

Efforts Renew to Deny Family Planning Funds to Agencies That Offer Abortions

By Rachel Benson Gold

Last year, Rep. David Vitter (R-LA) sought to attach an amendment to pending appropriations legislation that would have denied federal family planning dollars, under Title X of the Public Health Service Act, to otherwise-qualified community-based nonprofit agencies that use their non-Title X funds to perform abortions. Although deterred by a Republican leadership seeking to preserve an appearance of bipartisan unity in the immediate aftermath of September 11, Vitter has vowed to renew his fight this year.

Vitter's attempt to defund certain providers of subsidized family planning services because they engage in other, entirely legal activities with which he personally disagrees—notwithstanding the immediate negative impact that would have on large numbers of vulnerable young and low-income women across the country who depend on the providers for their contraceptive care—is hardly new. In fact, his amendment marks the return of a first-generation tactic in an almost three-decade-long campaign, in the words of antiabortion leaders, to “get the government out of the abortion business.”

That campaign—to ban both direct and “indirect” government support for abortion—was conceived almost before the ink was fully dry on the 1973 *Roe v. Wade* decision. From the beginning, it was seen as a central strategy in support of the antiabortion movement's ultimate goal of making abortion illegal once again.

With the enactment of the federal Hyde amendment in 1976 and com-

parable policies in the majority of states, opponents have made major strides toward banning the direct use of public dollars for abortion. Ending what they consider to be indirect government support of abortion—that is, the allocation of public family planning dollars to organizations, such as local Planned Parenthood affiliates, that also provide abortions with nonpublic funds—has been far more elusive.

Initial State Action

Abortion opponents have long advanced several arguments for why taxpayer funds should not go to these organizations. Among the most commonly heard are that even though public funds may not directly be used to perform abortions, they nonetheless “free up” private funds that may then be used; that family planning agencies that also provide abortions must have a vested interest in “funneling” women to their abortion service; and that taxpayers should not be required to pay for things they consider to be immoral. At bottom, however, the central argument, even if rarely expressed in so many words, is that by funding organizations that provide abortions, no matter for what other purpose, government somehow gives its imprimatur to abortion itself—and that imprimatur must be removed.

In the late 1970s and early 1980s, this question was debated extensively in state legislatures. Arizona, Minnesota and North Dakota enacted laws to cut off public funding to family planning agencies that provided abortion services with private dollars, regardless of how sepa-

rated the abortion activities were from the family planning activities.

Arizona, for example, enacted legislation in 1981 that flatly blocked state funding of agencies that “offer abortions, abortion procedures, counseling for abortion procedures or abortion referrals.” In the litigation that followed, federal courts explicitly rejected the state's argument that the family planning funds awarded to these organizations somehow facilitated the use of their own private funds to provide abortion services. According to the appeals court, the so-called freeing-up theory (now commonly referred to as fungibility theory) “cannot justify withdrawing all state funds from otherwise eligible entities merely because they engage in abortion-related activities disfavored by the state.” Ultimately, the courts blocked the North Dakota and Minnesota attempts as well.

Enter the Gag Rule

Thwarted by the courts, proponents of a flat ban regrouped around a slightly less-extreme approach and turned to the federal government in hopes of obtaining a nationwide policy. Since its enactment in 1970, the Title X statute had included a prohibition on the use of Title X funds “in programs where abortion is a method of family planning.” Until 1987, when the Reagan administration issued the so-called gag rule, that provision consistently had been interpreted as a ban on the use of Title X funds to pay for abortions, and the federal regulations governing Title X did not otherwise reflect an antiabortion animus toward providers. The gag rule turned the long-standing Title X rules on their head. Although better known for the ban in Title X-funded projects on nondirective counseling and referral for abortion on request, the measure also called for a physical and financial “wall of separation” between an agency's publicly funded family planning program and its privately funded abortion activities.

When the gag rule case came before the U.S. Supreme Court, family planning providers argued that in crafting the statute, Congress expected that Title X family planning projects might be housed within larger entities, such as hospitals or local health departments, that provide a wide range of other services, including abortion services. Holding that congressional intent in this regard was unclear, the Court said the rule did not force a Title X grantee agency or its staff to forego non-Title X abortion-related activities, but “merely require[d] that the grantee keep such activities separate and distinct from Title X activities.”

Accordingly, the Court in *Rust v. Sullivan* upheld the rule in 1991. Related legal challenges lingered, however, and the measure was actually in effect for only one month before being suspended when President Clinton took office in 1992. Program guidance to grantees issued shortly thereafter reiterated the long-standing ban on using Title X funds for abortion and refined the notion of a clear distinction between the Title X-funded family planning project and other activities—including the provision of abortion services—that may be offered by the agency with non-Title X dollars. These guidelines formed the basis of formal regulations promulgated in 2000.

The 2000 regulations formally restored Title X programs’ mandate to provide nondirective counseling and requested referrals to women facing problem pregnancies. Beyond that service, however, “non-Title X abortion activities must be separate and distinct from Title X project activities.” While the principle of separation “does not require separate grantees or even a separate health facility,” the distinction between an agency’s Title X-funded family planning project and its privately funded abortion activities must be substantial: “separate book-keeping entries alone will not satisfy

the spirit of the law.” For example, while certain types of shared staff are permissible, salaries must be “properly allocated and all abortion related activities of the staff members [must be] performed in a program which is entirely separate from the Title X project.” Certain kinds of shared facilities are allowed, “so long as it is possible to distinguish between the Title X supported activities and non-Title X abortion-related activities.”

