

September 30, 2016

Susan B. Moskosky, MS, WHNP-BC
Acting Director
Office of Population Affairs
US Department of Health and Human Services
200 Independence Avenue SW, Suite 716G
Washington, DC 20201

ATTN: 937-AA04

Re: **Compliance with Title X Requirements by Project Recipients in Selecting Subrecipients**

Dear Director Moskosky:

The National Family Planning & Reproductive Health Association (NFPRHA) is pleased to respond to the proposed rule issued by the Department of Health and Human Services' (HHS) Office of Population Affairs (OPA) related to Title X requirements concerning the selection of project subrecipients.

NFPRHA is a national membership organization representing the nation's publicly funded family planning providers – nurse practitioners, nurses, administrators, and other key health care professionals. NFPRHA's members operate or fund a network of nearly 5,000 health centers and service sites that provide high-quality family planning and other preventive health services to millions of low-income, uninsured, or underinsured individuals in 50 states and the District of Columbia. Services are provided through state, county, and local health departments as well as hospitals, family planning councils, Planned Parenthoods, federally qualified health centers and other private non-profit organizations.

NFPRHA appreciates OPA's notice of proposed rulemaking designed to clarify and strengthen longstanding patient protections for the more than 4 million women and men who seek care through the Title X family planning program, the nation's only dedicated source of public funding for family planning. NFPRHA strongly supports OPA's efforts to clarify and reinforce the longstanding requirement that health care providers not be excluded from the program for reasons unrelated to their qualifications to provide Title X-funded services.

Despite mounting evidence that expelling well-qualified, trusted family planning providers from publicly funded health programs like Title X has adverse effects on women's access to critical family planning and sexual health care, an increasing number of states are targeting family planning providers for exclusion from key federal health programs, including Title X. At least 13 states have laws on the books

that could impact the Title X service delivery network should the Title X funds flow through the state government; eight additional states have had bills introduced in their legislatures that would impact the network if they became law. Tiering and other prohibitions against family planning providers often exclude the very providers that are the most qualified and best-equipped to help Title X patients achieve their family planning goals. Federal courts have consistently held that state laws that limit provider participation in Title X based on factors unrelated to a provider's ability to provide project services are contrary to, and preempted by, federal law. While courts have therefore held that project recipients are prohibited from prescribing additional, narrower eligibility criteria for Title X subawards, other states continue to pursue discriminatory policies that undermine patient access and the intent of the Title X program.

As such, the proposed amendment to 42 CFR § 59.3 to include a requirement that “[n]o recipient making subawards for the provision of services as part of its Title X project may prohibit an entity from participating for reasons unrelated to its ability to provide services effectively” is a welcome and necessary clarification and strengthening of the current Title X rules. Precluding Title X recipients from “using criteria in their selection of subrecipients that are unrelated to the ability to deliver services to program beneficiaries in an effective manner” will help create a deterrent for legislative and policymaking actions against trusted health care providers while ensuring that priority is given to the networks designed on effective service delivery.

The proposed regulation is a critically important step toward protecting access to the Title X network. NFPRHA offers these comments in support of these protections, to help clarify the responsibilities of project recipients and OPA in complying with and overseeing them, and to further strengthen the proposed rule's effectiveness in ensuring access to Title X-funded services and providers.

Administrative burdens on both project recipients and OPA that could result from the proposed rule should be minimized, while compliance and oversight should be maximized.

The intent of the Title X program is to help women, men, and adolescents—regardless of their economic status, but prioritizing low-income individuals—achieve their family planning goals. Title X funding is therefore provided to public and nonprofit entities to “assist in the establishment and operation of voluntary family planning projects” that offer a broad range of effective family planning methods and services. To best achieve the program's goals, Title X funds a diverse network of service delivery providers designed by communities for communities, that include a range of providers—state, county, and local health departments, as well as hospitals, family planning councils, Planned Parenthoods, federally qualified health centers, and other private non-profit organizations. These networks vary widely across communities because they are specifically established to provide the most effective care to their specific patient populations. OPA has long reaffirmed this protection, including language in recent competitive grant announcements that it “will take into consideration the extent to which the applicant indicates it will be inclusive in considering all entities that can provide the required services and are eligible to receive Federal funds to best serve individuals in need throughout the anticipated service area.”

