

Title X Summary

June 2, 2018

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I. Trump Administration Rationale For New Title X Rule

The new rule is intended to "ensure compliance with and enhance implementation of the statutory requirement that none of the funds appropriated for Title X may be used in programs where abortion is a method of family planning." (pg. 1) The Background and Need for Change consider the effectiveness of the current approach to enforcing Section 1008 of the Public Health Service Act which states that "None of the funds appropriated under this title shall be used in programs where abortion is a method of family planning." (pg. 4) The Department states that it believes "the policies outlined in this proposed rule are based on the best interpretation of and provide appropriate guidance for compliance with Title X and section 1008" (pg.14). The Department frames this rule as ensuring program integrity.

The Department also uses the preamble to establish the power of administrative agencies to initiate this type of policy reset. It states that agencies "are free to change their existing policies as long as they provide a reasoned explanation for the change" (pg. 13) and that this analysis does not demand that an agency "demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one, it suffices that the new policy is permissible under the statute." (pg.13) By drawing on legal precedent that establishes this guideline, the Department gives itself the authority to propose this new rule.

The Department's "reasoned explanation for the change" is that the policies outlined in this proposed rule provide the best interpretation of section 1008 and Title X. The text does not address how the new rule will advance the health of those served by Title X or the public health goals of Title X or the government more widely.

II. Summary of Key Changes and Impacts

The proposed rule includes a number of changes and additions that will significantly impact the operation of the Title X program. This summary includes an overview of each of the most important changes with reference to the specific text from the rules attached in the glossary.

A. Definition of Family Planning

The 2018 rule includes a new definition of family planning as "the voluntary process of identifying goals and developing a plan for the number and spacing of children and the means by which those goals may be achieved." (pg. 47) This new definition is intended to apply a broad scope to family planning and explicitly includes the following services: contraceptive methods, natural family planning or other fertility awareness-based methods, preconception counseling, education and general reproductive and fertility health care to improve maternal and infant outcomes. This definition does not include post-conception care or abortion.

This definition will impact the kind of services and programs funded by Title X. By adding this definition, the Department is able to shape the requirements of the program based on a definition that is shaped by their political ideology. Crisis pregnancy centers, for example, could become eligible for Title X funds as fertility awareness-based methods are specifically outlined as a qualifiable family planning service.

(For more details and specific language see: §59.2 in Glossary)

B. Definition of Low-Income

The definition of a low-income family will now include “women who are unable to obtain certain family planning services under their employer-sponsored insurance due to their employers’ religious beliefs or moral convictions.” (pg. 51) The Department explains this shift as “preserv[ing] conscience protections for entities and individuals... while providing free or low-cost family planning services.” (pg. 52)

Including this population of women into the low-income category can have a positive effect on access to care for women. However, the rationale and conditions attached to this inclusion are of concern. This provision essentially creates a channel for greater use of conscientious objection from employers to avoid providing reproductive health care coverage. Furthermore, the inclusion of this additional population in Title X is not accompanied by any evidence of a plan to increase funding for Title X thereby creating an additional patient burden for an already strained program.

(For more details and specific language see: §59.2 in Glossary)

C. Family Participation Requirements

Title X service providers will be required “to encourage family participation in the decision of minors to seek family planning services and to document, in the records maintained with respect to each minor, the specific actions taken to encourage such family participation.”(pg. 52) In previous Title X regulation, providers were encouraged but not required to seek family participation. This new rule makes family participation a requirement. Indeed, the eligibility of an unemancipated minor to be considered on their own financial resources and thereby access care will be conditioned on the appropriate documentation of actions to encourage family participation.

Mandating family participation could serve to limit the agency of minors in making decisions about their own health and compromise the relationship between physician and patient. Confidentiality of reproductive health services is a key factor in enabling access for and participation of minors. This requirement could discourage young people from seeking reproductive health care.

(For more details and specific language see: §59.2 and §59.5 in Glossary)

D. From Broad Range of Methods to Specialized Services

Family planning projects would be permitted under the new rule to provide a single or limited number of specialized methods and services as long as the overall Title X project offers a broad range of family planning services. The range of methods that may be provided has expanded to include fertility-awareness-based methods along with services such as adoption. Furthermore, methods are no longer required to be *medically approved*. The Department states, “if a family planning method is, as required by the statute, ‘acceptable and effective’, it is likely to be approved by at least some medical sources.”(pg. 54)

Fertility awareness-based methods of family planning, for example, could be considered medically approved according to the rule. The rule refers to a 2016 ACOG recommendation which advised that such methods be provided with no cost-sharing in health coverage to support this. The rule also argues that fertility awareness-based methods are not included in the FDA list of approved birth control methods only because it is a non-drug/non-device, and not because it is not medically sound.

