DRAFT
October 30, 1991

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, 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 principal business is abortion.

I am confident that the regulations, if adhered to, will assure 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.

Sincerely,

DRAFT
October 30, 1991

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, 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 principal business is abortion.

I am confident that the regulations, if adhered to, will assure 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.

Sincerely,

OUTLINE OF SPENDING.... JHS '91
CONGRESS. GUYS —

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.

Sincerely,

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).

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. 37375 (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

[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 professional 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 serveral 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 countrary 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 insert 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. 320, 326 (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 practitioners 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 16, 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. 16, 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 constitute

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.[8] 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 Resolution was dropped in the 1988 Continuing Resolution.

[8] 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

501(c)(3)

§ 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 of 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 genetic 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 indicates 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 IIIB1 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. 63.)

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 or 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 simlar 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 entirely 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).

[FR Doc. 88-2089 Filed 1-29-88; 9:13 am]
BILLING CODE 4160-17-M

DRAFT
October 30, 1991

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 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.

Sincerely,

October XX, 1991

Dear Mr. Secretary:

Throughout the debate about the relationship of the Title X family planning program and abortion counseling, questions have been raised about the regulations that guide the services offered to pregnant women. The rule is likely to take effect shortly in areas beyond the parts of five states where it is currently in place, and thus it is timely to consider how the rule will be implemented.

All pregnant women should be counseled on their options in a setting where comprehensive health care is available. Title X projects are not meant to provide that care; Title X projects are meant to provide pre-conception care. Therefore pregnant women should be referred to full-service health care providers. These providers may perform abortions, as long as their principal business is not abortion. I am confident that the regulations, if adhered to, will assure that women will be counseled on their options.

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

Adherence to the guidance provided in this letter should assure that the operation of the Title X family planning program is compatible with free speech and the highest standards of medical care.

Sincerely,

2)

3)

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 discusssion 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 1976 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.

Sincerely,

from Chaffee

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)

YELLOW P: ABORTION/CLINICS

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

[] - Material to delete
Underlined - Language to insert ——— = Rejected by Chafee
Blue - new Chafee language

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;~~ pregnancy termination [. I] and if the woman elects to remain in that [clinic] ~~facility~~ project 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. The Title X projects under Part A may use Title X funds for all services that are allowable under Part B.

if they also provide prenatal care

restore bracketed matter

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~~] [I]~~f~~ 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;~~ pregnancy termination [. 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.

if they also provide prenatal 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

} Chafee would restore the bracketed matter.

add: including providers who do not also provide prenatal care.

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. (may also be)

Chafee would restore this [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~~, (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 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.~~ (recipient of) (funds)

Nothing in this statute is intended to address 42 CFR 59.9.

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.

Sincerely,

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, 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 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.

Sincerely,

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.

Sincerely,

(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

October XX, 1991

Dear Mr. Secretary:

Throughout the debate about the relationship of the Title X family planning program and abortion counseling, questions have been raised about the regulations that guide the services offered to pregnant women. The rule is likely to take effect shortly in areas beyond the parts of five states where it is currently in place, and thus it is timely to consider how the rule will be implemented.

I am directing you to make sure that, in the implementation of the rule, 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 referral to a medical facility 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 termination of pregnancy.

4. Referrals may be made by Title X programs to full-service health care providers that perform abortions, but not to providers who 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.

Sincerely,

01:47 PM 23-Oct MEMBER TO MEMBER: LABOR/HHS CONFERENCE REPORT

29	5	13	6	61	52	0
YES	LEAN YES	UNDECIDED	LEAN NO	NO	NO RESPONSE	ABSENT
Bentley	Bereuter	Baker	Coleman	Archer	Allard	
Boehlert	Coble	Bilirakis	James	Armey	Barrett	
Chandler	Goodling	Campbell	Lewis (FL)	Ballenger	Bateman	
Dickinson	Miller (WA)	Clinger	Marlenee	Barton	Bliley	
Duncan	Upton	Coughlin	McGrath	Broomfield	Boehner	
Gallo		Goss	Stearns	Burton	Bunning	
Gekas		Hammerschmidt		Combest	Callahan	
Gilman		Miller (OH)		Cox	Camp	
Grandy		Schaefer		Dannemeyer	Crane	
Green		Shaw		Davis	Cunningham	
Johnson (CT)		Smith (OR)		DeLay	Doolittle	
Kolbe		Spence		Dornan	Ewing	
Leach		Young (FL)		Dreier	Fawell	
Lewis (CA)				Edwards	Fish	
Machtley				Emerson	Franks	
McMillan				Fields	Gilchrest	
Meyers				Gallegly	Gillmor	
Morella				Gunderson	Gingrich	
Morrison				Hancock	Gradison	
Ravenel				Hansen	Hastert	
Regula				Hefley	Hobson	
Ridge				Henry	Hopkins	
Roukema				Herger	Horton	
Schiff				Holloway	Houghton	
Shays				Hunter	Hyde	
Skeen				Inhofe	Johnson (TX)	
Smith (TX)				Ireland	Klug	
Snowe				Kasich	Lent	
Thomas (WY)				Kyl	Martin	
				Lagomarsino	McCandless	
				Lightfoot	Michel	
				Livingston	Molinari	
				Lowery	Moorhead	
				McCollum	Nichols	
				McCrery	Nussle	
				McDade	Packard	
				McEwen	Paxon	
				Myers	Porter	
				Oxley	Pursell	
				Petri	Ramstad	
				Quillen	Riggs	
				Rhodes	Rogers	
				Rinaldo	Rohrabacher	
				Ritter	Santorum	
				Roberts	Slaughter	
				Ros-Lehtinen	Solomon	
				Roth	Taylor	
				Saxton	Thomas (CA)	
				Schulze	Walsh	
				Sensenbrenner	Wolf	

Shuster
Smith (NJ)
Stump
Sundquist
Vander Jagt
Vucanovich
Walker
Weber
Weldon
Wylie
Young (AK)
Zeliff
Zimmer

Congress of the United States

House of Representatives

Washington, DC 20515

October 11, 1991

President George Bush
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. President:

We are writing regarding the prohibition on enforcement of the restrictions placed on Title X of the Public Health Service Act contained in H.R. 2707, the Labor, Health & Human Services and Education appropriations bill for 1992.

We strongly urge you to sign this legislation including the "gag rule" provision.

Although the undersigned hold different views on the issue of abortion, we agree that the federal government cannot be allowed to intrude on the physician-patient relationship, which is the cornerstone of our health care system. Prohibiting physicians from discussing health care options with patients is a blatant and unconscionable contravention of medical ethics and violates society's most basic expectations of medical professionals.

In addition, we believe implementation of these restrictions raises deep concerns about the relationship between the government and the governed. We believe that regardless of what right may be in question, every citizen is absolutely entitled to be told the truth and the entire truth by the government concerning his or her constitutional options.

Finally, if you do veto this legislation, we would urge you to simultaneously direct the Secretary of Health & Human Services to withdraw the "gag rule" and to undertake a thorough review of this matter leading toward the issuance of new, more balanced regulations that would take into account the concerns we have expressed in this letter.

Sincerely,

John Edward Porter, M.C.

Jim Kolbe, M.C.

Bill Green, M.C.

Carl Pursell, M.C.

Ralph Regula, M.C.

cc: Hon. John Sununu

From: Harris (Jayne Gallagher)

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 information regarding her pregnancy. The provider of services will furnish a list of community resources for medical care and social services. If the woman elects to remain in that clinic for services, she will be provided with the [same pregnancy related services and information] services not covered by Title X that all of the [projects'] health center'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[. 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 medically necessary 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.

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.

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 information regarding her pregnancy. The provider of services will furnish a list of community resources for medical care and social services. If the woman elects to remain in that clinic for services, she will be provided with the [same pregnancy related services and information] services not covered by Title X that all of the [projects'] health center'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[. 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 medically necessary 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.

