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Memorandum

TO: Members of the Legislative Audit Committee

FROM: Joanne Hill, State Auditor

DATE: April 10, 2002

RE: Family Planning Program - Planned Parenthood Review

At the request of the Legislative Audit Committee, the Office of the State Auditor reviewed the issues associated with the Colorado Department of Public Health and Environment's decision to not contract state-funded family planning services with Planned Parenthood of the Rocky Mountains (PPRM) in Fiscal Year 2002. In Fiscal Year 2002 PPRM would have received about \$382,000 to provide state-funded family planning services. In this memo we provide our findings and recommendations related to these issues.

Background

The Family Planning Program is administered by the Women's Health Section of the Department of Public Health and Environment. The purpose of the Program is to reduce unintended pregnancies and to make family planning services available to low income people statewide. Family planning services are provided by delegate agencies which include county departments of public health, county nursing services, hospitals, and private not-for-profit clinics.

In Fiscal Year 2002 the Women's Health Section, which includes the Family Planning, Prenatal, and Prenatal Plus Programs, was appropriated almost \$4 million. Of this amount, approximately \$2.2 million was allocated from federal funds under Title X of the Public Health Services Act, about \$1.7 million from the State General Fund, and about \$88,000 from cash funds exempt for the Prenatal Plus Program. The Department contracts with delegate agencies for the purchase of family planning services. Contract provisions state the type of services to be provided, the estimated number of target clients to be served, and the amount of funds each agency will receive. The delegate agencies also may receive funds from other sources such as client fees, local governments, and donations to help operate the Program.

In 1999 the Department issued a Request for Proposal and used a competitive bid procurement process for awarding family planning contracts for the first time in 20 years. At that time the Department established new eligibility requirements for agencies applying to receive state

family planning funds. According to the Department, the new requirements were implemented in order to comply with the Colorado Constitution.

In response to questions regarding the Request for Proposal, the Department provided the following information to prospective bidders:

To be eligible for state family planning funding, an applicant must be able to show that none of the state funds it would receive from the State of Colorado would be used to pay for or otherwise reimburse, directly or indirectly, any person, agency, or facility for performing an induced abortion. Therefore, a person, agency, or facility that performs induced abortions will not be eligible to receive state family planning funds. Also, an applicant that maintains an affiliation with a person, agency, or facility that performs induced abortions will not be eligible to receive state family planning funds, unless it can show that the affiliate is independent. The affiliate must be separately incorporated, maintain separate facilities, and maintain financial records which demonstrate the financial independence of the affiliate from the applicant. Any applicant meeting these conditions will be eligible to receive state family planning funds.

In order to meet the new eligibility requirements and receive state family planning funds, Planned Parenthood reorganized in 1999 and formed a separate corporation to oversee its abortion operations. After the reorganization PPRM provided family planning services and Planned Parenthood of the Rocky Mountains Services Corporation (Services Corp.) provided abortion and other services. According to the Department, based on its initial review of documents provided by PPRM and by reorganizing, PPRM appeared to have demonstrated sufficient independence to be in compliance with the Constitution. As a result, the Department issued a contract to PPRM in 1999 to provide family planning services.

In June 2001 the Department entered into an engagement with an independent accounting firm, Anderson & Whitney, to apply agreed-upon-procedures to determine if PPRM was separately incorporated, occupied separate facilities, and maintained financial independence from Services Corp. An agreed-upon-procedures engagement is not an audit, but is a contract to conduct specific limited procedures agreed to by both the Department and the independent firm. Specifically, Anderson and Whitney agreed to conduct the following procedures:

- Review the articles of incorporation and bylaws for PPRM and Services Corp to determine if information accurately represents current practice.
- Review the two most recent financial audits and most recent IRS forms 990 for indications the two organizations are not legally separate.
- Tour the PPRM and Services Corp. facilities in Ft. Collins, Durango, and Denver and determine if the two organizations appear to be sharing facilities. If a facility appeared to be shared, determine if there are separate entrances, physical barriers within the

building, separate signage, separate phone lines, and whether there is a cost sharing arrangement between the two organizations for the facility.

