencies are employed under the same personnel system. Other provisions, criticizing the example at proposed § 59.9(b)(2), argued that it was improper to regulate what a physician or other health professional, who may be employed by the project on a part-time basis, does with the rest of his time.

The proposed requirement for separate accounting systems elicited similar criticisms. A number of comments recognized that it is reasonable, and consistent with customary and longstanding Department practice, to require Title X grantees to maintain separate accounting records. However, it was repeatedly stated that requiring separate accounting systems is infeasible for most large organizations, particularly governmental ones. For example, the state health department of New Jersey endorsed the reasonableness of requiring physical and financial separation of abortion and family planning services in a hospital, but argued that the common practice of having distinct "cost centers" in hospitals should be sufficient to meet the requirement for financial separation. These comments thus urged that both the policy and the example at proposed § 59.9(b)(4) be changed.

4. *Treatment of large, metropolitan hospitals:* The proposed provision which

used the example of "a large, metropolitan hospital" was critized on several grounds. A number of comments argued that it was vague. Other comments argued that it was arbitrary, in that there is no reason to except metropolitan hospitals from the requirement that does not also apply to rural hospitals, which may be the only provider of services in an area, or to hospitals which are constructed without wings but have some other type of physical separation. As noted above, a number of comments also stated that metropolitan hospitals typically locate abortion-related services in the same area of the facility as family planning services and not in separate wings. It was also argued that the proposal, together with the requirement for separate entrances and exits, does not take into account the concerns of inner city hospitals, which frequently restrict the number of entrances and exits for security reasons. For these reasons, many public providers expressed the view that the waiver for large metropolitan hospitals would be of very little help and that the co-siting requirements would force them to forego Title X funds.

5. *Legal authority*: The proposed physical separation requirements were attacked as illegal on several grounds. Numerous comments argued that there is no evidence that they are needed, asserting that the Inspector General and GAO audits failed to show that Title X grantees had intermingled project and abortion-related activities in any way. In this regard, it was argued that there is no evidence supporting the presumption of illegality with respect to common street or mailing addresses. It was also argued that the requirements greatly exceed what is needed to assure that Title X funds are not used for abortion-related purposes, and thus are invalid. The decisions in the litigation involving the State of Arizona and Planned Parenthood of Central and Northern Arizona (see, *e.g.*, *Planned Parenthood of Central and Northern Arizona* v. *The State of Arizona*, 789 F. 2d. 1348 (9 Cir. 1986), aff'd U.S. ____ 107 S. Ct. 391 (1986)) and *Planned Parenthood of Billings, Inc.* v. *The State of Montana*, *supra*, were cited in support of this argument. Finally, some comments also contended that the proposed requirements violate the First Amendment, based on the decision in *League of Women Voters*, *supra*. In that decision, it was argued, the Supreme Court established the principle that the government may not require the recipient of a Federal benefit (in that case, a broadcast license) to establish an "entirely separate facility" to exercise its First Amendment rights, even though it could decline to subsidize the exercise of those rights with Federal funds. The proposed co-siting requirements, it was argued, constitute a requirement to establish an "entirely separate facility" analogous to that considered and rejected by the Supreme Court and is thus invalid.

Proponents of the regulations uniformly supported the proposed physical separation requirements. Many argued that physical intermingling of Title X projects with abortion facilities necessarily has the effect of subsidizing the latter, contrary to Congressional intent. Others contended that lack of physical separation necessarily leads to the public perception that the government is supporting abortion as a method of family planning, which is contrary to the intent of section 1008 that Title X funds not be used to promote abortion as a method of family planning. Because Title X clients do not see the accounting and other "paper" indices of separation, it was argued, physical separation is the only reasonable means to clarify that Title X projects may not include abortion and that the federal government insists on a clear adherence to its policy against spending federal money to facilitate abortions. In this regard, it was evident from the comments of hundreds of individuals that they confused the Title X projects with abortion providers or assumed that Title X projects were generally abortion providers.

B. Response

The Department has carefully considered the comments received concerning the proposed separation requirements and has made a number of changes to the requirements in light of the comments received. In essence, the new rules adopt an approach that will enable the Department to make case-by-case determinations as to whether a given Title X project is physically and financially separate from prohibited activities. As stated in the proposed rules, meeting the requirement of section 1008 mandates that Title X programs be organized so that they are physically and financially separate from other activities which are prohibited from inclusion in a Title X program. Having a program that is separate from such activities is a necessary predicate to any determination that abortion is not being included as a method of family planning in the Title X program. Under the rules below, the separation must be objective: that is, if the Title X program cannot be distinguished from prohibited activities conducted by the grantee or others, the statutory mandate has not been met. Thus, the rule below provides that, while accounting separation is necessary, it is not sufficient. There must also be a visible separation between the Title X program and other activities which are prohibited from inclusion in the Title X program. To determine whether sufficient separation exists in a particular case, the Department will weigh the relevant factors. The regulation identifies four non-exclusion factors relevant to such a determination. See § 59.9 below. However, because the rule below adopts a "facts and circumstances approach," it is felt that providing examples would be misleading, in that examples are unlikely to replicate the complex circumstances and conditions that the Department will be considering when making the individual determinations called for by the rule. Accordingly, unlike proposed § 59.9, § 59.9 below contains no examples.

In light of these changes to the proposed rule, the Department makes the following responses to the public comments.

1. *Cost*. Because of the adoption of a case-by-case determination approach in the rules below, it is not possible to determine with any precision the costs that grantees will face in accommodating to the rules. However, the Department would note that most of the actual or apparent requirements of proposed § 59.9 that caused the most concern regarding costs, such as the stated requirement for separate entrances and exits and the apparent (although unintended) requirement to repave parking lots, no longer constitute *per se* tests under rules below. Certainly, the Department at this point does not have complete data about each of the 4,000 clinics presently in the program so that it could determine how much, if any, expense each would incur to maintain program integrity. Indeed, the Department has in part chosen a case-by-case approach so as to be able to implement this policy with a greater understanding and sensitivity to the costs imposed. In any event, because the rules no longer contain the rigid physical separation requirements of the proposed rules, it does not agree that the "worst case" estimates submitted of approximately $50,000 per clinic are likely to be realized for many clinics. Accordingly, the Department is not persuaded that the rules below will substantially impact upon rural health care providers.

The Department also is unpersuaded by the provider arguments that Title X benefits from lack of separation from

abortion facilities due to the economies of scale that are realized. Indeed, such comments only underscore the problem of commingling the Title X services with abortion services, both in the difficulty of ensuring that no subsidy in the other direction occurs, but also in creating the appearance, if not the reality, of federal support of abortion. Further, current program policy allows grant funds to be used for the one-time costs associated with relocating a Title X clinic for the express purpose of complying with the rules below.

2. *Continuity of care:* The above changes also respond to several of the provider concerns with continuity of care, as do the related changed discussed in the following section. The example typically cited—the Title X clinic that is located at the same site as a project funded under another program that provides genetic screening and counseling—may not be affected by the requirements revised, if the project can show that the later project's activities meet the separation indicia of § 59.9 below. To the extent the rules below minimize continuity between family planning and abortion, this is a result which the Department views as consistent with section 1008.

3. *Separation of medical records, personnel, and financial and accounting systems:* The requirements relating to separate financial and accounting, personnel, and medical records systems have been eliminated in response to the concerns raised in the public comments. See § 59.9 below. However, in order to ensure financial separation of abortion from Title X and consistent with past practice as well as in recognition of the customary financial management practices of health care providers, § 59.9 below provides that one of the indicia of separation to be considered is the existence of separate accounting *records* that are separate from those of any abortion activity it conducts. This, it should be emphasized, represents no change from longstanding program practice. With respect to the issue of shared personnel, § 59.9 below establishes the existence of separate personnel as one of the regulatory indicia of separation. However, as noted above with respect to this section, the existence of this factor—like the existence of any of the factors set out in § 59.9—in a particular case is not a *per se* disqualification, but rather must be considered in light of the facts and circumstances of the project as a whole. Where sharing of personnel exists, but the project can demonstrate on an overall basis that it is objectively separated from prohibited activities, the Department will determine that the project is in compliance with § 59.9. Accordingly, the Department does not believe that the concerns raised with respect to the ability of medical personnel to act outside their employment by the project are valid. These changes thus address and should allay many of the cost concerns expressed by the public comments.

4. *Treatment of large, metropolitan hospitals:* The Department has deleted the language relating to large hospitals. It agrees that this language was unclear and suggested criteria that were never intended to apply. Moreover, the approach adopted below makes such a provision no longer necessary.

5. *Legal authority:* The legal authority for these regulations is discussed extensively elsewhere in this preamble and does not need to be repeated here. In brief, section 1008 prohibits the use of title X funds in programs that include abortion as a method of family planning. Thus, section 1008 is broader than a mere restriction on the use of federal funds, and clearly authorizes the Department to set out rules to implement its mandate that Title X programs not include prohibited activities. Based on the need to implement the mandate of the statute and the Departments experience in administering the program, the Department has concluded that greater guidance and specificity is needed with regard to program separateness. Section 59.9's case-by-case approach will allow the Department to implement the statutory mandate of program separateness with sensitivity to the circumstances of each program. Thus, adopting the case-by-case approach reflects the Department's efforts to reconcile the commands of the statute with the concerns expressed by commenters. As such, it reflects a rasonable exercise of the Department's authority to promulgate rules for the administration of the Title X program. With repsect to the constitutional claims raised by some commenters, the Department disagrees that the cases cited, particularly *League of Women Voters, supra*, preclude the policies below, for the reasons more fully discussed previously and below.

VI. Advocacy of Abortion

Proposed § 59.10 set out a number of restrictions designed to ensure that Title X grantees do not promote or encourage abortion as a method of family planning with Title X funds. Under proposed § 59.10(a), a Title X project could—

take no action which encourages, promotes, or advocates abortion as a method of family planning, or which assists a woman in obtaining an abortion as a method of family planning. Actions are considered to encourage, promote, or advocate abortion as a method of family planning if they in any way have the effect of facilitating obtaining abortion as a method of family planning.

The proposed rule prohibited certain specific actions: lobbying, providing speakers promoting abortion and paying dues to abortion advocacy organizations (proposed § 59.9(a)(1)); using legal action to make abortion available as a method of family planning (proposed § 59.9(a)(2)); and developing or disseminating materials advocating abortion as a method of family planning (proposed § 59.9(a)(3)). Five examples were provided. The following four were termed impermissible under the statute: providing a brochure advertising an abortion clinic, paying dues to an organization which devotes a substantial part of its activities to lobbying Congress for liberalized abortion laws, displaying posters encouraging clients to write legislators to vote in favor of abortion, and assisting clients in making appointments at abortion clinics; the fifth example, concerning the activities of the Title X project's personnel outside of the project in writing legislators in support of pro-choice legislation, was termed permissible. See proposed § 59.10(b).

A. Comments

1. *Provision of abortion materials:* The majority of comments opposing proposed § 59.10 criticized the prohibition of proposed § 59.10(a) relating to assisting a woman to obtain a family planning abortion and actions that "in any way have the effect of facilitating obtaining abortion," together with proposed § 59.10(a)(3) relating to the development and dissemination of materials (including printed matter and audiovisual materials) advocating abortion as a method of family planning. The usual criticism was that these provisions are overbroad, in that they fail to distinguish between the provision of factual information and advocacy of abortion. It was argued that the provisions would prohibit Title X grantees from disseminating such things as patient package inserts included in oral contraceptive packages and the patient information required by the Food and Drug Administration regarding the IUD, or even keeping copies of the telephone yellow pages which contain advertisements by abortion clinics. A national medical organization suggested that the "assisting" and "facilitating" language of proposed § 59.10(a) would preclude Title X projects from providing

copies of a patient's medical records on request, if the request came from an abortion facility, which conflicts with the principle that patients have a right to their medical records.

A series of related legal objections were also raised. The same criticisms relating to informed consent and voluntary acceptance of services that were articulated with respect to the proposed counseling provisions were likewise stated with respect to proposed § 59.10. In addition, many opponents argued that these provisions are unconstitutionally vague in failing to make clear exactly what the limits on expression are, so that a provider could never be certain whether it had violated them or not. It was also argued by a number of organizations that the provisions violate the First Amendment in constituting viewpoint-based discrimination (by forbidding pro-abortion but not anti-abortion speech) and by requiring grantees to relinquish their right to speech that is protected under *Griswold* v. *Connecticut, supra.* It was further argued that these restrictions on speech are not permissible on the theory that a benefit, rather than a right, is denied, as the government may not condition receipt of a benefit upon the relinquishment of First Amendment rights, as such a condition would have a chilling effect on the exercise of those rights. *Perry* v. *Sindermann, supra, Planned Parenthood of Central and Northern Arizona* v. *The State of Arizona, supra,* and *Alan Guttmacher Institute* v. *McPherson,* 616 F. Supp. 195, 202 (S.D.N.Y. 1985) were cited in support of this argument.

Supporters of the proposed provisions, on the other hand, generally expressed the view that they were appropriate and needed. They contended that advocacy of abortion is not a proper governmental function and is certainly not a "family planning" service which should be subsidized with federal funds. With regard to constitutional concerns, it was argued that the provisions are constitutional because the constitutional guarantees under the First Amendment do not apply to the government: those acting as agents of the government have no greater rights than the government itself, and accordingly the government may lawfully restrict what they say on its behalf. Also cited in support of the constitutionality of these provisions was *Regan* v. *Taxation Without Representation, supra.*

2. *Dues payment, lobbying and litigation:* The remaining provisions of proposed § 59.10 attracted somewhat less comment. A general criticism of these provisions was that they would prevent Title X grantees who are pro-abortion from exercising their First Amendment rights. In this regard, the provisions were criticized as politically motivated and not politically neutral: it was argued that they permit Title X funds to be used to support pro-life political, legal and lobbying activities, but prohibit such use of funds for the contrary point of view. In addition, a number of specific criticisms of the provisions were expressed. The restriction on payment of dues to organizations that advocate abortion was objected to as depriving grantees of access to needed professional information and services, as well as being an unconstitutional restriction of their right to free association under the First Amendment. The restrictions on lobbying were generally criticized as unnecessary: several comments argued that IRS requirements and OMB Circular No. A-122 already limit lobbying by grantees, and stated that there is no evidence that grantees are not complying with these requirements. It was also asserted that the lobbying restrictions violated the First Amendment. Similar arguments were made with respect to the restriction on litigation which, in addition, was criticized as vague. Questions were raised as to whether a grantee, which in its non-project activities provides abortions, could defend itself under this provision in any malpractice actions arising out of such abortions.

Proponents of the proposed provisions generally took the position that, if anything, they did not go far enough. In this regard, it was argued that it is inconsistent to restrict a grantee from advocating abortion if the parent organization is permitted to do so on the ground that the federal funds "free up" funds of the parent organization for such advocacy activity. In addition, one comment took the position that the example at proposed § 59.10(b)(2) was inconsistent with the logic of the regulation as a whole: if the point of the provisions is to separate Title X funds from abortion advocacy, then payment of dues to an organization that devotes *any* part of its activities to lobbying for abortion should be prohibited. The proponents of the provisions also took the position that, since the restrictions only apply to the Title X project itself, they are constitutional. *Regan* v. *Taxation Without Representation, supra,* was cited in support of this argument, as, it was noted, that case specifically concerned the availability of a tax exemption with regard to lobbying activities: in that case, the organization's tax exemption was denied because a substantial part of its activities were devoted to lobbying.

B. Response

The Department has considered the comments received, but for the reasons stated below, has not accepted them. Accordingly, § 59.10 below remains substantially as proposed.

