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MEMORANDUM

TO: Amy R. Behnke, J.D.
Chief Executive Officer
Health Center Association of Nebraska

FROM: Jacqueline C. Leifer
Alexandra R. Rosenblatt

DATE: March 5, 2018

RE: Restrictions on Title X funding proposed in Legislative Bill 944

You have asked us to analyze whether Legislative Bill 944 is inconsistent with federal law to the extent it prohibits entities that make referrals for abortion services from receiving funds under Title X of the Public Health Service Act, 42 U.S.C. §300, *et seq* ("Title X"). As we explain in more detail below, we believe that the proposed language restricting Title X funding is inconsistent with federal law and therefore likely to be invalidated by a federal court.

Background

1. Title X Program

The Family Planning Program authorized under Title X provides grants to assist in establishing and operating voluntary family planning projects. 42 U.S.C. §300, *et seq*. The statute prohibits Title X funds from being used "in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. Congress has delegated to the Secretary of the Department of Health and Human Services (the "Department") authority to regulate Title X. 42 U.S.C. § 300a-4.

The Secretary's interpretation of Title X, particularly with regard to counseling and referrals related to abortions, has a complicated history. From 1972 until 1981, the Secretary took the position, through Advisory Opinions from the Department's Office of General Counsel, that Title X did not prohibit counseling and referrals related to abortions so long as the activity did not "have the immediate effect of promoting abortion or which did not have the principal purpose or effect of promoting abortion." 53 Fed. Reg. 2922-01, 2923 (Feb. 2, 1988). In 1981, the Secretary "went a step further and required Title X projects to engage in abortion-related activities under certain circumstances," such as when the patient requested a referral and when a referral was medically indicated. *Id.*

In 1988, the Secretary changed course by implementing the so-called "Gag Rule," which restricted the use of Title X funds to pre-pregnancy activities and prohibited such funds from being used for counseling or referrals related to abortions. *Id.* The Gag Rule was relatively short-lived. In 1993, the Secretary suspended the Gag Rule and announced a return to its

interpretation prior to 1988. 58 Fed. Reg. 7464-01 (Feb. 5, 1993). The interpretation announced by the Secretary in 1993 is still in place today.

In regard to pregnancy diagnosis and counseling, current Title X regulations specify that Title X projects must "[o]ffer pregnant women the opportunity to be provided information and counseling regarding each of the following options: (1) prenatal care and delivery; (2) infant care, foster care, or adoption; and (3) pregnancy termination." 42 C.F.R. §59.5(a)(5)(i). If a woman requests to receive such information and options counseling, the Title X project must "provide neutral, factual information and non-directive counseling on each of the options, and referral upon request, except with respect to any option(s) about which the pregnant woman indicates that she does not wish to receive such information and counseling." 42 C.F.R. §59.5(a)(5)(ii). Title X projects are also required to provide "necessary referral to other medical facilities when medically indicated." 42 C.F.R. §59.5(b)(1).

In July 2000, the Secretary provided further guidance on the meaning of the term "referral" as used in the regulation. Specifically, the Secretary explained that the term referral "may include providing a patient with the name, address, telephone number, and other relevant factual information (such as whether the provider accepts Medicaid, charges, etc.) about an abortion provider." 65 Fed. Reg. 41281 (July 3, 2000). A Title X project may not, however, "take further affirmative action (such as negotiating a fee reduction, making an appointment, providing transportation) to secure abortion services for the patient." *Id.*

The Secretary explained that a Title X project is also required to make a referral to abortion services "where a referral is medically indicated because of the patient's condition or the condition of the fetus (such as where the woman's life would be endangered)." *Id.* (referencing 42 U.S.C. 300a-6 and 42 C.F.R. §59.5(b)(1)). Where a referral is medically indicated, the limitations on referrals described above (negotiating a fee reduction, making an appointment, and providing transportation) do not apply. *Id.*

2. Legislative Bill 944

Legislative Bill 944 imposes certain restrictions on Title X funding. Specifically, the bill prohibits funds disbursed under Title X from being "paid or granted to an organization that performs, assists with the performance of, provides direct counseling in favor of, or refers for abortion." LB 944 at 45-46. The bill does not define the term "refers." The bill also broadly prohibits referrals with no exceptions for when the patient requests a referral or when the referral is medically indicated because of the patient's condition or the condition of the fetus.

