

### **Analysis of 2019 Final Rule on Title X Family Planning Program**

On March 4, 2019, the US Department of Health and Human Services (HHS) published its final rule for the Title X family planning program, “Compliance With Statutory Program Integrity Requirements,” in the *Federal Register*. The rule goes into effect 60 days after publication, on May 3, 2019, though certain provisions of the rule do not take effect until either 120 days after the rule’s publication (on July 2, 2019) or one year after publication (March 4, 2020).

Although the final rule, in many ways, is designed to target abortion-related activities and entities that provide abortion care, it is not limited to such activities and/or providers. The final rule will damage the nation’s family planning program and severely diminish, rather than increase, the public health benefits realized from the limited funding available to the program. It will have far-reaching implications for all Title X-funded entities, the services they provide, and the ability of patients to receive the confidential family planning and related sexual health care they seek.

**Undermines the standard of care:** The final rule weakens the ability of the Title X program to achieve its central mission of making modern methods of acceptable and effective contraception available to all who desire them. These changes open the door to funding Title X projects that refuse to offer a broad range of FDA-approved contraceptive methods.

- It eliminates “medically approved” from the longstanding regulatory requirement that projects provide “a broad range of acceptable and effective medically approved family planning methods.” (§ 59.5)
- It replaces the cautionary, caveat language of the current regulations (that organizations that only provide a single method of family planning can still participate in a Title X project, but only if the entire project offers a broad range of family planning services) with a more permissive, even encouraging, directive that “projects are *not required* to provide every acceptable and effective family planning method or service” and that participating entities can offer “only a single method . . . as long as the entire project offers a broad range of such family planning methods and services.” (§ 59.5)

**Eliminates pregnancy options counseling as a requirement in the nation’s family planning program and coerces all pregnant patients to receive prenatal care referrals, regardless of their wishes:** The final rule makes it impossible to provide pregnancy options counseling within a Title X project that is nondirective and inserts arbitrary and harmful limitations on who can counsel pregnant patients.

- The final rule jettisons Title X’s longstanding requirement that Title X projects provide nondirective counseling on all of a pregnant patient’s options (prenatal care and delivery; infant care, foster care, or adoption; and pregnancy termination) upon request. Instead, the rule makes optional whether a Title X provider offer any counseling and information concerning the patient’s options beyond the mandated prenatal referral. (§ 59.14)
- The final rule requires that Title X projects refer all pregnant patients for prenatal care and prohibits abortion referral, even upon a patient’s request, citing that Title X projects are prohibited from providing, promoting, referring for, or supporting abortion as a method of family planning. (§§ 59.5 and 59.14)
- In response to a patient’s request for an abortion referral, the provider may only share a list of comprehensive primary care health providers, which may or may not actually provide abortion care, and cannot indicate which providers on the list, if any, provide abortion care. (§ 59.14)

- The rule arbitrarily limits the optional delivery of pregnancy counseling to doctors and advanced practice providers, which does not reflect how counseling is often delivered in the Title X program and will cause serious disruptions in a number of Title X settings. For example, a registered nurse or a licensed clinical social worker who has been counseling pregnant patients for a decade would be prohibited from providing any pregnancy counseling. (§§ 59.14 and 59.2)
- Although the preamble asserts that the rule permits nondirective counseling, the complete prohibition on abortion referral and requirement for prenatal referral—requiring the withholding of some information by providers while requiring them to force other information on their patients—make it impossible to satisfy Congress’s mandate that all pregnancy counseling in Title X “shall be nondirective.”

**Imposes onerous physical and financial separation requirements:** The final rule imposes onerous physical separation and enhanced financial separation requirements on Title X-funded entities that will have a significant chilling effect on and prevent a wide variety of otherwise-permissible activities paid for with non-Title X funds.