UNITED STATES CATHOLIC CONFERENCE
Office of Government Liaison
3211 4th Street N.E. Washington, DC 20017-1194 (202) 541-3140 FAX: (202) 541-3313 TELEX 7400424

FACSIMILE TRANSMITTAL COVER SHEET

DATE: October 21, 1991

NUMBER OF PAGES: 3
(including cover sheet)

SEND TO: Governor John H. Sununu

LOCATION: White House

Washington, DC

FAX NUMBER: (202) 456-2397

FROM: Mark J. Gallagher OFFICE: GOVERNMENT LIAISON

TELEPHONE NUMBER: (202) 541-3140 FAX NUMBER: (202) 541-3313

COMMENTS: Attached is a modified version. While it addresses the medical ethics/doctor-patient issue, it precludes the advocacy, encouragement and promotion of abortion by Title X programs. We recommend that before the vote later this week on the Labor/HHS Conference report, the President take one of the three steps proposed with Rep. Hyde's language, indicating that the language addresses the medical ethics/doctor-patient issue, and that votes then for the Conference Report, will be votes in favor of:

...Recommending (counseling for) abortion
...Referring for abortions
...Scheduling the time for the abortion
...Arranging transportation to the abortion clinic
...Seeking private funding for the abortion
...Following up to make sure the abortion was obtained.

We believe if this is done, there will definitely be more than 1/3 opposition to the Chafee/Porter amendment. Honesty compels me to note however, that we would rather be defeated than agree to language that will permit Title X clinics to continue to funnel to abortion clinics tens of thousands of women/girls each year.

ACCT. NO: 03-003

POSSIBLE ADMINISTRATION POLICY
ON IMPLEMENTATION OF TITLE X REGULATIONS

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 the opportunity to receive complete medical information from a physician regarding her condition. The provider of services will furnish a list of community resources for medical care and social services; this list may include the provider of family planning services itself if it provides medical care and social services, but may not include any provider whose principal business is the provision of abortions. If the woman elects to remain on the premises of the Title X grantee, the medical care and social services she receives must be consistent with the program's rules on co-location of abortion services.

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

1. Information: 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 opportunity to receive complete medical information from a physician regarding her condition. The project will also 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 proper medical care.

2. Referral: If a woman is determined to be pregnant, the project will furnish a list of community resources for medical care and social services; this list may include providers that perform abortions, but may not include providers whose principal business is the provision of abortions. If requested, the project may assist the pregnant woman in making an appointment for prenatal care. If a woman is found to have a significant medical problem, she should be referred to a provider of comprehensive medical care.

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

The major agrument being used by abortion advocates against the Title X Regulations is that of medical ethics. In fact, a reasonable interpretation of the regulations is that they do not limit physicians in any way in providing medical advice. But the Planned Parenthood media campaign of disinformation has to be addressed if we are to be sure of having the votes to sustain the veto. This possibly could be accomplished through one of the following ways:

...An Executive Order by the President directing that the regulations be enforced as follows:

> Nothing in these regulations prevents a woman from receiving complete medical information about her condition from a doctor. In fact the regulations require a Title X project to provide necessary referral to a medical facility when medically indicated. If a woman is found to have any medical problem, she must be assisted in receiving complete and appropriate medical care even if the ultimate result may be terminantion of pregnancy. Referrals may be made by Title X programs to full-service health care providers that perform abortions, but not to providers whose <u>principal</u> business is abortion.

...A letter from the President to Secretary Sullivan directing him to so enforce the regulations.

...Adding an additional paragraph to the regulations to the same effect.

One of these steps could be taken after the veto of the Labor/HHS bill and prior to the House vote to override.

Fax
456-2397

The major agrument being used by abortion advocates against the Title X Regulations is that of medical ethics. In fact, a reasonable interpretation of the regulations is that they do not limit physicians in any way in providing medical advice. But the Planned Parenthood media campaign of disinformation has to be addressed if we are to be sure of having the votes to sustain the veto. This possibly could be accomplished through one of the following ways:

...An Executive Order by the President directing that the regulations be enforced as follows:

> Nothing in these regulations prevents a woman from receiving complete medical information about her condition from a doctor. In fact the regulations require a Title X project to provide necessary referral to a medical facility when medically indicated. If a woman is found to have any medical problem, she must be assisted in receiving complete and appropriate medical care even if the ultimate result may be terminantion of pregnancy. Referrals may be made by Title X programs to full-service health care providers that perform abortions, but not to providers whose <u>principal</u> business is abortion.

...A letter from the President to Secretary Sullivan directing him to so enforce the regulations.

...Adding an additional paragraph to the regulations to the same effect.

One of these steps could be taken after the veto of the Labor/HHS bill and prior to the House vote to override.

FOIA
456-2397

The major agrument being used by abortion advocates against the Title X Regulations is that of medical ethics. In fact, a reasonable interpretation of the regulations is that they do not limit physicians in any way in providing medical advice. But the Planned Parenthood media campaign of disinformation has to be addressed if we are to be sure of having the votes to sustain the veto. This possibly could be accomplished through one of the following ways:

...An Executive Order by the President directing that the regulations be enforced as follows:

> Nothing in these regulations prevents a woman from receiving complete medical information about her condition from a doctor. In fact the regulations require a Title X project to provide necessary referral to a medical facility when medically indicated. If a woman is found to have any medical problem, she must be assisted in receiving complete and appropriate medical care even if the ultimate result may be terminantion of pregnancy. Referrals may be made by Title X programs to full-service health care providers that perform abortions, but not to providers whose <u>principal</u> business is abortion.

...A letter from the President to Secretary Sullivan directing him to so enforce the regulations.

...Adding an additional paragraph to the regulations to the same effect.

One of these steps could be taken after the veto of the Labor/HHS bill and prior to the House vote to override.

FOIA
456-2397

The major agrument being used by abortion advocates against the Title X Regulations is that of medical ethics. In fact, a reasonable interpretation of the regulations is that they do not limit physicians in any way in providing medical advice. But the Planned Parenthood media campaign of disinformation has to be addressed if we are to be sure of having the votes to sustain the veto. This possibly could be accomplished through one of the following ways:

...An Executive Order by the President directing that the regulations be enforced as follows:

> Nothing in these regulations prevents a woman from receiving complete medical information about her condition from a doctor. In fact the regulations require a Title X project to provide necessary referral to a medical facility when medically indicated. If a woman is found to have any medical problem, she must be assisted in receiving complete and appropriate medical care even if the ultimate result may be terminantion of pregnancy. Referrals may be made by Title X programs to full-service health care providers that perform abortions, but not to providers whose <u>principal</u> business is abortion.

...A letter from the President to Secretary Sullivan directing him to so enforce the regulations.

...Adding an additional paragraph to the regulations to the same effect.

One of these steps could be taken after the veto of the Labor/HHS bill and prior to the House vote to override.

For
456-2397

CHRISTOPHER H. SMITH
4TH DISTRICT, NEW JERSEY

COMMITTEES
FOREIGN AFFAIRS
SUBCOMMITTEES
EUROPE AND THE MIDDLE EAST
HUMAN RIGHTS AND INTERNATIONAL ORGANIZATIONS
VETERANS AFFAIRS
SUBCOMMITTEES
HEALTH AND MEDICAL
EDUCATION, TRAINING AND EMPLOYMENT—VICE CHAIRMAN
COMMISSIONED
COMMISSION ON SECURITY AND COOPERATION IN EUROPE
SELECT COMMITTEE ON AGING

2449 RAYBURN HOUSE OFFICE B
WASHINGTON, DC 20515
(202) 225-3765

CONSTITUENT SERVICE OFFICES
1330 BEACHWOOD AVENUE
TOMS RIVER, NJ 08753
(908) 240-0600

420 HIGH STREET
ROOM 1
BURLINGTON CITY, NJ 08016
(609) 387-8034

888 PARK AVENUE, ROUTE 33
FREEHOLD, NJ 07728
(201) 780-3707

Congress of the United States

House of Representatives

Washington, DC 20515

TELECOPIER TRANSMISSION

To: Governor Sununu

Date: 10/21

From: Congressman Chris Smith

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

Transmission consists of this cover page and 5 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.

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

October 21, 1991

A Majority Supports The President's Position On Abortion, Opposes Abortion As A Method Of Birth Control

Dear Colleague:

During the recent debate on Judge Thomas' nomination, Senator Mitchell made the following incorrect statement:

> "The President's current position on the issue of abortion is the minority view in the United States. A majority of Americans disagree with the President on abortion."

A national survey conducted by *The Boston Globe* put public opinion in a much more accurate perspective:

Most in US favor ban on majority of abortions, poll finds

"Most Americans would ban the vast majority of abortions performed in this country, according to a Boston Globe/WBZ survey...when pregnancy poses financial or emotional strain, or when the woman is alone or a teen-ager -- the reasons given by most women seeking abortions -- an overwhelming majority of Americans believes abortion should be illegal, the poll shows."