- Contact PPRM's financial auditors and inquire as to the type of financial transactions existing between PPRM and Services Corp. and whether there are indications that PPRM could be subsidizing Services Corp.
- Review most recent financial audits of PPRM and Services Corp. to identify financial interactions between the two organizations.
- Interview PPRM staff to determine what financial arrangements exist between the two organizations regarding one agency sub-leasing from the other, one agency selling equipment to the other, or one agency providing administrative or other personal services to the other. Review any written agreements regarding these arrangements.
- For each financial arrangement that existed, test a sample of transactions to determine whether the organization purchasing or receiving the services is paying the selling or providing organization's costs and the timing of the payment compared to the sale or provision of services.
- Review a sample of startup costs or transactions and the supporting documentation regarding the book value of assets sold or leased compared to the sales price or lease amount.
- Through the review of financial audits and inquiry, determine whether PPRM is guaranteeing loans or lines of credit from third parties on behalf of Services Corp. and whether PPRM is transferring funds to or giving donations to Services Corp.

After completing the agreed-upon-procedures, the independent firm's results indicated that the two organizations were financially separate, with two exceptions. The first comment was that Services Corp. needed to increase the amount it had on deposit, from \$100,000 to \$125,000, to cover the cost of services provided by PPRM. This deposit was to prevent creating any outstanding balances which could be construed as a loan by PPRM to Services Corp. The second comment related to lease rates for the three PPRM-owned facilities rented by Services Corp. The independent firm determined that "the lease rates for buildings in Durango, Colorado Springs, and Denver (Vine Street) leased to Services Corp. are based on PPRM's depreciation expense plus other direct costs" and concluded that "the cost reimbursements appear to be well under market lease rates, in order to meet statutory requirements for property tax exemption." Therefore, it was recommended that "lease rates be at fair market value, in accordance with the Property and Services Agreement" between PPRM and Services Corp.

Based upon the agreed-upon-procedures recommendation, the Department informed PPRM that to receive state family planning funds, it would have to charge Services Corp. lease rates consistent with fair market value in order to comply with constitutional requirements. In order to comply with Section 39-3-116(2)(c), C.R.S. and maintain its property tax exempt status,

however, PPRM held that it could not charge Services Corp. rental amounts equal to the fair market value of the properties. In addition, PPRM maintained that its Property and Services Agreement does not require that Services Corp. pay fair market value for the property. Instead, according to PPRM, the Agreement states that the rental amounts will reflect PPRM's costs associated with the properties plus one dollar. The Department raised this issue with the independent auditor who responded, "the point is that paying less than fair value does not demonstrate the independence of the affiliate and could be viewed as providing an indirect benefit to Services Corp." Because PPRM did not comply with the Department's request to charge Services Corp. fair market value for the properties, the Department determined that it could not contract with PPRM for state-funded family planning services in Fiscal Year 2002.

Constitutional Requirements Need to Be Clarified in Law

Based on our evaluation, it appears that most of the issues surrounding the Department's decision to not contract with PPRM to provide state-funded family planning services have resulted from a lack of clarity in the law. Article V, Section 50 of the Colorado Constitution states:

No public funds shall be used by the State of Colorado, its agencies or political subdivisions to pay or otherwise reimburse, either directly or indirectly, any person, agency, or facility for the performance of any induced abortion.

The Constitution, however, does not define what it means to pay or reimburse, either directly or indirectly. In addition, the General Assembly has not statutorily defined what these terms mean. In an attempt to functionally interpret this provision, the Department followed guidelines established in a 1999 8th Circuit United States Court of Appeals decision. This case involved Planned Parenthood of Mid-Missouri and Eastern Kansas and the Missouri Department of Health. Planned Parenthood challenged a Missouri law which prohibited organizations, or affiliates of organizations, that provide or promote abortions from receiving state family planning funds. In its decision the Court stated that an affiliate will be independent and "No subsidy will exist if the affiliate that provides abortion services is separately incorporated, has separate facilities, and maintains adequate financial records to demonstrate that it receives no State family-planning funds." The Colorado Department of Public Health and Environment adopted these requirements in 1999 and announced that "any applicant meeting these conditions will be eligible to receive state family planning funds."

