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A S S O C I A T E D B A P T I S T P R E S S

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CONTACT: Greg Warner (904) 396-2351 ext. 302
Don McGregor (601) 885-8283

SBC COVERAGE: Associated Baptist Press will provide coverage of the Southern Baptist Convention June 4-6 in Atlanta. The normal Thursday release of ABP (June 6) will be delayed until Friday, June 7, in order to include stories about the SBC. To reach us during the convention, you may call the SBC press room at (404) 222-5005 or the Hyatt hotel at (404) 577-1234. Thanks.

May 30, 1991

High court upholds ban on abortion counseling

By Larry Chesser

WASHINGTON (ABP) -- A sharply divided U.S. Supreme Court has upheld a ban on abortion counseling and referrals at federally funded family planning centers.

In a 5-4 ruling announced May 23, the high court rejected statutory and constitutional challenges to 1988 Department of Health and Human Services regulations that restricted abortion-related activities at the family planning centers.

The revised regulations issued by HHS Secretary Louis Sullivan reinterpreted the following section of the statute authorizing the federal family planning program: "None of the funds appropriated under this title shall be used in programs where abortion is a method of family planning."

Previously the department had interpreted the federal statute as barring abortion services but not abortion counseling or referrals.

The high court majority affirmed decisions by a federal district court and the 2nd U.S. Circuit Court of Appeals upholding the regulations. The ruling also resolved a split among U.S. Circuit Courts of Appeal created by rulings against the regulations in the 1st and 10th Circuit Courts.

The court ruling came one day after the U.S. House of Representatives voted 220-208 to reverse a 3-year-old Pentagon policy restricting abortion services at overseas military bases. The amendment sponsored by Rep. Les AuCoin, D-Ore., would extend to U.S. service women and dependents stationed abroad the same abortion services or other reproductive health services available to their counterparts stationed in the United States.

Writing for the court majority, Chief Justice William H. Rehnquist acknowledged that the act did not specifically address

abortion counseling, referral or advocacy. He also noted that the statute's language and legislative history are ambiguous and that the department's revised interpretation of the statute is not the only acceptable interpretation. But in the absence of clear congressional intent, Rehnquist wrote, the court must defer to the department's interpretation.

Rehnquist also rejected arguments that the HHS regulations violated the free-speech rights of clinic owners, employees and patients as well as a woman's Fifth Amendment right to terminate a pregnancy.

"The Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected and may validly choose to fund childbirth over abortion," Rehnquist wrote.

The chief justice rejected the notion that the regulations amount to viewpoint-based discrimination. When Congress established the National Endowment for Democracy, he wrote, it was not required to establish similar programs to promote communism or fascism.

Rehnquist also rejected claims by opponents of the regulations that clients of federally funded planning centers are precluded by indigency and poverty from seeking an abortion elsewhere. Restraints on an indigent woman's ability to choose abortion are a product of her indigency, not governmental restrictions, he said.

A dissenting opinion filed by Justice Harry A. Blackmun was joined by Justice Thurgood Marshall and joined in part by Justices John Paul Stevens and Sandra Day O'Connor.

Blackmun said the regulation by HHS Secretary Sullivan "exceeds his statutory authority" and violates the First and Fifth Amendments of the Constitution.

"Until today, the Court never has upheld viewpoint-based suppression of speech simply because that suppression was a condition upon the acceptance of public funds," Blackmun wrote. "Whatever may be the Government's power to condition the receipt of its largess upon the relinquishment of constitutional rights, it surely does not extend to a condition that suppresses the recipient's cherished freedom of speech based solely upon the content or viewpoint of that speech."

Blackmun criticized the court majority's position that clinic physicians and counselors remain free to pursue abortion-related activities outside their duties at federally funded clinics.

"Under the majority's reasoning, the First Amendment could be read to tolerate any governmental restriction upon an employee's speech so long as that restriction is limited to the funded workplace."

"Until today," Blackmun said, "the court has allowed to stand only those restrictions upon reproductive freedom that, while limiting the availability of abortion, have left intact a woman's ability to decide without coercion whether she will continue her pregnancy to term. Today's decision abandons that

principle, and with disastrous results."

In a separate dissent, Justice Stevens argued that the statute "contains no suggestion that Congress intended to authorize the suppression or censorship of any information by any Government employee or by any grant recipient." Stevens also concurred in Blackmun's opinion that the regulations violate the Constitution.

In yet another dissent, Justice O'Connor wrote that because the statute's language does not require the department's interpretation and because the regulations raise serious First Amendment questions, she would invalidate the challenged regulations on statutory grounds without addressing the constitutional questions.

Justices Anthony M. Kennedy, Antonin Scalia, David Souter and Byron R. White joined Rehnquist in the majority ruling.

The case is Rust v. Sullivan, Secretary of Health and Human Services.