--*The Boston Globe*, March 31, 1989

A June 1991 national survey by The Wirthlin Group found 56% support for the President's position. Only 11% supported the extreme position of Planned Parenthood and their allies in the abortion lobby.

(over, please)

A nationwide poll conducted by the Gallup Organization in May 1990 found strong disapproval of abortion, even in the first trimester, under a wide variety of circumstances, including:

> * 88% disapprove of abortion "as a repeated means of birth control."
>
> * 77% disapprove of abortion in cases where the "pregnancy is unplanned and would interrupt a professional woman's career."
>
> * 91% disapprove of abortion if tests reveal the baby is not the sex the couple wants.

Within the next few days, the House is likely to vote on the Labor-HHS-Education Appropriations Conference Report (H.R. 2707). This legislation contains an amendment which blocks the enforcement of the President's Title X abortion separation regulation. The effect of this action would be to require Title X providers to counsel and refer for abortions as a method of family planning. Since approximately one-third of Title X clients are minors, tens of thousands of teenagers would be counseled and referred for abortions in federally funded clinics -- without their taxpaying parents' knowledge or consent.

In their June 1991 poll, The Wirthlin Group asked 1,000 adults the following question:

> "Do you favor or oppose offering abortions as a method of birth control in taxpayer-funded family planning programs?"

An overwhelming 77% of the American public indicated their opposition to taxpayer-funded family planning programs offering abortions as a method of birth control.

Public Opinion Strategies, an Alexandria VA based firm, has also conducted a recent national survey on abortion. Their July 24-26, 1991 poll fouond that 67% of Americans "oppose legislation allowing federally funded family planning centers to refer teenagers under the age of 18 for abortions without notifying their parents."

Contrary to propaganda that has been disseminated by pro-abortion special interest groups, President Bush's regulations require Title X recipients "to refer the client immediately to an appropriate provider of emergency medical services" when such an emergency exists (Section 59.8(a)(2). Likewise, Title X projects are required to provide "necessary referral to other medical facilities when medically indicated" (Section 59.5(b)(1).

We believe that President Bush's family planning reforms are very reasonable and entirely consistent with the overwhelming sentiment of the American public. Therefore, we urge you to join us in supporting the President's family planning reforms and opposing the Labor-HHS-Education Conference Report in its current form.

Sincerely,

CHRISTOPHER H. SMITH, M.C.

HENRY J. HYDE, M.C.

The Wirthlin Group

excerpts from

National Survey Including American Attitudes on Abortion Funding Post *Rust* Decision.

* *Interviews conducted June 17-19, 1991.*
* *Margin of error ± 3%.*

05545-12 (3)

Turning now to something else ...

3. Do you approve or disapprove of the way George Bush is handling his job as president?

(IF "APPROVE/DISAPPROVE", ASK:) Would that be STRONGLY (approve/disapprove) or just SOMEWHAT (approve/disapprove)?

STRONGLY APPROVE	37%
SOMEWHAT APPROVE	37%
SOMEWHAT DISAPPROVE	9%
STRONGLY DISAPPROVE	11%
DON'T KNOW (DO NOT READ)	4%
REFUSED (DO NOT READ)	1%

Turning now to another issue, I'd like you to think very specifically about your position on the issue of abortion.

4. Which one of the following statements most closely describes your PERSONAL position on the issue of abortion?

(ROTATE TOP TO BOTTOM AND BOTTOM TO TOP)

Abortions should be prohibited in all circumstances	10%	56%
Abortions should be legal only to save the live of the mother	12%	
Abortions should be legal only in the cases of rape, incest, or to save the life of the mother	34%	
Abortions should be legal for any reason, but not after the first three months of pregnancy	24%	29%
Abortions should be legal for any reason, but not after the first six months of pregnancy	5%	
Abortions should be allowed at any time during a woman's pregnancy and for any reason	11%	11%
DON'T KNOW (DO NOT READ)	2%	
REFUSED (DO NOT READ)	2%	

Thinking about something else ...

24. Do you PERSONALLY favor or oppose using abortions as a method of birth control?

(WAIT FOR RESPONSE, THEN ASK:) And do you STRONGLY (favor/oppose) or just SOMEWHAT (favor/oppose) using abortions for birth control?

STRONGLY FAVOR	8%
SOMEWHAT FAVOR	7%
SOMEWHAT OPPOSE	14%
STRONGLY OPPOSE	69%
DON'T KNOW (DO NOT READ)	2%
REFUSED (DO NOT READ)	1%

> 83%

25. Do you favor or oppose offering abortions as a method of birth control in taxpayer-funded family planning programs?

(WAIT FOR RESPONSE, THEN ASK:) And is that STRONGLY (favor/oppose) or just SOMEWHAT (favor/oppose)?

STRONGLY FAVOR	10%
SOMEWHAT FAVOR	10%
SOMEWHAT OPPOSE	12%
STRONGLY OPPOSE	65%
DON'T KNOW (DO NOT READ)	2%
REFUSED (DO NOT READ)	1%

> 77%

26. And, would you favor or oppose legislation that would REQUIRE taxpayer-funded family planning programs to provide abortion counseling and referral?

(WAIT FOR RESPONSE, THEN ASK:) And would you say you STRONGLY (favor/oppose) or just SOMEWHAT (favor/oppose) this legislation?

STRONGLY FAVOR	25%
SOMEWHAT FAVOR	18%
SOMEWHAT OPPOSE	14%
STRONGLY OPPOSE	40%
DON'T KNOW :(DO NOT READ)	3%
REFUSED (DO NOT READ)	1%

> 54%

#5545-12 (12)

27.a) As you may know, the U.S. Supreme Court recently ruled that the federal government is not required to use taxpayer funds for family planning programs to perform, counsel, or refer for abortion as a method of family planning.

In general, do you favor or oppose this ruling? (WAIT FOR RESPONSE, THEN ASK:) And do you STRONGLY (favor/oppose) or just SOMEWHAT (favor/oppose) this ruling?

STRONGLY FAVOR	28%	> 48%
SOMEWHAT FAVOR	20%	
SOMEWHAT OPPOSE	17%	> 48%
STRONGLY OPPOSE	31%	
DON'T KNOW (DO NOT READ)	3%	
REFUSED (DO NOT READ)	1%	

Still thinking about the Supreme Court's ruling . . .

27. b) If you knew that any government funds not used for family planning programs that provide abortion WILL BE GIVEN TO OTHER FAMILY PLANNING PROGRAMS that provide contraception and other PREVENTIVE methods of family planning, would you then favor or oppose the Supreme Court's ruling?

(WAIT FOR RESPONSE, THEN ASK:) And do you STRONGLY (favor/oppose) or just SOMEWHAT (favor/oppose) this ruling?

STRONGLY FAVOR	39%	> 69%
SOMEWHAT FAVOR	30%	
SOMEWHAT OPPOSE	11%	> 27%
STRONGLY OPPOSE	16%	
DON'T KNOW (DO NOT READ)	3%	
REFUSED (DO NOT READ)	2%	

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

A. Treatment of Title X projects which provide prenatal care, such as, but not limited to, community health centers, hospitals, or ~~Planned Parenthood~~ 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. If the woman elects to remain in that clinic for services, she will be ~~provided with~~ entitled to 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.

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. 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. Identification of providers of adoption and pregnancy termination services will be made available upon a woman's request. 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, 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.

4. Nothing in these regulations is intended to circumscribe the services offered 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.

UNITED STATES CATHOLIC CONFERENCE
Office of Government Liaison
3211 4th Street N.E. Washington, DC 20017-1194 (202) 541-3140 FAX: (202) 541-3313 TELEX 7400421

FACSIMILE TRANSMITTAL COVER SHEET

DATE: October 21, 1991

NUMBER OF PAGES: 2
(including cover sheet)

SEND TO: Governor John H. Sununu

LOCATION: White House

Washington, DC

FAX NUMBER: (202) 456-2397

FROM: Mark J. Gallagher OFFICE: GOVERNMENT LIAISON

TELEPHONE NUMBER: (202) 541-3140 FAX NUMBER: (202) 541-3313

COMMENTS: Attached is a modified version. While it addresses the medical ethics/doctor-patient issue, it precludes the advocacy, encouragement and promotion of abortion by Title X programs. We recommend that before the vote later this week on the Labor/HHS Conference report, the President take one of the three steps proposed with Rep. Hyde's language, indicating that the language addresses the medical ethics/doctor-patient issue, and that votes then for the Conference Report, will be votes in favor of:

...Recommending (counseling for) abortion
...Referring for abortions
...Scheduling the time for the abortion
...Arranging transportation to the abortion clinic
...Seeking private funding for the abortion
...Following up to make sure the abortion was obtained.

