S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
500 CHARLOTTE AVENUE
NASHVILLE, TENNESSEE 37243

June 6, 2007

Opinion No. 07-89

Withholding Title X Funds from Planned Parenthood

QUESTIONS

A proposed amendment to the current appropriations bill provides as follows:

> No funds shall be expended under this act for any contract entered into with Planned Parenthood of Middle and East Tennessee and Memphis Regional Planned Parenthood for the provision of family planning services unless the commissioner of health certifies the department of health has examined alternative means of providing such services with either department resources or with alternative providers and that no such alternative means of delivery is available.

Title X of the Public Health Service Act provides project grants to public and private agencies for family planning services. Services provided pursuant to Title X and the regulations promulgated thereunder include preventive health services, *e.g.*, education and counseling, breast and pelvic exams, cervical cancer screenings, STD screenings, pregnancy testing and contraceptive services, supplies and counseling.

1. Who is eligible to apply for grant funding pursuant to Title X?

2. If an applicant meets the requirements to receive grant funding pursuant to Title X, can the General Assembly restrict the distribution of those funds?

3. Is the proposed amendment constitutional?

OPINIONS

1. Any public or nonprofit entity in a State may apply for a grant. The project must not provide abortion as a method of family planning.

2. No. In accordance with a recent decision of the Fifth Circuit Court of Appeals concerning a similar legislative restriction, it is our opinion that the proposed appropriations amendment is impliedly preempted by Title X statutes and regulations and thus unenforceable.

3. Because the proposed appropriations amendment is impliedly preempted by Title X statutes and regulations, it is unconstitutional under the Supremacy Clause. Additionally, because the funding restriction contained in the amendment singles out Tennessee Planned Parenthood organizations, it raises equal protection concerns under the federal and state constitutions. We are unaware of any legally valid justification for the proposed withholding of funding and thus conclude it is constitutionally suspect on equal protection grounds as well.

ANALYSIS

1. Relevant to the issues about which you have inquired, 42 C.F.R. § 59.3, a United States Department of Health and Human Services ("HHS") regulation adopted pursuant to Title X (42 U.S.C. §§ 300 *et seq.*), provides that:

> Any public or nonprofit entity in a State may apply for a grant under this subpart.

"Nonprofit" means that no part of the entity's net earnings may benefit any private shareholder or individual. 42 C.F.R. § 59.2.

42 C.F.R. § 59.4 sets out the process for applying for a grant. This regulation requires, *inter alia*, that the application must contain a satisfactory description of the project and how it will meet regulatory requirements, a budget and justification of the amount of grant funds requested, and a description of the standards and qualifications which will be required for all personnel and for all facilities to be used by the project. 42 C.F.R. § 59.4(c).

The requirements that must be met by a family planning project are detailed at 42 C.F.R. § 59.5. One such requirement is that the project must "[n]ot provide abortion as a method of family planning." 42 C.F.R. § 59.5(a)(5).[1] Any funds granted under Title X must be expended solely for the purpose for which the funds were granted in accordance with the approved application and budget, the governing regulations, the terms and conditions of the award, and applicable cost principles prescribed in federal regulations. 42 C.F.R. § 59.9.

2. *Planned Parenthood of Houston and Southeast Texas v. Sanchez*, 403 F.3d 324 (5th Cir. 2005) is a recent federal appellate decision that addresses your question. The litigation was initiated by six Texas Planned Parenthood entities that had been contractors in Texas's family planning program for many years. Pursuant to Title X's statutory requirements, the entities strictly segregated their Title X programs from their abortion-related activities to ensure that no federal funds were used for abortions. 403 F.3d at 327. In 2003, the Texas Legislature passed a general appropriations act that contained a rider restricting distribution of federal family planning money, including Title X funds:

---

[1]42 U.S.C. § 300a-6 also specifies that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning."

> Prohibition of Abortions
>
> a. It is the intent of the Legislature that no funds shall be used to pay the direct or indirect costs (including overhead, rent, phones and utilities) of abortion procedures provided by contractors of the department.
> b. It is also the intent of the legislature that no funds appropriated under Strategy D.1.2, Family Planning, shall be distributed to individuals or entities that perform elective abortion procedures or that contract with or provide funds to individuals or entities for the performance of elective abortion procedures.
> c. If the department concludes that compliance with b. would result in a significant reduction in family planning services in any public health region of the state, the department may waive b. for the affected region to the extent necessary to avoid a significant reduction in family planning services to the region. . .
> d. The department shall include in its financial audit a review of the use of appropriated funds to ensure compliance with this section.

The Planned Parenthood entities challenged the rider on several grounds, including a claim that it was impliedly preempted by federal statutes and regulations and thus unconstitutional under the Supremacy Clause of the federal constitution. Following the district court's grant of a preliminary injunction against enforcement of the rider, *Planned Parenthood of Central Texas, et al. v. Sanchez,* 280 F.Supp.2d 590 (W.D. Tex. 2003), the State of Texas appealed to the United States Court of Appeals for the Fifth Circuit.