Return of the States

In the post-gag rule era, action returned to the state level. Using language similar to the original gag rule, for example, a budget measure enacted in Ohio last year requires that family planning services funded by the state be “physically and financially separate from abortion-providing and abortion-promoting activities.” How the state will interpret that language in the process of writing regulations, and hence the ultimate impact of this provision, is uncertain.

Clearly, antiabortion activists are seeking to stretch the parameters of a separation requirement to the breaking point. In the mid-1990s, Missouri enacted legislation that would have flatly banned any state revenues from going to an organization that “provides or promotes” abortion, a formulation reminiscent of the original state laws of the late 1970s. As the only agencies in the state that both received state family planning funds and provided abortion services, two local Planned Parenthood affiliates—Planned Parenthood of Kansas and Mid-Missouri and Planned Parenthood of the St. Louis Region—immediately challenged the law, which was struck down in federal court. This pattern was repeated annually until 1999.

That year, a federal court hearing the state’s appeal added a new twist, essentially reconstructing the statute itself. The court said that the statute should be read to allow the local

Planned Parenthood affiliates to receive funds so long as they provided abortion services through separately incorporated agencies that use separate facilities and receive none of the state funds. The Planned Parenthood affiliates complied with those requirements. In response, Missouri enacted even more stringent requirements that would have prevented the local Planned

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Parenthoods and the abortion providers from having any common employees, regardless of their function, and any common facilities, even if they were nonclinical facilities such as lunchrooms or conference rooms. These more stringent requirements have been challenged in court.

While this legal action continues, Peter Brownlie, CEO of Planned Parenthood of Kansas and Mid-Missouri, says the two local affiliates have lost their state funding and are out of the family planning program altogether. The result, notes Susan Hilton, executive director of the Family Health Council of Missouri, is that the state has family planning dollars it cannot spend because of a dearth of providers. No funds were allocated to serve 3,300 clients in the Kansas City area alone, because no provider stepped forward to bid on the funding.

In late January, yet another wrinkle was added to a case that was already maddeningly complex. The state supreme court, in a unanimous ruling, told the state that it could not simultaneously defend its law prohibiting funding *and* represent the state department of health, which had determined that the providers had satisfied the requirements for separation. The state attorney gen-

eral chose to side with the health department, for a moment ending the litigation. The next day, however, a lower state court judge demanded that the attorney general justify his decision, a move likely to delay a final end to the case once again.

A similar drama has been playing out in Colorado. Since 1984, the state constitution has banned the use of state funds for abortion. In 1999, the newly appointed head of the state health agency changed the interpretation that had been applied to the amendment for 15 years, saying that family planning agencies that provide abortion services are ineligible for

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state family planning funds. At that point, Planned Parenthood of the Rocky Mountains (PPRM) separately incorporated its abortion services as a freestanding agency. With no alternative agencies stepping forward to bid on the family planning funds, the state backed down and reinstated PPRM's funding.

The state then turned its energies to attempting to demonstrate that the two entities were not sufficiently separate, despite the findings of several audits in the intervening years. A new audit released this fall noted that PPRM was charging the abortion

provider below-market rates for facilities it rented from the family planning agency. (In fact, PPRM asserts that it was charging the abortion provider the maximum amount it could without jeopardizing its property tax exemption as a non-profit agency.) The state quickly seized on this finding and cut off \$380,000 in family planning funds to PPRM.

Planned Parenthood estimates that the cut will affect family planning services to 13,000 low-income women who will now be charged fees. Those unable to pay will likely have to turn to county health departments for their care, and they may not be in luck. Chuck Stout, Boulder County health director, has said that the county's clinics are already operating at capacity and would not be able to absorb the 2,500 women who had been obtaining free care through Planned Parenthood. In late January, state legislators entered the fray, by ordering yet another audit, the results of which may not be available for some time.

Back to the Future

"If a statewide Planned Parenthood operated a string of ten separate family planning clinics, but offered abortions at only one of them, none of those clinics could receive Title X funds." So said Concerned Women for America on its website in support of Rep. Vitter's amendment last year. By attempting to deny all federal Title X funds to agencies that perform any abortions with their own funds, the Vitter amendment defies more than 20 years of state and fed-

eral policy-making jurisprudence, both before and after the Reagan administration gag rule. It suggests that, ultimately, no amount of separation between a program's publicly funded family planning activities and its privately funded abortion services will be sufficient to satisfy the most extreme wing of the antiabortion movement.

Although the Vitter amendment would not punish public-sector grantees, such as state and local health departments that offer abortions, it would defund nearly 600 private, Title X-supported family planning service sites around the country. One in four of these sites is run by a hospital or community health center; the remainder are operated by local Planned Parenthood affiliates or other independent family planning agencies. An analysis by The Alan Guttmacher Institute demonstrates that nearly one million women obtain contraception and other preventive health care, including breast and cervical cancer screening and testing for STDs, through these sites.

Vitter justifies his gambit as an "antiabortion" amendment, and it is undeniably part of a key strategy toward the antiabortion movement's long-term goal of making abortion illegal once again. But the impact of the amendment were it to be enacted reveals what else it is in the here and now: a full-scale assault on family planning—not only on certain of its providers but also on the women across the country who depend on them. ⊕