

Fact Sheet

Title X Regulations: Abortion Counseling and Referral

In 1970, Congress passed Title X of the Public Health Service Act as a means for the Department of Health and Human Services (HHS) to offer family planning assistance to low-income women. The statute was designed to direct federal grants to programs which offer pregnancy prevention services. Title X was never intended to fund or facilitate abortions, as noted in the statute:

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

While Title X clearly prohibits the use of federal funds for the performance of abortion, it does not expressly address the questions of counselling and referral for abortion. Initially, HHS interpreted the law as allowing Title X grantees to counsel for abortion and to refer for abortion.

In 1981, HHS staff issued guidelines which went beyond the initial interpretation by requiring all Title X grantees to offer “nondirective” counselling and “mere referral.” Essentially, these guidelines mandated Title X programs to treat abortion as an ordinary method of family planning.

This situation led to grave abuses of the statute's intent. In 1982, both the Health and Human Service's Office of the Inspector General (OIG) and the General Accounting Office (GAO) reported that Title X grantees were failing to maintain the necessary

separation between family planning projects and abortion-related activities. Many clinics effectively used Title X funds to steer patients into their own abortion programs. The OIG and GAO found the separation between Title X funds and abortion to be in practice only a matter of symbolic bookkeeping.

To prevent continuing abuse of the statute, HHS issued clarifying regulations in 1988, which interpreted the statute's “wall of separation” between Title X funds and abortion to prohibit counselling and referral for abortion as a method of family planning in all Title X programs. The constitutionality of the regulations was immediately challenged by Planned Parenthood. On May 23, 1991, the U.S. Supreme Court upheld the regulations as constitutional (*Rust v. Sullivan*).

What do the regulations say?

The regulations stipulate that any abortion-related activities must be “physically and financially separate” from the Title X project. A grantee must carry out the federally funded project with personnel, facilities, and accounts that are distinct from any involvement in abortion-related activities. The 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” nor may the project “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.”

Title X personnel may not present abortion as a method of family planning or direct a patient to a facility for a nontherapeutic abortion. If the patient inquires about clinics which perform abortion, the staff may reply that abortion is a legal option which the Department of Health and Human Services does not consider an appropriate method of birth control in Title X clinics. If the patient is pregnant, the staff must provide her with a list of local facilities which offer prenatal care. This list may include facilities that perform abortions but may not be weighted in their favor, and it may not include any facilities whose primary or exclusive function is to perform abortions.

Do the regulations endanger women's health?

Opponents claim that the regulations subject pregnant women to inferior health care. For example, the claim is made that the regulations would force a woman to carry a life-threatening pregnancy to term, or that a pregnant woman diagnosed with breast cancer would not be informed of her condition. These claims are patently false. The preamble to the regulations states:

Title X providers are not precluded from making “and indeed are obliged to make” appropriate referrals with respect to treatment of conditions that are diagnosed in the course of examining pregnant Title X clients.

If the Title X health professional discovers a condition that threatens the

patient's health, the patient is to be referred to appropriate medical facilities. This includes a woman whose life may be endangered by a pregnancy.

Do the regulations violate freedom of speech?

Critics of the regulations describe it as a “gag rule” which breaches the freedom of speech of health professionals. To such charges, the Court responded in *Rust* that the regulations are not a general law discriminating against speech on the basis of viewpoint. Rather, they are guidelines defining the scope of a government program. Noting that the government may refuse to fund certain activities (including speech), the Court wrote:

The government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way. In so doing, the government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another.

Critics have charged that the regulations place an undue restriction on federal grantees. This objection is based on the fact that the use of public funds does not deprive a person of constitutional rights. However, the use of government funds is always conditioned upon the grantees' agreement to carry out program objectives. For example, federal funds

are unavailable to schools which promote racial discrimination. The Court, reaffirming an earlier decision in *Harris v. McRae*, stated:

The government may make a value judgment favoring childbirth over abortion, and...implement that judgment by the allocation of public funds.

An employer has the right to set standards for an employee's activity in the work-place; this includes speech. In the case of Title X, the employer is the taxpayer of the United States. Public opinion polls consistently show that the overwhelming majority of Americans oppose the use of taxpayer funds in family planning programs that promote abortion. A June 1991 Wirthlin poll shows 77% of Americans in agreement on this.

The regulations do not restrict the rights of Title X personnel to advocate, counsel, refer, or even perform abortions outside the context of the federally funded program. They simply establish guidelines for the implementation of a federal program.

Do the regulations violate medical ethics?

A maxim of medical ethics is the principle of *informed consent* -- the precept that a doctor is obliged to inform the patient of the full range of treatments and of the risks and ramifications of each. Critics charge that the regulations violate this principle by prohibiting the health practitioners to discuss abortion as an option. However, the principle of informed consent generally applies only within the scope of a proposed course of treatment; *e.g.*, a back-surgeon must inform a patient of all possible forms of

treatment for a back-injury, but is under no obligation to discuss forms of treatment for heart disease. Title X projects conduct family planning; any form of medical care after conception is outside the scope of the program.

The core of this objection is the belief that abortion is an ordinary and acceptable means of family planning. However, the June 1991 Wirthlin poll found that 83% of Americans reject the use of abortion as a method of birth control. Furthermore, in *Harris v. McRae*, the Supreme Court asserted:

[Abortion is] inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life.

Are the regulations poor medical practice?

Opponents say the regulations violate sound medical practice by removing family planning from the context of broader health care. However, a wide array of studies, including a 1990 report by the Alan Guttmacher Institute's *Family Planning Perspectives*, indicate that the consideration of abortion as a means of birth control reduces the effectiveness of a family planning program. When family planning treats abortion as an option, pregnancy rates increase. When family planning focuses on the prevention of pregnancy, pregnancy rates fall.

The preamble to the regulations addresses this question on the grounds of the Title X statute:

If Congress enacted a statutory grant program 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.

Are the current regulations necessary?

Opponents of the regulations insist that they are unnecessary, and that the government should trust each recipient-organization to use its own judgment in this matter. However, the 1982 reports by OIG and GAO show that this policy (formerly applied to Title X) causes serious violations of the Congressional intent of the Title X statute:

Many comments argued that the practice of 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.

In addition, numerous women “said that they were never presented with any favorable or neutral information on any other option.” Permitting or requiring counseling and referral for abortion at Title X clinics only invites the exploitation of women by the abortion industry.

What is Planned Parenthood's role in this debate?

Planned Parenthood spent \$5 million in a campaign attempting to have Congress overturn the regulations. Before the regulations were enforced, Planned Parenthood received the largest share of the Title X funds – \$37 million in 1990. In 1989, its clinics provided only 4,732 women nationwide with prenatal care, but performed 122,191 abortions. Obviously, Planned Parenthood has a vested interest in receiving Title X funds. As the largest single provider of abortion in the United States, it also has a substantial stake in promoting abortion through its family planning programs.

The abortion industry is one of the largest unregulated businesses in the country. Planned Parenthood cites the First Amendment to justify exempting itself from federal regulation of its use of public money.