DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–1625/1dn
DAK:wlj:km

March 8, 2001

To Representative Gundrum:

1. I have redrafted LRB99–3027/1, with the changes requested by Ms. Mary Klaver on your behalf. The bill's language is similar to language enacted as section 10.715 (1), 89th Leg., 2d Sess. (Mo. 1998), which was reviewed by the 8th Circuit Court of Appeals in *Planned Parenthood of Mid–Missouri v. Dempsey*, 167 F.3d 458 (8th Cir. 1999) U.S. *cert.den–*, 120 SC 501 (1999). The language prohibits payment of the funds specified in s. 20.9275 (2), stats., to an organization or affiliate of an organization that provides abortions; promotes, encourages, or counsels in favor of abortion services; or makes abortion referrals either directly or through an intermediary in any instance other than when an abortion is directly and medically necessary to save the life of the pregnant woman. (For simplicity, I will refer to the funds as "family planning funds" and to the prohibited activities as "abortion–related activities.") Under the language as drafted, then, organizations are prohibited from receiving family planning funds if they are organizations or affiliates of organizations that provide abortion–related activities; put another way, to receive the family planning funds, they may not have any affiliation with an organization that provides abortion–related activities. However, please note that, if this is your intent, as it is expressed in the motion, the court in *Planned Parenthood v. Dempsey* found the language *unconstitutional*:

"In addition, Tier I would cross the line established in *Rust*, *League of Women Voters*, and *Regan*, and hence be an unconstitutional condition, if we interpreted it to prohibit grantees from having any affiliation with abortion service providers. . . . Accordingly, we construe the language of Tier I to allow a grantee to maintain an affiliation with an abortion service provider, so long as that affiliation does not include direct referrals for abortion. Under this construction, Tier I is not an unconstitutional condition, because it allows grantees to exercise their constitutionally protected rights through independent affiliates.

"To remain truly "independent" however, any affiliate that provides abortion services must not be directly or indirectly subsidized by a section 10.715 grantee. . . . No subsidy will exist if the affiliate that provides abortion services is separately incorporated, has separate facilities, and maintains adequate financial records to demonstrate that it receives no State family–planning funds." *Planned Parenthood v. Dempsey*, at 463.

The language proposed and drafted has none of the additions to it that the court in *Planned Parenthood v. Dempsey* finds necessary to make it constitutional. No opinion

exists in the 7th Circuit (of which Wisconsin is a part) that construes the language to have these additions. At this time, therefore, without more, the language appears under *Planned Parenthood v. Dempsey* to be unconstitutional.

2. The proposed and drafted language repeals s. 20.9275 (3m), stats., which states that restrictions under current law under s. 20.9275 (2) and (3), stats., on the authorization of payment and the use of federal funds passing through the state treasury shall apply only to the extent that the application of the restriction does not result in the loss of any federal funds. Thus, the bill eliminates protection to the state if the restrictions currently under s. 20.9275 result in a loss of federal funds.

3. Under the bill, the amendment to s. 20.9275 (3), stats., prohibits an organization that receives funds specified under s. 20.9275 (2), stats., from using any other public funds for an abortion–related activity, as specified under s. 20.9275 (2) (a), stats. Some of the organizations that receive these funds currently include organizations that are certified medical assistance providers. This prohibition appears to exceed the federal restrictions on the provision of medical assistance under the Hyde Amendment, since they make no exception for abortions in the case of rape; therefore, the prohibitions would place the state out of compliance with federal Title XIX (medicaid) requirements; potential loss to the state of federal medicaid money would not occur, however, under operation of s. 20.9275 (3m), stats.

Secondly, as proposed, the language is in conflict with s. 20.927, which permits use of public funds for performance of an abortion that is directly and medically necessary to save the life of the woman, in the case of sexual assault or incest (s. 20.927 (2) (a), stats.) or if the abortion is directly and medically necessary to prevent grave, long–lasting physical health damage to the woman (s. 20.927 (2) (b), stats.).

Lastly, the breadth of the prohibition, especially with respect to counseling in favor of an abortion and referral for an abortion, may impinge on the doctor–patient relationship to a degree that violates the First Amendment to the U. S. Constitution and article I, section 3, of the Wisconsin Constitution. Restrictions on counseling or referrals for abortion that were at one time placed on recipients of Title X funds were upheld in *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759 (1991). With respect to the First Amendment challenge, the court found that programs covered by the restrictions did not significantly impinge on the doctor–patient relationship because that relationship was "not sufficiently all–encompassing" given that the program "does not provide post–conception medical care." *Rust*, 500 U.S. at 200, 111 S. Ct. at 1776. By going further than the regulations at issue in *Rust* and extending restrictions on abortion counseling and referral to all activities of a physician who provides care under the affected funding, including activities involving prenatal care and pregnancy services, the prohibitions created in this draft may be more susceptible to a free speech challenge.

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