DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–1625/2dn
DAK:wlj:jf

April 24, 2001

To Representative Gundrum:

1. For this redraft, I have made the following changes, for the following reasons, to the material proposed by Ms. Mary Klaver as amendments to s. 20.9275 (2) (intro.) and (a) 2., stats., to incorporate language of the 1988 federal Title X regulations upheld in *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759 (1991):

a. I changed the phrase "including, but not limited to," where proposed, to "including," to avoid the redundancy inherent in the phrase and to comply with long–standing LRB drafting policy, as specified in our Drafting Manual, sections 2.01 (1) (i) and 7.08. Please note that when a statute (such as s. 20.9275 (2) (intro.), stats.) contains specific enumerations, they may undercut a statute's force by raising a question as to whether the statute applies to examples not enumerated or whether the statute applies only to examples of the same general type enumerated. In *Hatheway v. Gannett Satellite Network*, 157 Wis. 2d 395 (Ct. App. 1990), the court relied on two related canons of statutory construction: *ejusdem generis*, which holds that, when a general definition is followed by a list of specifics, the definition is limited to other examples of the same kind, class, or nature as the items listed; and *noscitur a sociis*, which holds that a word is known by its associates. In *Hatheway*, the statute in question had coupled the specific enumeration with language stating that the definition "shall be interpreted broadly to include, but not be limited to [the enumerated items]"; nonetheless, the court refused to broaden the applicability of the statute to include a classified ad section of a newspaper as a "place of business." Thus, it is not the phrase "but not limited to" that can provide support to a broad interpretation of items that are not specified, but, rather, the range of the specified items. In s. 20.9275 (2) (intro.), stats., the specified items are publicly funded programs; if it is your ultimate intent to limit public funding of abortion–related activities to publicly funded programs, the language, as drafted, appears to meet that goal. You may wish to review whether the enumerated examples in the material drafted (particularly in proposed s. 20.9275 (2) (a) 2. g.) provide a sufficiently broad range. Obviously, the definition in proposed s. 20.9275 (1) (am) in the draft has some of the same potential flaws.

b. The language proposed as an amendment to s. 20.9275 (2) (a) 2., stats., did not include all of the language of the federal regulations; specifically, it did not include reference to increasing the availability or accessibility of abortion for family planning purposes, and it did not include the phrase "as a method of family planning" for the

specified items or the definitions of "family planning" and "prenatal care" contained in the federal regulations. I have drafted all of these, because it is my understanding from Ms. Mary Klaver that you wished to duplicate the language of the federal regulations. In addition, the language is important with respect to the First Amendment challenge to the regulations at issue in *Rust v. Sullivan*; 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." *Id.*, at 200, 111 S. Ct. at 1776.

c. For s. 20.9275 (6) (a), I did not draft proposed language that stated "[T]o ensure that the state, a state agency or local governmental unit does not lend its imprimatur to an activity that is specified under sub. (2) (a) 1. to 3., and to ensure that an organization that engages in an activity that is specified under sub. (2) (a) 1. to 3. does not receive a direct or indirect economic or marketing benefit from program funds." This language is redundant to the prohibition involved; it also is, in effect, a statement of legislative intent, which we do not draft except as a separate statement in support of a statute that may be vulnerable to a constitutional challenge. I spoke with Ms. Klaver concerning this and suggested that she provide me with such a statement if, indeed, it is your intent to have it included and if, indeed, there appears to be a constitutional vulnerability that you wish to address.

d. I significantly changed the language proposed for s. 20.9275 (6) (intro.), to make it clearer, and throughout made minor technical changes. Also, note that I amended s. 20.9275 (2), stats., to make it subject to the newly created sub. (6).

2. I consulted Senior Attorney Robert Nelson concerning the "standing to enforce" language proposed for s. 20.9275 (8). We believe that, rather than an assertion of standing, what would best fulfill what appears to be your intent is a statement that authorizes a person to file a petition for a writ of mandamus or prohibition to enforce s. 20.9275, stats. The standing is automatically provided under this authority and it appears to be the most appropriate legal remedy for enforcement. It would be necessary, of course, for the person bringing the petition to fulfill the requirements for mandamus (the legal right to the action sought to be compelled, as provided by s. 20.9275 (8), is clear, specific, and free from substantial doubt), *Mazurek v. Miller*, 100 Wis. 2d 426, 430, citing *Eisenberg v. ILHR Department*, 59 Wis. 2d 98, 101 (1973). The definition of "person" in s. 990.01 (26), stats., which would govern this provision, is extremely broad, so it is unnecessary to specify, as proposed, that a legislator may file a petition.

3. Section 20.9275 (6) in this redraft permits the provision of public funding to an organization that is affiliated with an organization that engages in abortion–related activities, under specified restrictions. This language is, according to Ms. Klaver, current Missouri law. Several of the specific restrictions proposed and drafted appear to exceed the limit specified in *Planned Parenthood of Mid–Missouri v. Dempsey*, 167 F.3d 458 (8th Cir. 1999), U.S. *cert. den.*, 120 S. Ct. 501 (1999), however. The *Dempsey* court specified these restrictions as follows:

"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." *Id.*, at 463.

In s. 20.9275 (6) (a), as proposed and drafted, the publicly funded organization and its affiliate are prohibited from occupying the same building and sharing, among other things, the same or a similar name; equipment or supplies; services; employees; and databases. Further, s. 20.9275 (6) (c) prohibits separation of program funds from other moneys by means of bookkeeping alone; the language is not specific as to what other methods must be employed to demonstrate that the financial independence exists. *Dempsey* required only separate incorporation and facilities and "adequate" financial records; the restrictions appear to go beyond those requirements and, with respect to s. 20.9275 (6) (c), are vague.

4. Please note that I included an initial applicability provision, to prevent any potential impairment of contract issue from being raised under article I, section 10, of the U.S. Constitution or article I, section 12, of the Wisconsin Constitution.

5. 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 under s. 20.9275, stats., result in a loss of federal funds.

6. This redraft eliminates the words "that is" from s. 20.9275 (2) (intro.), stats., and substitutes the word "including." Because the change, in effect, broadens the applicability of s. 20.9275 (2) (intro.), stats., to any federal funds, and because the definition of "program funds" under s. 20.9275 (1) (f), stats., encompasses funds specified under s. 20.9275 (2) (intro.), stats., I have deleted the language "or any other public funds" as an amendment to s. 20.9275 (3), stats. By these changes, an organization that receives public funds may not use the funds for an abortion–related activity. A direct conflict then results with respect to s. 20.927, stats., 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.). To avoid this conflict, I have notwithstood those paragraphs in amending s. 20.9275 (2) (intro.) and (3), stats.

This effect of the amendments to s. 20.9275 (2) (intro.) and (3) appears to exceed the federal restrictions on the provision of medical assistance under the Hyde Amendment, since no exception is made for abortions in the case of rape; therefore, the prohibitions would place the state out of compliance with federal Title XIX (medicaid) requirements; although potential loss to the state of federal medicaid money would not have occurred, under operation of s. 20.9275 (3m), stats., that provision, as noted above, is eliminated.

Secondly, as proposed, the language is in conflict with s. 20.927, stats., 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 prohibitions, 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 the panoply of health care offered women under medical assistance, the prohibitions created in this draft may be more susceptible to a free speech challenge.

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