Analysis

The Supreme Court holds that "under the Supremacy Clause, federal Spending Clause legislation" – like Title X – "trumps conflicting state statutes or regulations." *Missouri Child Care Ass'n v. Cross*, 294 F.3d 1034, 1041 (8th Cir. 2002) (citing *Blum v. Bacon*, 457 U.S. 132, 145–46, 102 S.Ct. 2355, 72 L.Ed.2d 728 (1982); *Carleson v. Remillard*, 406 U.S. 598, 604, 92 S.Ct. 1932, 32 L.Ed.2d 352 (1972); and *Townsend v. Swank*, 404 U.S. 282, 285, 92 S.Ct. 502, 30 L.Ed.2d 448 (1971)). The Supremacy Clause states that "the Laws of the United States … shall be the supreme Law of the Land." Art. VI, Cl. 2. The phrase "'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization." *City of New York v. F.C.C.*, 486 U.S. 57, 63, 108 S. Ct. 1637, 1642, 100 L. Ed. 2d 48 (1988). Federal law preempts state law, and thus renders it invalid, when, among other things, "compliance with both state and federal law is impossible [] or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699, 104 S. Ct. 2694, 2700, 81 L. Ed. 2d 580 (1984) (internal citations and quotations omitted).

The Secretary properly adopted the Title X implementing regulations in accordance with its statutory authorization. In *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991), the Supreme Court acknowledged that the statutory provision regarding abortion in Title X is ambiguous because it "does not speak directly to the issues of counseling, referral, advocacy, or program integrity." *Id.* at 184. Because the statute is ambiguous, it is interpreted as containing a gap that Congress authorized the Secretary to fill. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44, 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694 (1984). Accordingly, the Supreme Court held that it "must defer to the Secretary's permissible construction of the statute." *Rust*, 500 U.S. at 187.

Although at the time of *Rust*, the Secretary had imposed the Gag Rule, the Supreme Court would likely defer to the Secretary's current interpretation that Title X requires referrals to abortion providers in certain circumstances. In fact, in *Rust*, the Supreme Court specifically recognized that "[a]n agency is not required to establish rules of conduct to last forever, but rather must be given ample latitude to adapt [its] rules and policies to the demands of changing circumstances." *Id.* at 186–87 (internal citations and quotations omitted). As a result, a court would likely consider the Secretary's Title X regulations to be a "Law of the United States" under the Supremacy Clause.

Compliance with both the Title X regulations and LB 944 is impossible, and therefore a court is likely to find that LB 944 is invalid. Title X regulations require grantees to make referrals to abortion providers under two circumstances: (1) when the patient requests such a referral and (2) when such a referral is medically indicated because of the patient's condition or the condition of the fetus. LB 944, on the other hand, broadly prohibits those referrals in any circumstances. As a result, it is impossible to comply with both Title X and LB 944.

In a decision binding on the State of Nebraska, the Eighth Circuit confronted the precise question presented here. *Valley Family Planning v. State of N.D.*, 661 F.2d 99 (8th Cir. 1981). The State of North Dakota had passed legislation providing that "no federal funds passing through the state treasury or a state agency shall be used as family planning funds by any person, public or private agency which performs, refers, or encourages abortion." *Id.* at 100 (quoting N.D.Cent.Code s 14-02.3 (1981)). The court held that the broad prohibition against referral services was inconsistent with Title X. *Id.* at 102. As a result, the court found that "the North Dakota statute is invalid under the Supremacy Clause." *Id*.

The budget rider commonly known as the Weldon Amendment does not change this result. In that amendment, the federal, state and local governments may not discriminate against a *health care entity* on the basis that the entity does not provide, pay for, provide coverage of, or refer for abortions. The Amendment does not mean that the State of Nebraska can pass legislation that conflicts with federal regulations implementing Title X.

Conclusion

To the extent that LB 944 prohibits referrals to abortion providers, it is inconsistent with Title X regulations. A court would likely find the prohibition against referrals preempted by federal law and therefore invalid.