We believe if this is done, there will definitely be more than 1/3 opposition to the Chafee/Porter amendment. Honesty compels me to note however, that we would rather be defeated than agree to language that will permit Title X clinics to continue to funnel to abortion clinics tens of thousands of women/girls each year.

ACCT. NO: 03-003

POSSIBLE ADMINISTRATION POLICY
ON IMPLEMENTATION OF TITLE X REGULATIONS

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 the opportunity to receive complete medical information from a physician regarding her condition. The provider of services will furnish a list of community resources for medical care and social services; this list may include the provider of family planning services itself if it provides medical care and social services, but may not include any provider whose principal business is the provision of abortions. If the woman elects to remain on the premises of the Title X grantee, the medical care and social services she receives must be consistent with the program's rules on co-location of abortion services.

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

1. Information: 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 opportunity to receive complete medical information from a physician regarding her condition. The project will also 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 proper medical care.

2. Referral: If a woman is determined to be pregnant, the project will furnish a list of community resources for medical care and social services; this list may include providers that perform abortions, but may not include providers whose principal business is the provision of abortions. If requested, the project may assist the pregnant woman in making an appointment for prenatal care. If a woman is found to have a significant medical problem, she should be referred to a provider of comprehensive medical care.

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

Relationship of the "Possible Agreement" and the 1988 Regulations

The "possible agreement" language would not replace the 1988 regulation. The 1988 regulation would be unchanged where it does not conflict with the "possible agreement" language. The clarification made in the 1988 regulation that counseling pregnant women is a service beyond the scope of Title X would remain unchanged. The prohibition of referral for elective abortion would remain unchanged. The requirement that pregnant women be referred to providers of prenatal and/or social services would remain unchanged. The prohibition of including providers primarily in the business of abortion in the printed referral list would remain unchanged.

If enacted into law, the "possible agreement" would replace the 1988 regulation only to the extent that they might conflict. Where the 1988 regulation speaks and the "possible agreement" language is silent, the 1988 regulation would continue to guide the Title X program.

The "possible agreement" covers ground not covered by the 1988 regulation. The 1988 regulation clarifies the line between covered and non-covered services to classify options counseling as a non-covered service. It creates a standard of conduct, requiring that pregnant women be referred. It does not address the ability or inability of Title X personnel to respond to clients' questions.

The "possible agreement" would replace the silence of the 1988 regulation with a statement that factual answers to questions a woman has about her pregnancy, including the extent of her legal and medical options, are not prohibited.

The "possible agreement" language speaks as well to the question, also not answered in the 1988 regulations, of whether providers might identify which providers on the referral list provide abortion services and whether there are any other providers of abortion services. The "possible agreement" language provides that providers may tell individuals which providers on the referral list provide abortion services as well as orally identify providers not on the list.

The "possible agreement" provides protection against abuse by including language that if a Title X worker is directive, the project would be subject to procedures that apply to misuse of grant funds, including termination of the grant.

Nothing in these regulations prevents a woman from receiving complete medical information about her condition from a doctor. In fact the regulations require a Title X project to provide necessary referral to a medical facility when medically indicated. If a woman is found to have any medical problem, she must be assisted in receiving complete and appropriate medical care even if the ultimate result may be terminantion of pregnancy. 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.

Nothing in these regulations prevents a woman from receiving complete medical information about her condition from a doctor. In fact the regulations require a Title X project to provide necessary referral to a medical facility when medically indicated. If a woman is found to have any medical problem, she must be assisted in receiving complete and appropriate medical care even if the ultimate result may be terminantion of pregnancy. 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.

The "possible agreement:" Has any ground been lost?

Since the advent of the Title X program, despite the many allegations of misuse of Title X funds through violation of the statutory prohibition on use of funds in programs in which abortion is a method of family planning, no Title X grantee has lost its funds because it violated the prohibition. The effect of this has been to allow each Title X project free rein to interpret the abortion prohibition as it wishes.

Improvement must be evaluated from where the program is. Today grantees decide how to apply the abortion prohibition in their programs. All appear to understand that Title X funds can not be used to pay for the abortion procedure, but the comments received on the 1988 regulation suggest there is a wide degree of variation of interpretation about how far short of paying for the abortion procedure a Title X grantee may go. For example, one commenter revealed that the commenter's project would call abortion providers to set up appointments and provide transportation to the abortion provider.

The "possible agreement" language will do nothing to slow the efforts to end the use of Title X funds in programs that refer women for abortion or facilitate obtaining their obtaining an abortion. The commenter's Title X project would not be any less threatened by the "possible agreement" language than the 1988 regulation.

The 1988 regulation does not speak to a set of questions that are addressed in the "possible agreement" language. These include whether answering questions about the legality and availability of abortion is prescribed by the regulations, whether Title X personnel may identify which providers on the referral list provide abortion and whether personnel may answer if asked whether there are any other providers of services.

Even without the "possible agreement" language, there is the strong possibility that the process of applying the regulations will lead to an administrative or judicial finding that, because answering questions is not prohibited by the 1988 regulation, no action may be taken to stop Title X grantees from answering questions. Absent the "possible agreement" language, there would be no definitive decision on whether answers to questions are permitted until a test case works its way through the courts.

The argument that answers to questions is prohibited by in Title X projects is fraught with problems. These include (1) do the regulations prohibit answering questions posed by pregnant women?, (2) is such an interpretation of the regulations supported by the statute?, and (3) is such an interpretation consistent with the First Amendment? These questions pose problems far more extensive than those resolved in favor of the regulations in Rust v. Sullivan.

Relationship of the "Possible Agreement" and the 1988 Regulations

The "possible agreement" language would not replace the 1988 regulation. The 1988 regulation would be unchanged where it does not conflict with the "possible agreement" language. The clarification made in the 1988 regulation that counseling pregnant women is a service beyond the scope of Title X would remain unchanged. The prohibition of referral for elective abortion would remain unchanged. The requirement that pregnant women be referred to providers of prenatal and/or social services would remain unchanged. The prohibition of including providers primarily in the business of abortion in the printed referral list would remain unchanged.

If enacted into law, the "possible agreement" would replace the 1988 regulation only to the extent that they might conflict. Where the 1988 regulation speaks and the "possible agreement" language is silent, the 1988 regulation would continue to guide the Title X program.

The "possible agreement" covers ground not covered by the 1988 regulation. The 1988 regulation clarifies the line between covered and non-covered services to classify options counseling as a non-covered service. It creates a standard of conduct, requiring that pregnant women be referred. It does not address the ability or inability of Title X personnel to respond to clients' questions.

The "possible agreement" would replace the silence of the 1988 regulation with a statement that factual answers to questions a woman has about her pregnancy, including the extent of her legal and medical options, are not prohibited.

The "possible agreement" language speaks as well to the question, also not answered in the 1988 regulations, of whether providers might identify which providers on the referral list provide abortion services and whether there are any other providers of abortion services. The "possible agreement" language provides that providers may tell individuals which providers on the referral list provide abortion services as well as orally identify providers not on the list.

The "possible agreement" provides protection against abuse by including language that if a Title X worker is directive, the project would be subject to procedures that apply to misuse of grant funds, including termination of the grant.

Revised final paragraph:

Trying to argue that answers to questions is within the scope of activity prohibited by the 1988 regulation is not without problems. The hurdles that would have to be overcome in litigation that sought to uphold the argument that the regulations preclude answering questions include: (1) is the answering of questions indeed prohibited by the words of the 1988 regulation? (2) is such an interpretation of the regulations supported by the statute and not arbitrary and capricious? and (3) is such an interpretation consistent with the First Amendment? These questions pose problems far more extensive than those resolved in favor of the regulations in Rust v. Sullivan.

