DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–4932/1dn
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February 18, 2002

To Representative Liebham:

1. Section 20.9275 (6) in this draft 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. Mary 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. Lastly, the breadth of the prohibitions under s. 20.9275 (2) (a) 2., 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 and services provided under s. 253.02, stats., the prohibitions created in this draft may be susceptible to a free speech challenge.

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