In analyzing the implied preemption issue, the Court of Appeals began by reciting the "core principle" that such preemption occurs when "compliance with both federal and state regulations is a physical impossibility" or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 403 F.3d at 336 (citations omitted). It noted that federal regulations have no less preemptive effect than federal statutes. *Id.* The Court stated:

> Implied conflict preemption of the obstacle variety is at issue in this case as [Planned Parenthood is] claiming that [the Texas Department of Health] has impermissibly added conditions and impediments to the receipt of federal funds. It is the prerogative of Congress, within limits, to attach conditions to federal funds:
>
> > There is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any state law or

> regulation inconsistent with such federal terms and conditions is to that extent invalid.

Id. (citing *King v. Smith*, 392 U.S. 309, 333 n.34, 88 S.Ct. 2128 (1968)). The mere fact that a state program imposes an additional "modest impediment" to eligibility for federal funds does not provide a sufficient basis for preemption. However, a state eligibility standard that altogether excludes entities that might otherwise be eligible for federal funds is invalid under the Supremacy Clause. *Id*. at 336-337.

The Court of Appeals reviewed Title X statutes and regulations, including those cited at page 2 of this opinion, *i.e.*, 42 U.S.C. § 300a-6, 42 C.F.R. § 59.3, and 42 C.F.R. § 59.5. It also examined the "Standards of Compliance for Abortion-Related Services in Family Planning Services Projects" issued by the Secretary of HHS at the time of adoption of 42 C.F.R. §§ 59.1, *et seq.*[2] It noted that the compliance regulations state that there need not be complete physical separation between a Title X project and private abortion activities as long as the abortion activities receive no Title X funding and the Title X activities do not promote or encourage abortion; the Secretary has concluded that the financial audits of grant recipients are sufficient to uphold the government's interest in ensuring that funds are not used to provide abortions. 403 F.3d at 339. The Court quoted from the Supreme Court's decision in *Rust v. Sullivan*:

> The Secretary's regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities. Title X expressly distinguishes between a Title X *grantee* and a Title X *project*. The grantee, which normally is a health-care organization, may receive funds from a variety of sources for a variety of purposes. The grantee receives Title X funds, however, for the specific and limited purpose of establishing and operating a Title X project. The regulations govern the scope of the Title X *project*'s activities, and leave the grantee unfettered in its other activities. *The Title X grantee can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds*.

403 F.3d at 340 (emphasis in original) (quoting *Rust v. Sullivan*, 500 U.S. 173, 187-90, 111 S.Ct. 1759 (1991)).

The Court of Appeals concluded that "[u]nder Title X, then, abortion providers are eligible to receive family planning funding; Title X requires only that they use that funding for legitimate Title X purposes." *Id.* It held that the Texas appropriations rider would be preempted if: 1) it were

---

[2]These are published at 65 Fed. Reg. 41270, 2000 WL 870374 (July 3, 2000).

interpreted as prohibiting Planned Parenthood from continuing to receive federal funding even if it created independent "affiliates" separate from those performing abortions; or 2) the burden of forming such affiliates would in practical terms frustrate its ability to receive federal funds. 403 F.3d at 341-342.

The proposed Tennessee appropriations bill amendment about which you have inquired is more restrictive than the Texas appropriations rider at issue in *Planned Parenthood of Houston and Southeast Texas v. Sanchez*. Tennessee's amendment would entirely prohibit the Planned Parenthood organizations named therein from receiving any Title X funds unless the commissioner of health certifies that no alternative means of delivery of the family planning services is available. In accordance with the Fifth Circuit's *Planned Parenthood* decision, it is our opinion that the proposed appropriations amendment is impliedly preempted by Title X statutes and regulations and thus violates the Supremacy Clause.

3. As discussed above, we believe that the proposed appropriations amendment is constitutionally suspect under the Supremacy Clause. Additionally, because the funding restriction contained in the amendment singles out Tennessee Planned Parenthood organizations, it raises equal protection concerns under the federal and state constitutions.

Under traditional equal protection analysis, a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest. *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 533, 93 S.Ct. 2821, 2825 (1973). However, a bare legislative desire to harm a politically unpopular group cannot constitute a legitimate governmental interest. *Id*. at 534 (striking down Food Stamps Act amendment that Court determined had purpose of discriminating against hippies and hippie communes, without reference to some independent considerations in the public interest). Stated another way, legislation that imposes a disability on a single named group and does not advance any legitimate government interest will not survive rational basis scrutiny. *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 1627 (1996). The state may not invidiously discriminate and may not rely upon a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446, 105 S.Ct. 3249 (1985). That is, a law must be narrow enough in scope and grounded in a sufficient factual context for a court to ascertain that there exists some relation between the classification and the purpose it serves. *Romer v. Evans, supra*.

We are unaware of any justification under the equal protection clause for singling out the Tennessee Planned Parenthood organizations for this special restriction among all potential grant applicants who provide services similar to Planned Parenthood. Therefore, it is our opinion that the amendment is constitutionally suspect on equal protection grounds, as well as violative of the Supremacy Clause.

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

SUE A. SHELDON
Senior Counsel

Requested by:

The Honorable Beverly Robison Marrero
State Senator
3 Legislative Plaza
Nashville, Tennessee 37243