- The rule requires a Title X project to be “organized so that it is physically and financially separate” from activities prohibited under § 1008 of the Title X statute and §§ 59.13, 59.14, and 59.16 of the final rule. (§ 59.15)
- Although financial separation of Title X-funded services and abortion services is already required in Title X, the rule expands this requirement to allow HHS to reach into Title X projects and ensure “Title X grantees [are] financially transparent and accountable throughout the grant disbursement process”<sup>1</sup> rather than through the regular, extensive, and comprehensive audits long used to enforce the existing requirements. The final rule adds vague and overreaching requirements for Title X projects to “fully account for, and justify, charges against the Title X grant” and stating that HHS “shall put additional protections in place to prevent possible misuse of Title X funds through misbilling or overbilling, or any other unallowable expense.” (§ 59.18)
- The rule gives HHS wide latitude to determine how the physical and financial separation requirement would be applied to activities and/or Title X-funded entities. The rule requires Title X projects to have “objective integrity and independence” from prohibited activities as determined by the HHS Secretary based on the Secretary’s subjective review of facts and circumstances, including (but not limited to): separate examination, consultation, treatment, and waiting rooms; separate phone numbers, email addresses, and websites; separate staff; separate workstations; separate electronic or paper-based health care records (which means separate electronic health records systems); and even separate office entrances and exits. (§ 59.15)
- Because the separation requirements apply to the Title X *project*, they apply to all entities funded by the project: grantees, subrecipients, and service sites. Furthermore, the separation requirements apply not only to the performance of abortion (§ 59.13) or to referral for abortion (§ 59.14), but also to abortion counseling provided by professionals other than physicians or advanced practice providers (§ 59.14) and activities that encourage, promote, advocate for, or support abortion paid for with non-Title X funds (§§ 59.14 and 59.16).

**Limits the ability of any Title X-funded entity to provide non-Title X funds to entities that provide, promote, refer for, or support abortion:** The final rule’s physical separation requirements will have far-reaching effects beyond Title X. The burden and expense of the separation requirements make it highly impractical, if not impossible, for many Title X-funded entities to carry out Title X-prohibited activities with their non-Title X funds as purportedly permitted by the rule. Moreover, the rule will impair the ability of any Title X-funded entity to support agencies or programs that provide, promote, refer for, or support abortion, even when those agencies are outside of Title X and the programs are funded with non-Title X funds.

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<sup>1</sup> “Compliance With Statutory Program Integrity Requirements,” 84 *Federal Register* 7714, 7725, March 4, 2019, <https://www.govinfo.gov/content/pkg/FR-2019-03-04/pdf/2019-03461.pdf>.

- Due to the physical separation requirements, any entity that receives Title X funds and uses non-Title X funds to engage in abortion-related activity prohibited by the rule—to pay dues to an organization that “as a more than insignificant part of its activities” advocates for abortion (§ 59.16) or have a registered nurse provide nondirective options counseling or provide abortion referral, for example—would have to perform that activity from a facility entirely separate from the Title X project and with staff whose positions are in no way supported by Title X. (§ 59.15)
- Because the rule requires a Title X project to be organized so that it is physically and financially separate from activities prohibited by the rule (§59.15), a grantee administering the project would have to keep any non-Title X funding it provides to fund activities or organizations prohibited by the rule physically and financially separate from its Title X project. As stated in the rule’s preamble, “when a grantee or subrecipient conducts abortion activities that are not part of the Title X project, and would not be permissible if they were, the grantee must ensure that the Title X-supported project is separate and distinguishable from those other activities.”<sup>2</sup>
- Thus, the separation requirements do not stop with the activities in which a Title X-funded entity wants to engage, but also to the activities of the entities the Title X-funded entity *supports*. For example, if a state health department’s family planning program administers both a Title X grant and state-only funding for family planning and provides the state-only funding to a non-Title X entity that provides abortion care, the state health department could not administer both the Title X and state funding from one family planning program; the state would have to create a second family planning program, administered by different staff located in a different facility, to administer the family planning program funded by state-only dollars.

**Undermines confidentiality and trust:** The final rule threatens patient confidentiality, particularly for minors, by increasing pressure on Title X-funded entities to compel adolescent patients to share information about who they have sex with and include their parents in their family planning care, with all efforts documented in detail and subject to HHS oversight. The final rule also forces providers to violate their professional judgment and risks damaging the patient-provider relationship by requiring providers to encourage minors to involve their parents in their family planning decisions in circumstances when the provider has good reason to believe that doing so would be harmful to the minor.

