A Solution in Search of a Problem: Revisiting the Title X “Gag Rule”

The national family planning program, Title X of the Public Health Service Act, was established in 1970 with broad bipartisan support. The program provides federal funds for project grants to public and private nonprofit organizations to provide family planning information and services – services which improve maternal and infant health, lower the incidence of unintended pregnancy, reduce the incidence of abortion, and lower rates of sexually transmitted diseases (STDs). The program’s FY 2008 appropriation will enable clinics to provide services to nearly five million clients in more than 4,400 clinics nationwide.

The Title X program is statutorily prohibited (section 1008) from paying for abortion services. Title X clients facing unplanned pregnancies are entitled to nondirective options counseling about a full range of options, including abortion, if they request it. Program regulations and guidelines issued in 2000 codified with the force of law the mandate that pregnant women be offered neutral and factually accurate information about all of their legal medical options, including "prenatal care and delivery; infant care, foster care, or adoption; and pregnancy termination," as well as referrals for services, including abortion, upon request. The regulations and guidelines also require Title X projects to be separate and distinguishable from abortion-related activities, although complete physical separation is not required.

Despite these severe and explicit restrictions, 80 conservative advocacy groups led by the Family Research Council (FRC) sent a letter in early May 2008 to President Bush urging him to implement regulations that would prohibit family planning providers in the United States from receiving funding through Title X of the Public Health Service Act if they refer patients for abortion services or share facilities with abortion providers. These conservative leaders are insisting that President Bush implement similar regulations through a simple order that would go into effect after a brief public comment period. The request comes amid the traditional end of the term scramble to use federal regulations to implement policy goals that cannot be achieved through legislation.

Background:

In 1988, the Reagan Administration promulgated a regulation – quickly dubbed the “gag rule”-- which prohibited health care professionals in Title X family planning clinics from providing abortion information or referrals to a woman facing an unintended pregnancy, even when she specifically requested such information. In addition, the gag rule required physical and financial separation of a clinic's privately funded abortion-related activities from its Title X project activities.

The rule was challenged in court on the grounds that it interfered with medical providers’ First Amendment right to free speech and their ability to discuss the full range of medical options with patients. The rule was ultimately upheld in a 1991 Supreme Court decision, Rust v. Sullivan, by a 5-4 vote. The Court agreed with lower court rulings that the regulation was a permissible exercise of executive authority. The rule was opposed by 78 major national health organizations, 36 state health departments and the nation's 25 schools of public health.
In 1991, Congress voted to approve an appropriations bill explicitly allowing options counseling for pregnant women that included discussion of abortion. President George Herbert Walker Bush vetoed the bill. The Senate subsequently overrode the veto (73-27) but the House failed to do so by 12 votes. In 1992, a second gag rule fight took place in the context of a Title X reauthorization bill, which also explicitly allowed full options counseling. This bill was approved by Congress but, once again, vetoed by President Bush. This time, the effort to override the President’s veto fell just 10 votes short in the House. Key to the failure to override the veto was a letter from the President allowing physicians to counsel or refer patients for abortion, but not other health care professionals who often provide the bulk of services at Title X clinics.

In 1992, the Bush Administration’s new policy was challenged in court by the National Family Planning and Reproductive Health Association (NFPRHA). The U.S. court of appeals in NFPRHA v. Sullivan ruled that the Administration had violated the Administrative Procedures Act by reinterpretating the regulation without allowing the public an opportunity to comment on the change. Ultimately, the gag rule was in effect for only one month in 1992.

That is because, as one of his first acts, President Clinton issued an executive memorandum suspending the gag rule on January 22, 1993. The Department of Health and Human Services codified President Clinton’s Presidential Memorandum in revised regulations issued on July 3, 2000. The new rule required Title X projects to provide patients with complete factual information about all medical options and the accompanying risks and benefits as well as referrals for abortion if requested. The regulations also make clear that non-Title X abortion activities must be separate and distinct from Title X project activities but do not require physical separation.

**Abortion Counseling and Referral:** The regulations and guidelines outline strict limits on the parameters of the nondirective counseling and referrals. The rules specify that a project must offer pregnant women the opportunity to receive information and counseling regarding each of the following options:

- (A) Prenatal care and delivery;
- (B) Infant care, foster care, or adoption; and
- (C) Pregnancy termination.

If requested to provide such information and counseling, provide neutral, factual information and nondirective counseling on each of the options, and referral on request, except with respect to any option(s) about which the pregnant woman indicates she does not wish to receive such information.