The new rule provides important clarity about the intent and expectations of OPA and HHS in the makeup of Title X's service delivery networks, putting the ability to provide required services in an effective manner front and center in the selection of subrecipients when project recipients do not provide services directly. However, further clarity is required in how OPA will assess the selection of subrecipients to ensure compliance with § 59.3, and in the administrative burdens such oversight will place on project recipients. To the greatest extent possible, administrative burdens on project recipients and on OPA should be minimized, while compliance and oversight should be maximized.

To that end, any compliance processes or documentation required by OPA to ensure compliance with § 59.3 should be integrated into current Title X project award processes. Project recipients currently have to document the process by which they will select subrecipients as part of their Title X application, which must also be approved by OPA. That approval should now be aligned with § 59.3. Information on the regulation governing the selection of subrecipients should be included in Title X project recipient application materials.

The Title X rules should be further amended to clarify the process by which OPA will monitor and enforce project recipients' selection of subrecipients.

Central to the implementation and success of § 59.3's requirements regarding subrecipients is OPA oversight of the selection of subrecipients. We recommend adding a new section, § 59.301, to clarify for project recipients and subrecipients how it will ensure that the selection of subrecipients conforms to § 59.3 and the process by which it will enforce such requirements. We recommend the new section read as follows:

§ 59.301 Participation as a subrecipient as part of a family planning project. The Office of Population Affairs shall monitor and enforce the requirements in this section, including but not limited to requiring recipients of Federal funds under title X of the Act to maintain and submit records regarding the criteria used in the decisions of the project recipient in the selection of Title X service providers when the recipient does not provide services directly. Within thirty days of identifying noncompliance by any recipient, the Secretary shall take appropriate action to remedy the noncompliance, including immediate redirection of project funds from the recipient to a suitable, qualified alternative entity that will administer the grant funds consistent with this section while minimizing the impact of any interruption of services in the affected service area. In the event that a recipient relinquishes its grant funding, whether in part or in full, for noncompliance, the Secretary shall take appropriate action within sixty days of notice of relinquishment to redirect or otherwise administer the grant funds consistent with this section while minimizing the impact of any interruption of services in the affected service area, including through the approval of a sole source replacement grant to a suitable, qualified alternative entity.

Processes demonstrating a project recipient’s criteria for selecting providers should be the primary mechanism for achieving compliance and integrated into the existing Title X project application and approval processes, but a complaint process should also be developed.

NFPRHA believes that integrating compliance into the existing Title X project application and approval processes will minimize administrative burdens on OPA and project recipients, and result in consistent, enforceable oversight of § 59.3. As previously discussed, project recipients currently have to document the process by which they will select subrecipients as part of their Title X application, which must also be approved by OPA. That approval should now be aligned with § 59.3.

By aligning the current application requirements regarding subrecipient selection with § 59.3, OPA will have a reliable, regular source of information from which to determine a baseline for compliance and against which to monitor and ensure continued compliance by project recipients.

Additionally, OPA should create a form available on the OPA website through which OPA can confidentially collect and evaluate any complaints by entities barred from inclusion or removed from participation in a project in violation of § 59.3. Entities that wish to file a complaint would need to provide OPA with evidence of actual discrimination or inappropriate criteria being used in a project recipient’s selection of subrecipients in violation of § 59.3, so as to minimize the administrative burdens caused by any frivolous claims.

The proposed regulatory language is unlikely to interfere with other generally applicable state laws due to the limited scope of the proposed rule.

Due to the limited scope of the proposed regulation, it is likely that the only state laws that would be impacted by § 59.3 are ones that violate it. The proposed regulation does not automatically invalidate conflicting state laws. Instead, the regulation puts states with conflicting laws on notice that if they currently are a project recipient or intend to apply for Title X funds, they will need to comply with federal law that precludes them from prohibiting an entity from participating for reasons unrelated to its ability to provide services effectively.