PPRM created its Property and Services Agreement in 1999 to establish its eligibility pursuant to the Department's Request for Proposals and to qualify to receive a state family planning contract. In 2001, as a result of the agreed-upon-procedures engagement, the Department determined that PPRM's practices were not sufficient to demonstrate Services Corp.'s financial independence from PPRM. As a result, the Department informed PPRM that it must charge Services Corp. fair market value for rental properties in order to comply with the Constitution and receive state family planning funds. According to the Department, "paying less than fair market value lease rates does not demonstrate the necessary independence of the affiliate (Services Corporation) from the entity receiving state general fund dollars for the

provision of family planning services (Planned Parenthood of the Rocky Mountains)" and "may be viewed as providing an indirect benefit to Services Corporation." These changes reflected the Department's interpretation of the Constitution and the Court of Appeals' decision.

PPRM argues that state funds cannot be subsidizing abortions because state funds represent only 16 percent of PPRM's costs associated with providing family planning services. According to PPRM, in Fiscal Year 2001 it cost them about \$2.3 million to provide family planning services to the estimated 14,000 clients served. (These numbers were provided by PPRM and have not been audited by our office. In addition, due to IT problems PPRM was not able to provide us with an exact number of clients served.) For this time period PPRM received the following amounts from state and federal funds:

Planned Parenthood Family Planning Contracted Services and Funding Sources Fiscal Year 2001				
Type of Service	Estimated No. of Clients to Serve	Funding Source		
		Federal	State	Total
Family Planning Services	12,139 ²	\$507,443	\$318,805	\$826,248
Boulder County Patients	450	\$0	\$45,000	\$45,000
Expansion Project	155	\$31,500	\$0	\$31,500
Project GWYN	200	\$67,500	\$0	\$67,500
Contraceptive Supplies	0	\$1,000	\$0	\$1,000
TOTAL	12,944	\$607,443	\$363,805	\$971,248

Source: Fiscal Year 2001 contract between PPRM and the Department.

Note ¹: These services are to be provided to target clients which includes those at or below 150 percent of the federal poverty level and all adolescents.

² State General Funds were used to provide family planning services to approximately 4,700 target clients. Federal Title X funds were used to provide family planning services to approximately 7,300 target clients.

Also of note, is that it appears that specific non-abortion services were purchased in an open competitive process at or below market value, with market value established by organizations with and without abortion affiliates. According to the terms of the contract between the Department and PPRM, the family planning services purchased by the State were based on a semi-capitated arrangement with prescribed services. Unlike a block grant, PPRM had little discretion over how the state funds would be used.

Because neither the Constitution nor statutes clearly define what conditions must be met in order to receive state family planning funds, the Department has used its discretion to interpret and implement the constitutional provision. In addition to the effect this interpretation has on family planning services, the Department's interpretation may impact other state agencies and programs that contract with private organizations to provide health care services. Ultimately, the interpretation of this constitutional provision is a statewide policy issue that could potentially affect multiple state agencies and programs. Therefore, the General Assembly should consider clarifying the Constitution in statute.

Recommendation No. 1:

The Department of Public Health and Environment should propose legislation to clarify the constitutional provision which prohibits the public funding of abortions. This legislation should define what it means to indirectly reimburse or subsidize abortion activities, as well as establish what criteria would demonstrate sufficient independence to ensure state dollars are not used to fund abortions.

Department of Public Health and Environment Response:

Partially Agree.

Implementation Date: July 2003

If the General Assembly chooses to move forward and adopt legislation on this issue, the Department will be pleased to assist and comment as necessary.

It is the Department's position that the language of the Colorado Constitution regarding the limitation on the use of state funds to directly or indirectly pay or otherwise reimburse for the performance of any induced abortion is clear and unambiguous and that, in its authority as the state agency charged with the administration of state family planning program, the Department has properly exercised its authority in implementing this constitutional language.

The Department Should Establish Eligibility Criteria Through Regulation

Because the Constitution is subject to interpretation, the Department has established eligibility requirements for state family planning funds based on its interpretation of constitutional provisions and case law. After reviewing its governing statutes, however, we question whether the Department can establish these requirements without the benefit of rule-making by the State Board of Health.