1. *Provision of abortion materials:* The Department notes that many of the comments criticizing these provisions proceed from a misunderstanding of the requirements or have been addressed in connection with revisions to the rest of the regulation. As noted in the discussion at sections IIIB1 and IIIB2 above, it is not the intent of these regulations to restrict the provision of information to Title X clients necessary to assess the risks and benefits of different methods of contraception. See § 59.8(a)(4) above. Similarly, keeping the yellow pages in the project office and provision of medical records to another medical provider would not be proscribed, as they are not actions that directly "assist" a woman to obtain an abortion.

With respect to the legal criticisms of these provisions, the Department does not believe that they have merit. It notes, as an initial matter, that with the exception of the provision relating to payment of dues, the policies at proposed § 59.10(a) represent the long-standing interpretation of section 1008 by this Department, of which the grantee community should be aware and is currently bound. What the final rules below do is reduce to readily accessible written, regulatory form compliance standards which were articulated in an OGC opinion written in 1978 and a matter of public record since 1980. It is difficult to understand how, with these policies reduced to written, regulatory form and with concrete applications of them provided as in the proposed rules and the final rules below, the regulatory framework can be challenged as "vague," when the *status quo,* which the opponents of the regulations uniformly seek to continue, is not. The criticisms made on informed consent and "voluntariness" grounds are, with respect to the provisions of § 59.10, irrelevant, as those provisions in general do not relate to treatment, *per se.* However, to the extent that the requirements of § 59.10 do impinge on treatment, these concerns are addressed at section IIIB2 above. With respect to the claims that § 59.10 is unconstitutional, the Department disagrees that these claims have merit. These provisions are constitutional under the standards set forth in *Regan* v.

Taxation Without Representation, supra, and *League of Women Voters, supra,* because they do not prohibit organizations from establishing affiliates that provide abortion materials. They permit an organization to operate both a Title X project and a project that would educate women on abortion as long as they are separate and distinct.

2. *Dues payment, lobbying, and litigation:* The Department disagrees with the comments criticizing the proposed policies as not politically neutral. It is true that § 59.10, like the remainder of the rules below, does exhibit a bias in favor of childbirth and against abortion as a method of family planning. However, this bias is explicit in the statute itself, and is not a creation of this Department or this Administration. Moreover, as noted above, virtually all of the policies in § 59.10 represent program requirements that antedate the present Administration. Thus, it considers these criticisms to be unfounded.

With respect to the specific objections to the provisions relating to dues payment, lobbying and litigation, the Department disagrees that they have merit. It should be noted in this regard that the requirements apply only to the project. Thus, if a grantee organization believes that its interests are best served by belonging to an organization that advocates abortion, it is free to join; it simply may not use project funds for payment of dues. Similarly, if it wishes to lobby for the passage of pro-abortion legislation, it may, so long as project funds (including project personnel working on project time) are not used. The same principle applies with respect to the restriction on litigation, and thus the answer to the malpractice concern raised by some providers is that the organization may of course defend itself. See the examples at § 59.10(b) below.

The Department has thus not accepted the criticism expressed by some supporters of the rule, *i.e.*, that the restrictions of § 59.10 should apply to the organization in its entirety rather than just to the Title X-supported project. It does not agree that it has the statutory authority to impose such a policy, as section 1008 by its terms applies solely to programs supported with Title X funds; therefore, activities lying outside the project are not covered by the statutory prohibition. Moreover, such a policy would raise potential constitutional concerns. By the same token, since the restrictions at issue affect only the project, and not the organization as a whole, they come squarely within the *Regan* case, *supra,* and the claim that they violate the First Amendment is without merit.

VII. Regulatory Impact Analysis

A. Executive Order 12291

Executive Order 12291 requires that a regulatory impact analysis be performed for any "major rule," as defined in the Executive Order. Although the rules below establish standards of performance for all Title X programs, only the requirements under § 59.9, *Maintenance of program integrity,* may have effects of the type and/or magnitude covered by Executive Order 12291. As discussed above, in reponse to comments about costs of complying with the rules, the Department has changed the rules to require appropriate and objective separation between the Title X program and activities prohibited under the subpart. The Department at this point does not have complete data about each of the 4,000 clinics presently in the program to determine how much, if any, expenses each will have to incur to maintain program integrity as mandated by Congress. However, since the rules no longer contain the rigid physical separation requirements of the proposed rules, the Department does not believe that the costs associated with implementation of the requirements contained in § 59.9 will even begin to approach the level of $100 million. The Secretary has determined, therefore, that this final rule is not a "major rule" as defined under E.O. 12291 because it will not have an annual effect on the economy of $100 million or more, or otherwise meet the criteria for which a regulatory impact analysis is required.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. Ch. 6) requires the federal government to anticipate and reduce the impact of rules and paperwork requirements on small entities. Although the rules below establish standards of performance for all Title X programs, only the requirements under § 59.9, *Maintenance of program integrity,* may have effects of the type covered by the Regulatory Flexibility Act. With one exception, the effect of the rules is to eliminate existing requirements or permissive provisions concerning the provision of abortion-related services, and as a result the rules should to this extent produce a reduction in costs for Title X programs. The exception is at § 59.9, relating to separation of services prohibited under this subpart from the Title X program. For the reasons discussed above, the Secretary certifies, under 5 U.S.C. 605(b), enacted by the Regulatory Flexibility Act (Pub. L. 96-354), that these rules will not have a significant impact on a substantial number of small entities.

C. Executive Order 12612

Executive Order 12612 requires that a Federalism Assessment be prepared in any cases in which proposed policies have significant federalism implications as defined in the Executive Order. Among the types of actions which can have such implications are federal regulatory actions which preempt State law. As discussed above, the Department does not intend or interpret these rules as imposing additional costs or burdens on the States or preempting State laws and has argued that these rules will not have any of those effects, nor are they inconsistent with any of the principles, criteria or requirements established by this Executive Order. To the extent there are any additional costs for the operation of Title X programs resulting from these regulations, these costs are small, (see the discussion of Executive Order 12291, above) and are costs which will affect only the expenditure of Title X program funds. To the extend that these rules may have any effect undetected by this analysis, which would create any federalism impact, the Department maintains that these regulations are necessary to ensure the integrity of the Title X program and appropriate enforcement of section 1008. Therefore, these rules comply with the letter and spirit of Executive Order 12612.

D. Paperwork Reduction Act

The final rules do not impose a burden of information collection under the Paperwork Reduction Act. Information collection requirements which were included in § 59.9 of the proposed rules have been deleted. The requirement established at § 59.7 will be administered in such a way that it will not create any paperwork burden. Applicants for grants will be asked merely to sign an assurance of compliance with the requirements in § 59.8 through § 59.10. Additional documentary evidence will be requested of an applicant or grantee only on a case-by-case basis in situations where such information is deemed necessary by the Secretary. The final rules do not contain any information collection requirements subject to OMB approval under the Paperwork Reduction Act.

E. Family Impact

The final rules have been reviewed in conformance with E.O. 12606. The effect of the final rules is to establish standards of compliance concerning the

separation of abortion services from the national family planning program.

The final rules were assessed under the seven criteria in section 1 of E.O. 12606. We conclude that the rules below will not have a significant potential negative impact on family well-being, based on the following determinations:

1. *Impact on stability of the family:* Although program services are provided without regard to, among other things, age, sex, number of pregnancies, or marital status, it is inherent in the character of the services provided under the program that other family members, such as a spouse, will be affected by the services. The limitations on project involvement with abortion in the rules below are intended to convey to the public the Department's concern for the well-being of both mothers and their unborn children.

2. *Impact on parental influence:* The rules below will lessen the influence of service providers and create an increased opportunity for parental influence on the education, nurture, and supervision of their children. Approximately 1,000,000 adolescents are served by Title X. Of those who become pregnant, Title X will no longer counsel or refer them for abortion. This increases the likelihood of adolescents seeking parental advice when faced with pregnancy and reinforces that the seeking of parental advice and involvement is preferable to government services.

3. *Governmental intrusion on family activities:* The rules below prohibit Title X projects from counseling once pregnancy is diagnosed and require referral for services. Insofar as this policy affects teenage clients of Title X projects, it thus diminishes the role of federally funded entities in influencing the childbearing decision and may serve to increase the parental role.

4. *Impact on family earnings:* The rules below will have no impact on family earnings, as they relate solely to receipt of health services under governmentally funded programs and not to income-producing activities of individuals. There should likewise be no impact on family budgets in the aggregate, as the decrease of services in some areas (*e.g.*, prenatal services) will be replaced by increased services in other areas (*e.g.*, preventive family planning services).

5. *Feasibility of less Federal government involvement:* The rules below principally involve establishing standards for compliance with a federal statute by recipients of federal grant funds. The monitoring activities called for could not be discharged by a non-federal entity.

6. *Message of the rules regarding the status of the family:* One message to the public is that family planning is separable from abortion and that the government supports, through its funding, programs that enable families to plan the number and spacing of their children, either through preventive methods of family planning or through management of infertility problems, but not through elimination of unborn children by abortion. In reviewing the public comments, the Department was impressed that both supporters and opponents of the proposed rules seemed to agree that Title X has in the past linked family planning and abortion; the rules below break this link and dispel any perception that Title X funds may be used to support abortion services and activities.

7. *Message of the rules to young people concerning their behavior and social norms:* The message to young people is that the federal government does not sanction abortion as a method of family planning and that it will not provide funding for actions that help young women with an unintended pregnancy to obtain an abortion.

List of Subjects in 42 CFR Part 59

Family planning—birth control, Grant programs—health, Health facilities.

Dated: January 28, 1988.

Robert E. Windom,

Assistant Secretary for Health.

Approved: January 28, 1988.

Otis R. Bowen,

Secretary.

For the reasons set out in the preamble, Subpart A of Part 59, 42 Code of Federal Regulations, is hereby amended as set forth below.

PART 59—[AMENDED]

1. The authority citation for Subpart A of 42 CFR Part 59 is revised to read as follows:

Authority: 42 U.S.C. 300a–4

2. In 42 CFR 59.2, the following definitions are added:

§ 59.2 [Amended]

* * * * *

"Family planning" means the process of establishing objectives for the number and spacing of one's children and selecting the means by which those objectives may be achieved. These means include a broad range of acceptable and effective methods and services to limit or enhance fertility, including contraceptive methods (including natural family planning and abstinence) and the management of infertility (including adoption). Family planning services includes preconceptional counseling, education, and general reproductive health care (including diagnosis and treatment of infections which threaten reproductive capability). Family planning does not include pregnancy care (including obstetric or prenatal care). As required by section 1008 of the Act, abortion may not be included as a method of family planning in the Title X project. Family planning, as supported under this subpart, should reduce the incidence of abortion.

"Grantee" means the organization to which a grant is awarded under section 1001 of the Act.

* * * * *

"Prenatal care" means medical services provided to a pregnant woman to promote maternal and fetal health.

"Program" and "project" are used interchangeably and mean a coherent assembly of plans, activities and supporting resources contained within an administrative framework.

* * * * *

"Title X" means Title X of the Act, 42 U.S.C. 300, *et seq.*

"Title X program" and "Title X project" are used interchangeably and mean the identified program which is approved by the Secretary for support under section 1001 of the Act, as the context may require. Title X project funds include all funds allocated to the Title X program, including but not limited to grant funds, grant-related income or matching funds.

§ 59.5 [Amended]

3. In 42 CFR 59.5(a), paragraph (a)(5) is removed and paragraphs (a)(6) through (a)(11) are redesignated as paragraphs (a)(5) through (a)(10) respectively.

4. 42 CFR 59.5(b)(3)(i) is revised to read as follows:

§ 59.5 [Amended]

* * * * *

(b) * * *

(3) * * *

(i) achieve community understanding of the objectives of the Title X program,

* * * * *

5. In 42 CFR Part 59, § 59.7 through § 59.13 are redesignated as § 59.11 through § 59.17 respectively, and new § 59.7 through § 59.10 are added to read as follows:

§ 59.7 Standards of compliance with prohibition on abortion.

A project may not receive funds under this subpart unless it provides assurance satisfactory to the Secretary that it does not include abortion as a method of family planning. Such assurance must include, as a minimum, representations

(supported by such documentation as the Secretary may request) as to compliance with each of the requirements in § 59.8 through § 59.10. A project must comply with such requirements at all times during the period for which support under Title X is provided.

§ 59.8 Prohibition on counseling and referral for abortion services; limitation of program services to family planning.

(a)(1) a Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.

(2) Because Title X funds are intended only for family planning, once a client served by a Title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child. She must also be provided with information necessary to protect the health of mother and unborn child until such time as the referral appointment is kept. In cases in which emergency care is required, however, the Title X project shall be required only to refer the client immediately to an appropriate provider of emergency medical services.

(3) A Title X project may not use prenatal, social service or emergency medical or other referrals as an indirect means of encouraging or promoting abortion as a method of family planning, such as by weighing the list of referrals in favor of health care providers which perform abortions, by including on the list of referral providers health care providers whose principal business is the provision of abortions, by excluding available providers who do not provide abortions, or by "steering" clients to providers who offer abortion as a method of family planning.

(4) Nothing in this subpart shall be construed as prohibiting the provision of information to a project client which is medically necessary to assess the risks and benefits of different methods of contraception in the course of selecting a method; *provided*, that the provision of this information does not include counseling with respect to or otherwise promote abortion as a method of family planning.

(b) *Examples.* (1) A pregnant client of a Title X project requests prenatal care services, which project personnel are qualified to provide. Because the provision of such services is outside the scope of family planning supported by Title X, the client must be referred to appropriate providers of prenatal care.

(2) A Title X project discovers an ectopic pregnancy in the course of conducting a physical examination of a client. Referral arrangements for emergency medical care are immediately provided. Such action is in compliance with the requirements of paragraph (a)(2) of this section.

(3) A pregnant woman asks the Title X project to provide her with a list of abortion providers in the area. The Title X project tells her that it does not refer for abortion but provides her a list which includes, among other health care providers, a local clinic which principally provides abortions. Inclusion of the clinic on the list is inconsistent with paragraph (a)(3) of this section.

(4) A pregnant woman asks the Title X project to provide her with a list of abortion providers in the area. The project tells her that it does not refer for abortion and provides her a list which consists of hospitals and clinics and other providers which provide prenatal care and also provide abortions. None of the entries on the list are providers that principally provide abortions. Although there are several appropriate providers of prenatal care in the area which do not provide or refer for abortions, none of these providers are included on the list. Provision of the list is inconsistent with paragraph (a)(3) of this section.

(5) A pregnant woman requests information on abortion and asks the Title X project to refer her to an abortion provider. The project counselor tells her that the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion. The counselor further tells the client that the project can help her to obtain prenatal care and necessary social services, and provides her with a list of such providers from which the client may choose. Such actions are consistent with paragraph (a) of this section.

(6) Title X project staff provide contraceptive counseling to a client in order to assist her in selecting a contraceptive method. In discussing oral contraceptives, the project counselor provides the client with information contained in the patient package insert accompanying a brand of oral contraceptives, referring to abortion only in the context of a discussion of the relative safety of various contraceptive methods and in no way promoting abortion as a method of family planning. The provision of this information does not constitute abortion counseling or referral.

§ 59.9 Maintenance of program integrity.

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

(a) The existence of separate accounting records;

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

(c) The existence of separate personnel;

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

§ 59.10 Prohibition on activities that encourage, promote or advocate abortion.

(a) A Title X project may not encourage, promote or advocate abortion as a method of family planning. This requirement prohibits actions to assist women to obtain abortions or increase the availability or accessibility of abortion for family planning purposes. Prohibited actions include the use of Title X project funds for the following:

(1) Lobbying for the passage of legislation to increase in any way the availability of abortion as a method of family planning;

(2) Providing speakers to promote the use of abortion as a method of family planning;

(3) Paying dues to any group that as a significant part of its activities advocates abortion as a method of family planning;

(4) Using legal action to make abortion available in any way as a method of family planning; and

(5) Developing or disseminating in any way materials (including printed matter and audiovisual materials) advocating abortion as a method of family planning.

