DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–1625/3dn
DAK:wlj:ch

May 7, 2001

To Representative Gundrum:

1. 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.

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 under s. 20.9275, stats., result in a loss of federal funds. Further, 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., an organization that receives public funds may not use the funds for an abortion–related activity.

The 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, is eliminated.

Secondly, as proposed, the language is in conflict with s. 20.927 (2), 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 under the 1988 federal regulations 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 and the services provided under s. 253.02, stats., the prohibitions created in this draft may be more susceptible to a free speech challenge.

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