The regulations also make clear that, while a Title X project may provide a referral for abortion, which may include providing a patient with the name, address, and telephone number of an abortion provider, the project can’t take any further steps, such as negotiating a fee reduction, making an appointment, or providing transportation to secure abortion services for the patient. In addition, a referral for an abortion is only given upon request.

**Why is a gag rule bad public health policy?**
Limiting the speech of health care professionals in Title X settings creates legal and ethical issues for providers. Medical professionals are put in the no-win situation of choosing between giving patients complete medical information and complying with the gag rule. In fact, “informed consent” requires health care providers to fully disclose the range of options available to a patient, so that person can make a decision regarding treatment in a fully informed and self-determined manner. Obtaining informed consent is required by professional and ethical standards established by the American Medical Association and the American College of Obstetricians and Gynecologists, among others. Health care providers who do not comply with a patient’s right to full information could face medical malpractice. Most states recognize a legal right of recovery for a lack of informed consent.

A gag policy creates a two-tiered standard of care – one for low income women who would be deprived of full information and another for those with private insurance who have access to it.

Congress repeatedly said no to the gag rule on a number of different occasions. The most recent vote occurred in 1992, when Congress voted overwhelmingly to require full pregnancy options counseling, including discussion of abortion, under the Title X program.

A gag rule is at odds with legislative language in the FY2008 Omnibus Appropriations Act which requires pregnancy counseling provided under the program to be non-directive.

A woman facing an unplanned pregnancy who visits a Title X clinic and requests a referral to an abortion provider and is denied such information risks delaying safe and timely care, possibly jeopardizing her health.

The gag rule would force Title X clinics to choose between offering only government-approved information or foregoing federal funding. If they opt in favor of full disclosure and turn down federal funds, some clinics may be forced to close and low-income women will lose access to contraceptive services and related health care. This will only serve to compromise the health of low-income women and, by denying women access to contraceptives, lead to more unintended pregnancies and abortions.

Why are additional requirements related to the separation of family planning and abortion services unnecessary?

Current policies already require Title X projects to be separate and distinguishable from abortion-related activities.

The call for additional separation is based on the mistaken belief that Title X dollars help to fund abortion services. They do not.

The 2000 rule adequately addresses separation requirements, clarifying that Title X grantees must demonstrate in financial records, counseling and service protocols, and administrative procedures that abortions are not performed, promoted, or encouraged by projects receiving Title X funds. However, complete physical separation is not required.
Periodically, grantees undergo rigorous site reviews to ensure compliance with separation requirements and all other program requirements. No violation of the prohibitions on abortion-related activities has ever been documented in the program’s 37-year history.

According to the July 3, 2000 rule:

Non-Title X abortion activities must be separate and distinct from Title X project activities. Where a grantee conducts abortion activities that are not part of the Title X project and would not be permissible if they were, the grantee must ensure that the Title X-supported project is separate and distinguishable from those other activities. What must be looked at is whether the abortion element in a program of family planning services is so large and so intimately related to all aspects of the program as to make it difficult or impossible to separate the eligible and non-eligible items of cost.

The Title X project is the set of activities the grantee agreed to perform in the relevant grant documents as a condition of receiving Title X funds. A grant applicant may include both project and nonproject activities in its grant application, and, so long as these are properly distinguished from each other and prohibited activities are not reflected in the amount of the total approved budget, no problem is created. Separation of Title X from abortion activities does not require separate grantees or even a separate health facility, but separate bookkeeping entries alone will not satisfy the spirit of the law. Mere technical allocation of funds, attributing federal dollars to non-abortion activities, is not a legally supportable avoidance of section 1008.

Certain kinds of shared facilities are permissible, so long as it is possible to distinguish between the Title X supported activities and non-Title X abortion-related activities: (a) A common waiting room is permissible, as long as the costs properly pro-rated; (b) common staff is permissible, so long as salaries are properly allocated and all abortion related activities of the staff members are performed in a program which is entirely separate from the Title X project; (c) a hospital offering abortions for family planning purposes and also housing a Title X project is permissible, as long as the abortion activities are sufficiently separate from the Title X project; and (d) maintenance of a single file system for abortion and family planning patients is permissible, so long as costs are properly allocated. Whether a violation of section 1008 has occurred is determined by whether the prohibited activity is part of the funded project, not by whether it has been paid for by federal or non-federal funds. A grantee may demonstrate that prohibited abortion-related activities are not part of the Title X project by various means, including counseling and service protocols, intake and referral procedures, material review procedures, and other administrative procedures.

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