UNITED STATES CATHOLIC CONFERENCE
Office of Government Liaison
3211 4th Street N.E. Washington, DC 20017-1194 (202)541-3140 FAX (202)541-3322 TELEX 7400424

FACSIMILE TRANSMITTAL COVER SHEET

DATE: Oct. 22, 1991

NUMBER OF PAGES: 3
(including cover sheet)

SEND TO: Governor John H. Sununu

LOCATION: White House

FAX NUMBER: (202)456-2397

FROM: Mark Gallagher OFFICE: GOVERNMENT LIAISON

TELEPHONE NUMBER: (202) 541-3140 FAX NUMBER: (202) 541-3313

COMMENTS: In preparation for our conversation

ACCT. NO.: 03-003

Comments: 1988 Title X regulations vs. "possible agreement"

I. What the Regulations Really Say

Contrary to some claims, 59.8 does address certain issues also addressed by the "possible agreement." The regulation and the "agreement" come to opposite conclusions on these issues. The "possible agreement" would overturn 59.8 on these points:

A. Can "options counseling" on abortion be done if the woman requests it? 59.8 (a)(1) says no -- such counseling cannot be provided, regardless of who started the conversation. This is further elaborated in (b)(5): If a woman asks for information on abortion, the grantee must decline, and instead tell her that "the project does not consider abortion to be an appropriate method of family planning and therefore does not counsel or refer for abortion." So 59.8(a)(1) is amended by the "agreement," and 59.8(b)(5) is gutted.

EXAMPLE

B. Can a grantee identify which providers perform abortions? The regs say no. This is described in (a)(3) as "steering" clients to providers who perform abortions, and is prohibited. This is further elaborated in (b)(4) and (b)(5): Even if the woman's own request was for a list of abortion providers, the grantee must decline that request and give her a list of medical providers; that list must include local facilities that do not do abortions (if available), and must not include facilities that principally do abortions. These provisions are gutted by the "agreement."

C. Can a grantee tell the client that there are other providers of services that do perform abortions? 59.8 (b)(3) and (b)(5) say no; the "agreement" says yes. These provisions would be overturned by the "agreement."

II. Alleged Benefits of the "Agreement"

- Avoid future costly litigation? No, because the regs do answer the specified questions that were alleged to be unsettled, and those regs are already upheld by the U.S. Supreme Court.

- Ban "directive" counseling? But that was the old policy, that counseling must be "non-directive." This means treating abortion as an equally positive option alongside childbirth -- an approach that the federal government has rejected in every other funding program, and that the Supreme Court has said Congress is not required to do. It means that a grantee may not affirmatively recommend prenatal care -- so 59.8(a)(2), telling the grantee to specify actions "necessary to protect the health of the mother and unborn child" until they can get to a prenatal care clinic, is threatened by the ban on "directive" counseling.

(This apparent tension between 59.8 and the "agreement" could create new litigation.) And a ban on "directive" counseling on abortion cannot be effectively enforced without a great deal of subjective judgment and some constitutionally suspect invasions of the counseling relationship -- which is why the Administration decided to separate this problem out of the Title X program altogether in the first place.

- Does the "agreement" prevent grantees from lining up abortion appointments for their clients? No. The "agreement" requires grantees to provide "identification of providers of...pregnancy termination services" upon the woman's request. Taking the next step of actually lining up the appointment goes beyond the requirement of the "agreement," but it is not prohibited by it either. (And it is not explicitly prohibited by 59.8, because there was no need then to do so -- talking about abortion providers was prohibited at the outset, so the question of lining up the appointment never arose. With the "agreement" in place, the question does arise, and the grantee seems free to do it.)

In short, the contradiction between 59.8 and the "agreement" is clearcut and pervasive. One cannot enact the latter as written without gutting the former.

Nothing in these regulations prevents a woman from receiving complete medical information about her condition from a doctor. In fact the regulations require a Title X project to provide necessary referral to a medical facility when medically indicated. If a woman is found to have any medical problem, she must be assisted in receiving complete and appropriate medical care even if the ultimate result may be terminantion of pregnancy. Referrals may be made by Title X programs to full-service health care providers that perform abortions, but not to providers whose <u>principal</u> business is abortion.

Nothing in these regulations prevents a woman from receiving complete medical information about her condition from a doctor. In fact the regulations require a Title X project to provide necessary referral to a medical facility when medically indicated. If a woman is found to have any medical problem, she must be assisted in receiving complete and appropriate medical care even if the ultimate result may be terminantion of pregnancy. Referrals may be made by Title X programs to full-service health care providers that perform abortions, but not to providers whose <u>principal</u> business is abortion.

Revised final paragraph:

Trying to argue that answers to questions is within the scope of activity prohibited by the 1988 regulation is not without problems. The hurdles that would have to be overcome in litigation that sought to uphold the argument that the regulations preclude answering questions include: (1) is the answering of questions indeed prohibited by the words of the 1988 regulation? (2) is such an interpretation of the regulations supported by the statute and not arbitrary and capricious? and (3) is such an interpretation consistent with the First Amendment? These questions pose problems far more extensive than those resolved in favor of the regulations in Rust v. Sullivan.

October 16, 1991

MEMORANDUM

TO: THE HONORABLE HENRY HYDE

FROM: RICHARD DOERFLINGER
ASSOCIATE DIRECTOR
NCCB SECRETARIAT FOR PRO-LIFE ACTIVITIES

RE: "POSSIBLE AGREEMENT" ON TITLE X POLICY

==========

I have been asked to comment on this proposed agreement. Mark Gallagher tells me you need an immediate response; in what follows I try to provide this, but I would like to study it further with the aid of our attorneys and give a more complete response tomorrow.

A. Title X programs which provide prenatal care:

The woman will receive "information regarding her pregnancy" (very vague; could be construed as including information on her options, including elective abortion). She will be provided with "the same pregnancy related services and information that all of the project's patients receive." This is even more vague -- it seems to beg the question, which is: what kinds of services will the Title X project be providing to this woman as well as all the others? For example, may it include abortion and/or abortion referrals? If so, what have we gained?

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

1. The same open-ended phrase about "information regarding her pregnancy." What information?

2. We trade away the ban on information and counseling re abortion. We gain nothing in return, because the counseling called for by the old policy (written by Planned Parenthood) was always phrased in terms of "non-directive" counseling. The problem is that, without genuine invasions of physician-patient relationships etc., there is no way to enforce the requirement that each counseling session will be "non-directive" (and people will disagree widely as to what would count as non-directive). This is why we decided to keep the issue out of the Title X program altogether.

3. The "professional duty" phrase may be taken by many as carte blanche for abortion counseling and referral, since many professional organizations (contrary to the Hippocratic Oath) have wrongly identified these as professional duties.

4. A provision with no legal effect -- it simply restates that only the counseling/referral regulation will be gutted.

In short, if this is a compromise, it will require further study before I can ascertain what the other side is giving up regarding abortion counseling/referral. Our side gives up a great deal, to no advantage that I can see as yet.

UNITED STATES CATHOLIC CONFERENCE
Office of Government Liaison
3211 4th Street N.E. Washington, DC 20017-1194 (202) 541-3140 FAX: (202) 541-3313 TELEX 7400424

FACSIMILE TRANSMITTAL COVER SHEET

DATE: October 21, 1991

NUMBER OF PAGES: 3
(including cover sheet)

SEND TO: Governor John H. Sununu

LOCATION: White House

Washington, DC

FAX NUMBER: (202) 456-2397

FROM: Mark J. Gallagher OFFICE: GOVERNMENT LIAISON

TELEPHONE NUMBER: (202) 541-3140 FAX NUMBER: (202) 541-3313

COMMENTS: Attached is a modified version. While it addresses the medical ethics/doctor-patient issue, it precludes the advocacy, encouragement and promotion of abortion by Title X programs. We recommend that before the vote later this week on the Labor/HHS Conference report, the President take one of the three steps proposed with Rep. Hyde's language, indicating that the language addresses the medical ethics/doctor-patient issue, and that votes then for the Conference Report, will be votes in favor of:

...Recommending (counseling for) abortion
...Referring for abortions
...Scheduling the time for the abortion
...Arranging transportation to the abortion clinic
...Seeking private funding for the abortion
...Following up to make sure the abortion was obtained.

We believe if this is done, there will definitely be more than 1/3 opposition to the Chafee/Porter amendment. Honesty compels me to note however, that we would rather be defeated than agree to language that will permit Title X clinics to continue to funnel to abortion clinics tens of thousands of women/girls each year.

