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ATTORNEY GENERAL OPINION NO. 89- 121

The Honorable Wanda Fuller
State Representative, Eighty-Seventh District
2808 Sennett
Wichita, Kansas 67211-3848

Re: Public Health Service--Population Research and
Voluntary Family Planning Programs--Prohibition
Against Funding Programs Using Abortion as Family
Planning Method; Provision Does Not Prohibit
Funding Entirely

Synopsis: The Kansas Department of Health and Environment
(KDHE), as agent of the Department of Health and
Human Services (DHHS), and the entities with whom
KDHE contracts, as subagents of DHHS, are
subject to the final decree issued by the United
States District Court for the District of
Massachusetts in Commonwealth of Massachusetts v.
Bowen, 679 F.Supp. 137 (D. Mass. 1988),
enjoining the enforcement and application of the
regulations published at 52 Fed. Reg. 2944-2946
(February 2, 1988), including without limitation
those regulations appearing at 42 C.F.R. §§59.7,
59.8, 59-9 and 59.10, and the related definitions
appearing at §59.2. A partial effect of these
regulations, which expanded the definition of
"federal funds" to include matching funds and
income from fee paying clients, would have been to
prohibit health clinics from obtaining membership
in or supporting organizations whose lobbying
activities advocated abortion, and to deny federal
grant funds to health clinics which provided
abortion counseling or referrals, even though the
activities were supported through nonfederal funds.

Cited herein: 42 U.S.C. §300a (1982); 42 C.F.R.
§§59.2; 59.7-10.

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Dear Representative Fuller:

As Chairman of the Sedgwick County Delegation, you request our opinion regarding the permanent injunction issued by the United States District Court for the District of Massachusetts in Commonwealth of Massachusetts v. Bowen, 679 F.Supp. 137 (D. Mass. 1988). Specifically you ask whether the injunction extends to parties such as the Wichita-Sedgwick County Board of Community Health who contract with the Kansas Department of Health and Environment.

The purpose of Title X of the Public Health Service Act, 42 U.S.C. §300 et seq. (1982), is to assist in the establishment and operation of voluntary family planning projects through the awarding of grants to public or nonprofit private entities. To achieve this purpose, the Secretary of Health and Human Services is authorized to "make grants . . . to State health authorities to assist in planning, establishing, maintaining, coordinating and evaluating family planning services." 42 U.S.C. §300a. Because the state health authorities are interested in the development and operation of family planning projects, the state health authorities may stand as agents of the Department of Health and Human Services (DHHS).

Authority can be vested in an agent to do for his principal any lawful act performable by the principal whenever the act involved is not of such character that it can be done only in person. An agent cannot do what the principal himself could not honestly or lawfully have done. 2A C.J.S. Agency §144, p. 765. When the agent obviously lacks the authority to do a particular act, the agent lacks authority to delegate its performance to a subagent. 3 C.J.S. Agency §257, p. 18.

The Kansas Department of Health and Environment (KDHE) has received Title X funding for the purpose of developing and operating family planning projects, thereby becoming an agent of DHHS. KDHE has in turn delegated its authority to such entities as the Wichita-Sedgwick County Board of Community Health, thus placing these entities in the position of subagent to DHHS.

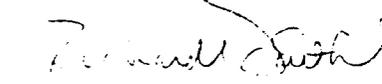
The final decree issued by the United States District Court for the District of Massachusetts states that:

"1. The defendant in his capacity as Secretary of the Department of Health and Human Services and all officers, agents, employees and attorneys of said Department are enjoined from enforcing or applying the regulations published at 52 Fed. Reg. 2944-2946 (February, 2, 1988), including without limitation those regulations appearing at 42 C.F.R. §§59.7, 59.8, 59.9 and 59.10, and the related definitions appearing at §59.2, against these plaintiffs and the entities they represent, in any manner either directly or indirectly, anywhere within the United States." (Emphasis added, footnote omitted.) Commonwealth of Massachusetts v. Bowen, supra, at 148.

Because of its standing as an agent of DHHS, KDHE is subject to the injunction issued in Massachusetts. Any entities to whom KDHE delegates its obligations stand in the position of subagent. As KDHE cannot grant the authority to enforce or apply the regulations published at 52 Fed. Reg. 2944-2946 (February 2, 1988), the subagents are also unable to enforce or apply those regulations. The Wichita-Sedgwick County Board of Community Health is therefore subject to the injunction issued in Commonwealth of Massachusetts v. Bowen.

Very truly yours,


ROBERT T. STEPHAN
Attorney General of Kansas


Richard D. Smith
Assistant Attorney General

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