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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

March 20, 2001

The Honorable George E. Campsen
Member, House of Representatives
320D Blatt Building
Columbia, South Carolina 29211

Dear Representative Campsen:

You have proposed a bill, H.3903, which has been introduced into the House of Representatives. You have asked that we review this legislation and issue an opinion as to "whether passage of the bill would result in a loss to the State of federal Title X family planning funds." You ask further that should this Office "conclude the bill would result in a loss of Title X funds, [that we] ... recommend any amendments to the bill that would avoid such a loss while still paying deference to parental rights."

Law / Analysis

H.3903 creates new Section 44-1-115 of the Code. This provision would require the Department of Health and Environmental Control to develop a database in which parents and guardians could register with DHEC their desire to prohibit either DHEC or any other agency from providing condoms or contraceptives to their children under 16 years of age. The Bill provides as follows:

Section 1. The 1976 Code is amended by adding:

> Section 44-1-115. (A) The Department of Health and Environmental Control shall develop a data base in which a parent, legal guardian, or one acting in loco parentis to a child under sixteen years of age may register in writing with the department prohibiting the department or another agency or department of the State from providing condoms or other types of contraceptives to their child.
>
> The department shall publish and distribute informational brochures to schools, physicians, and health agencies and facilities which include procedures for registration, and shall provide access to this information to

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> another department or agency of the State that provides condoms or other contraceptives to minors.

Section 2. The 1976 Code is amended by adding:

> Section 44-1-117. Notwithstanding another provision of law, the Department of Health and Environmental Control, another state agency or department, or a person acting on behalf of an agency or department may not distribute condoms or other types of contraceptives to a person under sixteen years of age if the child's parent, legal guardian or one acting in loco parentis has registered with the Department of Health and Environmental Control in accordance with Section 44-1-115.

Congress enacted Title X of the Public Health Act, which is also entitled the Public Health Service Act, in 1970. Title X is codified at 42 U.S.C. § 300 et seq. The design of Congress in enacting Title X was to make "comprehensive family planning services readily available to all persons desiring such services." Implementing regulations, promulgated pursuant to Title X, provide that such services must be provided without regard to age. Thus, adolescents are included as recipients. See, Planned Parenthood Fed. of America v. Heckler, 712 F.2d 650, 651-2 (D.C. Cir. 1983).

Moreover, it has been held by the courts that the distribution of contraceptives, including condoms, constitutes part of Title X's mandate. Court decisions have emphasized that the statute requires confidentiality. In that regard, the Court in Heckler stated that "Congress made clear that confidentiality was essential to attract adolescents to the Title X clinics; without such assurances, one of the primary purposes of Title X – to make family planning services readily available to teenagers – would be severely undermined." 712 F.2d at 659.

For that reason, a number of courts have squarely held that, consistent with Title X's requirements of confidentiality, a state may not impose the requirement of parental consent or parental notification upon the distribution of condoms to minors under Title X. See, Planned Parenthood v. Heckler, supra; Planned Parenthood Assn. of Utah v. Schweiker, 700 F.2d 710 (D.C. Cir. 1983); County of St. Charles, Missouri v. Missouri Family Health Council, 107 F.3d 682 (8th Cir. 1997); Jane Does v. Utah Dept. of Health, 776 F.2d 253 (10th Cir. 1985); Planned Parenthood Assn. of Utah v. Dundoy, 810 F.2d 984 (10th Cir. 1987); New York v. Heckler, 719 F.2d 1191 (2d Cir. 1983). As the Court emphasized in County of St. Charles,

> [a]ll of the circuits which have considered the validity of parental consent requirements for adolescents to receive Title X federal services have found them prohibited by statute, regardless of whether they are based on state law.

107 F.3d at 684. In the context of a Utah statute requiring parental notification, the Court in Planned Parenthood v. Matheson, 582 F.Supp. 1001, 1005 (D. Utah, 1983), concluded that such legislation

"would do major damage to the federal interests created by Title X by preventing Title X grantees from providing confidential services to eligible minors on request."

At the same time, Title X clearly expresses Congress' policy of encouraging family involvement with respect to teenagers' use of contraceptives. See, Planned Parenthood v. Heckler, supra. The House report accompanying its version of the bill concerning Title X, (subsequently enacted as an amendment in 1981) emphasized the "past Committee concern that in the process of contraceptive counseling, unmarried teenagers, where feasible, should be encouraged to involve their families in their decision about use of contraceptives." Id. at 659 (emphasis in case).