(b) *Examples.* (1) Clients at a Title X project are given brochures advertising an abortion clinic. Provision of the brochure violates subparagraph (a) of this section.

(2) A Title X project makes an appointment for a pregnant client with

an abortion clinic. The Title X project has violated paragraph (a) of this section.

(3) A Title X project pays dues to a state association which, among other activities, lobbies at state and local levels for the passage of legislation to protect and expand the legal availability of abortion as a method of family planning. The association spends a significant amount of its annual budget on such activity. Payment of dues to the association violates paragraph (a)(3) of this section.

(4) An organization conducts a number of activities, including operating a Title X project. The organization uses non-project funds to pay dues to an association which, among other activities, engages in lobbying to protect and expand the legal availability of abortion as a method of family planning. The association spends a significant amount of its annual budget on such activity. Payment of dues to the association by the organization does not violate paragraph (a)(3) of this section.

(5) An organization that operates a Title X project engages in lobbying to increase the legal availability of abortion as a method of family planning. The project itself engages in no such activities and the facilities and funds of the project are kept separate from prohibited activities. The project is not in violation of paragraph (a)(1) of this section.

(6) Employees of a Title X project write their legislative representatives in support of legislation seeking to expand the legal availability of abortion, using no project funds to do so. The Title X project has not violated paragraph (a)(1) of this section.

(7) On her own time and at her own expense, a Title X project employee speaks before a legislative body in support of abortion as a method of family planning. The Title X project has not violated paragraph (a) of this section.

6. In addition to the amendments set forth above, in 42 CFR Part 59 remove the words "project" or "projects" or "project's" and add in their place, the words "Title X project" or "Title X projects" or "Title X project's," respectively, in the following places:

(a) Section 59.2 definition of "low income family";
(b) Section 59.5(a)(1);
(c) Section 59.5(b), introductory text;
(d) Section 59.5(b)(3)(iii);
(e) Section 59.5(b)(4);
(f) Section 59.5(b)(7);
(g) Section 59.5(b)(10);
(h) Section 59.6(a);
(i) Newly redesignated § 59.11(a);
(k) Newly redesignated § 59.11(a)(7);
(l) Newly redesignated § 59.11(b);
(m) Newly redesignated § 59.11(c);
(n) Newly redesignated § 59.12(a), the first time it appears;
(o) Newly redesignated § 59.15;
(p) Newly redesignated § 59.16(a).

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

THE DIRECTOR

July 11, 1991

Honorable Robert Dole
United States Senate
Washington, D.C. 20510

Dear Mr. Leader:

The purpose of this letter is to express the Administration's views on the Labor, Health and Human Services, Education, and Related Agencies Appropriations Bill, FY 1992, as passed by the House.

The House bill contains a provision that would permit the use of Title X funds for counseling on abortion. Title X funds are intended only for family planning. Under current regulations, pregnant women who seek services from Title X funded projects are now appropriately referred for such counseling to qualified providers. The President stated in a letter to Majority Leader Mitchell and Republican Leader Dole on June 4th that he would veto any legislation that weakens current law or existing regulations for abortion-related activities. His intention is to assure that no Federal funds are used to support abortion. He is not in any respect seeking to impose a so-called "gag rule." The President, of course, remains committed to the protection of free speech. He would veto this bill if it were adopted as presently written, and will accept a bill only if it is consistent with the principles here articulated.

The Administration has concerns with several other provisions of the House-passed bill. In its consideration of this bill, the Subcommittee is respectfully requested to address these concerns, noted below, and to develop a bill that reflects more substantially the President's priorities.

The House has created a contingent appropriation to provide additional funds for administration of the unemployment insurance (UI) system. Under the House language, an additional $30 million would be provided for every 100,000 increase in the average weekly insured unemployment (AWIU) projected by the Department of Labor over the 3.24 million AWIU level assumed in the President's FY 1992 Budget request. Such additional funds would be provided without further action by the Congress and the President.

IDENTICAL LETTERS SENT TO HONORABLE MARK O. HATFIELD, HONORABLE ROBERT C. BYRD, HONORABLE TOM HARKIN, AND HONORABLE ARLEN SPECTER

In an earlier Statement of Administration Policy, we advised that the President's senior advisers would recommend that he veto this bill if it contained the UI provision. This recommendation was based on the assumption that the provision reclassified discretionary UI administrative costs as mandatory expenditures -- a fundamental change in the Budget Enforcement Act (BEA).

The Congressional Budget Office has a different interpretation of this provision: they classify it as a contingent appropriation. After consulting with them and reviewing the reasons for their interpretation, we now agree with them. Therefore, OMB will score $76 million in budget authority for the contingency as a result of this provision. However, despite this change in scoring, the Administration is still opposed to the provision for the reasons stated below. But the President's senior advisers would not recommend that he veto legislation that contains this provision if the current scoring interpretation of the provision prevails.

Aside from the contingent appropriation, the House bill provides discretionary funding for UI administrative costs at the President's requested level of $2.3 billion. The Administration is pleased with this action and encourages the Senate to fund UI administrative costs at this level. The Administration has indicated that, to the extent that changed real growth and unemployment forecasts cause unexpected UI administrative cost increases, the amount by which the revised estimates exceed the budget request would be designated as "emergency" funds and thus exempt from the BEA spending limits. As a result, no new contingency fund is necessary or appropriate.

The Administration objects to the House's inclusion of $600 million in "dire emergency" funding for the Low Income Home Energy Assistance Program (LIHEAP). The House's base funding level of $1.0 billion is generally consistent with the President's request of $1.025 billion. The budget request for a $100 million contingency appropriation, however, is based on specific market criteria, including a 20-percent increase in oil prices. In contrast, the House's "emergency fund" is specifically designed to circumvent the discipline of the domestic discretionary spending limits established by the BEA. Under the House's proposal: (1) the $600 million would become available if the President submitted a request designating the funding as an emergency; and (2) the resulting funding would be considered to be over the spending limits mandated by the BEA.

It is the Administration's position that annual appropriations for programs such as LIHEAP, the requirements for which can be -- and have been for many years -- reasonably estimated in advance, should not be designated as "emergency." Therefore, the Office of Management and Budget would not recommend to the President that he designate any of these funds as "emergency." If the Congress' priorities include higher spending for LIHEAP, then the Administration believes that the Congress should enact a larger regular appropriation, with offsetting reductions in other programs.

The House has funded only $69 million of the requested $139 million for the Healthy Start Initiative. This initiative targets funds for high-risk infant mortality areas and is a high priority of the Administration. The reduced level of funding provided by the House bill would severely limit the Department's ability to address this public health crisis. The Senate is urged to fund fully the Healthy Start Initiative.

The $257 million level of funding recommended by the House for the Health Care Financing Administration's (HCFA's) contractor account greatly exceeds any previous contingency fund level. The FY 1992 Budget proposes a $100 million contingency. Further, language of the House bill would provide for release of the contingency funds for "unanticipated costs," instead of for "unanticipated workloads." The House language would greatly increase the likelihood that these funds may be utilized.

The Administration appreciates the willingness of the House to reserve $250 million for the AMERICA 2000 initiative, which is pending authorization. However, $690 million is required for this initiative, of which $46.5 million requires no new authorizing legislation. It is the Administration's view that the full requested amount should be included in this bill to ensure the successful implementation of the AMERICA 2000 initiative. All elements of this initiative are essential to the States' efforts to reform education.

The House bill would provide $54.4 million less than the President's request for research, statistics, and improvement activities within the Department of Education. Of that amount, the President has requested $27.5 million to support important research and data collection activities that would help States and localities to improve educational performance and achieve the National Education Goals. These activities are vital to successful education reforms. The Senate is urged to restore funding to the requested level.

The House bill would not provide any of the increases requested in the FY 1992 Budget for drug treatment and prevention programs of the Alcohol, Drug Abuse, and Mental Health Administration. Further, the bill would not provide any of the $68 million requested for grants to increase drug abuse treatment capacity. The Administration urges the Senate to provide funds for these high-priority programs at the levels requested in the FY 1992 Budget in anticipation of enactment of authorizing legislation.

On the basis of OMB's initial scoring, the Administration finds that the House bill exceeds the Senate 602(b) allocation for domestic discretionary budget authority by $137 million and the domestic discretionary outlay allocation by $622 million. This is in large part due to the House's excessive funding of contingencies.

Additional Administration concerns with the bill as passed by the House are discussed in the enclosure.

With best regards,

Richard Darman
Director

Enclosure

(Senate Subcommittee)

ADDITIONAL CONCERNS
H.R. 2707 -- DEPARTMENTS OF LABOR, HEALTH AND HUMAN SERVICES, AND EDUCATION, AND RELATED AGENCIES APPROPRIATIONS BILL, FY 1992

MAJOR PROVISIONS OPPOSED BY THE ADMINISTRATION

A. Funding Levels

Department of Health and Human Services:

Interim Assistance to States for Legalization. The House bill would use $242 million of the FY 1993 discretionary outlay spending limit by moving FY 1992 Interim assistance to States for legalization (SLIAG) outlays a few months into FY 1993. The Administration proposed permanently rescinding these funds to free up resources for higher priority spending in FY 1992 and subsequent years. The House, in electing not to make real reductions in resources for this activity, has, instead, shifted the outlay burden into the future. The Administration continues to believe that rescission of these funds is appropriate.

Health Resources and Services Administration (HRSA) -- Health Professions Training. The Administration is pleased that the House has met the FY 1992 President's request for high-priority health professions training programs that assist disadvantaged and minority students in pursuing a health professions education. However, the Administration continues to object to the funding of numerous low-priority categorical grants, most of which provide medical and allied health school curriculum assistance. The House has provided approximately $300 million for categorical health professions training programs, many of which are untargeted and outdated grants. After two decades of heavy Federal support, the aggregate shortage of health professionals has abated. The Administration believes that this money would be far better spent in broad-based student aid programs for low income students -- such as Pell Grants -- than for these special interest grants. There is no justification for providing special assistance only to these selected institutions and professions.

National Institutes of Health (NIH) -- Biomedical Research. The Administration commends the House for placing a high priority on biomedical research, consistent with the President's FY 1992 Budget. However, the Administration observes that after NIH absorbs its portion of the HHS-wide reduction of $124

million in funding for salaries and expenses recommended by the House, the net funding level for NIH may fall below the President's request. This could delay the advances in biomedical research sought in the FY 1992 Budget.

NIH -- One-Percent Transfer Authority. The Administration is concerned that the House did not approve the request for authority for the Director of NIH to direct up to one percent of the NIH appropriation to important research opportunities as they emerge. This important authority is needed so that the NIH Director may adjust resource allocations as public health challenges arise.

NIH -- Human Genome. The Administration regrets that the House has allocated only $93 million to the human genome project, instead of the $110 million requested in the FY 1992 Budget, and urges the Senate to restore funding to the requested level.

Office of the Inspector General (OIG). The Administration objects to the House's $9.5 million reduction from the request for the OIG. The House funding level would jeopardize the Inspector General's ability to carry out critical functions, including added responsibilities required to support full implementation of the Chief Financial Officers Act of 1990.

Department of Education:

Vocational Education. The House bill would provide $366.7 million above the President's request for vocational education. The Administration believes that such an increase is inappropriate at this time. The House report accompanying the bill directs the largest increases to programs that were either added or substantially revised by the recent Vocational Education reauthorization. Implementation of these programs is just beginning. It is the Administration's view that an increase in funding should not be considered until there is evidence on which to evaluate the implementation of the new provisions.

Head Start. The House bill would provide an increase of $262 million over the FY 1991 enacted level of $1,952 million, including $250 million through a transfer of funds from the Department of Education to the Department of Health and Human Services. The Administration believes that all funding for Head Start should be provided through appropriations to the Department of Health and Human Services.

School Improvement Program. The Administration objects to the House's failure to adopt the President's proposal to consolidate the Education for Homeless Children and Youth program into a consolidated authority to be administered by the Department of Housing and Urban Development. The President's proposal would provide unified funding to support comprehensive innovative programs to meet long-term needs of the homeless. Instead, the House has retained the highly compartmentalized structure of current law and has provided $37 million, an increase of $29.7 million over the FY 1991 funding level, for this program.

In addition, the House has provided $20.8 million over the President's request for the Dropout Prevention Demonstration. The House has inappropriately provided funding for this program as if it were a regular grant program. The additional money is not required to complete the current round of demonstrations; another set of Federally-funded projects is not needed. Evaluation of the current demonstration projects will provide information needed to guide and improve the many dropout prevention programs already being funded through non-Federal sources.

Howard University. The House bill would provide $23.6 million more than requested for "emergency construction," providing 100-percent financing for the repair of Howard's electrical and water systems and for the repair and replacement of Howard's data processing systems. The President's request contains no construction funding, on the grounds that it is inappropriate for the Federal Government to assume responsibility for maintaining the physical plant of the University.

Education Research, Statistics, and Improvement. The report accompanying the House bill recommends that the Department of Education create an Office of Educational Technology and earmarks $8 million to initiate a single, model High Tech Demonstration Program, to be awarded to one local educational agency. This is substantial funding for a single project. The Department is heavily engaged in a variety of projects to explore high technology, and it would be highly inappropriate to invest this much money in any one project at this time.

Chief Financial Officers Act of 1990 (CFOs Act). The Administration supports full implementation of the CFOs Act of 1990. Funding requested by the President for the preparation and audit of financial statements for Program administration and the Office of the

Inspector General was not provided by the House. The Administration urges the Senate to restore this funding to carry out implementation of the CFOs Act.

Department of Labor:

Training and Employment Services -- Title III of the Job Training Partnership Act. The House has added $50 million for the Clean Air transition assistance program to the President's FY 1992 request of $527 million for the Economic Dislocation and Worker Adjustment Assistance (EDWAA) program, authorized in title III of the Job Training Partnership Act. The Administration's request includes $50 million for Clean Air transition assistance within the $527 million total requested. Nearly 295,000 dislocated workers would be served under the Administration's EDWAA request, representing about 55 percent of the annual average number of prime-age, experienced dislocated workers reported in surveys conducted by the Bureau of Labor Statistics. This participation rate compares favorably with participation rates reported in evaluations of several Labor Department worker readjustment demonstration projects. Moreover, the Administration request takes into account the $150 million provided in FY 1991 for three years to finance worker adjustment assistance programs authorized by the Defense Conversion Adjustment program.

Training and Employment Services -- Job Corps. The House has added $31 million to the Administration's $867 million request for new budget authority for the Job Corps in FY 1992. The House has denied the budget request for a $20 million reappropriation of FY 1989 capital funds earmarked for program expansion. Instead, the House bill would provide an unrequested $20 million to replace the proposed reappropriation and another $11 million in additional funding, and would extend by one year the time over which the FY 1989 capital funds may be spent. In report language, the House directs the Administration to use the $20 million to carry out the six-center expansion program in an "expeditious manner."

The Administration firmly believes that the House's priorities for the Job Corps program are misdirected. The FY 1992 Budget calls for halting any expansion beyond the two new centers opening in program year 1991. Diverting limited resources to finance program expansion could hurt program outcomes at existing centers. In addition, expanding the program by four additional centers would require substantial additional appropriations for capital costs, and would boost operations costs by about $20 million

annually. The Administration urges the Senate to provide funding for Job Corps programs consistent with the President's request.

State Unemployment Insurance and Employment Services Operation (SUIESO) -- Employment Service. The House has provided $55 million in additional funds for allotments to States to operate local Employment Service offices and an additional $12 million for automation of State activities, the latter amount made unavailable for obligation until after September 30, 1992. This amounts to $67 million above the President's request. In the Administration's view, there are higher priority uses of these funds, and the Senate is urged to finance the Employment Service at the requested level.