(For more details and specific language see: §59.5 in Glossary)

E. Prohibition on Referral for Abortion

The current requirement that Title X projects provide abortion referrals upon request was deemed, by the Department, to be inconsistent with section 1008. As such this new provision expressly prohibits any Title X projects from performing, promoting, referring for, or supporting abortion as a method of family planning.

In the absence of referring for abortions, the rule provides detailed guidelines on the information that providers can share: “If asked, a medical doctor may provide a list of licensed, qualified, comprehensive health service providers (some, but not all, of which also provide abortion, in addition to comprehensive prenatal care), but only if a woman who is currently pregnant clearly states that she has already decided to have an abortion. This list is only to be provided to a woman who, of her own accord, makes such a request. The list shall not identify the providers who perform abortion as such. All other patients will be provided, upon request, a list of licensed, qualified, comprehensive health service providers (including providers of prenatal care) who do not provide abortion as a part of their services.” (pg. 119)

If a client is verified as pregnant, the rule states that she must be referred for appropriate prenatal and/or social services and shall be given assistance with setting up a referral appointment “to optimize the health of the mother and unborn child.” (pg. 120)

The rule states that a physician would be permitted to provide "nondirective counseling" on abortion, but is not required to do so. The rule states that the prohibition of referrals "shall not be construed as prohibiting the provision of information to a client that is medically necessary to assess the risks and benefits of different methods ... provided that provision of such information does not otherwise promote abortion as a method of family planning". (pg. 120) Thus, while "non-directive counseling" is still permitted, this rule limits and biases the steps that providers can take based on that counseling and thus the impact of any potential counseling. Providers could provide assistance in accessing prenatal care but are instructed to offer intentionally confusing information in response to a request for an abortion. Ultimately, patients would, therefore, be getting directed care.

A provision to provide necessary medical services or referrals to other medical facilities when indicated was adapted to be consistent with this prohibition. There is a danger that if a woman's pregnancy could severely affect her health, due to a diagnosis of cancer or another medical condition, her clinician could refuse to tell her about abortion as an option or provide an appropriate medical referral.

This new rule places an undue burden on women seeking abortion services or simply an informed medical opinion. This rule directly impacts the information a provider can provide, the actions they can take, and the type of assistance they can offer.

(For more details and specific language see: §59.14 in Glossary)

F. Prohibition on Activities That Encourage, Promote, or Advocate for Abortion

Title X grantees and subrecipients will be prohibited, under §59.16, from using funds to encourage, promote, or advocate for abortion as a form of family planning. This would include the use of funds to promote abortion through lobbying, providing speakers, attending conferences, paying dues, taking legal action, developing or disseminating advocacy material, or promoting favorable attitudes. Grantees and subrecipients will also be required to provide evidence that Title X funds are physically and financially separate from any engagement in the activities listed above.

Within the written language of the new rule, there is an example situation given that involves a program funding a sex education class within a local high school. Under this new requirement if the program distributed information that in any way includes abortion as a method of family planning they would be in violation of Title X requirements. This kind of restriction not only promotes a skewed understanding of safe reproductive practices and education but also curbs the dissemination of medically accurate information.

(For more details and specific language see: §59.16 in Glossary)

G. Maintenance of Physical and Financial Separation.

In an effort to create a clear separation between abortion services and Title X funds a new requirement of both *physical* and financial separation will be established under §59.15. Previous regulations were seen to only require “bookkeeping” separation and did not facilitate compliance with section 1008. Whether the degree of separation created by a grantee or subrecipient is sufficient will be at the discretion of the Secretary. This determination will be based on factors such as the existence of separate accounting and patient records, facilities, personnel, workstations, and any form of identification (signs, website, email, phone number, social media, and reference materials). The Department is also requesting comment on additional factors that should be considered, including the requirement that Title X clinics operate under distinct names from facilities that provide abortions.

The requirement of physical separation places additional barriers on women who seek access to abortion services within family planning programs. Title X organizations serving areas lacking in sufficient sites for safe medical abortions will face a severe financial burden if they wish to continue these services. Establishing the required level of separation between abortion services and Title X funded family planning services may be more than many programs can afford. Patients may find many Title X funded clinics and organizations that provide abortion services losing funding resulting in a decrease of availability for alternative forms of family planning. This will be especially true in low-income and rural communities where access to these services is already limited and in programs that receive a large portion of their funding from Title X.