Thus, the issue is whether the proposed bill - H.3903 - conflicts with Title X to the extent that such conflict would result in jeopardizing the State's Title X funding. Of course, only the Department of Health and Human Services could make the final determination regarding the State's eligibility for federal funding if H.3903 were enacted into law. However, in our opinion H.4093 would not conflict with Title X requirements of confidentiality and a cutoff of federal funding is not warranted by passage of the legislation by the South Carolina General Assembly. Indeed, it is our opinion that the proposed legislation simply requires DHEC and other state agencies to effectuate preexisting parental instruction to their children regarding the use of contraceptives. The proposed bill, rather than constituting legislation mandating parental consent or notification when a minor receives contraceptives, is instead legislation which requires the State to recognize parents' fundamental constitutional right to teach and rear their children.

Parents have a fundamental liberty interest, protected by the 14th Amendment of the United States Constitution, in the care, custody and nurture of their children. In Wisconsin v. Yoder, 405 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), the Supreme Court elaborated upon parents' right to raise their children by stating the following:

> [t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty to recognize and prepare him for additional obligations .... [Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925).
>
> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. Pierce v. Society of Sisters, supra. And it is in recognition of this that these decisions have respected the private realm of family life which the State cannot enter. Prince v. Massachusetts, [321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944).
>
> The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

> The duty to prepare the child for "additional obligations "referred to by the Court, must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship.

406 U.S. at 232, 232, 92 S.Ct. at 1542.

Courts have recognized that parents have a constitutionally protected right to instruct their children not to obtain contraceptives from a publicly operated family planning clinic. In Doe v. Irwin, 615 F.2d 1162 (6th Cir. 1980), for example, a class action lawsuit was brought against a family planning clinic and the board members and administrators of a health department alleging that the center's practice of distributing contraceptives to unemancipated minors without parental notice violated the parents' constitutional right to rear their children. The Sixth Circuit Court of Appeals concluded that the clinic did not violate the parents' constitutional rights in this regard because the parents remained free to instruct their children not to use the clinic. The Court, in upholding the clinic's practices, wrote:

> [t]he State of Michigan, acting through the Center and defendants has imposed no compulsory requirements or prohibitions which affect rights of the plaintiffs. It has merely established a voluntary birth control clinic. There is no requirement that the children of the plaintiffs avail themselves of the services offered by the Center and no prohibition against the plaintiffs participating in decisions of their minor children on issues of sexual activity and birth control. The plaintiffs remain free to exercise their traditional care, custody and control over their unemancipated children.

615 F.2d at 1167 (emphasis added).

Moreover, in The Matter of Alfonzo v. Fernandez, 606 N.Y.S. 259 (1993), the New York Appellate Division struck down the New York program for voluntary distribution of condoms in high schools where the program made no provision for parental consent or for parents to "opt out" of the program. Parents sued, contending that the program violated their constitutional right to raise their children as they saw fit.

The Alfonso Court concluded that the distribution of condoms in the public schools of New York was a "health service" rather than a component of the schools' educational mission. The New York Appellate Division said that "[t]he supplying of condoms is conduct which constitutes a service separate and apart from education." 606 N.Y.S.2d at 262.

In addition, the Court recognized that parents possessed a fundamental "liberty" interest to raise their children as they see fit, including the ability to instruct them against the use of condoms. In the mind of the Court, the schools' program of condom availability unconstitutionally infringed upon the parents' constitutional rights to rear their children because parents were given no opportunity to insure that the school would not countermand their teachings of their children in this regard. The Court concluded as follows:

> [f]inally, the distribution can go forward without interfering with the petitioners' rights simply by allowing parents who are interested in providing appropriate guidance and discipline to their children to "opt out" by instructing the school not to distribute to their children without their consent. We are not blind to the possibility that children of parents who elect to "opt out" will become or remain sexually active, but in view of the access to condoms discussed previously this possibility cannot serve as a reason to interfere with the parents' right to discourage that behavior.
>
> We conclude that the condom availability component of the respondent's program violates the petitioners' constitutional due process rights to direct the upbringing of their children.

Id. at 266-7. (Emphasis added).

Finally, Parents United for Better Schools v. School District of Phil. Bd. of Ed., 148 F.3d 260 (3d Cir. 1998) is also particularly instructive. There, the Court of Appeals addressed the question on appeal whether "a board of education exceeded its authority by implementing a consensual program to distribute condoms in public schools in order to prevent disease." The condom distribution program gave parents the option of refusing to let their child participate. As part of the program, a parent was given the "absolute right to veto their child or children's participation in the program." Parents were given an "opt out" form which, if returned, insured that "the counselor will not supply the student with condoms." Id. at 263.