According to Section 25-1-102, C.R.S., the Executive Director is responsible for administering the Department, subject to the authority of the State Board of Health. Section 25-1-108, C.R.S., specifies that the State Board of Health is "to determine general policies to be followed by the Division of Administration in administering and enforcing the public health laws" and "to adopt such rules and regulations, and to establish such standards as the Board may deem necessary or proper to...administer and enforce the public health laws of the state." According to these statutory provisions, the State Board of Health is responsible for developing general policies and for adopting rules to carry out these policies, while the Executive Director is responsible for administering and enforcing the rules and policies adopted by the Board. Consequently, the responsibility for establishing eligibility requirements for state family planning funds may have been more appropriately addressed by the Board.

When determining whether a Board-established policy should be adopted as a rule one must first consider what constitutes a rule. According to the State Administrative Procedures Act (APA), a rule is defined as an "agency statement of general applicability and future effect implementing, interpreting, or declaring law or policy or setting forth the procedure or practice requirements of any agency." It appears that the eligibility requirements established by the Executive Director would meet this definition because they constitute an agency statement of general applicability and future effect that interprets or declares law or policy for the Department. Therefore, any general policies implemented by the Department regarding eligibility requirements for state family planning funds should be adopted as a rule by the State Board of Health.

In order for the State Board of Health to adopt a rule, the APA requires that it follow formal rule-making procedures. These procedures include holding a public hearing at which interested persons have an opportunity to submit written data, views, or arguments and to present the information orally. In addition, all adopted rules must be submitted to the Office of Legislative Legal Services for review to determine if the rules are within the agency's rule-making authority and to the Legislative Committee on Legal Services to ensure the rules comply with statutes. Finally, an Attorney General's opinion must be provided for every rule. By going through the formal rule-making process, the Department and the State Board of Health would:

- Ensure that any rules adopted related to eligibility requirements for state family planning funds are consistent with the law and are within the Board's authority.
- Allow interested stakeholders an opportunity to present evidence and testimony supporting their position.

- Inform prospective applicants of the requirements that must be met in order to receive state family planning funds.

A condition of rule-making is that an organization must have statutory authority to promulgate rules in a particular area. While it appears that the State Board of Health may have this authority, the Department questions whether current statutes give them specific rule-making authority for the Family Planning Program. Therefore, the Department should seek clarification from the Attorney General's Office as to whether the Board currently has the appropriate rule-making authority. If the Attorney General's Office determines that the Board has the necessary authority, the Board should promulgate rules to establish eligibility requirements that must be met in order to receive state family planning funds. If the Attorney General's Office determines that the Board does not have the statutory authority needed to promulgate rules for the Family Planning Program, the Department should seek this authority through legislation. This legislation should be separate from the legislation proposed in Recommendation No. 1 which is intended to clarify the intent of the Constitution, but does not address the Board's rule-making authority.

Recommendation No. 2:

The Department of Public Health and Environment should seek clarification from the Attorney General's Office as to whether the State Board of Health has the statutory authority to promulgate rules for the Family Planning Program.

- If the Attorney General's Office determines that the Board has the authority, the Department should propose that the State Board of Health promulgate rules to establish eligibility requirements that must be met in order to receive state family planning funds. These rules should be consistent with any statutory changes that might result from Recommendation No. 1.
- If the Attorney General's Office determines that the Board does not have the authority, the Department should propose legislation that provides the Board with the authority to promulgate rules for the Family Planning Program. Once the Board obtains this authority, the Department should propose that the State Board of Health promulgate rules to establish eligibility requirements that must be met in order to receive state family planning funds.

Department of Public Health and Environment Response:

Partially Agree.

Implementation Date: September 2003

Historically, the Office of the Attorney General and the Office of Legislative Legal Services have advised the Department that the State Board of Health cannot promulgate rules without express statutory authority. The current family planning statutes, Article 6 of Title 25, C.R.S., do not include any authority to promulgate and adopt rules on this issue. However, the Department will seek a formal Attorney General's opinion in this matter.

Planned Parenthood's Contract Provisions Are Not Clear

Because the law is not clear on how to interpret the constitutional prohibition on the use of state funds for abortion activities, the Department relied on its own interpretation of the Constitution and case law. Based upon the results of our evaluation, however, we found that the Department should have reconciled the terms of PPRM's Property and Services Agreement before determining that PPRM was not eligible to receive state family planning funds.

