

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

THE FAMILY PLANNING ASSOCIATION)
OF MAINE D/B/A MAINE FAMILY)
PLANNING *et al.*,)

Plaintiffs,)

v.)

Case No. 1:19-cv-00100-LEW

UNITED STATES DEPARTMENT OF)
HEALTH AND HUMAN SERVICES *et al.*,)

Defendants.)

_____)

**STATEMENT OF UNDISPUTED MATERIAL FACTS IN
SUPPORT OF DEFENDANTS’ MOTION TO DISMISS OR,
IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

Pursuant to Local Civil Rule 56(b), Defendants submit the following statement of material facts as to which there is no genuine issue in support of their motion to dismiss or, in the alternative, for summary judgment. Defendants note that because this case arises under the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*, “the traditional Rule 56 standard does not apply,” *Bennett v. Murphy*, 166 F. Supp. 3d 128, 139 (D. Mass. 2016), and the Court reviews the challenged agency action “not to determine whether a dispute of fact remains but, rather, to determine whether the agency action” was consistent with the APA standard of review. *Boston Redevelopment Auth. v. Nat’l Park Serv.*, 838 F.3d 42, 47 (1st Cir. 2016).

1. Congress enacted Title X of the Public Health Service Act in 1970. *See* Pub. L. No. 91-572, 84 Stat. 1504.

2. The Department of Health and Human Services (HHS) promulgated regulations on February 2, 1988 that, among other things, prohibited Title X projects from referring patients for

abortion as a method of family planning and required Title X programs to be physically separate from abortion-related activities. 53 Fed. Reg. 2922 (Feb. 2, 1988).

3. The Supreme Court upheld these 1988 regulations against challenges brought under the APA and the Constitution. *See Rust v. Sullivan*, 500 U.S. 173 (1991).

4. Congress has not amended Title X since *Rust* was decided.

5. The 1988 regulations were suspended in 1993. 58 Fed. Reg. 7455 (Jan. 22, 1993); 58 Fed. Reg. 7464 (Feb. 5, 1993).

6. On July 3, 2000, HHS promulgated regulations that (1) required Title X projects to offer and provide upon request “information and counseling regarding” specific options, including “[p]regnancy termination,” followed by “referral upon request,” and (2) eliminated the physical-separation requirement from the 1988 regulations. 65 Fed. Reg. 41,270 (July 3, 2000).

7. On June 1, 2018, HHS issued a notice of proposed rulemaking (NPRM) relating to the Title X program. 83 Fed. Reg. 25,502 (June 1, 2018).

8. HHS received more than 500,000 comments on the NPRM, but none of the comments argued that the proposed rule would violate the “Access to therapies” provision of the Affordable Care Act, 42 U.S.C. § 18114.

9. On March 4, 2019, HHS promulgated a final rule that prohibits Title X projects from providing referrals for, or engaging in activities that otherwise encourage or promote, abortion as a method of family planning. 84 Fed. Reg. 7714 (Mar. 4, 2019) (Rule). The Rule also requires that Title X projects remain physically separate from any abortion-related activities conducted outside the program.

10. Plaintiffs filed a lawsuit under the APA challenging the Final Rule on March 6, 2019. ECF No. 1.

11. The basis for the Rule is set forth in the preamble to the Rule, located in the Federal Register at 84 Fed. Reg. 7714 and in the administrative record.

Dated: January 16, 2020

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

MICHELLE R. BENNETT
Assistant Branch Director

/s/ R. Charlie Merritt
R. CHARLIE MERRITT (VA Bar No. 89400)
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
919 East Main Street, Suite 1900
Richmond, VA 23219
Telephone: (202) 616-8098
robert.c.merritt@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2020, I electronically filed the foregoing document using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF system.

/s/ R. Charlie Merritt
R. CHARLIE MERRITT