B. Language Provisions

Department of Health and Human Services:

Health Education Assistance Loans Program (HEAL). The Administration commends the House for recognizing the problem of increasing default expenditures for the HEAL program, and agrees that this cannot and should not continue. The Administration is pleased that the House has again placed a limitation on HEAL annual obligational authority and, further, urges the Senate to adopt an annual limit on HEAL obligational authority of $185 million rather than $260 million as proposed by the House. Given the Government's total liability from the nearly $2.6 billion in HEAL loans already outstanding and the high levels of default rates among some categories of schools, the program warrants complete restructuring. The Administration is working with the authorizing committees to improve the targeting and effectiveness of the HEAL Program.

Department of Labor:

Job Corps. The House bill includes language in sections 103 and 104 of the General Provisions that would prohibit the use of funds to contract out operations of Job Corps' Civilian Conservation centers with a non-governmental entity (section 103) and that would restrict the use of Job Corps funds for paying legal expenses in criminal cases (section 104). These provisions would limit the Administration's flexibility to manage the Job Corps program efficiently, and the Senate is urged to delete them.

Occupational Safety and Health Administration (OSHA). The Administration objects to the inclusion of restrictive provisions in OSHA's appropriations language concerning reporting requirements related to small farms; recreational hunting, shooting, or fishing; and small firms. These restrictions would limit the agency's flexibility to focus inspection resources on workplaces with the poorest safety records. In addition, the change in the reporting instruction that would require employers to report employment accidents that result in the hospitalization of one or more employees is objectionable. OSHA would be required to investigate an increased number of accidents, placing an additional burden on the agency's already scarce resources.

Mine Safety and Health Administration (MSHA). The Administration objects to the inclusion of appropriations language that would exclude sand, surface limestone, and similar mine operations from coverage under section 115 of the Mine Act. The hazards faced by these mining operations are no less serious than the hazards faced in other mining operations. Statistics show that these mines are no safer than other metal and non-metal mines.

LABOR, HEALTH AND HUMAN SERVICES AND EDUCATION APPROPRIATIONS BILL, FY 1992

(In millions of dollars)

10-Jul-91
12:18 PM

Major Programs	FY 1991 Enacted 1/		President's Request		House Floor 2/		House difference from: Enacted		House difference from: Request	
	BA	OL	BA	OL	BA	OL	BA	OL	BA	OL
DOMESTIC DISCRETIONARY:										
Department of Education:										
Compensatory education for the disadvantaged	6,224	5,335	6,224	6,037	7,076	6,139	851	803	851	102
Impact aid	781	815	620	695	765	806	-16	-10	145	111
School improvement programs	1,583	1,541	1,501	1,597	1,578	1,606	-5	65	77	9
Educational Excellence	---	---	629	75	250	30	250	30	-379	-45
Bilingual and immigrant education	198	193	201	199	249	204	51	12	48	6
Education for the handicapped	2,467	2,317	2,730	2,632	2,823	2,643	355	326	93	11
Vocational and adult education	1,246	901	1,265	1,036	1,652	1,083	406	181	387	47
Student financial assistance	6,714	5,970	6,714	6,541	6,853	6,546	139	576	139	5
Higher education	771	600	795	637	821	641	51	41	27	5
Other	991	971	1,077	1,025	1,128	1,056	137	85	51	31
Total, Department of Education	20,974	18,644	21,754	20,473	23,194	20,755	2,220	2,110	1,440	282
Department of Health and Human Services:										
Health resources and services	2,122	1,902	2,019	1,946	2,139	2,018	17	116	121	72
Centers for disease control	1,312	1,234	1,398	1,288	1,391	1,284	79	51	-7	-4
National Institutes of Health	8,277	7,783	8,775	8,253	8,825	8,274	548	492	50	21
Alcohol, Drug Abuse and Mental Health Administration	2,947	2,608	3,048	2,909	2,918	2,858	-30	250	-131	-51
Office of the Assistant Secretary for Health	67	83	65	78	61	76	-6	-7	-4	-2
Health Care Financing Administration	2,683	2,569	2,334	2,326	2,878	2,715	195	146	543	390
Low income home energy assistance	1,610	1,669	1,025	991	1,600	1,058	-10	-611	575	68
Refugee and entrant assistance	411	386	411	408	294	326	-117	-59	-117	-82
Community services block grant	436	444	11	148	421	426	-15	-18	410	279
Interim assistance to States for legalization	-567	---	-1,123	-242	-1,123	-242	-556	-242	---	---
Human development services	3,462	3,157	3,667	3,627	3,758	3,546	297	389	91	-81
Supplemental security income program	1,415	1,278	1,321	1,444	1,371	1,444	-44	166	50	---
Other	1,069	344	1,052	881	1,091	885	22	542	39	4
Total, Department of Health and Human Services	25,244	23,456	24,004	24,056	25,624	24,671	380	1,215	1,621	614

LABOR, HEALTH AND HUMAN SERVICES AND EDUCATION APPROPRIATIONS BILL, FY 1992

(In millions of dollars)

10-Jul-91
12:18 PM

Major Programs	FY 1991 Enacted 1/		President's Request		House Floor 2/		House difference from: Enacted		House difference from: Request	
	BA	OL	BA	OL	BA	OL	BA	OL	BA	OL
Department of Health and Human Services -- Social Security:										
Limitation on administrative expenses	---	2,220	---	2,473	---	2,512	---	292	---	39
Total, Department of Health and Human Services -- Social Security	---	2,220	---	2,473	---	2,512	---	292	---	39
Department of Labor:										
Training and employment services	4,079	3,897	4,052	4,074	4,138	4,056	58	+159	86	-18
State unemployment insurance and employment services	25	25	25	24	23	23	-2	-1	-1	-0
Unemployment trust fund	3,138	3,122	3,322	3,403	3,532	3,467	394	345	210	63
Occupational Safety and Health Administration	285	279	302	296	302	296	17	17	---	---
Community service employment for older Americans	390	360	343	380	390	388	0	28	48	9
Other	924	979	1,042	1,077	1,008	1,049	84	70	-34	-29
Total, Department of Labor	8,843	8,661	9,085	9,254	9,394	9,278	551	617	309	25
Corporation for Public Broadcasting	299	299	327	327	327	327	28	28	---	---
All other	854	852	802	800	873	879	19	27	71	79
Total, Domestic Discretionary	56,214	54,132	55,972	57,383	59,412	58,422	3,198	4,290	3,440	1,038
INTERNATIONAL DISCRETIONARY:										
United States Institute of Peace	8	9	9	9	8	8	0	-0	-1	-1
Total, International Discretionary	8	9	9	9	8	8	0	-0	-1	-1
TOTAL, DISCRETIONARY	56,222	54,141	55,981	57,392	59,420	58,430	3,198	4,290	3,439	1,038

602(b) Allocations:	BA	OL
Domestic Discretionary	59,275	57,800
International Discretionary	9	9

Note: Detail may not add to totals due to rounding.

1/ FY 1991 Enacted includes credit reform adjustments for comparability with FY 1992.

2/ Based on preliminary OMB scoring of the House bill.

CBO ESTIMATES COMPARED TO OMB ESTIMATES
LABOR, HEALTH AND HUMAN SERVICES, AND EDUCATION APPROPRIATIONS BILL, FY 1992
(IN MILLIONS OF DOLLARS)

10-Jul-91
12:53 PM

	House Floor BA	House Floor OL
CBO ESTIMATE, DOMESTIC DISCRETIONARY SPENDING 1/	58,506	57,796
Scorekeeping Adjustments:		
Department of Labor:		
Employment and Training Administration: Unemployment trust fund	76	---
As stated in the Budget Enforcement Act (BEA), appropriations contingent on the fulfillment of some action by the Executive branch or some other event normally estimated, new budget authority will be scored with the appropriation. OMB's scoring of the contingency takes into account the budget authority required to fund the standard error in the Department of Labor's technical estimates of average weekly uninsured employment.		
Employment and Training Administration: Program administration, Training and employment services, and Community service employment for older Americans	---	26
Spendout rate difference.		
Department of Health and Human Services:		
Health Care Financing Administration: Program management	157	109
The House bill increases the President's requested Medicare contractor contingency level from $100 M to $257 M. OMB scores the full contingency amount as BA, consistent with the BEA requirement. Language contained in the House bill eases the availability of contingency funds by permitting their use for any "unanticipated costs," not just for "unanticipated workload" increases. OMB scores outlays of $109 M resulting from an assumed obligation level of $125 M for the contingency level of $257 M.		
Family Support Administration(FSA): Low income home energy assistance program (LIHEAP)	600	---
As stated in the BEA, appropriations contingent on the fulfillment of some action by the Executive Branch or some other event normally estimated, new budget authority will be scored with the appropriation. OMB scores the full contigency amount as BA, consistent with the BEA. OMB does not score the appropriation as an emergency requirement. OMB would not recommend designation of any of these funds as an "emergency" since the requirements for the program can be reasonably estimated in advance.		
FSA: Low income home energy assistance program	---	83
Spendout rate difference		
FSA: Interim assistance to States for legalization	---	117
Spendout rate difference		

CBO ESTIMATES COMPARED TO OMB ESTIMATES
LABOR, HEALTH AND HUMAN SERVICES, AND EDUCATION APPROPRIATIONS BILL, FY 1992
(IN MILLIONS OF DOLLARS)

10-Jul-91
12:53 PM

	House Floor	
	BA	OL
Department of Health and Human Services (cont'd):		
National Institutes of Health: Buildings and facilities	---	35
Spendout rate difference		
Social Security Administration: Supplemental security income program	50	---
The FY 1992 President's Budget includes a $50 M contingency for this account. The House bill provides a $100 M contingency fund for use "only to the extent necessary to process workloads not anticipated in the budget estimates..." OMB scores the contingency consistent with the President's Budget and the BEA requirement.		
Health Resources and Services Administration: Health education assistance loans programs	1	1
CBO gives the Appropriations Committee credit for reducing the loan level below the baseline.		
Railroad Retirement Board: Federal windfall subsidy	21	15
CBO scores the base appropriation for this account $18 M lower than OMB. CBO believes that $18 M of the total appropriation becomes available under section 224(c)(1)(B) of P.L. 98-76. OMB scores the $18 million as discretionary because the windfall benefit taxes are a a result of Congress' appropriation to this discretionary account CBO scores $9 M in estimated interest earnings to this account. OMB scores estimated interest earnings of $12 million, $3 M higher than CBO.		
Other Outlay Spendout Rate Differences (net)	---	-68
Less CBO Budget Resolution Adjustment	---	328
TOTAL SCOREKEEPING ADJUSTMENTS	**905**	**626**
OMB ESTIMATE, DOMESTIC DISCRETIONARY SPENDING 2/	**59,412**	**58,422**
HOUSE 602(b) ALLOCATION	**59,275**	**57,800**
SENATE 602(b) ALLOCATION	**59,275**	**57,800**
Difference between OMB estimate and House 602(b) allocation	**137**	**622**

Note: Detail may not add to totals due to rounding.
1/ CBO's estimates based on CBO bill run dated 6/26/91.
2/ Based on OMB's preliminary scoring of the House-passed bill.

Title X Votes

Governor,
- we still have 43 votes to check on but we already have enough to support the President QB 7/11

Support Regulations/Will Support Veto - 149

Allard
Annunzio
Applegate
Archer
Armey
Baker
Ballenger
Barnard
Barton
Bennett
Bevill
Bilirakis
Bliley
Boehner
Bunning
Burton
Byron
Callahan
Camp
Combest
Costello
Cox
Crane
Cunningham
Dannemeyer
Davis
DeLay
Donnelly
Doolittle
Dornan
Dreier
Edwards, Mickey
Emerson
Ewing
Fields
Gallegly
Gaydos
Gilmor
Gingrich
Goodling
Goss
Hall, Tony
Hall, Ralph
Hammerschmidt
Hancock
Hansen
Hastert
Hayes
Hefley
Henry
Herger
Holloway

Hopkins
Huckaby
Hunter
Hutto
Hyde
Inhofe
Ireland
James
Johnson, Sam
Kanjorski
Kasich
Kildee
Kolter
Kyl
LaFalce
Lagomarsino
Lightfoot
Lipinski
Livingston
Lowery
Luken
Manton
Marlenee
Martin
Mazzoli
McCandless
McCollum
McCrery
McDade
McEwen
McGrath
McMillan
McNulty
Michel
Miller, Clarence
Mollohan
Montgomery
Moorhead
Murphy
Murtha
Myers
Nowak
Oberstar
Orton
Oxley
Packard
Parker
Paxon
Peterson, Colin
Petri
Poshard
Pursell
Quillen
Ray

Rhodes
Rinaldo
Ritter
Roberts
Roe
Rogers
Rohrabacher
Ros-Lehtinen
Roth
Santorum
Sarpalius
Saxton
Schaefer
Sensenbrenner
Shaw
Shuster
Skelton
Slaughter, French
Smith, Chris
Smith, Robert
Solomon
Spence
Stearns
Stenholm
Stump
Sundquist
Tauzin
Taylor, Charles
Taylor, Gene
Thomas, Craig
Traxler
Vander Jagt
Volkmer
Vuchanovich
Walker
Walsh
Weber
Weldon
Wolf
Wylie
Yatron
Young, Don
Young, Bill

<u>Opposed to Regs but Will Sustain Veto - 2</u>
Clinger
Skeen

<u>Pro-Lifers/Marginals Position Unknown - 43</u>

Barrett
Bateman
Bentley

Bereuter
Bilbray
Bonior
Borski
Broomfield
Browder
Bruce
Coble
Coleman
de la Garza
Duncan
English
Fish
Grandy
Gunderson
Harris
Hertel
Johnson, Tim
Kleczka
Lent
Lewis, Tom
Lloyd
Mavroules
Moakley
Nussle
Ortiz
Penny
Perkins
Rahall
Riggs
Roemer
Rostenkowski
Russo
Schulze
Slattery
Smith, Lamar
Staggers
Stallings
Tallon
Thornton

<u>Opposed to Regs, May Support Veto - 6</u>

Fawell - voted against passage
Gekas
Gradison - voted against bill, leaning against veto
Nichols - voted against passage
Thomas, Bill - voted against bill
Zeliff - voted against bill

S.I.C.

AMENDMENT NO. ____ Calendar No. ____

Purpose: To provide for a substitute amendment.

IN THE SENATE OF THE UNITED STATES--102d Cong., 1st Sess.

S. 323

To require the Secretary of Health and Human Services to ensure that pregnant women receiving assistance under title X of the Public Health Service Act are provided with information and counseling regarding their pregnancies, and for other purposes.

Referred to the Committee on _____ and ordered to be printed

Ordered to lie on the table and to be printed .

AMendment In the Nature of a Substitute intended to be proposed by Mr. Durenberger

Viz:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. REQUIREMENTS FOR FAMILY PLANNING PROJECTS RECEIVING TITLE X FUNDING.

Title X of the Public Health Service Act (42 U.S.C. 300 et seq.) is amended by adding at the end thereof the following new section:

''SEC. 1010. REQUIREMENTS FOR FAMILY PLANNING PROJECTS.

''(a) In General.--Notwithstanding any other provision of

law, a project receiving assistance for family planning services under this title shall--

''(1) provide medical services related to family planning, including physician's consultation, examination, prescription, and continuing supervision, laboratory examination, contraceptive supplies;

''(2) make necessary referrals to other medical facilities when such referrals are medically indicated;

''(3) provide for the effective usage of contraceptive devices and practices;

''(4) provide for social services referral, including counseling, referral to and from other social and medical service providers, and other ancillary service providers;

''(5) ensure that family planning medical services will be performed under the direction of a physician with special training or experience in family planning;

''(6) provide for the coordination and use of referral arrangements with other providers of health care services, local health and welfare departments, hospitals, voluntary agencies, and health service providers supported by other federal programs;

''(7) ensure that upon the diagnosis of a pregnancy in a client of the project, such client will be provided with a list, in accordance with subsection (b), of prenatal care providers which offer services to low-

income persons in the area in which such client resides;

''(8) provide information to a pregnant client concerning health care until such time as the client attends a prenatal care referral appointment concerning the pregnancy; and

''(9) provide for emergency medical referrals, as determined to be necessary, for pregnant clients and for other social service referrals.