During our review, we found the Property and Services Agreement contains conflicting provisions with respect to the amount PPRM should charge Services Corp. to rent clinic space for three abortion facilities. Specifically:

- The "Recital of Purpose & Intention" portion of the Agreement states "The express intention of the Parties is that PPRM shall perform in accord with this Agreement in return for the compensation set forth below, which has been established in keeping with fair market value and which shall be paid by Services Corporation to PPRM."
- However, the portion of the Agreement that specifically relates to the lease of real properties states that "Services Corp. shall pay to PPRM an amount reflecting PPRM's actual cost of owning, operating, and maintaining each of the leased premises, plus one dollar for each of the leased premises, as monthly rent."

Neither the Department nor the independent firm attempted to reconcile these seemingly contradictory provisions before determining that PPRM was not complying with its own agreement. In the absence of a legal opinion, both took the position that under the terms of the Agreement, PPRM was required to charge Services Corp. fair market value for the properties. However, neither acknowledged the significance of the language in the Agreement that specifically stated how the rental amounts should be determined. This language appears to clarify what is intended by both parties regarding PPRM's ability to charge fair market value.

In an attempt to reconcile these provisions, we requested the assistance of the Colorado Office of Legislative Legal Services (Legal Services). After reviewing the contract, Legal Services found that the terms of the Agreement could be subject to interpretation. One interpretation is that the more specific terms of the contract, which state that a market rate cannot be charged

because of constraints on non-profits, carry more weight than the general terms, which refer to fair market value. According to Legal Services, "to the extent there is a conflict between the provisions, the express rent provision would control. Recital provisions in a contract are used for purposes of establishing the intent of the parties, but are not considered part of the contract." However, in an attempt to reconcile the terms of the Agreement, Legal Services went on to state:

There may not be a conflict between the provisions. Courts attempt to give effect to all provisions of a contract so that none are rendered meaningless. The parties were aware that PPRM was a nonprofit organization and, as was stated in the agreement, was exempt from paying real property taxes. Thus, the fair-market-rental rate may have been intended to recognize this fact in that the fair-market-rental rate would not have been for comparable space, but comparable space being rented out by a nonprofit organization that intended to avoid paying real property taxes. Accordingly, the rental rate would have been capped by the amount allowed by Section 39-3-116(2)(c), C.R.S. As the Services Corp. was paying the maximum amount allowed by the statute, arguably it was paying the fair-market-rental rate intended by the parties to the agreement.

In other words, a legal interpretation of the contract terms could lead to the conclusion that PPRM was complying with the terms of its Property and Services Agreement.

Because the Department did not reconcile or resolve the conflicting issues surrounding the Property and Services Agreement, its determination that PPRM was not complying with the terms of the Agreement leaves the State open to legal challenge and public criticism. Before entering into future contracts with private agencies, the Department needs to determine what eligibility requirements non-profit organizations must meet in order for them to receive state family planning funds. These requirements should be included in the rules adopted by the State Board of Health as proposed in Recommendation No. 2.

Recommendation No. 3:

The Department of Public Health and Environment should work with the Attorney General's Office to resolve the issues related to the appropriateness of charging cost or fair market value for properties when a non-profit organization is a potential bidder for state family planning funds. Once these issues are resolved, the Department should propose that the State Board of Health include eligibility requirements for non-profit organizations in the rules adopted pursuant to Recommendation No.2.

Department of Public Health and Environment Response:

Partially agree.

Implementation Date: January 2004

The Department in the future may consult with the Attorney General's Office to determine whether fair market value rent should be charged to an affiliate that performs abortions in order not to have a subsidy by a state-funded family planning provider. When the Department consulted Anderson & Whitney to apply agreed-upon procedures to determine if PPRM was separately incorporated, maintained separate facilities, and maintained financial independence from Services Corp., the Department did not ask Anderson & Whitney to assess PPRM's compliance with the Property and Services Agreement. Anderson & Whitney focused instead on whether there were indications that PPRM could be subsidizing Services Corp. in violation of the state Constitution.