Parents sued the board on a variety of grounds. Among the contentions made was that the "opt out" provision was coercive, forcing "parents to affirmatively respond to insure their children do not participate in the condom distribution program." Parents claimed such "coercion" violated their Fourteenth Amendment "liberty" interest to raise their children in the manner which they saw fit.

The Court recognized that under Title X of the Public Health Service Act, the school board could not impose a blanket parental consent requirement. The Third Circuit quoted the District Court saying that "[i]f Pennsylvania's Minor Consent Act requires parental consent before providing contraceptives, it must yield to federal confidentiality requirements whenever a minor seeks contraceptives through [programs funded under this statutory scheme]." Likewise, a blanket parental consent requirement unconstitutionally intruded upon a minor's privacy rights.

By contrast, however, the Court concluded that the "opt out" alternative given parents violated the rights of no one. Again quoting the District Court with approval, the Third Circuit upheld the validity of the opt out provision:

> [s]o also, just as the condom program at issue here is not coercive upon the parents, nor is it coercive upon the students. Students may be compelled to attend school, but they are not compelled to participate in the condom program. Students use the health

> resource centers is entirely voluntary. Further, parents are free to instruct their children not to use the program and may even actively prevent their children's participation by sending an opt out letter to the school. In fact, the opt out provision encourages parental involvement by notifying them of the school program and permitting their children to use it. Because it allows parents to restrict children's in-school access to condoms, the provision gives parents more authority to control their children. The opt out provision supports, not burdens parental rights. Parents thus remain free to exercise their traditional care, custody and control over their emancipated children.

148 F.3d at 269, quoting 978 F.Supp. at 911.

In enacting the Bill, the General Assembly could reasonably determine that condom distribution to minors is not in the best interest of the child whose parent has opted out of such distribution. Studies continue to show that even if teenagers use condoms consistently and correctly, they still may not be protected from sexually transmitted diseases (STD's) that are transmitted by skin-to-skin contact rather than bodily fluids. This includes genital herpes and the dangerous HPV (Human Papilloma virus). HPV causes over 90% of cancer and precancer of the cervix which, in turn is causing the deaths of approximately 5,000 American women each year. Condoms offer almost no protection against HPV.

Moreover, S.C. Code Ann. Section 20-7-280 permits minors who have reached the age of 16 to procure health services including the receipt of contraceptives without the consent of their parents. See, Op. Atty. Gen. 1971-72 Op. No. 3364. Thus, the General Assembly, in enacting the proposed Bill would be treating the receipt of contraceptives by minors under the age of 16 as a health service consistent with § 20-7-280.

Conclusion

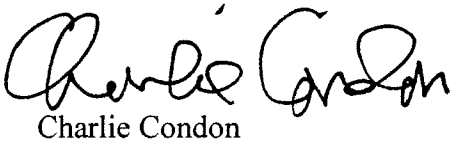
In summary, the proposed Bill, H.3903, does not interfere with a minor's privacy, but rather reinforces parents' responsibility. If parents say no to their children obtaining condoms, then DHEC must say no as well. Parents possess a fundamental constitutional right to raise their children as they see fit. The proposed Bill supports parents in the exercise of their constitutional right to rear their children. In other words, in our opinion, there is absolutely no interference by this Bill with federal law. There is absolutely no reason that enactment of this legislation should in any way jeopardize Title X funding.

The Bill simply requires agencies, such as DHEC, to give effect to parents' preexisting decision to teach their children to abstain from sex prior to marriage by instructing them not to obtain condoms or other contraceptives such as condoms. The decision of parents to teach their children abstinence from sex prior to marriage lies at the very heart of the parental rearing of children.

As has been pointed out in the decisions referenced above, federal law prohibits the acceptance of Title X funds, while at the same time the State imposes a blanket parental consent requirement prior to a minor's obtaining contraceptives from a Title X funded clinic. All of these decisions, however, also recognize that even under the federal constraints, a parent remains free to instruct his or her child not to go to a clinic seeking contraceptives.

Here, the proposed Bill simply recognizes and gives effect to the decision of those parents who have instructed their children not to seek contraceptives from DHEC or other agencies. Allowing parents to "opt out" their children from the distribution of condoms at a family planning clinic is a reasonable means of permitting parents to exercise traditional control over their children, and is legal. The Bill does not constitute discrimination against minors. A parental "opt out" system places no constraints upon Title X requirements because it merely requires the State to effectuate the parent's instruction to his or her child. This bill's parental "opt out" of condom distribution does not interfere with federal requirements and does not threaten federal funding.

Sincerely,



Charlie Condon
Attorney General

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