''(b) List of Providers.--A list provided in accordance with subsection (a)(7) shall include hospitals and other sites in which abortions are performed, if--

''(1) such hospitals and sites are also major providers of prenatal care; and

''(2) a referral is to be specifically made for such prenatal care services.

''(c) Definition.--As used in this section:

''(1) Family planning.--

''(A) In general.----The term 'family planning' means the process of establishing objectives concerning the decision of an individual to have children, the number of such children, and the spacing of such children and selecting the means by which such objectives may be achieved. The means of achieving such objectives may include a broad range of acceptable and effective methods and services to

limit or enhance fertility, including contraceptive methods (such as natural family planning and abstinence) and the management of infertility (such as adoption options).''

''(B) Services.--Servies that may be provided in accordance with the definition under subparagraph (A) include preconceptional counseling, education, and general reproductive health care (including diagnosis and treatment of infections that threaten reproductive capability).

''(C) Limitation.--Servies that may not be provided in accordance with the definition under subparagraph (A) include--

''(i) pregnancy care services (including obstetric or prenatal care); and

''(ii) as required under section 1009, abortions performed as a method of family planning.

''(D) Construction.--The definition of 'family planning' under this paragraph shall be construed so as to reduce the incidence of abortion.

''(2) Prenatal care.--The term 'prenatal care' means medical services provided to a pregnant woman to promote maternal and fetal health.

''(3) Project.--The term 'project' means an entity

that provides family planning services with funds received under this title.''.

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01a. Memo	From Brian Waidmann to John Sununu Re: Legislative Developments on the Family Planning Bill (1 pp.)	6/19/91	P/5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Right to Life / Abortion 1991 [4]: Title X

Open on Expiration of PRA
(Document Follows)
By JJ (NLGB) on 10/28/05

Date Closed:	1/5/2005	**OA/ID Number:**	29170-004
FOIA/SYS Case #:	1998-0004-F[2]	**Appeal Case #:**	
Re-review Case #:	2005-0426-S	**Appeal Disposition:**	
P-2/P-5 Review Case #:		**Disposition Date:**	
AR Case #:		**MR Case #:**	
AR Disposition:		**MR Disposition:**	
AR Disposition Date:		**MR Disposition Date:**	

RESTRICTION CODES

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

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

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Removed as a personal record misfile.

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

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

per: McClure - wk of 7-8

Set meeting up per JHS K

THE WHITE HOUSE

WASHINGTON

AC/ER

June 19, 1991

THE CHIEF of STAFF has seen 11:45 7/10

MEMORANDUM FOR JOHN H. SUNUNU

THROUGH: Fred McClure

FROM: Brian Waidmann 7054

SUBJECT: Legislative Developments on the Family Planning Bill

President Bush signed a letter saying he would veto legislation changing current federal abortion policy, including legislation that weakens the family planning regulations recently upheld by the Supreme Court.

We are working to keep veto strength in the Senate. You should know about one new development that could affect veto strength.

The legislation approved by the Senator Labor committee **requires** family planning clinics to provide non-directive abortion counselling. Nearly all Senators who usually vote pro-life oppose this mandatory provision. Several add, however, that making abortion information optional at the discretion of the clinic could get their support.

Pro-choice Senators are considering this change. If they accept it, we could fall short of the necessary 34 votes in the Senate. This is especially true in light of the intense lobbying campaign being waged by Planned Parenthood and others who are characterizing this as a free speech issue.

This change has surface appeal. While it could be argued that the change improves the bill, the fact remains that it could substantially affect the HHS' proposed family regulations.

This will be the key issue during the coming debate on the family planning bill. I recommend that you soon convene a meeting with officials from counsel's office, Justice Department and HHS to discuss this issue and decide legislative strategy. I will work with Fred McClure to set up the meeting.

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01b. Memo	From Sue Auther to Jackie Kennedy Re: Wednesday, July 10 Meeting (1 pp.)	7/3/91	P-5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Right to Life / Abortion 1991 [4]: Title X

Open on Expiration of PRA
(Document Follows)
By gp (NLGB) on 10/28/05

Date Closed:	1/5/2005	**OA/ID Number:**	29170-004
FOIA/SYS Case #:	1998-0004-F[2]	**Appeal Case #:**	
Re-review Case #:	2005-0426-S	**Appeal Disposition:**	
P-2/P-5 Review Case #:		**Disposition Date:**	
AR Case #:		**MR Case #:**	
AR Disposition:		**MR Disposition:**	
AR Disposition Date:		**MR Disposition Date:**	

RESTRICTION CODES

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

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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Removed as a personal record misfile.

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(b)(9) Release would disclose geological or geophysical information

July 3, 1991

MEMORANDUM FOR JACKIE KENNEDY

FROM: Sue Auther

SUBJECT: Wednesday, July 10, 11:00 a.m. meeting

The following individuals will be attending the Family Planning Bill meeting:

Fred McClure
Boyden Gray
Lee Liberman
Gary Andres
Brian Waidmann
John Roberts (Deputy Solicitor General, Department of Justice
Mike Astrue (General Counsel, HHS)
Dr. William Archer (HHS staffer, in charge of family planning programs dealing with population)

I have cleared the three agency folks in for the meeting.

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
02a. Memo	From Chris Smith to John Sununu Re: Attached Paper on Congressional Pro-Life Issues (1 pp.)	5/29/91	P-5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Right to Life / Abortion 1991 [4]: Title X

Open on Expiration of PRA
(Document Follows)
By _____ (NLGB) on 10/28/05

Date Closed:	1/5/2005	**OA/ID Number:**	29170-004
FOIA/SYS Case #:	1998-0004-F[2]	**Appeal Case #:**	
Re-review Case #:	2005-0426-S	**Appeal Disposition:**	
P-2/P-5 Review Case #:		**Disposition Date:**	
AR Case #:		**MR Case #:**	
AR Disposition:		**MR Disposition:**	
AR Disposition Date:		**MR Disposition Date:**	

RESTRICTION CODES

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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Removed as a personal record misfile.

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(b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
(b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
(b)(9) Release would disclose geological or geophysical information

THE CHIEF of STAFF has seen

TO: Governor Sununu

FROM: Chris Smith

Here is the memo I promised outlining the major pro-life congressional issues with which we are dealing this year. We are sending this memo to Gary Andres as well, since he requested such a rundown.

Withdrawal/Redaction Sheet
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May 29, 1991

INTRODUCTION

In 1989, the President vetoed four bills to prevent weakening of existing pro-life policies (Labor/HHS, foreign operations, and DC twice). During 1990, it was not necessary for the President to employ his veto in defense of pro-life policies, because all pro-abortion amendments were defeated in one fashion or another.

During 1991, it will probably again be necessary for the President to use his veto to block pro-abortion legislation, due in part to the departure of pro-life stalwarts Humphrey and Armstrong from the Senate, and an eight-seat shift in the House in the 1990 election.

We believe that the President's veto will be sustained on any issue which is properly defined by the White House as an abortion issue.

However, the need for vetoes can be reduced by early assistance from the White House (and from various Executive Branch agencies) in framing specific issues before congressional votes occur. For example, the President's June 26, 1990 letter promising to veto any foreign aid bill that weakened the Mexico City Policy or Kemp-Kasten anti-coercion law played a key role in framing that issue and in the eventual defeat of the pro-abortion amendments in Congress. On the other hand, the lack of such a letter prior to the May 22, 1991 vote on the AuCoin Amendment, inhibited the ability of pro-life House members to convince marginal members that a vote for AuCoin would be perceived as a vote for "abortion on demand throughout pregnancy" (although in substance it was just that).

TITLE 10 FAMILY PLANNING PROGRAM-- PRO-LIFE REGULATIONS

The May 23 Supreme Court decision in *Rust v. Sullivan* represents a major advance in de-legitimizing abortion as a method of family planning. The Court upheld regulations that erect a "wall of separation" between abortion and federally funded contraceptive programs.

Lopsided majorities of the public oppose the use of abortion as a method of birth control. Thus, to the extent that the issue is framed as intended to discourage the promotion of abortion as a birth-control method, it resonates favorably with a majority of the public. Of course, the opposition and much of the press will insist that it is an issue of free speech and equal access to "medical care."

The Planned Parenthood Federation of America (PPFA), NARAL, and their allies first intend to invest massive resources in an all-out campaign to seek enactment of legislation (probably a Title 10 reauthorization bill) that would overturn the pro-life regulations-- within 60 days. This campaign will be led by Rep. Waxman and Senators Kennedy and Chafee.

"We are poised and ready to get out a massive advertising campaign with a much higher intensity than we have ever done before," PPFA President Faye Wattleton told *The New York Times*. The newspaper added that "the campaign would be directed particularly at members of Congress in their home districts, she said, and would include waves of letter-writing and telephone calls."

The pro-abortion coalition believes that if they can generate enough pressure on the Title 10 issue, some pro-life Members of Congress may panic and go entirely over to the pro-abortion side. That would make it easier for the pro-abortion forces to pass other bills to repeal existing pro-life policies.

* *It is important that appropriate Administration officials step forward to accurately explain the purpose and effect of the regulations, e.g., to end government-sponsored promotion of abortion as a "family planning option".* Failure to do so will enhance PPFA's ability to frame this as a First Amendment issue. DHHS Secretary Sullivan chose not to participate in a May 28 debate on the issue on the *MacNeil/Lehrer Report*, and lower-ranking officials familiar with the issue were not permitted to go on to defend the regulations.

* The President should immediately state flatly that he will veto any language to undermine the pro-life Title 10 regulations, whatever the vehicle. That will help lock up some soft pro-life Republican votes early on.

* The Administration should actively get behind efforts by pro-life congressional leaders to attach a strong parental notification law to the Waxman-Kennedy bill. (See below.) This issue cuts strongly against the pro-abortion lobby.

Judging from the May 22 House roll call on the AuCoin Amendment, the Waxman bill will likely pass the House, but with early assistance from the White House, the margin should be well short of two-thirds.

On Sept. 25, 1990, the Senate adopted a similar Chafee amendment by a vote of 62 to 36 (the 62 included at least two votes that are recoverable), but the vehicle (Title 10) then died when Sen. Hatch led other Republicans in opposing cloture (which failed 50-46). Senator Hatch's active leadership will be essential to blocking the Waxman-Kennedy-Chafee effort.

Pro-regulation talking points include:

-- The Waxman-Kennedy-Chafee bill should be rejected because it would require the federal government to promote abortion as a birth-control "option." Most Americans oppose the use of abortion as a method of birth control.

-- Although abortion remains legal, abortion is not simply another "medical service." Every abortion stops a beating heart. Abortion is not a medical benefit but a social evil, and the government can recognize this by seeking to discourage abortion, even while abortion remains legal. By the same token, cigarettes and assault weapons are generally legal, but the government is not required to promote these things.

-- The Waxman-Kennedy-Chafee bill should be rejected because the regulations do not interfere with constitutional free-speech rights, according to the U.S. Supreme Court. Rather, the regulations merely reflect the laudable government policy of favoring childbirth and discouraging abortion.

-- The regulations explicitly provide that if a woman shows up at a Title 10 clinic with a life-endangering condition, such as an ectopic (tubal) pregnancy, the Title 10 project is required "to refer the client immediately to an appropriate provider of emergency medical services." [Sec. 59.8(a)(2) and (b)(2)] The Supreme Court rejected a claim by Planned Parenthood that the regulations would prohibit referral of "a woman whose pregnancy places her life in imminent peril," citing these two subsections of the regulations.

"FREEDOM OF CHOICE ACT" (HR 25, S. 25)

The so-called "Freedom of Choice Act" (HR 25, S. 25) has become the major political "litmus test" for NARAL and some other pro-abortion groups. Pro-abortion Congressman Mike Kopetski (D-Or.), a member of the House Judiciary Civil and Constitutional Rights Subcommittee and a co-sponsor of the FOCA, said May 22 on the House floor that the bill would be debated "before this House chamber in just a few months." It is doubtful that this statement reflects Speaker Foley's timetable, but it does appear that some pro-abortion leaders are eager to bring this legislation to the floor during this Congress. Even if the actual vote is delayed until next year, the pro-abortion groups will try to exploit the *Rust* ruling to build support for the FOCA during the next few months.

One essential element of the pro-abortion strategy is to "market" the FOCA as "a simple codification of *Roe v. Wade*." Of course, a bill to codify *Roe*, if it could be formulated, would be a very bad bill. But the FOCA goes much further, and would invalidate many abortion laws that survived under *Roe v. Wade*, such as parental notification laws.

It is very important, therefore, that pro-life forces immediately challenge any press story or editorial that inaccurately characterizes the bill as incorporating the standards of *Roe*. Please refer to the attached material quoting the ACLU, Congressman Edwards (the prime sponsor of the FOCA), and other sources to demonstrate that the bill would invalidate virtually any restrictions on abortion at any stage in pregnancy, including all parental notice and consent laws.

Because the FOCA incorporates a national abortion policy that is in actuality far more permissive than that favored by the majority of Americans, the pro-abortion push for congressional action on this bill provides pro-life forces and the Administration with an opportunity to re-frame the abortion debate. Rather than just responding to attacks on rape, incest, and free speech, we should all be pointing to this bill as the embodiment of the real agenda of the "pro-choice" movement-- abortion on demand throughout pregnancy, with government funding and mandatory participation by health-care providers.

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LEVINE BILL (HR 1703)-- CONGRESSIONAL ENDORSEMENT OF A FEDERAL CONSTITUTIONAL RIGHT TO ABORTION

H.R. 1703, the "Freedom of Access to Clinic Entrances Act of 1991," was introduced by Rep. Mel Levine (D-Ca.) on April 10, 1991. On the same day, Mr. Levine inserted a speech in the the *Congressional Record* explaining the legal and policy rationales for the bill.

Under H.R. 1703, a person who "intentionally prevents an individual from entering or exiting" a "medical facility," by "detaining the individual" or by "obstructing, impeding, or hindering the individual's passage," is guilty of a federal felony, punishable by imprisonment of up to three years and fines of up to $250,000. In addition, "any person aggrieved by a violation" would be granted a private cause of action, and would be able to collect damages and attorneys' fees.

NRLC supports only lawful, peaceful activities in defense of innocent human life. However, enactment of the Levine bill would be a <u>congressional endorsement</u> of a federal constitutional right to abortion. Presumably, Mr. Levine hopes that a congressional endorsement of *Roe* would influence future cases in which the Supreme Court or lower federal courts review restrictions on abortion.

Mr. Levine's intent is clear. His language would be inserted in the section of the U.S. code that deals with criminal penalties for violations of federal constitutional rights (e.g., the right to vote). His April 10 speech-- which would be an important part of the "legislative history" of H.R. 1703 if it is enacted-- appeared under the headline, "ABORTION IS A CONSTITUTIONALLY PROTECTED RIGHT IN THIS COUNTRY." In the speech, Mr. Levine stated:

> [E]very day opponents of abortion and family planning gather for the express purpose of intimidating and harassing women trying to see their doctor and to deny women their constitutionally guaranteed right to reproductive choice. [...] Traditionally, Federal criminal sanctions have been imposed, in addition to any State sanctions, where important Federal rights are involved... The precedent for this remedy is clear. First, the issue involves rights protected by the Federal Constitution: the right to freedom of choice.

NRLC strongly opposes HR 1703 or any other measure that would place Congress on record as supporting *Roe v. Wade*.

PARENTAL NOTIFICATION FOR ABORTION

About 12% of all abortions are performed on girls age 17 and under. Often, such abortions are performed on minors without any notification to, or consent by, either parent.

The federal government should not fund agencies that provide abortions to minor girls in secret. Parents have the right to know when their child undergoes a surgical procedure as serious as an abortion. Young girls need guidance from their parents before they make life-changing decisions, such as whether or not to have an abortion.