In facilities that do have the means to create the mandated physical separation, patients would be required to go to a different location or use a different entrance for abortion care. Today, at many Federally Qualified Health Centers around the country that receive Title X funds, abortion is provided as a regular part of care in the same exam rooms and by the same providers. This allows for a dignified experience of abortion. The new rule serves to physically reinforce the notion that abortion is not a normal part of healthcare and increase stigma.

(For more details and specific language see: §59.15 in Glossary)

H. Confidentiality.

§59.11 of the new ruling states that concerns with respect to confidentiality of information cannot be used as a rationale for noncompliance with state and local reporting laws. These reporting laws include possible cases of child abuse, child molestation, sexual abuse, rape, incest, intimate partner violence, and human trafficking. For patients dealing with situations of abuse such as intimate partner violence the confidentiality granted between provider and patient can be paramount. Abusing this confidence and reporting before a patient is ready or aware can be life-

threatening and result in broken trust that deters current or prospective patients from seeking help in the future.

(For more details and specific language see: §59.11 in Glossary)

I. Requirements and Selection of Grantees

All Title X service providers, under §59.5, will be required to have comprehensive primary care onsite or have a broad range of referrals that are in close proximity to the Title X site. The Department states that research has shown that Title X women have worse health than women who receive care elsewhere there is a need to decrease cost and transportation barriers. While factually sound, this solution to the problem could largely reduce the number of existing service sites in favor of a few future sites that have easier access via referral linkages. For programs sites that operate as one of the only service providers in the county the requirement of close physical proximity to referral sites is unrealistic. Many of these sites are rural health care centers and would be punished under this requirement which would deem them ineligible for Title X funding.

The proposed rule would remove the requirement that past grantees be consulted for new services or projects. The Department claims that this would encourage a larger range of applicants and approaches that may “not have been supported by past grantees”. They claim that loosening the status quo of available services will benefit underserved communities. The rule specifically refers to being able to include programs that previously refused to provide abortion referrals and were deemed ineligible under current regulations. Crisis pregnancy centers are such a program and the emergence of these centers in areas surrounding abortion providers without consultation is problematic. Many of these centers operate under misleading names and do not provide medical services, but rather instructional services. Without communication, the coordination of information to patients about available services and providers will suffer and result in additional information barriers that affect access to care.

The rule establishes new criteria for selecting grantees. Projects will be primarily judged on how well they promote the statutory provisions and requirements of this regulation. The number of patients served and the local need for services are secondary criteria.

(For more details and specific language see: §59.5 and §59.7 in Glossary)

III. Key Elements of Regulatory Impact

A. Economic impacts

Within the Regulatory Impact Statement created by the Department, they have estimated that the new rule will not be economically significant as measured by the \$100 million threshold created under Executive Orders 12866 and 13563. Additionally, they have estimated that the new rule

will not have a significant economic impact on small entities, will not result in expenditures that exceed \$100 million, and will have no substantial direct effect on States. Each of these determinations has been based on estimated costs of implementing the new rules following their publication in 2019. The time and money estimated to be spent were based on national hourly wages for each of the medical and legal staff positions needed to fulfill the new requirements. The time estimated to fulfill each new requirement should be calculated and verified by current Title X grantees and subrecipients before the comment period. The same should be encouraged for the estimated costs of implementation and compliance with each new ruling. Specific focus should be directed towards the Departments seemingly low estimate that it would cost an average of \$20,000 per site for compliance with the newly established physical separation requirements.

B. Federal Regulation and Policies on Families

The Federal Treasury and General Government Appropriations Act of 1999 requires that federal departments determine whether new regulation or policy could affect family well-being. The Department states in their report that this new rule will not negatively affect family well-being without any explanation regarding how this assessment was carried out or concluded. Within this Act, a policy or regulation cannot affect disposable income or poverty of families and children. It cannot establish a policy concerning the relationship between the behavior and personal responsibility of youth and the norm of society. It also cannot impact the stability or safety of the family, particularly in term of marital commitment. If it is found to impact any of these areas is must prepare an assessment to address the impact specified in the law. This Act should be addressed more closely by Title X recipients and patients for public comment. The impacts of the new rules are far-reaching and affect low-income and rural populations of women most directly. Creating access barriers that are both economic and physical which could resonate down to the relationship and well-being of a patient's family.

