National Institute for Reproductive Health

After *NIFLA:* What Cities Can Do Protect Their Residents from Deception and Expand Access to Reproductive Healthcare

November 2018

Local Regulation of Deceptive Practices of "Fake Clinics" or "Crisis Pregnancy Centers"

Fake clinics, sometimes called crisis pregnancy centers, are organizations that have the core goal of persuading pregnant women and teens to choose motherhood or adoption over abortion by pushing medically inaccurate information, using deceptive advertising, and engaging in a variety of other dishonest tactics to lure women who are seeking care and information about their full range of health care options into visiting their facilities. At these facilities, women are often given misinformation about pregnancy, abortion, their own health and their rights. These facilities have been steadily proliferating all over the country and now far outnumber abortion clinics nationally. Fake clinics also target low-income women, women of color, and women on college campuses by positioning themselves in or near these communities and advertising directly to them.

For over a decade, cities and counties around the country have considered ways to address the organizations' deceptive practices in a few different ways. Baltimore, Montgomery County, Austin and New York City all passed ordinances requiring these types of facilities to post certain signs about the services they do and do not provide – while several of those were struck down, New York City's law was upheld in large part and is currently in effect. Hartford, Connecticut recently enacted a similar ordinance. In Wisconsin, Dane County enacted an ordinance ensuring that any organization or facility that contracts with the county to provide medical care must provide only medically accurate information with those public funds. San Francisco took a different tact, enacting a law aimed at the deceptive advertising used by fake clinics to "lure" women seeking reproductive healthcare into their facilities. That law was also upheld. While the California law called the FACT Act, discussed in detail below, was struck down, cities around the country have recognized the problem and, after *NIFLA,* continue to have options for protecting their residents from deception and for promoting access to comprehensive, non-judgmental reproductive health counseling and services.

National Institute for Reproductive Health

Background on *National Institute of Family and Life Advocates (NIFLA) v. Becerra*

On June 26, 2018, the Supreme Court decided *NIFLA v. Becerra*, a case considering the constitutionality of the California FACT Act. The FACT Act had two pieces: First, licensed pregnancy had to post or distribute a statement that "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]." Second, unlicensed pregnancy centers had to post signs in their facilities and put disclaimers in their advertising and websites that: "[t]his facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services" in multiple languages and in a "clear and conspicuous" manner. NIFLA (the National Institute for Family and Life Advocates), which operates 100 unlicensed and licensed pregnancy centers (often called CPCs or fake clinics) in California sued the state, alleging that the statute violates its First Amendment speech and religion rights. The Court held that both provisions of the FACT Act are likely unconstitutional under the First Amendment's Free Speech Clause and remanded the case down for further proceedings.

Key Takeaways from the Decision

- The Court found that both provisions likely violated the First Amendment rights of these fake clinics because they compel the facilities to engage in speech to which they object.

- With regard to the licensed facilities, the Court specifically objected to the fact that the California law required the facilities, which are anti-abortion at their core, to mention abortion and to provide information about where to obtain a service that the Court deemed "controversial." In addition, the Court held that California had other, more effective ways of communicating about its own Medi-Cal program that would not have burdened speech, and that this requirement was not "narrowly tailored" enough.

- With regard to the unlicensed facilities, the Court was most troubled by what it viewed as the burdensome nature of the specific requirements of the law rather than the overall concept of requiring such a disclosure. The Court pointed to the facts that the disclosures were required to be made in all advertisements, in potentially many languages and in large font that might "drown out" the facilities' original message. The Court noted that it was not deciding here whether other laws with similar disclosure requirements but supported by a stronger record, with clearer evidence of the state's interest, and with less burdensome requirements, could be constitutional.
- Although the decision seems to imply that the First Amendment offers incredibly strong protection against compelled speech, the Court also held that this decision was not broad enough to change the standards by which other types of laws should be

National Institute for Reproductive Health

reviewed, such as abortion counseling requirements or standard disclosure laws mandated by the government from everything to cars to toothpaste.

- The entire Court, including the majority, concurrence and dissent, all seemed concerned about the way the statute appeared to be targeted at those who hold anti-abortion beliefs. Although the decision did not reach the issue, it is clear the Court would carefully review a similar statute for "viewpoint discrimination," meaning discriminating against someone because of their viewpoint. Viewpoint discrimination is virtually always unconstitutional.

Regulating Fake Clinics After *NIFLA*

Depending on the needs of your community, NIRH believes that the below policy options are still available to cities and counties seeking to address the deception and harms caused by fake clinics.

- Consider publicly funded public education campaigns: The Court stated that California could have met its own goals in a variety of ways, including through a "public information campaign" or "could even post the information on public property near crisis pregnancy centers." New York State and New York City have already begun engaging in public education campaigns, paired with educational materials about where women who are pregnant or think they might be can get comprehensive, non-judgmental reproductive healthcare.
- Engage in advocacy-based public education campaigns, which advocates in some states, including California, Colorado and West Virginia, have already done, such as putting up billboards informing the community that there are a certain number of fake clinics in their town or state.
- Prohibit false and misleading advertising at the city or state level.
- Determine whether the medical professionals who staff some of these facilities are following proper medical and ethical standards, and follow up with the right authorities if they are not.
- Enforce existing consumer fraud statutes where applicable.
- Ensure that any fake clinics receiving public money cannot use that money to lie to women.
- Because in some situations, requiring unlicensed facilities that pose as medical facilities to disclose that they are not medical facilities may be constitutional, such policies may be worth consideration in the future.

To learn more about these ideas and for assistance in determining what might be right for your city, contact Jenny Dodson Mistry, Senior Manager of Special Initiatives, at jmistry@nirhealth.org.