ACCT. NO: 03-003

POSSIBLE ADMINISTRATION POLICY
ON IMPLEMENTATION OF TITLE X REGULATIONS

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 the opportunity to receive complete medical information from a physician regarding her condition. The provider of services will furnish a list of community resources for medical care and social services; this list may include the provider of family planning services itself if it provides medical care and social services, but may not include any provider whose principal business is the provision of abortions. If the woman elects to remain on the premises of the Title X grantee, the medical care and social services she receives must be consistent with the program's rules on co-location of abortion services.

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

1. Information: 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 opportunity to receive complete medical information from a physician regarding her condition. The project will also 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 proper medical care.

2. Referral: If a woman is determined to be pregnant, the project will furnish a list of community resources for medical care and social services; this list may include providers that perform abortions, but may not include providers whose principal business is the provision of abortions. If requested, the project may assist the pregnant woman in making an appointment for prenatal care. If a woman is found to have a significant medical problem, she should be referred to a provider of comprehensive medical care.

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

The major agrument being used by abortion advocates against the Title X Regulations is that of medical ethics. In fact, a reasonable interpretation of the regulations is that they do not limit physicians in any way in providing medical advice. But the Planned Parenthood media campaign of disinformation has to be addressed if we are to be sure of having the votes to sustain the veto. This possibly could be accomplished through one of the following ways:

...An Executive Order by the President directing that the regulations be enforced as follows:

> Nothing in these regulations prevents a woman from receiving complete medical information about her condition from a doctor. In fact the regulations require a Title X project to provide necessary referral to a medical facility when medically indicated. If a woman is found to have any medical problem, she must be assisted in receiving complete and appropriate medical care even if the ultimate result may be terminantion of pregnancy. Referrals may be made by Title X programs to full-service health care providers that perform abortions, but not to providers whose <u>principal</u> business is abortion.

...A letter from the President to Secretary Sullivan directing him to so enforce the regulations.

...Adding an additional paragraph to the regulations to the same effect.

One of these steps could be taken after the veto of the Labor/HHS bill and prior to the House vote to override.

For 456-2397

Confidential

Member-to-Member Whip Check As of October 16, 1991

(contact with Members "not reached" or listed as "undecided" is ongoing... Will update as information becomes available)

Whip Explanation and Questions

The President has said he will veto the Labor-HHS Appropriations bill if it contains a provision to block enforcement of the President's Title 10 family planning regulations.

As you may know, these regulations seek to ensure that abortion not be used as a method of birth control in the federally funded Title 10 family planning program. To this end, the Bush regulations do not permit counseling and referral for abortions as a method of family planning in Title 10 projects.

1. Will you vote to sustain the President's veto of the Labor-HHS Appropriations bill?

Yes	145
Lean Yes	17
Total	162
Undecided	8
Not Reached	4
No	11
Lean No	14
Total	25

2. Would you also vote to sustain the President's veto of another bill -- a freestanding bill -- such as Senator Chafee's S. 323, which would overturn the President's Title 10 regulations?

Yes	146
Lean Yes	17
Total	163
Undecided	10
Not Reached	4
No	13
Lean No	8
Total	21

		Sustain Veto	*Labor-HHS Bill*	*Chafee Bill*
1	Allard		Y	Y
2	Annunzio		Y	Y
3	Applegate		Y	Y
4	Archer		Y	Y
5	Armey		Y	Y
6	Baker		Y	Y
7	Ballenger		LN	N
8	Barnard		Y	Y
9	Barrett		Y	Y
10	Barton		Y	Y
11	Bateman	"I think I'll be alright from your perspective."	LY	LY
12	Bennett		Y	Y
13	Bereuter		LN	LN
14	Bevill		LY	LY
15	Bilbray		N	N
16	Bilirakis		Y	Y
17	Bliley		Y	Y
18	Boehner		Y	Y
19	Bonior		LN	LN
20	Borski		Y	Y
21	Broomfield		LY	LY
22	Browder		UNDECIDED	UNDECIDED
23	Bruce		N	N
24	Bunning		Y	Y
25	Burton		Y	Y
26	Byron		Y	Y
27	Callahan		Y	Y
28	Camp		Y	Y
29	Clinger		LY	UNDECIDED
30	Coble		LN	UNDECIDED
31	Coleman, Tom		Y	LY
32	Combest		Y	Y
33	Costello		Y	Y

34	Cox	Y	Y
35	Crane	Y	Y
36	Cunningham	Y	Y
37	Dannemeyer	Y	Y
38	Davis	Y	Y
39	de la Garza	UNDECIDED	UNDECIDED
40	DeLay	Y	Y
41	Dickinson	UNDECIDED	UNDECIDED
42	Donnelly	Y	Y
43	Doolittle	Y	Y
44	Dornan	Y	Y
45	Dreier	LY	UNDECIDED
46	Duncan	Y	Y
47	Edwards, Mickey	Y	Y
48	Emerson	Y	Y
49	English	N	N
50	Ewing	Y	Y
51	Fields	Y	Y
52	Fish	UNDECIDED	UNDECIDED
53	Gallegly	Y	Y
54	Gaydos	Y	Y
55	Gekas		
56	Gillmor	Y	Y
57	Gingrich	Y	Y
58	Goodling	LY	Y
59	Goss	Y	Y
60	Gradison		
61	Grandy	UNDECIDED	UNDECIDED
62	Gunderson	LN	LN
63	Hall, Tony	Y	Y
64	Hall, Ralph	Y	Y
65	Hammerschmidt	LY	LY
66	Hancock	Y	Y
67	Hansen	Y	Y
68	Harris	N	N
69	Hastert	Y	Y

106	McCandless	Y	N
107	McCollum	Y	Y
108	McCrery	Y	Y
109	McDade	Y	Y
110	McEwen	Y	Y
111	McGrath called	Y ok	Y
112	McMillan, Alex	Y	N
113	McNulty Doesn't like voting against HHS Bill for one provision	LN	Y
114	Michel	Y	Y
115	Miller, Clarence	Y	Y
116	Moakley	LY	LY
117	Mollohan	Y	Y
118	Montgomery	Y	Y
119	Moorhead	Y	Y
120	Murphy	Y	Y
121	Murtha	Y	Y
122	Myers	Y	Y
123	Natcher	N	Y
124	Nichols		
125	Nowak	Y	Y
126	Nussle	Y	Y
127	Oberstar	Y	Y
128	Ortiz	Y	Y
129	Orton	Y	Y
130	Oxley	Y	Y
131	Packard	Y	Y
132	Parker	LY	Y
133	Paxon	Y	Y
134	Penny	LN	LY
135	Perkins	LY	Y
136	Peterson, Collin	ok Y	Y
137	Petri	Y	Y
138	Poshard	Y	Y
139	Pursell	Y	LY
140	Quillen	Y	Y
141	Ray	Y	Y

70	Hayes, Jimmy	Y	Y
71	Hefley	Y	Y
72	Henry	Y	Y
73	Herger	Y	Y
74	Hertel	UNDECIDED	UNDECIDED
75	Holloway	Y	Y
76	Hopkins	Y	Y
77	Huckaby	Y	Y
78	Hunter	Y	Y
79	Hutto	Y	Y
80	Hyde	Y	Y
81	Inhofe	Y	Y
82	Ireland	Y	Y
83	James	Y	Y
84	Johnson, Sam	Y	Y
85	Johnson, Tim	N	N
86	Kanjorski	Y	Y
87	Kasich	Y	Y
88	Kildee	Y	Y
89	Kolter	Y	Y
90	Kyl	Y	Y
91	La Falce	LY	LY
92	Lagomarsino	Y	Y
93	Lent	Y	Y
94	Lewis, Tom	Y	Y
95	Lightfoot	Y	Y
96	Lipinski	Y	Y
97	Livingston	Y	Y
98	Lloyd	N	N
99	Lowery	Y	Y
100	Luken	Y	Y
101	Manton	LN	N
102	Marlenee	Y	Y
103	Martin	N	N
104	Mavroules	LY	LY
105	Mazzoli	Y	Y