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Federal court of appeals
upholds parochial aid plan

WASHINGTON (ABP) -- A federal appeals court has rejected a lower court ruling that the way the Secretary of Education distributes remedial education funds to parochial schools violates the First Amendment.

In overturning a federal district court ruling in Pulido v. Cavazos, the 8th U.S. Circuit Court of Appeals approved the department's plan that results in a disproportionate allocation of federal remedial education dollars to private and parochial schools.

"This case illustrates how difficult it has become to get federal courts to enforce the religious liberty clauses of the First Amendment," said Oliver S. Thomas, general counsel of the Baptist Joint Committee on Public Affairs. "The lesson is plain: If Americans wish to preserve the separation of church and state, they must become more active in the legislative process."

The parochial school aid arrangement was challenged by a group of Missouri taxpayers, including Rudy A. Pulido, pastor of Southwest Baptist Church in St. Louis, and Americans United for Separation of Church and State.

The challenged regulations allow two sets of costs associated with providing remedial education to private and parochial schools to be taken "off the top" of a state's remedial education budget. One set of costs, known as "bypass costs," are additional administrative expenses incurred when outside contractors are used to provide remedial services to private schools.

The second set of expenses, known as "Felton costs," are expenses incurred in providing remedial education outside parochial school buildings. These expenses, which include such costs as mobile classrooms, arose after the U.S. Supreme Court

ruled in Aguilar v. Felton that public school teachers could not provide remedial instruction in parochial school classrooms.

Challengers of the plan argued that the off-the-top allocation method resulted in much higher per-pupil spending in private schools.

The Federal District Court for the Western District of Missouri agreed in part, holding that because of the small amount of money involved, "bypass costs" could be taken off the top of the federal allocation to Missouri. The court held that the "Felton costs" must be attributed to the state's private school allocation. In addition, the district court ruled against placement of mobile classrooms on parochial campuses but upheld placement of the classrooms on adjoining property.

The 8th Circuit reversed the parts of the case won by challengers, holding that "Felton costs" could be taken off the top of a state's allocation and that mobile classroom could be located on parochial school property.

A broad coalition of religious and educational groups, including the Baptist Joint Committee, filed a friend-of-the-court brief at the 8th Circuit, arguing that the parochial-aid plan was unconstitutional because it lacked a secular purpose, advanced religion and created excessive entanglement between government and religion.

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--By Larry Chesser

Dunn lashes plan to launder
parochial aid through parents

WASHINGTON (ABP) -- Laundering public funds by passing them through parents' hands to parochial schools does not eliminate the problems of using public funds for non-public purposes, James M. Dunn told a group of education, religious and civil-liberties representatives here May 22.

Dunn, executive director of the Baptist Joint Committee on Public Affairs, described a Bush administration proposal -- to encourage states and local school districts to provide vouchers to send children to private and parochial schools -- as a "back-door" method of funding such schools.

"It is a well-established principle of law that one cannot do through the back door what could not be done through the front," Dunn said.

The so-called "choice" segment of the administration's education reform package would authorize $200 million in federal grants in fiscal 1992 and "such sums as may be necessary" during the next four fiscal years for local school districts that allow parents to select the school, including private schools, their children attend.

The measure also would authorize $30 million in fiscal 1992 and "such sums as may be needed" during the next four years for

state and local school districts to conduct "choice" demonstration projects. Under the measure, Chapter 1 remedial-education services or funds would follow students participating in a "choice" program.

"Funny mental tricks are needed to justify taking public money for non-public purposes," Dunn said. "Defending voucher plans as indirect aid to religious institutions rather than direct support for sectarian schools is a distinction without a difference."

Dunn spoke to the National Coalition for Public Education, an umbrella organization of U.S. education, religious and civil-liberties groups.

He said educational vouchers are "a blatant attempt" to fund religious institutions through a governmental "back door."

Dunn cited former Supreme Court Justice William O. Douglas' opinion in the case of Abington v. Schempp, which states, "It is the use to which public funds are put and not to whom they are provided that is controlling. ... What may not be done directly may not be done indirectly lest the Establishment Clause become a mockery."

Church-related schools "hardly have a reason to exist without providing religious instruction and indoctrination," Dunn said, adding that "no fast book work by accountants, no shifting the government money from one pocket to another to maintain the fiction that no taxes teach religion will keep the ethical slate clean for a church school indirectly receiving federal funds."

Dunn also pointed to Supreme Court rulings that even indirect financial aid results in federal regulations.

"How in the world, then, when vouchers promise a morass of governmental regulations that many 'choice' supporters oppose, can any reasonably well-informed church leader indirectly invite 'regs' and guidelines? Why would anyone who pays even token tribute to separation of church and state welcome this false advertising in educational reform? 'Choice' indeed! It's more a matter of chance."

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