Congressmen Chris Smith (R-NJ) and Alan Mollohan (D-WV), co-chairmen of the Congressional Pro-Life Caucus, have introduced the Family Unity and Parental Notification Act (HR 1490). (Senator Coats intends to introduce a very similar measure.) This bill would require organizations that receive federal DHHS funds to notify one parent 48 hours before performing an abortion on a girl aged 17 or younger. The bill would not apply in states that already have laws in effect requiring parental consent or parental notification for abortion, or in certain exceptional cases.

A version of this bill will be offered as an amendment to legislation to reauthorize Title 10 (see above).

The Supreme Court has repeatedly upheld the constitutionality of parental notification and consent laws, most recently in 1990. (However, the "Freedom of Choice Act" would invalidate all laws requiring parental notification or consent for abortion, including those explicitly upheld by the Supreme Court under *Roe*. See above.)

Public Opinion

There is overwhelming public support for laws to require abortionists to notify at least one parent before performing an abortion on a minor. For example, a 1989 New York Times poll found 83% support for mandatory notification of "at least one parent."

1990 Senate action on parental notification

During 1990, the Senate twice approved amendments, sponsored by now-retired Sen. William Armstrong (R-Co.), to require notification of one parent 48 hours prior to performance of an abortion on a minor daughter. The Armstrong amendments were very similar to the Smith-Mollohan bill.

The Armstrong proposal was first offered to a bill (1989-90 number S. 110) to reauthorize Title 10 of the Public Health Service Act, on Sept. 26, 1990. The amendment was adopted after surviving a procedural challenge, 54 to 43, but S. 110 then died without Senate passage. On Oct. 12, Armstrong offered a similar amendment to the Fiscal Year 1991 DHHS appropriations bill. After heated debate, the amendment was adopted after surviving a tabling motion on a 48-48 tie. However, it was dropped in conference committee, without a vote by the House. If the Smith-Mollohan bill is modified to include a "bypass" procedure for cases of child abuse, such as incest (as is under discussion among pro-life leaders), a majority might be mustered in the current Senate for the Smith-Mollohan-Coats measure.

PRO-LIFE POLICIES THAT GOVERN THE AID "POPULATION ASSISTANCE" PROGRAM

The U.S. currently provides about $330 million/yr., in several accounts administered by the U.S. Agency for International Development (USAID), for "population assistance" programs in less-developed nations. These funds are currently governed by two major pro-life policies: (1) the Reagan-Bush "Mexico City Policy," and (2) the Kemp-Kasten anti-coercion law. Both of these policies are currently under attack by a coalition of "abortion rights," population-control, and environmental organizations.

NRLC neither supports nor opposes "population assistance" funding, so long as distribution of the funds continues to be governed by the undiluted Mexico City Policy and Kemp-Kasten law.

The Mexico City Policy

NRLC regards the Mexico City Policy as perhaps the most important single pro-life policy in effect at the federal level.

The policy provides that private organizations that campaign to legalize abortion in foreign countries, or that otherwise promote abortion (other than in cases of life of mother, rape, and incest) are ineligible for population assistance funds. The key here is that the policy is an eligibility criterion. A recipient organization may not promote abortion even with funds from non-U.S. sources. Prior to adoption of the policy, private organizations that received from 25% to 90% of their annual budgets from USAID were also able to perform and aggressively promote abortion in Third World nations, simply by 'segregating' the U.S. funds from the direct cost of the abortion procedures in their bookkeeping.

Opponents, led by the Planned Parenthood Federation of America (PPFA), claim that it has crippled delivery of contraceptive services. In fact, the policy has only crippled PPFA's ability to promote abortion, since in many Third World nations, local family-planning associations are no longer responsive to PPFA pressure to promote abortion (since to do so would cost them their AID funds).

PPFA has taken the position that "reproductive rights are indivisible," and thus, has lost its AID funding. However, the policy has not reduced funding for contraceptive services by $1. All funds removed from Planned Parenthood have been re-programmed to other agencies that have agreed to stick to contraception-- of which there are about 400.

In a June 26, 1990 letter to key members of Congress, President Bush made it clear that he would use his veto power to prevent any weakening of the Mexico City Policy.

Since 1985, the key battles on the Mexico City Policy and the Kemp-Kasten Amendment have occurred on the foreign operations appropriations bill. Beginning in 1989, Chairman Obey, although generally pro-abortion, has consistently voted against all amendments to weaken either policy, on pragmatic grounds that inclusion of pro-abortion language achieves nothing but getting his bill vetoed. When the President vetoed the bill in 1989 on the UNFPA issue, Obey did not seek an override vote, but immediately dropped the offensive provision and sent the President another bill.

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On June 27, 1990, Obey provided crucial support for a Chris Smith-Henry Hyde Amendment that struck language that would have undercut the Mexico City and Kemp-Kasten policies.

This year, Obey will no doubt push for meetings, negotiations, and some sort of "deal" on these issues. On the substance of the abortion policies, no compromise is possible. All of the formulations put forward by Kostmayer, Bill Green, Chet Atkins, et al, have the same effect-- to restore U.S. funding to organizations that promote abortion (or even coercive abortion), with various bookkeeping rules for cosmetic effect.

So far, the population-control groups have been able to have it both ways: they concentrate their lobbying efforts on repeal of the anti-abortion policies, but in the press they claim that the issue is family-planning funding, which they imply that the Administration is opposed to, or has cut back on. (See, for example, the May 9 op ed piece by Hobart Rowen in the *The Washington Post.*) They have continued to make these claims even after the President with no fuss signed the FY 1991 bill that contained a $60 million increase in aggregate population assistance (from about $270 to about $330 million).

The President's pro-contraception position could be highlighted, and the opposition's pro-abortion priorities spotlighted, if the Administration established a linkage between these two issues. Right now, the population-control/environmental coalition is pressing for an increase in aggregate population assistance to $570 million. If the Administration tells Green, Snowe, Obey et al that willingness to accept bills containing future increases in population assistance is contingent on the continuing application of the Mexico City and Kemp-Kasten policies, they and their allies would be placed more on the defensive in justifying their campaign to repeal the abortion restrictions.

In the Senate, Chairman Leahy is hostile to the pro-life policies and sympathetic to funding increases. Last year, Sen. Wirth garnered 57 cloture votes on an anti-MCP amendment.

In an annual ritual, the House Foreign Affairs Committee this month approved amendments to the foreign aid authorization bill to overturn the MCP (the Meyers Amendment) and to exempt the UNFPA from the Kemp-Kasten Amendment (the Kostmayer Amendment). The Senate committee is likely to adopt similar provisions. Of course, Sen. Helms is strongly committed to the pro-life policies, and is in a position to impede the progress on the measure.

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Kemp-Kasten Anti-Coercion Law

The Kemp-Kasten anti-coercion law, which is a part of the annual foreign operations appropriations bill, denies U.S. population-control assistance to any organization that "supports or participates in the management of a program of coercive abortion or involuntary sterilization." Under this amendment, the U.S. has withdrawn funding from the United Nations Population Fund (UNFPA), based on determinations by the USAID that the UNFPA is deeply involved in China's population control program, which systematically employs coerced abortion. *(The U.S. Court of Appeals for the District of Columbia in 1986 upheld USAID's determination that the UNFPA's extensive role in China violates the law.)*

The UNFPA has been a consistent and vigorous defender of China's population-control policies. As UNFPA Executive Director Nafis Sadik put it on the *CBS Nightwatch* program (Nov. 21, 1989), "The implementation of the [birth control] policy [in China] and the acceptance of the policy is purely voluntary. There is no such thing as, you know, a license to have a birth and so on."

There have been many attempts to understate the nature and the degree of the UNFPA's involvement in China's program. For example, it is often alleged that the UNFPA role in China is limited to "demographic statistics" or "research in contraceptive technology." Even if these claims were true, it would not ameliorate the fact that top officials of the UNFPA have vigorously defended China's population program against all critics, or that the UNFPA points to China as a model for other developing nations. But in fact, the UNFPA role is far more extensive. After an in-depth review, USAID concluded in 1985 that "the kind and quality of assistance provided by UNFPA contributed significantly to China's ability to manage and implement a population program in which coercion was pervasive," and this remains the case.

Rep. Smith has received a May 23 letter from AID reporting that the FY 1991 funds originally earmarked for UNFPA had been re-programmed to other family planning projects, "since there have been no significant changes either in the nature of China's population program or in UNFPA's assistance to it that would warrant the resumption of support for UNFPA."

All funds withdrawn from UNFPA since 1985 have been re-programmed to other family planning agencies. Attached to the May 23 letter was a list of 15 population programs that will receive the $10 million in FY 1991 funds originally budgeted for UNFPA. The largest grant on the list is a $2.5 million grant to the International Planned Parenthood Federation/Western Hemisphere, a federation of Latin American family planning groups.

In 1989, President Bush vetoed the entire foreign operations assistance bill, based in large part upon the inclusion of the Mikulski Amendment. (In 1990 a similar Mikulski Amendment was defeated when only 51 senators voted to invoke cloture on the amendment.) In vetoing the Mikulski Amendment in 1989, President Bush said: "Unfortunately, the Congress has inserted in the bill the so-called Mikulski Amendment, which would fatally weaken the integrity of the Kemp-Kasten anti-coercion provision by earmarking funds for the United Nations Fund, the only organization that has ever been determined to violate that provision. The Fund participates in and strongly defends the program of a particular foreign government which relies heavily upon compulsory abortion. This fund has received no United States assistance

since 1985, precisely because of its involvement in this coercive abortion policy. The current bill thus represents a radical and unwarranted change in policy. The Mikulski Amendment is rendered no more acceptable by a clause which requires the Fund to keep its books in a manner so as to prevent the direct flow of United States assistance to the particular foreign government. The current Kemp-Kasten law tells all family planning organizations that they must refrain from supporting coercive programs, or the United States will direct its resources to alternative organizations which respect the fundamental principle of voluntariness. The bill would negate this essential human rights principle through substitution of a simple accounting requirement, and I find this unacceptable."

All of the President's 1989 statements logically should apply with equal force to the Kostmayer Amendment (approved by the House Foreign Affairs Committee earlier this month), which takes the same approach.

This year, Hatfield, Green, and the others will attempt to negotiate a "compromise" with the White House. You can be sure that any so-called "compromise" will amount to (1) continued UNFPA participation in China's coercive program, along with (2) restored U.S. funding for the UNFPA-- the very combination forbidden by the Kemp-Kasten anti-coercion law. Any such proposal, however formulated, would directly contradict the unequivocal position stated by the President in his November 19, 1989 veto message on the Mikulski Amendment, and his June 26, 1990 letter opposing the Lehman Amendment.

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DEPARTMENT OF DEFENSE

A successful filibuster of the pro-abortion AuCoin-Wirth Amendment might be mounted, with White House assistance. Otherwise, a veto will be necessary, and would be sustained in either house. (See attached press releases.)

MEDICAID ABORTIONS--HYDE AMENDMENT--LABOR/HHS APPROPRIATIONS BILL

Until 1976, any abortion performed by a physician on a Medicaid-eligible client was considered by definition to be "medically necessary," and therefore automatically reimbursed by the federal government. Under this de facto abortion-on-demand policy, the federal Medicaid program was paying for nearly 300,000 abortions annually. Since 1976, Congress has prohibited federal Medicaid funding of almost all abortions through the "Hyde Amendment," which is a "rider" to the annual Department of Health and Human Services (DHHS) appropriations bill. Since 1981, these bills have permitted federal funds to be used only "where the life of the mother would be endangered if the fetus were carried to term."

In 1989, Congress sent President Bush a DHHS appropriations bill that would have expanded the circumstances under which federal Medicaid funds could be used for abortions. The language approved by Congress (the "Boxer Amendment") ostensibly would have provided federal funding of abortion in cases of rape and incest. However, the Boxer Amendment was written so as to require federal funding of abortion in cases in which minor females became pregnant, through consensual sex, in violation of state "statutory rape" laws. Also, the Boxer Amendment permitted an alleged assault to be reported to "a public health service," which could be an abortion clinic or telephone counseling service, in lieu of reporting to a law enforcement agency, and set no explicit time limit on such reporting.

President Bush objected to the Boxer Amendment and vetoed the bill, for reasons explained in a letter to Senator Hatfield dated Oct. 17, 1989. The President's veto was upheld on Oct. 25, 1989, on a vote of 231 to override to 191 to sustain-- 51 votes short of two-thirds.

During 1990, pro-life House Chairman Natcher employed procedural devices to prevent the pro-abortion forces from obtaining a House vote on the rape/incest language. Later, the Senate Appropriations Committee added the rape/incest language. Pro-life forces responded on the Senate floor by attaching to the rape/incest clause, an Armstrong amendment requiring DHHS-funded organizations to provide parental notification for abortion. Rather than provoke a politically painful confrontation on the parental notification issue on the House floor, pro-abortion Senate Chairman Harkin dropped the hybrid rape-incest-parental notification in conference.

This year, pro-abortion members of the House Appropriations Committee are pressing to have the DHHS bill considered under a Rules Committee resolution that would permit them a vote on the rape/incest amendment. Predictably, Natcher will not go along with this; he prides himself on never seeking a rule on his bill. The pro-abortion forces may retaliate by raising a point of order (legislation on an appropriations bill) on the floor, which would strike the entire Hyde Amendment from the bill. The Senate Committee can be expected to restore the rape/incest version, which would also command a substantial majority on the floor. The pro-life forces will again respond

by offering the parental notification proposal as an amendment to the rape/incest language.

The White House could be most helpful in lobbying for the parental notification measure, since it is winnable (the most recent vote, on Oct. 12, 1990, was a 48-48 tie). If the parental notice amendment is adopted, it torpedoes the rape/incest clause. If it is defeated, if provides an additional justification for a veto that is vastly more politically attractive than the rape/incest issue alone. [E.G., "the President could not sign the bill because the Congress weakened existing restrictions on the use of tax funds for abortions, and rejected a requirement that federally funded agencies notify one parent before performing an abortion on a minor. The President does not feel that the federal government should subsidize clinics that perform abortions on minors in secret, without the knowledge of a parent.)

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FUNDING OF ABORTION IN THE DISTRICT OF COLUMBIA

The entire District of Columbia budget, including so-called "local funds," is under federal control and is appropriated by Congress, in accord with Article I of the Constitution, which gives Congress complete legislative authority over all D.C. affairs. Until 1988, the city government used congressionally appropriated "local" funds to pay for abortion on demand.

In 1988, Congress for the first time adopted an NRLC-backed amendment ending government funding of abortions in D.C., except to save the life of the mother. In 1989, Congress sent President Bush two bills that would have restored the authority of the city government to pay for abortion on demand with so-called "local" funds, and to fund abortions in cases of rape and incest with "federal" funds. The President vetoed both bills, thereby preserving the pro-life policy.

As a result of the pro-life policy, the total number of abortions performed annually in D.C. has dropped by about 1,000 a year. The number of government-funded abortions had dropped from about 4,000 a year to 1.

In 1990, the Fiscal Year 1991 D.C. appropriations bill that emerged from conference again contained language that would have restored tax-funded abortion on demand in D.C. The House twice rejected the conference language (Oct. 20 and Oct. 25, 1990). The conference committee then restored language preserving the pro-life status quo.

We hear that Chairman Julian Dixon feels that he is compelled to again go through the exercise of including the same old pro-abortion language in the bill. However, if the House rejects the conference report once, he will not force a second vote, we are told. Moreover, it seems unlikely that he would force more than one veto, as he did in 1989.

The Washington Post and other critics of the President's pro-life policy claim that it is a federal infringement on "home rule" or "local funds." In fact, however, as Marlin Fitzwater pointed out in 1989, all of the funds involved are appropriated by Congress. For the President to sign a bill that lifted the ban on "local funds" would be tantamount to signing a check to pay for roughly 4,000 abortions a year.