[For NFPRHA members: consider whether any other laws in your state might be impacted by the proposed regulation and, if you determine there might be an impact, detail any concerns.]

OPA should amend the final rule to further more fully realize the essential role of Title X providers in the ACA-driven health care economy, including more fully codifying Title X’s longstanding confidentiality protections.

There has been a tremendous amount of sub-regulatory work to encourage operational changes by the Title X family planning provider network to conform to the Affordable Care Act (ACA) insurance expansion. However, to more fully realize and fulfill the vision of the essential role of safety-net providers in the ACA-driven health care economy, it is critically important that the final rule include the

regulatory adjustments needed to strengthen and improve the publicly funded family planning safety net. OPA should examine the opportunity afforded by this proposed rule to implement a modest package of changes that would modernize the program to more fully align with the ACA.

One critical area of need is to codify Title X's longstanding confidentiality protections. Since the 1970s, federal law has required that both adolescents and adults be able to receive confidential family planning services in Title X-funded projects. The strong confidentiality protections for adolescents are derived from the Title X statute, regulations, and relevant case law. Developed over several decades, these protections remain in federal law today. They have been modified only to encourage, but not mandate, family involvement, and to require Title X providers to comply with state child abuse reporting laws.

Efforts to require parental consent or notification for Title X-funded family planning services have been consistently rejected by the courts. Consistent with the Title X statute, regulations, and case law, the previously issued 2001 Title X Guidelines, which combined program requirements and clinical program guidelines, contained a three-paragraph section specifically on adolescent confidentiality and explicit statements regarding parental notice and consent. The third paragraph of Section 8.7 of the 2001 Title X Guidelines specifically addressed the question of parental consent and notice, stating:

Adolescents must be assured that the counseling sessions are confidential and, if follow-up is necessary, every attempt will be made to assure the privacy of the individual. However, counselors should encourage family participation in the decision of minors to seek family planning services and provide counseling to minors on resisting attempts to coerce minors into engaging in sexual activities. Title X projects may not require written consent of parents or guardians for the provision of services to minors. Nor can the project notify parents or guardians before or after a minor has requested and received Title X family planning services.

When the 2001 Title X Guidelines were replaced by the 2014 Title X Program Requirements, the explicit language was removed even though the principles articulated in Section 8.7 are still valid and consistent with existing statute, regulations, and case law. On June 5, 2014, OPA released an "OPA Program Policy Notice" clarifying that Title X's protections remain unchanged in the 2014 Program Requirements for Title X-Funded Family Planning Projects. However, the lack of explicit regulatory clarity has led to concern from some providers as to whether the program requirements provide sufficient clarity to override state parental notice and consent laws. Codifying the 2001 Title X Guidelines confidentiality language in an updated Title X regulation would eliminate confusion about this hallmark protection for patients, ensuring that all Title X patients, including adolescents, continue to receive confidential family planning services in Title X-funded projects.

We therefore recommend amending § 59.11 as follows:

§ 59.11 Confidentiality.

All information as to personal facts and circumstances obtained by the project staff about individuals receiving services must be held confidential and must not be disclosed without the individual's documented consent, except as may be necessary to provide

services to the patient or as required by law, with appropriate safeguards for confidentiality. Otherwise, information may be disclosed only in summary, statistical, or other form which does not identify particular individuals. **Title X projects may not require written consent of parents or guardians for the provision of services to minors, nor can any Title X project staff notify a parent or guardian before or after a minor has requested and/or received Title X family planning services.**

NFPRHA appreciates OPA's efforts to update the Title X regulations and the opportunity to comment on the proposed rule. If you require additional information about the issues raised in this letter, please contact Robin Summers at 202-293-3114 ext. 227 or at rsummers@nfprha.org.

Sincerely,

A handwritten signature in blue ink that reads "Clare M. Coleman". The signature is written in a cursive style with a long horizontal flourish at the end.

Clare Coleman
President & CEO