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Title X Family Planning Program: 2019 Final Rule

Introduction

On March 4, 2019, the Secretary of the Department of Health and Human Services (HHS) published a final rule on the Title X Family Planning Program (Title X) in the *Federal Register* (<https://go.usa.gov/xEdTp>). The rule changes, among other things, how family planning projects (Title X projects) provide family planning methods and services to clients.

The Family Planning Services and Population Research Act of 1970 (P.L. 91-572, as amended) established the Family Planning Program under Title X of the Public Health Service Act. Administered by HHS, Title X provides grants to public and nonprofit agencies to establish and maintain Title X projects. Title X is the only domestic federal program devoted solely to family planning and related preventive health services. In 2017, the program served 4 million clients through 3,858 Title X clinics. Congress appropriated \$286.5 million to the program for FY2019.

Overview of the New Rule

This section summarizes selected regulatory changes made by the final rule.

Family Planning Definition

Prior regulation. Prior regulations did not define “family planning.”

New regulation. The final rule introduces a new definition of *family planning*, referring to it 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.” Family planning can include, among other things, a 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).”

Scope of Family Planning Services

A Title X grantee can undertake a Title X project that has several participating entities, organizations, and/or clinics. A grantee that is a state agency, for example, can have a Title X project that supports local entities, organizations, and clinics throughout the state.

Prior regulation. Prior regulations required Title X projects to “[p]rovide a broad range of acceptable and effective medically approved family planning methods (including natural family planning methods) and services (including infertility services and services for adolescents). If a health care entity offers only a single method of family

planning, it may participate as part of a project as long as the entire project offers a broad range of family planning services.”

New regulation. The new rule does not require family planning methods and services to be “medically approved.” The rule also does not require Title X projects to provide every acceptable and effective family planning method or service. In addition, the rule does not change the abovementioned criterion for participation. According to the rule’s preamble, the rule allows participation by clinics that, “for reasons of conscience,” limit the services they offer.

Physical and Financial Separation

Prior guidance. By law, Title X funds may not be used for abortion. Prior program guidance interpreted the law as requiring that a grantee’s abortion activities be “separate and distinct” from its Title X project activities. Under prior guidance, a grantee’s abortion activities and its Title X project activities could share a common facility, a common waiting room, common staff, and a common records system, “so long as it is possible to distinguish between the Title X supported activities and non-Title X abortion-related activities,” for example through allocating and pro-rating costs (<https://go.usa.gov/xEdtA>).

New regulation. The new rule requires Title X projects to be “physically and financially separate” from prohibited activities, including providing, referring, encouraging, promoting, or advocating for abortion. The rule requires, for example, separate facilities (including exam and waiting rooms, entrances and exits, and websites), separate staff, separate accounting and medical records, and separate workstations. Title X funds cannot be used to build infrastructure for prohibited abortion-related activities.

The preamble to the final rule states that abortion-providing organizations may still apply for and receive Title X grants, provided they comply with the physical and financial separation requirements, and other Title X requirements.

Referrals to Primary Care

Prior regulation. Prior regulations required Title X projects to “provide for coordination and use of referral arrangements” with other health care providers.

New regulation. The new rule encourages Title X projects to “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.”

Services for Pregnant Clients

Prior regulation. Prior regulations required Title X projects to offer pregnant clients information and nondirective counseling on each of these options: prenatal care and delivery; infant care, foster care, or adoption; and abortion. Projects were also required to provide referrals upon client request, including referral for abortion.

New regulation. The new rule removes the above requirements. It adds a new requirement that Title X projects refer pregnant clients “to a health care provider for medically necessary prenatal health care.” The preamble to the rule states that prenatal care is medically necessary for all pregnant clients.

The rule allows Title X projects to refer pregnant clients to social services and adoption agencies, to provide pregnancy health information, and to provide a list of comprehensive primary health care providers including prenatal care providers. The rule permits, but does not require, the abovementioned list to include some primary care providers who also perform abortion. The list and project staff may not identify which providers on the list perform abortion. The rule permits, but does not require, physicians and advanced practice providers to give nondirective pregnancy counseling, which may include nondirective counseling on abortion. The preamble states that nondirective counseling involves presenting options “in a factual, objective, and unbiased manner.”

The new rule prohibits Title X projects from referring patients for abortion as a means of family planning. The preamble to the rule states that abortion referrals for emergency care reasons are permitted. According to a footnote in the rule’s preamble, abortion referral may also be permitted in certain cases of rape or incest.

Services for Minors

Current law and guidance. All Title X services are confidential, including services to minors. Title X projects may not require parental notification or parental consent for services to minors. However, Title X statutorily requires grantees, “[t]o the extent practical,” to encourage family participation.

Appropriations law requires Title X projects to counsel minors on how to resist attempted coercion into sexual activity, and to comply with all state and local laws on notification or reporting of child abuse, child molestation, sexual abuse, rape, and incest.

New regulation. The new rule does not change the law, but it adds a new regulation that Title X projects must conduct a preliminary screening of any minor client with a sexually transmitted disease, pregnancy, or any suspicion of abuse, in order to rule out victimization. The rule also has new documentation requirements. For example, certain minors’ medical records must indicate their sexual partners’ ages. Title X projects must also document, for each minor client, either (1) the specific actions taken to encourage family participation or (2) the provider’s suspicion of abuse or incest, and compliance with state and local reporting laws.

Eligibility for free or discounted care

Prior regulations. Clients are eligible for free, discounted, or full-cost services, depending on their income. Clients who the Title X project director determines are unable, “for good reasons,” to pay for family planning are also eligible for free or discounted services. For example, for unemancipated minors who request confidential services, eligibility for discounts must be based on the minor’s own income.

New regulation. The rule allows, but does not require, Title X project directors to use the “good reasons” exception to offer free or discounted contraceptive services to certain clients who cannot get job-based contraception coverage due to their employer’s religious or moral objection. In such cases, the director would also consider the client’s total income and the out-of-pocket costs of contraception.

Supporting and Opposing Views

Some stakeholders and Members of the 116th Congress have released statements applauding the rule, while others have expressed concerns. Some supporters contend, for example, that the rule

- better ensures compliance with the Title X statute on abortion,
- improves conscience protections for providers participating in the program,
- encourages a broader and more diverse set of providers to apply for and to participate in the program, and
- enhances protections for vulnerable clients, such as minors.

Some of the rule’s critics contend, for example, that

- HHS did not provide evidence of current projects’ noncompliance,
- the rule is a “gag rule” that can keep providers from disclosing all relevant information to clients,
- the rule may make it difficult for some specialized family planning clinics (including some Planned Parenthood clinics) to continue in the program, and
- the rule might deter some minors from seeking services from or disclosing information to Title X providers.

The abovementioned views are discussed in the preamble to the rule (<https://go.usa.gov/xEdTp>).

Compliance Dates

Title X projects must comply with the physical separation requirements by March 4, 2020. Compliance dates for the rule’s other provisions are either May 3, 2019, or July 2, 2019, depending on the provision. Recently announced lawsuits could potentially affect the rule’s implementation.

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