The Department agrees that not all of the provisions of Planned Parenthood's contract are as clear as is desirable. However, it is the Department's position that any ambiguity in this contract must be interpreted in a manner that is consistent with the clear and express language of Article V, Section 50 the Colorado Constitution. To the extent any of the provisions of PPRM's contract seem to suggest otherwise, those provisions must give way to Colorado's Constitution.

Depreciation Expense Is Not an Allowable Expense Under Property Tax Statutes

In addition to the contract issues discussed above, during the course of our review we found that PPRM was out of compliance with one of the terms of its Property and Services Agreement. According to the Agreement, "PPRM has established the rent for the leased premises so as to comply with Section 39-3-116(c), and that such rent reflects the amount PPRM may lawfully collect as rent from any entity while maintaining its exempt status with respect to Colorado real property taxes." However, according to Section 39-3-116(2)(c), C.R.S.:

The amount received by the owner for the use of such property...shall not exceed one dollar per year plus an equitable portion of the reasonable expenses incurred in the operation and maintenance of the property so used. For purposes of this paragraph (c), reasonable expenses shall include interest expenses ***but shall not include depreciation or any amount expended to reduce debt.***

As mentioned previously, Anderson & Whitney determined that PPRM's lease rates consisted of depreciation expense plus other direct costs in order to comply with statutory requirements for property tax exemption. We found that, in fact, the rental amounts for all three facilities

were based on PPRM's depreciation expense for the buildings themselves, as well as depreciation for lease-hold improvements. Because depreciation expense is not an allowable expense under the property tax exemption statutes, the entire rental amounts charged by PPRM for the past two years were not appropriate. When we brought this problem to the attention of PPRM management, they immediately filed the appropriate forms with the Division of Property Taxation to correct the error and reimbursed Services Corp. \$138,000 in inappropriately billed rent and interest. Because PPRM has taken the necessary actions to remedy this situation, we do not have a recommendation in this area.

Compliance Audits

The Department entered into an agreed-upon-procedures engagement with an independent accounting firm to determine if PPRM was separately incorporated, maintained separate facilities, and maintained financial independence from Services Corp. As mentioned previously, an agreed-upon-procedures engagement is not a complete audit, but is an agreement to conduct specific limited procedures. An agreed-upon-procedures engagement puts the burden for determining the sufficiency of testing procedures on the Department, not the auditor.

We found that the Department may not have had to enter into a separate engagement to ensure that PPRM was in compliance with state law. According to the terms of the family planning contract entered into by the Department and PPRM, contractors receiving more than \$300,000 in federal funds must agree to have an annual audit performed by an independent certified public accountant which meets federal requirements. In Fiscal Year 2001 PPRM received over \$600,000 in federal funds. Therefore, PPRM hired an independent accounting firm, KPMG, to conduct a comprehensive audit in accordance with the federal requirement and its contract with the Department. The audit conducted by KPMG covered compliance with finance-related legal and contractual provisions. If the Department had any concerns about the extent of the auditor's testwork, it could have modified its contract with PPRM to ensure the audit covered these concerns. This would have resulted in a more thorough evaluation with less risk to the State. In the future, the Department should work with delegate agencies to incorporate any specific procedures that it believes are necessary to ensure compliance with state and federal law, into the annual audit requirement provided for in the contract.

Recommendation No. 4:

In the future, the Department of Public Health and Environment should incorporate any reviews necessary to ensure compliance with state and federal law into the annual independent audit as required by the family planning contract.

Department of Public Health and Environment Response:

Partially Agree.

Implementation Date: Implemented.

The Department will consider, as necessary and appropriate, incorporating reviews to ensure compliance with the state Constitution and laws into the federal audit provisions of its family planning contracts.

However, there are situations where this is not a feasible and effective option. For example, had the Department adhered to the annual Federal audit schedule, as recommended by this review, the determination of PPRM's non-compliance would not have been until after the annual award of family planning funds. Instead, the Department chose to have the agreed-upon procedures engagement performed by an independent accounting firm prior to issuing a contract to PPRM. The Department considered this review particularly important because, at the time PPRM was awarded its initial contract in 1999, the legal transaction separating PPRM and Services Corp. had just been completed, but there was no record of operations to review.

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