IV. **Provision Glossary: Key Quotes**

§59.2 Definitions.

““Family planning” means the voluntary process of identifying goals and developing a plan for the number and spacing of children and the means by which those goals may be achieved. These means include a broad range of acceptable and effective choices, which may range from choosing not to have sex to the use of other family planning methods and services to limit or enhance the likelihood of conception (including contraceptive methods and natural family planning or other fertility awareness-based methods) and the management of infertility(including adoption).” *page 112/129*

“Unemancipated minors who wish to receive services on a confidential basis must be considered on the basis of their own resources., provided that the Title X provider has

documented in the minor’s medical records the specific actions taken by the provider to encourage the minor to involve her/his family (including her/his parents or guardian) in her/his decision to seek family planning services” *page 113/129*

§59.5 What Requirements Must be Met By A Family planning Project?

"Removing this requirement would encourage a broader range of applicants and permit innovative approaches that may not have been envisioned or supported by past grantees." *page 58/129*

“It would also promote grantee diversity by expanding the number of qualified entities that would be willing and able to apply to provide Title X services.” *page 58/129*

“While communication and coordination is often beneficial and encouraged, removing the requirement for consultation is intended to have the effect of loosening the status quo for service provision in a community in favor of a broader reach in order to previously underserved populations.” *page 58-59/129*

“offer either comprehensive primary health services onsite or have a robust referral linkage with primary health providers who are in close physical proximity to the Title X site.” *page 59/129*

“This provision decreases the overall cost and transportation challenges related to access for vital healthcare services that may be discovered as a result of routine family planning screening and consultation.” *page 59/129*

§59.7 What criteria will the Department of Health and Human Services use to decide which family planning services projects to fund and in what amounts?

“The Secretary may award grants for the establishment and operation of those projects which will, in the Department’s judgment, best promote the purposes of statutory provisions applicable to the Title X program.” *page 117/129*

“Any grant applications that do not clearly address how the proposal will satisfy the requirements of this regulation shall not proceed to the competitive review process, but shall be deemed ineligible for funding.” *page 117/129*

§59.11 Confidentiality

“To ensure that Title X grantees and subrecipients comply with applicable reporting requirements, the proposed rule would clarify that concerns about confidentiality of information may not be used as a rationale for noncompliance with such reporting laws.” *page 64/129*

§59.14 Prohibition On Referral For Abortion.

“Because Title X funds are intended only for family planning, once a client served by a Title X project is medically verified as pregnant, she must be referred for appropriate prenatal and/or social services (such as prenatal care and delivery, infant care, foster care, or adoption), and shall be given assistance with setting up a referral appointment to optimize the health of the mother and unborn child. She must also be provided with information necessary to protect her health and the health of the unborn child until such a time as the referral appointment is kept.” *page 120/129*

“A Title X project may not use prenatal, social service, emergency medical, or other referrals as an indirect means of encouraging or promoting abortion as a method of family planning. Recognizing, however, the duty of a physician to promote patient safety, a doctor may, if asked, provide a list of licensed, qualified, comprehensive health service providers (some of which also provide abortion, in addition to comprehensive prenatal care). Such information related to abortion is permitted only if a woman who is currently pregnant clearly states that she has already decided to have an abortion.” *page 120/129*

§59.15 Maintenance of Physical and Financial Separation

“In accordance with section 1008, the Department wishes to ensure, among other things, that there is a clear separation between Title X services and any abortion services provided by a Title X grantee or subrecipients and that Title X funds are not being used to build infrastructure that supports, or may be used to support, the separate abortion business of a Title X grantee or subrecipient.” *page 68/129*

“The lack of a requirement of organizational separation could continue to blur the line between permitted and prohibited Title X services and activities, making enforcement more difficult. For example, individuals seeking Title X services may mistakenly visit non- Title X sites engaged in activities such as abortion which are actually prohibited by Title X, but that have the same names and are part of the same organization as the Title X site.” *page 71/129*

§59.16 Prohibition on Activities That Encourage, Promote, or Advocate, For Abortion.

“ A Title X project may not encourage, promote or advocate abortion as a method of family planning. This restriction prohibits actions to assist women to obtain abortions or to increase the availability or accessibility of abortion for family planning purposes.” *page 123/129*

"A Title X project uses Title X funds for sex education classes in a local high school. During the course of the class, information is distributed to students that include abortion as a method of family planning. The Title X project has violated paragraph (a) of this section." *page 125/129*