142	Rahall	Y	Y
143	Rhodes	Y	Y
144	Rinaldo	Y	Y
145	Ritter	Y	Y
146	Roberts	Y	Y
147	Roe	Y	Y
148	Roemer	Y	Y
149	Rogers	LN	LN
150	Rohrabacher	LY	LY
151	Ros-Lehtinen	Y	Y
152	Rostenkowski	Y	Y
153	Roth	Y	Y
154	Russo	Y	Y
155	Santorum	UNDECIDED	UNDECIDED
156	Sarpalius	Y	Y
157	Saxton	Y	Y
158	Schaefer	Y	Y
159	Schulze	Y	Y
160	Sensenbrenner	LY	LY
161	Shaw	Y	Y
162	Shuster	LN	LN
163	Skeen	Y	Y
164	Skelton May also vote to sustain veto if rape/incest is added to Hyde	N	N
165	Slattery	UNDECIDED	LY
166	Slaughter, French	N	N
167	Smith, Chris	Y	Y
168	Smith, Lamar	Y	Y
169	Smith, Robert	LN	LN
170	Solomon	Y	Y
171	Spence	Y	Y
172	Staggers	Y	Y
173	Stallings	LY	Y
174	Stearns	Y	Y
175	Stenholm	Y	Y
176	Stump	Y	Y
177	Sundquist	Y	Y

178	Tallon	Y	LY
179	Tauzin	Y	Y
180	Taylor, Charles	Y	Y
181	Taylor, Gene	Y	Y
182	Thomas, Craig	LN	LN
183	Thomas, William		
184	Thornton	LN	LN
185	Traxler	Y	Y
186	Vander Jagt	Y	Y
187	Volkmer	Y	Y
188	Vucanovich	Y	Y
189	Walker	Y	Y
190	Walsh	Y	Y
191	Weber	Y	Y
192	Weldon	Y	LY
193	Whitten	N	LY
194	Wolf	Y	Y
195	Wylie	Y	Y
196	Yatron Hospitalized for heart surgery - Yes per Staff	LY	LY
197	Young, Don	Y	Y
198	Young, Bill	LY	Y
199	Zeliff	LN	N

The major agrument being used by abortion advocates against the Title X Regulations is that of medical ethics. In fact, a reasonable interpretation of the regulations is that they do not limit physicians in any way in providing medical advice. But the Planned Parenthood media campaign of disinformation has to be addressed if we are to be sure of having the votes to sustain the veto. This possibly could be accomplished through one of the following ways:

...An Executive Order by the President directing that the regulations be enforced as follows:

> Nothing in these regulations prevents a woman from receiving complete medical information about her condition from a doctor. In fact the regulations require a Title X project to provide necessary referral to a medical facility when medically indicated. If a woman is found to have any medical problem, she must be assisted in receiving complete and appropriate medical care even if the ultimate result may be terminantion of pregnancy. Referrals may be made by Title X programs to full-service health care providers that perform abortions, but not to providers whose <u>principal</u> business is abortion.

...A letter from the President to Secretary Sullivan directing him to so enforce the regulations.

...Adding an additional paragraph to the regulations to the same effect.

One of these steps could be taken after the veto of the Labor/HHS bill and prior to the House vote to override.

For
456-2397

UNITED STATES CATHOLIC CONFERENCE
Office of Government Liaison
3211 4th Street N.E. Washington, DC 20017-1194 (202) 541-3140 FAX: (202) 541-3313 TELEX 7400424

FACSIMILE TRANSMITTAL COVER SHEET

DATE: October 21, 1991

NUMBER OF PAGES: 3
(including cover sheet)

SEND TO: Governor John H. Sununu

LOCATION: White House

Washington, DC

FAX NUMBER: (202) 456-2397

FROM: Mark J. Gallagher OFFICE: GOVERNMENT LIAISON

TELEPHONE NUMBER: (202) 541-3140 FAX NUMBER: (202) 541-3313

COMMENTS: Attached is a modified version. While it addresses the medical ethics/doctor-patient issue, it precludes the advocacy, encouragement and promotion of abortion by Title X programs. We recommend that before the vote later this week on the Labor/HHS Conference report, the President take one of the three steps proposed with Rep. Hyde's language, indicating that the language addresses the medical ethics/doctor-patient issue, and that votes then for the Conference Report, will be votes in favor of:

...Recommending (counseling for) abortion
...Referring for abortions
...Scheduling the time for the abortion
...Arranging transportation to the abortion clinic
...Seeking private funding for the abortion
...Following up to make sure the abortion was obtained.

We believe if this is done, there will definitely be more than 1/3 opposition to the Chafee/Porter amendment. Honesty compels me to note however, that we would rather be defeated than agree to language that will permit Title X clinics to continue to funnel to abortion clinics tens of thousands of women/girls each year.

ACCT. NO: 03-003

POSSIBLE ADMINISTRATION POLICY
ON IMPLEMENTATION OF TITLE X REGULATIONS

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 the opportunity to receive complete medical information from a physician regarding her condition. The provider of services will furnish a list of community resources for medical care and social services; this list may include the provider of family planning services itself if it provides medical care and social services, but may not include any provider whose principal business is the provision of abortions. If the woman elects to remain on the premises of the Title X grantee, the medical care and social services she receives must be consistent with the program's rules on co-location of abortion services.

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

1. Information: 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 opportunity to receive complete medical information from a physician regarding her condition. The project will also 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 proper medical care.

2. Referral: If a woman is determined to be pregnant, the project will furnish a list of community resources for medical care and social services; this list may include providers that perform abortions, but may not include providers whose principal business is the provision of abortions. If requested, the project may assist the pregnant woman in making an appointment for prenatal care. If a woman is found to have a significant medical problem, she should be referred to a provider of comprehensive medical care.

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

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

A. Treatment of Title X projects which provide prenatal care, such as, but not limited to, community health centers, hospitals, or Planned Parenthood 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. If the woman elects to remain in that clinic 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.

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. 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. Identification of providers of adoption and pregnancy termination services will be made available upon a woman's request. 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, 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.

4. Nothing in these regulations is intended to circumscribe the services offered 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.

The major agrument being used by abortion advocates against the Title X Regulations is that of medical ethics. In fact, a reasonable interpretation of the regulations is that they do not limit physicians in any way in providing medical advice. But the Planned Parenthood media campaign of disinformation has to be addressed if we are to be sure of having the votes to sustain the veto. This possibly could be accomplished through one of the following ways:

...An Executive Order by the President directing that the regulations be enforced as follows:

> Nothing in these regulations prevents a woman from receiving complete medical information about her condition from a doctor. In fact the regulations require a Title X project to provide necessary referral to a medical facility when medically indicated. If a woman is found to have any medical problem, she must be assisted in receiving complete and appropriate medical care even if the ultimate result may be terminantion of pregnancy. Referrals may be made by Title X programs to full-service health care providers that perform abortions, but not to providers whose <u>principal</u> business is abortion.

...A letter from the President to Secretary Sullivan directing him to so enforce the regulations.

...Adding an additional paragraph to the regulations to the same effect.

One of these steps could be taken after the veto of the Labor/HHS bill and prior to the House vote to override.

For
456-2397

October 10, 1991

Title X

Background

The 1988 abortion counseling regulation provides a negative definition: providers are not to counsel on abortion, nor to refer clients for abortion services.

The regulation leaves ambiguous what can be done without violating the prohibition on counseling or referral.

Chafee Proposal

Senator Chafee has proposed:

- Making clear that Title X workers can provide factual answers to questions regarding a pregnant woman's legal and medical options.
- Specifying that Title X workers can, in response to an inquiry, inform a pregnant woman where she can obtain adoption or pregnancy termination services.

Assessment

- This approach seeks to resolve the controversy in a way that does not directly repudiate the 1988 regulations. Not least, it seeks to address the so-called "gag rule" phenomenon.
- The right-to-life community will like:
  - The preference for pre-natal care found in the referral list provided to all clients, the effort to assist in making appointments with pre-natal providers, and the written advice from HHS.
  - More importantly, the provisions against directive counseling and termination of federal funds for projects that engage in directive counseling.
- The pro-choice community will like:
  - The disappearance of what they perceive as the "gag rule" aspects of the regulation.
  - The provision that permits a Title X project to provide information to a woman, if she asks, about where she can go to terminate her pregnancy.

Gov. S –
FYI
11/8 NYTimes
Judy

Truth in medicine. Tell the President to make it legal again—for *all* of us.

November 8, 1991

President George Bush
The White House
Washington, DC 20500

Dear President Bush:

The Labor-HHS-Education Appropriations Bill on your desk right now doesn't just deal with money.

It reverses the Gag Rule--the infamous regulations on federally funded family planning clinics that would bar doctors, nurses, and counselors from giving clinic patients the same facts about pregnancy and legal abortion that private patients get.