As for "home rule," it is noteworthy that Julian Dixon, Norton, and other critics of the pro-life policy do not really object in principle to Congress "dictating" abortion policy to the District of Columbia. We know this because they are all co-sponsors of the "Freedom of Choice Act" (see page 4), which would explicitly prohibit the D.C. city government (and all 50 state legislatures) from placing any limits on abortion.

LEGISLATION DEALING WITH THE RU 486 ABORTION PILL

Wyden bill (HR 875) to overturn FDA import ban

NRLC is strongly opposed to the use of RU 486 to induce abortions, whether in research studies or otherwise. But NRLC has never objected to research on RU 486 for purposes unrelated to abortion.

In June, 1989, the Food and Drug Administration (FDA) added the French abortion pill, RU 486, to the list of drugs that may not be imported into the U.S. by private individuals for personal use. RU 486 is not approved to be prescribed for any purpose in the United States, and in the FDA's judgment the drug poses substantial health risks unless it is taken as part of a carefully supervised research program. This judgment is clearly well-founded. In France, even under extraordinarily close medical supervision, there has been a reported death, two near-fatal heart attacks, and serious complications in 5% of the women who have used the RU 486 abortion technique. Recently, the French government banned administration of the pill to any woman over age 35, or to smokers of any age. Although the American Medical Association (AMA) supports testing of RU 486 for abortion and other purposes, the AMA strongly supported the FDA's import ban on RU 486.

Rep. Ron Wyden has introduced HR 875, which would nullify the FDA's import ban. At present, the pro-abortion lobby is using this bill mostly as a propaganda tool, telling the press that its passage is necessary in order to lift a federal ban on "medical research" with RU 486. In reality, of course, the personal import ban has nothing to do with medical research. As the FDA has repeatedly stressed, there is no ban on medical research on RU 486, and indeed no restrictions on such research, other than the research permit requirements that apply to all unapproved drugs.

It is not clear whether Wyden actually intends to try to move the pill through the legislative process. If he did so, he would risk the sort of debate that would reveal his phony equation of the import ban with a research ban, and also the public-health grounds for maintaining the import ban.

"Product Liability Fairness Act" (S. 640)

The proposed "Product Liability Fairness Act" (S. 640) would greatly weaken barriers to the introduction of risky new abortion-inducing drugs in the U.S., such as the French abortion pill, RU 486. NRLC opposes the bill unless it is amended to preserve current law on such drugs. The House Energy and Commerce Committee approved such an amendment (the "Tauke Amendment") in 1988, but the bill never reached the House floor.

FETAL TISSUE TRANSPLANTATION-- N.I.H. BILL

Current DHHS policy prohibits NIH funding of transplantation into humans of tissue obtained from induced abortions. This "moratorium" does not prohibit research (including transplantation) on tissue obtained from ectopic pregnancies or spontaneous abortions, or cell cultures begun from such sources; NIH continues to fund these types of research (which are supported by NRLC).

Title I of Rep. Waxman's "NIH Revitalization Amendments" (HR 2281, originally HR 1532) would mandate federal funding of fetal-tissue transplantation. At the May 7 subcommittee markup, this provision was retained on a nearly partly line vote, and the bill itself was then approved on a party-line vote. A similar pattern is expected in full committee, where markup is tentatively scheduled for June 4.

Title I would also severely diminish the authority of the Secretary of DHHS to block any form of human experimentation on ethical grounds. In testimony before Mr. Waxman's Health Subcommittee on April 15, recently confirmed NIH Director Bernadine Healy, M.D., said:

> Under the title [Title I], this important responsibility would, in fact, be taken from the Secretary and given to a review board, which would be an intrusion on the authority of the Executive Branch. This could be a dangerous precedent. As you know, [the] statute vests broad discretionary authority in the Secretary to determine what kinds of research the Department will or will not support; it is necessary to make these decisions using a mix of scientific, social, policy, and ethical considerations. The authority to define research funding policy should remain under the purview of the Secretary, who has the broad-based knowledge to make these decisions, as well as the ultimate responsibility for the outcome of those decisions.

Dr. Healy's comments, while helpful, were somewhat off the mark in calling Waxman's language a "precedent." Waxman is establishing not a precedent, but a process, which will govern all future issues involving biomedical research on human subjects. The mechanism that Waxman would create would virtually guarantee that future decisions about federal funding of ethically questionable human experimentation would be made by ad hoc committees dominated by specialists in the specific research fields affected. Although the Secretary of DHHS would appoint the committees, he must do so according to criteria spelled out in the bill, under which it would be politically very difficult to appoint a committee not dominated by "nominees" of the professional societies with the greatest stake in any given line of research. It is impossible to predict all of the issues to which such a process might apply in the future, but not all would involve fetuses. Under the Waxman bill, neither the Secretary nor the President could overrule the vote of one of these elite ad hoc committees.

Congressman Lent questioned the constitutionality of this proposal at the May 7 subcommittee markup, but on rather narrow "appointments clause" grounds. This "separation of powers" attack should be expanded and amplified throughout the legislative process, thereby laying the groundwork for a veto (successfully sustained) separate and distinct from the merits of the fetal-tissue moratorium.

May 29, 1991, confidential memo on upcoming abortion issues: 16

LEGAL SERVICES CORPORATION

Agencies that receive funds from the federal Legal Services Corporation (LSC) are currently prohibited by the LSC authorizing statute from using federal or private funds to litigate to procure an abortion, except to save the mother's life. In addition, a rider to the annual Commerce-Justice-State appropriations bill prohibits the use of LSC funds "to participate in any litigation with respect to abortion." However, some LSC grantees continue to utilize IOLTA ("Interest On Lawyers' Trust Accounts") funds for pro-abortion litigation.

NRLC supports language to prohibit any litigation or lobbying by LSC-funded agencies, with funds from any source, including IOLTA funds, on either side of the abortion issue. During subcommittee markup on Rep. Frank's LSC reauthorization bill (HR 2039) on April 25, Rep. Gekas offered such an "abortion-neutral," which was defeated 2-5. The same amendment will be offered at subsequent stages in the legislative process. Unless the amendment is included in the final bill, it should be vetoed, lest the LSC network again become a legal-defense arm of the pro-abortion movement.

#######

4TH DISTRICT, NEW JERSEY

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TELECOPIER TRANSMISSION

THE CHIEF of STAFF has seen

To: Governor Sununu

Date: May 30

From: Congressman Chris Smith

Congressman Christopher H. Smith
Telecopier # (202) 225-7768

Transmission consists of this cover page and 4 additional pages to follow.

If you do not receive all pages, or if there is a problem, please contact the sender at (202) 225-3765.

I thought you would be interested in seeing this "Dear Colleague" letter and fact sheet that we sent to pro-life and marginal Members of the House today.

I will get you the comparison on the foreign aid langvage as quickly as possible.

Congress of the United States
House of Representatives
Washington, D.C. 20515

May 30, 1991

Dear Colleague:

On May 23, the U.S. Supreme Court upheld the constitutionality of federal regulations that seek to ensure a Congressionally-mandated "wall of separation" between abortion and family planning.

Unfortunately, many media reports have trumpeted misleading charges by opponents of the regulations about their actual scope and purpose. We have also heard many "the sky is falling" claims that this decision will "cripple family planning services."

This campaign was carefully orchestrated by Planned Parenthood and other supporters of abortion-on-demand well in advance of the Court's decision. A Planned Parenthood publication, "The Title X Gag Rule--Winning No Matter What The Court Decides," lays out their strategy in considerable detail.

Supporters of abortion-on-demand have already introduced legislation to overturn these common sense regulations. Their principal argument is that the regulations violate "free speech" rights. We believe that this argument and others are easily refuted when one takes the time to look at the facts.

The principal point to keep in mind when examining this issue is that <u>Congress did not intend for abortion to be treated as a method of family planning</u> when it created the Title X program. The legislative history is abundantly clear on this point.

Likewise, the American people are overwhelmingly opposed to the use of abortion as a method of family planning. Details on polling data and other pertinent information are included in the attached fact sheet. We urge you to take a few moments to review this information and please don't hesitate to call on us if we can be of any further assistance.

Sincerely,

ALAN B. MOLLOHAN, M.C.

CHRISTOPHER H. SMITH, M.C.

HENRY J. HYDE, M.C.

EARL HUTTO, M.C.

VIN WEBER, M.C.

BARBARA F. VUCANOVICH, M.C.

Taxpayers Should Not Be Compelled To Subsidize Abortion Advocacy

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

--Section 1008 of Title X of the Public Health Service Act
(enacted by Congress in 1970)

"What is birth control? Is it an abortion?

Definitely not, an abortion kills the life of a baby after it has begun...Birth control merely postpones the beginning of life."

--Planned Parenthood, August 1963.

* The language of the Title X statute makes it clear that abortion is outside the scope of the program. "It is, and has been, the intent of both Houses that funds authorized under this legislation be used only to support preventive family planning services...," the 1970 Conference Report stated.

* Only programs that receive Title X funds are governed by the HHS regulations. They *do not* govern an organization's activities outside the scope of its Title X program. The regulations limit funding to programs which:

-- do not include abortion as a method of family planning;

-- maintain physical and financial separation from prohibited abortion activities;

> -- do not engage in any activities that encourage, promote, or advocate abortion as a method of family planning; and
>
> -- do not provide counseling and referral for abortion.

The Supreme Court found that "the Secretary amply justified" the change in the regulations with a "reasoned analysis." The Chief Justice, writing for the majority, stated:

> "The Secretary explained that the regulations are a result of his determination, in the wake of the critical reports of the General Accounting Office (GAO) and the Office of the Inspector General (OIG), that prior policy failed to implement properly the statute and that it was necessary to provide 'clear and operational guidance to grantees to preserve the distinction between Title X programs and abortion as a method of family planning.'" (Rust v. Sullivan, Majority Opinion, p. 10)

In its previous Maher v. Roe decision, the Court held that government may "make a value judgment favoring childbirth over abortion, and...implement that judgment by the allocation of public funds."

Likewise, in upholding the constitutionality of the Hyde Amendment in 1980 (Harris v. McRae), the Court declared: "Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life."

Opponents of the HHS regulations argue--incorrectly--that they deny "free speech" rights. The Court addressed this issue directly:

> "The Secretary's regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities. Title X expressly distinguishes between a Title X *grantee* and a Title X *project*." (Rust v. Sullivan, pp.19-20)

The argument that the Government "unconstitutionally discriminates on the basis of viewpoint" was also dismissed by the Court. That argument "would render numerous government programs constitutionally suspect," the Court pointed out. "When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy," the Justices explained.

The Court also addressed the red herring claim that the regulations do not provide any latitude for dealing with a medical emergency:

> "Abortion counseling as a 'method of family planning' is prohibited, and it does not seem that a medically necessitated abortion in such circumstances would be the equivalent of its use as a 'method of family planning.' Neither Section 1008 nor the specific restrictions of the regulations would apply. Moreover, the regulations themselves contemplate that a Title X project would be permitted to engage in otherwise prohibited abortion-related activity in such circumstances. Section 59.8(a)(2) provides a specific exemption for emergency care and requires Title X recipients 'to refer the client immediately to an appropriate provider of emergency medical services.' 42 CFR 59.8(a)(2) (1989). Section 59.5(b)(1) also requires Title X projects to provide 'necessary referral to other medical facilities when medically indicated.'" (Rust v. Sullivan, pp.18-19)

* Prior to the 1988 HHS reforms, grantees were required to refer for abortions as a condition of receiving federal funds. Since approximately one-third of all Title X clients are adolescents and Title X has a "client confidentiality" policy, Congress was subsidizing a program that referred unemancipated minors for abortions without their parents' knowledge or consent.

* It is hypocritical for opponents of the regulations to argue that they are advocates of "free speech" when they would force conscientiously opposed individuals to refer for abortions as a condition of receiving federal family planning funds.

* Public opinion polls have repeatedly demonstrated that Americans do not support the provision of abortion "as a means of birth control." A March 1989 Boston Globe poll found 89% opposition to this practice and a survey conducted by the Gallup Organization in May 1990 found 88% disapproval.

* Planned Parenthood, a leading opponent of the regulations, has **performed more than a million abortions** in its own facilities since 1980. (Their 1989 "Service Report" lists annual figures from 1980 through 1988. Assuming the same abortion carnage in 1989 and 1990 as in 1988--a conservative estimate--the figure is well over a million.) The yearly breakdown follows:

Year	Abortion Procedures
1988	111,189
1987	104,411
1986	98,638
1985	91,065
1984	88,824
1983	85,242
1982	82,916
1981	79,997
1980	77,880

M E M O R A N D U M

TO: Ed Rogers, Deputy Assistant to the President and Executive Assistant to the Chief of Staff

FROM: Elizabeth Kepley Law, Family Research Council
Michael Franc, Rep. Dannemeyer's Office MF

RE: Suggested Talking Points Regarding Administration Position

DATE: May 31, 1991

At the outset, please bear in mind that the President's statement on Rust v. Sullivan will frame the debate on the contested HHS regulations. Per our conversation and a meeting this afternoon with Hill staff, NRLC, and other sympathetic groups, the following are the fundamental points which we will use in defending the Rust decision:

* The debate over Rust is about nothing less than whether the federal government should subsidize abortion as a method of family planning.

* Abortion is not a method of birth control or family planning. Polls indicate that the opposition to abortion is greatest when it is presented in this context;

* Federal funds should not be used to directly or indirectly promote abortion or refer women for abortions;

* When the Congress created the Title X program, it envisioned a narrow program focused exclusively on preconceptual and preventive family planning services. The opposition regards the Title X program as an all-encompassing health facility for women, which is contrary to the legislative history. Neither clinic counselors nor facilities are equipped to offer women extensive medical advice (see final section of majority opinion in Rust).

* Please note that the pro-abortion Members on the Energy and Commerce Committee will distort

the meaning of Rust and draw analogies to broader programs such as Medicare.
* It is to our advantage to emphasize how narrow the Title X program is, and to keep it focused on its original purpose.

cc Brian Waidmann
Frances Norris
Leigh Ann Metzger

THE WHITE HOUSE

WASHINGTON

November 5, 1991

MEMORANDUM FOR THE SECRETARY OF HEALTH AND HUMAN SERVICES

Throughout the debate about the relationship of the Title X family planning program and abortion counseling, some have raised questions about the regulations dealing with services offered to pregnant women.

We must ensure that the confidentiality of the doctor/patient relationship will be preserved and that the operation of the Title X family planning program is compatible with free speech and the highest standards of medical care.

In order to clarify the purpose and intent of these regulations, I am directing that in implementing these regulations you ensure that the following principles, inherent in the statute, are adhered to:

1. Nothing in these regulations is to prevent a woman from receiving complete medical information about her condition from a physician.

2. Title X projects are to provide necessary referrals to appropriate health care facilities when medically indicated.

3. If a woman is found to be pregnant and to have a medical problem, she should be referred for complete medical care, <u>even</u> if the ultimate result may be the termination of her pregnancy.

4. Referrals may be made by Title X programs to full-service health care providers that perform abortions, but not to providers whose principal activity is providing abortion services.

I am determined to assure the integrity of the Title X program in its mission to provide family planning services to low-income individuals; adherence to this guidance will produce this result.

POSSIBLE AGREEMENT ON POLICY WITH RESPECT TO PREGNANCY RELATED SERVICES IN TITLE X FUNDED CLINICS (OCTOBER 25 , 1991)

A. Treatment of Title X projects which provide prenatal care, such as, but not limited to, community health centers, hospitals, or family planning clinics that offer such care:

When a woman comes in for family planning services and is determined in the course of the visit to be pregnant, she should be offered information regarding her pregnancy. The provider of services will furnish a list of community resources for medical care and social services which may include providers of pregnancy termination if they also provide prenatal care. If the woman elects to remain in that project for services, she will be provided with the same pregnancy related services and information that all of the projects' patients receive. The project would be allowed to retain Title X funds as part of its general operating support. The Title X projects under Part A may use Title X funds for all services that are allowable under Part B.

