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Title X Family Planning Program: 2019 Final Rule

The Title X Family Planning Program (Title X) is the only domestic federal program devoted solely to family planning and related preventive health services. The program provides grants to public and nonprofit agencies to establish and maintain family planning projects (Title X projects). A Title X grantee can undertake a Title X project that has several participating entities. For example, a state-agency grantee can have a Title X project that supports the state's local organizations and clinics.

In the March 4, 2019, *Federal Register*, the Department of Health and Human Services (HHS) published a final rule for the program, <https://go.usa.gov/xEdTp>. Among other things, it prohibits Title X projects from referring clients for abortion as a method of family planning. It also requires physical and financial separation between Title X projects and certain abortion-related activities. For a redline document showing how the rule changed prior regulations, see <https://go.usa.gov/xAFQA>.

Status of the Final Rule

HHS required compliance with the final rule starting July 15, 2019, except for the physical separation requirements, for which compliance was required by March 4, 2020. The rule was challenged in several lawsuits across the country, but took effect in all states except Maryland, where it was enjoined, see <https://go.usa.gov/xVX4t>. On February 22, 2021, the Supreme Court of the United States announced that it would hear oral argument on three cases that could affect the rule's further implementation, see <https://go.usa.gov/xsWHQ>.

On January 28, 2021, President Biden released a memorandum stating that "The Secretary of Health and Human Services shall review the Title X Rule and any other regulations governing the Title X program that impose undue restrictions on the use of Federal funds or women's access to complete medical information and shall consider, as soon as practicable, whether to suspend, revise, or rescind, or publish for notice and comment proposed rules suspending, revising, or rescinding, those regulations, consistent with applicable law, including the Administrative Procedure Act," see <https://go.usa.gov/xAJKC>.

Overview of the 2019 Final Rule

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

Family Planning Definition

Prior regulation. "Family planning" was not defined.

2019 rule. The 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, an array 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

Prior regulation. Title X projects were required 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."

2019 rule. The rule requires Title X projects to "[p]rovide a broad range of acceptable and effective family planning methods (including contraceptives, natural family planning or other fertility awareness-based methods) and services (including infertility services, information about or referrals for adoption, and services for adolescents)." The rule does not require family planning methods and services to be "medically approved." The rule does not require Title X projects to provide every acceptable and effective family planning method or service. The rule states that "[a] participating entity may offer only a single method or a limited number of methods of family planning as long as the entire project offers a broad range of such family planning methods and services." According to the preamble, the rule allows participation by clinics that, "for reasons of conscience," limit the services they offer.

Physical and Financial Separation

By law, Title X funds may not be used in projects where abortion is a method of family planning (42 U.S.C. 300a-6).

Prior guidance. 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 prorating costs, see <https://go.usa.gov/xEdtA>.

2019 rule. The 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 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.

Primary Care Referrals

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

2019 rule. The 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 site.

Services for Pregnant Clients

Prior regulation. Title X projects were required to offer pregnant clients information and nondirective pregnancy 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 abortion referrals.

2019 rule. The rule removes the requirements described above. It adds a new requirement that Title X projects must 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 generally prohibits projects from referring patients for abortion as a method of family planning. However, the preamble to the rule states that abortion referrals are permitted in certain circumstances, including emergencies and cases of rape and incest. 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.”

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.

2019 rule. The 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 specific reason why such family participation was not encouraged.

Free or Discounted Care Eligibility

Prior and current 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, discounts are based on the minor’s own income.

2019 rule. 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.

Change in Title X Providers

According to the 2019 Family Planning Annual Report, “As a result of the Final Rule, 18 agencies representing 19 grants and 231 subrecipients discontinued participation in the Title X program; the number of Title X service sites was reduced by 945 sites,” see <https://go.usa.gov/xGQXE>. The January 2021 Family Planning Directory listed no Title X sites in Hawaii, Maine, Oregon, Vermont, or Washington, available at <https://go.usa.gov/x7qrT>.

Congressional Activity

During the 116th Congress, the House Energy and Commerce Subcommittee on Oversight and Investigations held a June 19, 2019, hearing on the rule, <https://go.usa.gov/xdvVG>. Also, during the 116th Congress, the House passed two appropriations bills that would have prohibited the final rule’s implementation in FY2020 and FY2021, respectively: the Labor, Health and Human Services, Education, Defense, State, Foreign Operations, and Energy and Water Development Appropriations Act, 2020 (H.R. 2740), and the Defense, Commerce, Justice, Science, Energy and Water Development, Financial Services and General Government, Labor, Health and Human Services, Education, Transportation, Housing, and Urban Development Appropriations Act, 2021 (H.R. 7617). Neither bill became law.

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