A lot of people thought the Gag Rule was just a bad joke in the beginning--till the Supreme Court went along with it. Then reality hit. Americans were shocked--then outraged.

The Court's decision jolted us into realizing how deeply we believe in not just the right, but the obligation ... to practice only one kind of medicine. ... Democratic medicine ...

November 8, 1991

President George Bush
The White House
Washington, DC 20500

Dear President Bush:

The Labor-HHS-Education Appropriations Bill on your desk right now doesn't just deal with money.

It reverses the Gag Rule--the infamous regulations on federally funded family planning clinics that would bar doctors, nurses, and counselors from giving clinic patients the same facts about pregnancy and legal abortion that private patients get.

A lot of people thought the Gag Rule was just a bad joke in the beginning--till the Supreme Court went along with it. Then reality hit. Americans were shocked--then outraged.

The Court's decision jolted us into realizing how deeply we really believe in not just the right, but the obligation of medical professionals to practice only one kind of medicine. Not Republican medicine. Not Democratic medicine. But honest medicine--for poor and middle-class alike.

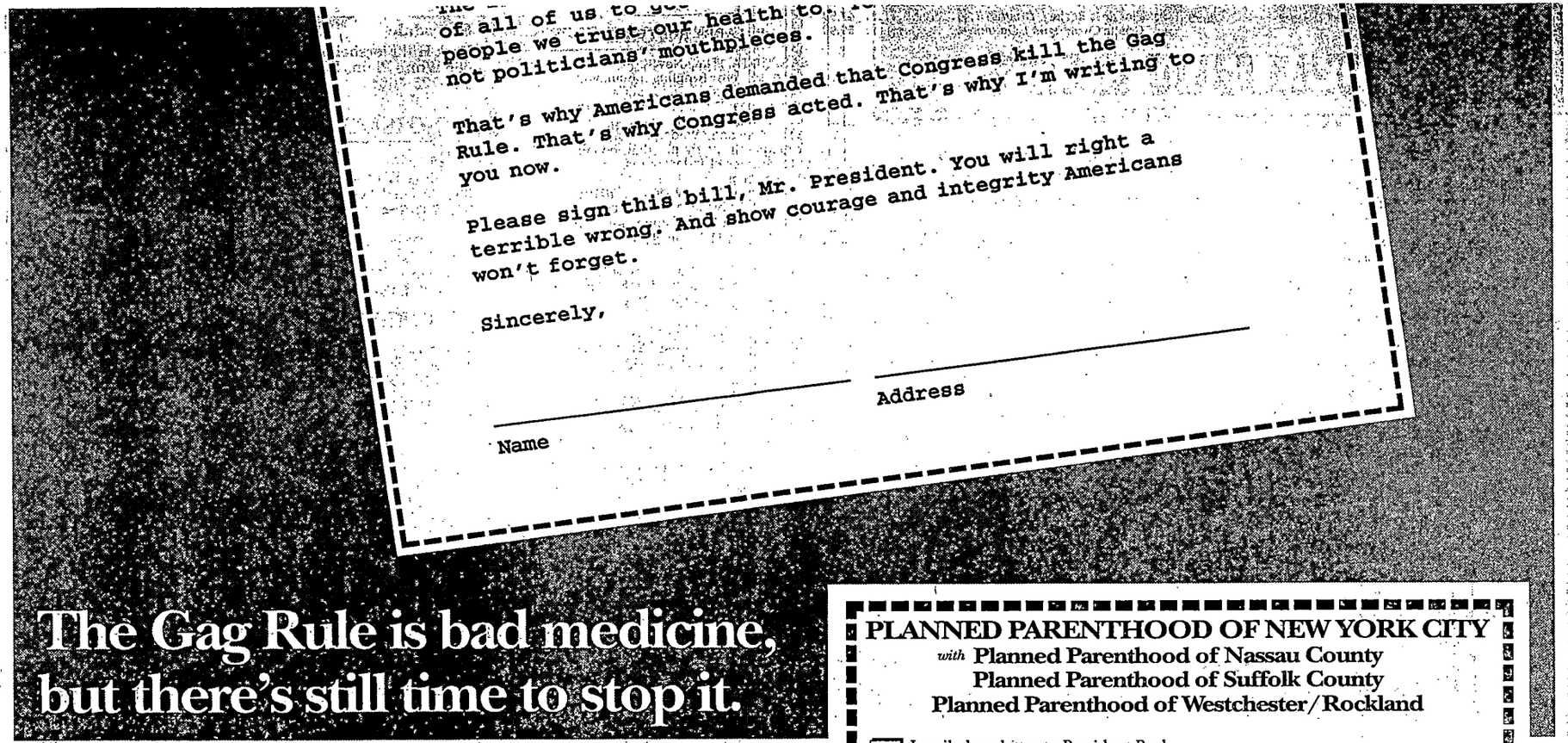
The issue isn't abortion, Mr. President. It's the right of all of us to get the whole, uncensored truth from the people we trust our health to. To have doctors be doctors, not politicians' mouthpieces.

That's why Americans demanded that Congress kill the Gag Rule. That's why Congress acted. That's why I'm writing to you now.

Please sign this bill, Mr. President. You will right a terrible wrong. And show courage and integrity Americans won't forget.

Sincerely,

Name _____ Address _____



The Gag Rule is bad medicine, but there's still time to stop it.

Cut out and mail this letter to President Bush. Or phone the White House at (202) 456-1111. Now!

To obtain copies of our financial and operating reports, write to New York Department of State, Charities Registration Section, 162 Washington Avenue, Albany, NY 12231.

PLANNED PARENTHOOD OF NEW YORK CITY
with Planned Parenthood of Nassau County
Planned Parenthood of Suffolk County
Planned Parenthood of Westchester/Rockland

- ☐ I mailed my letter to President Bush.
- ☐ I phoned President Bush.
- ☐ Put me on your mailing list. I support the fight against the Gag Rule.
- ☐ Enclosed is my tax-deductible contribution of $_____

to support Planned Parenthood's fight to keep truth in medicine and help New Yorkers prevent pregnancies they're not ready for.

Contributions will be distributed to the sponsoring agencies.
Please make checks payable to **Planned Parenthood of New York City.**
380 Second Avenue, New York, NY 10010

Name _____

Address _____

City/State/Zip _____

Telephone/Day _____ Evening _____

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01. Memo	From Gary Andres to John Sununu Re: House Labor/HHS Vote (1 pp.)	11/8/91	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 [5]: Title X

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

Date Closed:	1/5/2005	**OA/ID Number:**	29170-005
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

THE WHITE HOUSE

WASHINGTON

November 8, 1991

MEMORANDUM FOR GOVERNOR SUNUNU

THROUGH: FRED MCCLURE

FROM: GARY ANDRES

RE: House Labor/HHS Vote

On Wednesday, November 6, the House approved the Labor/HHS Appropriations Conference Report by a vote of 272 to 156. Fifty-one Republicans voted for the conference report while forty-three Democrats voted against. While it is always dangerous to depend on such a large number of Democrats to sustain the President's veto, we believe the veto will be sustained.

Several Democrats have already indicated they will not sustain a veto and the Democrat Leaders are sure to whip their Members hard. However, we are certain to pick up Republican Members who will not let the President down on an override vote.

Frankly, we were pleased with this vote, given the extraneous issues that clouded the picture. Members were reluctant to vote against the funding of popular programs such as those for women, senior citizens and cancer research. Further, Bill Natcher (D-KY) is a well-respected gentleman whose goal of a clean appropriations bill is well-known. His fellow appropriators were loath to vote against him. On the other hand, the $4 billion forward funding in the bill helped us pick up Members who would not otherwise have voted with us. While the Administration has used forward funding itself, it has never been of this magnitude.

There seemed to be genuine surprise at Wednesday's vote among some of the Democrats. Others, aware of where the votes lie, will continue to press for votes on abortion. They believe these votes will hurt our Members next year and that eventually pro-life Members will turn around on the issue or be turned out of office. The Waxman freestanding overturn of Title X is waiting in the wings and may be the next, new abortion vote. That vote should be easier to defend (and count) since it is not confused with popular funding issues.

It is not yet clear when the Labor/HHS bill will reach the White House. However, it is important that our veto message include a strong message on the $4 billion forward funding since it helped garner additional votes.