B. Treatment of Title X projects which do not provide prenatal care:

(1) When a woman comes in for family planning services and is determined in the course of the visit to be pregnant, she should be offered information regarding her pregnancy. If she is found to have a significant medical problem, she should be referred to a provider of comprehensive medical care. The project will furnish a list of community resources for medical care and social services which may include providers of pregnancy termination if they also provide prenatal care. If requested, the project will make every effort to assist the pregnant woman in making an appointment with a prenatal care provider. In addition, the project will provide the woman with written information to be developed by the Secretary of Health and Human Services about appropriate prenatal care that includes a discussion of proper nutrition and exercise, the need to avoid alcohol, drug and tobacco use, and the importance of receiving medical care.

(2) The project shall give factual answers to questions the woman has about her pregnancy and her legal and medical options. Questions about an individual's medical conditions that relate to her pregnancy should be referred to an appropriate practitioner, on or off premises. Upon a woman's request, identification of providers of adoption and pregnancy termination services will be made available, including providers who do not also provide prenatal care. Factual information may also be provided about the mix of services provided by each provider and the payment sources they accept. The project is not to provide directive counseling to the woman regarding her pregnancy. Should this process of answering questions be found to advocate pregnancy termination or adoption the Title X project would be subject to the procedures which apply to misuse of grant funds, including termination of the grant or portion of the grant which funds the project.

(3) Nothing in this statute is intended to preclude a health care professional or trained clinician under the supervision of a medical director, from fulfilling his or her generally-accepted professional duty.

C. Relationship to Non-Title X Services:

Nothing in this statute is intended to circumscribe the services offered by a recipient of Title X funds with other public or private funds. Nothing in this statute is intended to address 42CFR59.9 (Feb. 2, 1988)

THE WHITE HOUSE

WASHINGTON

November 5, 1991

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Throughout the debate about the relationship of the Title X family planning program and abortion counseling, some have raised questions about the regulations dealing with services offered to pregnant women.

We must ensure that the confidentiality of the doctor/patient relationship will be preserved and that the operation of the Title X family planning program is compatible with free speech and the highest standards of medical care.

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1. Nothing in these regulations is to prevent a woman from receiving complete medical information about her condition from a physician.

2. Title X projects are to provide necessary referrals to appropriate health care facilities when medically indicated.

3. If a woman is found to be pregnant and to have a medical problem, she should be referred for complete medical care, even if the ultimate result may be the termination of her pregnancy.

4. Referrals may be made by Title X programs to full-service health care providers that perform abortions, but not to providers whose principle activity is providing abortion services.

I am determined to assure the integrity of the Title X program in its mission to provide family planning services to low-income individuals; adherence to this guidance will produce this result.

POSSIBLE AGREEMENT ON POLICY WITH RESPECT TO PREGNANCY RELATED SERVICES IN TITLE X FUNDED CLINICS

[] - Material to delete
Underlined - Language to insert

A. Treatment of Title X projects which provide prenatal care, such as, but not limited to, community health centers, hospitals, or [Planned Parenthood] family planning clinics that offer such care:

When a woman comes in for family planning services and is determined in the course of the visit to be pregnant, she should be offered the following information regarding her pregnancy[. T]: the provider of services will furnish a list of community resources for medical care and social services which may include providers of abortion but not providers whose principal business is the provision of abortions; [. I] and if the woman elects to remain in that [clinic] facility for services, she will [be provided with the same pregnancy related services and information] have access to services not covered by Title X that all of the [projects'] facility's patients receive. The project would be allowed to retain Title X funds as part of its general operating support.

B. Treatment of Title X projects which do not provide prenatal care:

1. When a woman comes in for family planning services and is determined in the course of the visit to be pregnant, she should be offered the following information regarding her pregnancy[.]: [I]if she is found to have a significant medical problem, she should be referred to a provider of comprehensive medical care[. T]; the project will furnish a list of community resources for medical care and social services which may include providers of abortion but not providers whose principal business is the provision of abortions; [. I]; if requested, the project will make every effort to assist the pregnant woman in making an appointment with a prenatal care provider[. I]; in addition, the project will provide the woman with written information to be developed by the Secretary of Health and Human Services about appropriate prenatal care that includes a discussion of proper nutrition and exercise, the need to avoid alcohol, drug and tobacco use, and the importance of receiving medical care.

2. The project shall give factual answers to questions the woman has about her pregnancy and her legal and medical options as follows: [Q]questions about an individual's medical conditions that relate to her pregnancy should be referred to an appropriate practitioner, on or off premises[. I-dentification of providers of adoption and pregnancy termination services will be made available upon a woman's

request.] ; upon a woman's request, a grantee may provide factual information about the mix of services provided by each provider and the payment sources accepted by each provider. [The project is not to provide directive counseling to the woman regarding her pregnancy.] Should this process of answering questions be found to [be directive] encourage, promote or advocate abortion as a method of family planning, the Title X project would be subject to the procedures which apply to misuse of grant funds, including termination of the grant or portion of the grant which funds the project.

3. Nothing in these regulations is intended to preclude a health care professional or trained clinician under the supervision of a medical director, from fulfilling his or her generally-accepted professional duty to provide or assure access to emergency medical services.

C. Relationship to Non-Title X Services

Nothing in these regulations is intended to circumscribe the services offered outside the Title X project by a recipient of Title X funds [by a Title X provider] with other public or private funds, provided that all services must be consistent with the program's rules on co-location of abortion services.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service

42 CFR Part 59

Statutory Prohibition on Use of Appropriated Funds in Programs Where Abortion is a Method of Family Planning; Standard of Compliance for Family Planning Services Projects

AGENCY: Public Health Service, HHS.

ACTION: Final rules.

SUMMARY: The Public Health Service (PHS) amends the regulations governing the use of funds for family planning services under Title X of the Public Health Service Act in order to set specific standards for compliance with the statutory requirement that none of the funds appropriated under Title X may be used in programs where abortion is a method of family planning. It is expected that the amendments will improve compliance by grantees with the statute and facilitate monitoring of compliance by PHS.

DATE: The rules are effective March 3, 1988, except for 42 CFR 59.9, which will be effective April 4, 1988.

ADDRESS: Nabers Cabaniss, Deputy Assistant Secretary for Population Affairs, Room 736E, 200 Independence Ave. SW., Washington, DC 20201

FOR FURTHER INFORMATION CONTACT: Nabers Cabaniss at 202-245-0152.

SUPPLEMENTARY INFORMATION: On July 30, 1987, President Reagan announced that the Department of Health and Human Services would, within 30 days, publish proposed regulations applicable to grants under Title X of the Public Health Service Act, 42 U.S.C. 300, *et seq.*, to give effect to the statutory prohibition on the use of Title X appropriated funds in programs include abortion as a method of family planning. On September 1, 1987, a Notice of Proposed Rulemaking was accordingly published in the Federal Register. 52 FR 33210. The September 1 notice proposed rules which would prohibit Title X projects from counseling or referring project clients for abortion as a method of family planning. The proposed rules also required grantees to separate their Title X project—physically and financially—from any abortion activities. Finally, the rules proposed compliance standards for family planning projects funded under Title X to specifically prohibit certain actions that promote or encourage abortion as a method of family planning, such as the use of project funds for lobbying for abortion, developing and disseminating materials advocating abortion, or taking legal action to make abortion available as a method of family planning. Proposed 42 CFR 59.8–59.10.

The Department requested public comment on the proposed provisions. Approximately 75,000 comments were received during the 60-day comment period. Of these comments, a majority favored the proposed policies. The Department has carefully considered the issues raised by the public. A description and dicussion of these issues precedes the final rules set out below.

Background

Few issues facing our society today are more divisive than that of abortion. Those who oppose abortion do so on the ground that it is nothing less than the killing of an innocent human life and, as such, is not only the unconscionable destruction of an individual life but also sets the stage for the devaluation of life on a much broader scale. Those who favor the choice of abortion view it as an immediate and positive option for pregnant women in crisis and consider any governmental regulation of abortion to be a wrongful intrusion by the State into a very personal decision.

Indeed, the volume and highly charged nature of the public comments received on this regulatory proposal emphasize the polar divisions of national opinion on this issue. Because the rules below address such a controversial issue, it is imperative that these final rules be precisely understood. The extended discussion of the legal framework circumscribing the Department's regulatory authority and the detailed explanation of the Department's actions below are provided for this reason.

Title X of the Public Health Service Act was enacted in 1970 by Pub. L. 91–572. It authorizes the Secretary of Health and Human Services to, among other things, make grants to public and private nonprofit entities to establish and operate family planning projects. Section 1001(a) of the Public Health Service Act, 42 U.S.C. 300(a). Section 1008 of Title X, 42 U.S.C. 300a–6, contains the following prohibition, which has not been altered since enacted in 1970:

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

This language clearly creates a wall of separation between Title X programs and abortion as a method of family planning. It embodies a view that abortion is inappropriate as a method of family planning. Indeed, as the Supreme Court has recognized abortion is "inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." *Harris* v. *McRae*, 448 U.S.297, 325 (1980). In *McRae*, the Supreme Court stated that because there is a "legitimate congressional interest in protecting potential life," Congress may decline to subsidize abortions, even though it may not erect legal obstacles to the exercise of that choice. *Id.* Section 1008 and the rule below express just such a decision and thus fall squarely within the range of choices that the Supreme Court has recognized that the government may legitimately make.

It is important to recognize that section 1008 extends to all activities conducted by the federally funded project, not just the use of federal funds for abortions within the project. When a statute focuses only on the acutal use of federal funds, mere allocation of costs through appropriate bookkeeping entries may be appropriate. In section 1008, however, Congress crafted a broader prohibition, and that prohibition should be given effect.

Moreover, it is clear that Congress designed the Title X program to provided preventive family planning and infertility services, not to provide all possible medical services, including services for the care of pregnant women. (Compare section 1001 of the Act, 42 U.S.C. 300 and section 330 of the Act, 42 U.S.C. 254c.) This design is consistent with the statutory prohibition of section 1008.

The legislative history of Title X bears out this interpretation. The most significant expression of congressional intent in this connection is contained in the Conference Report accompanying S. 2108, which contains the following statement:

> It is, and has been, the intent of both Houses that the funds authorized under this legislation be used only to support *preventive* family planning services, population research, infertility services,[1] and other related medical, information and education activities. The conferees have adopted the language contained in section 1008, which prohibits the use of such funds for abortion in order to make clear this intent.[2]

In addition, Congressman John D. Dingell, the principal sponsor of section 1008, made the following statement on the floor of the House:

[1] The statutory requirements for infertility services was not added until the 1978 amendments.

[2] Conf. Rep. No. 91–1667, 97th Cong., 2nd Sess. 8–9 (1970).

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service

42 CFR Part 59

Statutory Prohibition on Use of Appropriated Funds in Programs Where Abortion is a Method of Family Planning; Standard of Compliance for Family Planning Services Projects

AGENCY: Public Health Service, HHS.

ACTION: Final rules.

SUMMARY: The Public Health Service (PHS) amends the regulations governing the use of funds for family planning services under Title X of the Public Health Service Act in order to set specific standards for compliance with the statutory requirement that none of the funds appropriated under Title X may be used in programs where abortion is a method of family planning. It is expected that the amendments will improve compliance by grantees with the statute and facilitate monitoring of compliance by PHS.

DATE: The rules are effective March 3, 1988, except for 42 CFR 59.9, which will be effective April 4, 1988.

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The Department requested public comment on the proposed provisions. Approximately 75,000 comments were received during the 60-day comment period. Of these comments, a majority favored the proposed policies. The Department has carefully considered the issues raised by the public. A description and dicussion of these issues precedes the final rules set out below.

Background

Few issues facing our society today are more divisive than that of abortion. Those who oppose abortion do so on the ground that it is nothing less than the killing of an innocent human life and, as such, is not only the unconscionable destruction of an individual life but also sets the stage for the devaluation of life on a much broader scale. Those who favor the choice of abortion view it as an immediate and positive option for pregnant women in crisis and consider any governmental regulation of abortion to be a wrongful intrusion by the State into a very personal decision.

Indeed, the volume and highly charged nature of the public comments received on this regulatory proposal emphasize the polar divisions of national opinion on this issue. Because the rules below address such a controversial issue, it is imperative that these final rules be precisely understood. The extended discussion of the legal framework circumscribing the Department's regulatory authority and the detailed explanation of the Department's actions below are provided for this reason.

Title X of the Public Health Service Act was enacted in 1970 by Pub. L. 91–572. It authorizes the Secretary of Health and Human Services to, among other things, make grants to public and private nonprofit entities to establish and operate family planning projects. Section 1001(a) of the Public Health Service Act, 42 U.S.C. 300(a). Section 1008 of Title X, 42 U.S.C. 300a–6, contains the following prohibition, which has not been altered since enacted in 1970:

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

This language clearly creates a wall of separation between Title X programs and abortion as a method of family planning. It embodies a view that abortion is inappropriate as a method of family planning. Indeed, as the Supreme Court has recognized abortion is "inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." *Harris* v. *McRae*, 448 U.S.297, 325 (1980). In *McRae*, the Supreme Court stated that because there is a "legitimate congressional interest in protecting potential life," Congress may decline to subsidize abortions, even though it may not erect legal obstacles to the exercise of that choice. *Id.* Section 1008 and the rule below express just such a decision and thus fall squarely within the range of choices that the Supreme Court has recognized that the government may legitimately make.

It is important to recognize that section 1008 extends to all activities conducted by the federally funded project, not just the use of federal funds for abortions within the project. When a statute focuses only on the acutal use of federal funds, mere allocation of costs through appropriate bookkeeping entries may be appropriate. In section 1008, however, Congress crafted a broader prohibition, and that prohibition should be given effect.

Moreover, it is clear that Congress designed the Title X program to provided preventive family planning and infertility services, not to provide all possible medical services, including services for the care of pregnant women. (Compare section 1001 of the Act, 42 U.S.C. 300 and section 330 of the Act, 42 U.S.C. 254c.) This design is consistent with the statutory prohibition of section 1008.

The legislative history of Title X bears out this interpretation. The most significant expression of congressional intent in this connection is contained in the Conference Report accompanying S. 2108, which contains the following statement:

> It is, and has been, the intent of both Houses that the funds authorized under this legislation be used only to support *preventive* family planning services, population research, infertility services,[1] and other related medical, information and education activities. The conferees have adopted the language contained in section 1008, which prohibits the use of such funds for abortion in order to make clear this intent.[2]

In addition, Congressman John D. Dingell, the principal sponsor of section 1008, made the following statement on the floor of the House:

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[1] The statutory requirements for infertility services was not added until the 1978 amendments.

[2] Conf. Rep. No. 91–1667, 97th Cong., 2nd Sess. 8–9 (1970).

October XX, 1991

Dear Mr. Secretary:

Throughout the debate about the relationship of the Title X family planning program and abortion counseling, some have raised questions about the regulations that relate to the services offered to pregnant women. In order to clarify the purpose and intent of these regulations, I am directing that in implementing these regulations you insure that the following principles, inherent in the statute, are adhered to:

1. Nothing in these regulations is to prevent a woman from receiving complete medical information about her condition from a physician.

2. Title X projects are to provide necessary referrals to appropriate health care facilities when medically indicated.

3. If a woman is found to have any medical problem, she must be assisted in receiving complete medical care, <u>even</u> if the ultimate result may be the termination of her pregnancy.

4. Referrals may be made by Title X programs to full-service health care providers that perform abortions, but not to providers whose principal business is abortion.

I am confident that the regulations, if adhered to, will assure that women will be counseled on their options, and that the operation of the Title X family planning program is compatible with free speech and the highest standards of medical care.

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Sincerely,