- The final rule requires Title X providers to encourage family participation for all patients, including adults, ignoring Title X’s statutory limitation on encouraging family involvement only “[t]o the extent practical” (§ 59.5(a)(14), and to document in a minor’s medical record “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” with only a single, extremely limited exception (§ 59.2).
- The final rule gives HHS substantial oversight over compliance with complex state reporting requirements and the authority to impose harsh penalties if HHS (not the state) believes a Title X project is out of compliance, allowing HHS to substitute its own judgment for that of the state (or locality) responsible for and in the best position to make determinations about compliance with state law. That increased oversight by HHS, together with the addition of new requirements to collect and document specific information in Title X records, will prompt inappropriate screening and over-reporting by providers that will harm patients and undermine the provider-patient relationship, ultimately resulting in fewer patients seeking critical health services.
- The rule requires Title X projects to conduct “a preliminary screening of any teen who presents with [an STD], pregnancy, or any suspicion of abuse, in order to rule out victimization of a minor.” This requirement would turn health care providers into interrogators of their patients, even when there is no sign of abuse. (§ 59.17)

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<sup>2</sup> Ibid, 7765.

**Prioritizes religious and moral belief over the needs and rights of Title X patients.** The final rule requires Title X projects to heavily favor an entity's possible religious and/or moral objection to abortion over the needs and wishes of patients.

- The rule eliminates the pregnancy options counseling requirement because HHS “believes this requirement is inconsistent with federal conscience laws,”<sup>3</sup> and emphasizes that this and other changes in the rule will open the program up to entities that have religious or moral objections related to abortion. The rule states, “If health care providers or entities know they will be protected from discrimination on the basis of conscience with respect to counseling on, or referring for, abortion, they might seek to participate in programs as a subrecipient where they may previously have been deterred from doing so under the current regulations. . . .”<sup>4</sup>
- The rule subverts Title X's focus on low-income women by seeking to use the program as a replacement for the Affordable Care Act's contraceptive coverage requirement in order to pay for free or subsidized contraceptive services for women whose employers provide insurance coverage but object to that coverage including contraception due to religious or moral beliefs. (§ 59.2)

**Gives HHS unchecked discretion to disqualify applicants:** The final rule changes the criteria for awarding Title X grants and gives HHS broad, seemingly unchecked discretion to disqualify applicants before the competitive review process even begins if the agency deems them to not have sufficiently described how they will satisfy every requirement of the regulation.

- The final rule includes no details for how HHS purports to determine whether an application has clearly addressed how it will satisfy the regulatory requirements to HHS's satisfaction, nor any mechanism for oversight of HHS's peremptory compliance review. Without such guidance or oversight, this new authority seems designed to be used to reshape the Title X network as HHS sees fit by allowing only favored applications to even reach the review panels. (§ 59.7)

**Gives HHS unclear, expanded oversight powers and imposes unnecessary obligations on Title X grantees:** The final rule seeks to give HHS unprecedented information and regulatory authority regarding Title X subrecipients.

- HHS's legal relationship is with Title X grantees concerning the projects they operate; as such, HHS has no direct oversight authority for subrecipients or health centers, and oversight of Title X (including program review) is through the Title X grantee. The final rule, nonetheless, apparently seeks to expand HHS's direct regulatory and oversight powers to subrecipients, by explicitly imposing the requirements of the Title X regulations equally on grantees and subrecipients. (§ 59.1)
- The final rule requires grantees and subrecipients to submit voluminous new information on an ongoing basis about entities and individuals that receive no federal funding and that are not part of their Title X projects, but instead may function as out-of-project referrals for Title X patients. (§ 59.5)
- The final rule prioritizes the provision of comprehensive primary health services—either onsite or through “a robust referral linkage with primary health providers who are in close physical proximity” to the Title X service site—despite the fact that primary care services are not required by the Title X statute nor permitted to be paid for with Title X funds. (§ 59.5)

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<sup>3</sup> Ibid, 7716.

<sup>4</sup> Ibid, 7780.