



Testimony of

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Chair DeGette, Ranking Member Guthrie, and Members of the Subcommittee, it is my honor to appear on behalf of the Department of Health and Human Services (HHS).

I was appointed as Deputy Assistant Secretary for Population Affairs (OPA) in May 2018 and also became the Director of the Office of Adolescent Health (OAH) in June 2019. It has been my privilege to work alongside the many dedicated, professional career staff who make it their mission to ensure that Title X funds are used to provide quality family planning methods and services to the adolescents, women, and men who need them. My professional career has been spent in the clinical practice of pediatrics with a focus on adolescent health. While chief resident in pediatrics, I was a Title X provider in one of the first school-based teen health centers located in a large high school in Indianapolis, Indiana. After residency, I founded and served as the medical director of Northpoint Pediatrics and spent the next seventeen years establishing one of the largest pediatric practices in central Indiana. During this same period, I also served as a pediatric clinical instructor for the pediatric and family practice residency programs at the Indiana University School of Medicine training young physicians in the areas of general pediatrics, adolescent gynecology, prevention and treatment of sexually transmitted diseases, healthy family formation, and global health.

In 2004, I relocated to Colorado where I provided direction to a private non-profit organization and implemented a federally funded sex education program in 26 high schools in the Colorado Springs area. Part of that direction included developing a medically accurate curriculum about sexually transmitted infections and contraception for middle and high school students that was incorporated into the health curricula in 5 school districts. Most recently, I was a part-time pediatrician at a certified Centers for Medicare & Medicaid Services Critical Access Hospital in Lamar, Colorado. At the same time, I served as Director of Medical Ministries for Global Partners of the Wesleyan Church, where my responsibilities included oversight of mission hospitals in Sierra Leone, Zambia, and Haiti.

Title X is the only federal program dedicated solely to the provision of family planning and related preventive services, with priority given to those from low income families. Established in 1970, by Public Law 91-572, 84 Stat. 1504, the program provides funding “to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents).”<sup>1</sup> OPA administers the Title X program and serves as the focal point to advise the Secretary of HHS and the Assistant Secretary for Health (ASH) on a wide range of reproductive health topics. One of my priorities as the Deputy Assistant Secretary of OPA is to make sure that comprehensive family planning and related preventive health services under the Public Health Service Act are provided to those who need them.

The regulations governing the Title X program have not been substantially updated since 2000. Since then, the need to clarify and ensure compliance has only increased. Presently, the Title X program funds 90 public health departments and community health, family planning, and other

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<sup>1</sup> Public Health Service (PHS) Act § 1001(a), 42 U.S.C. § 300(a).

private nonprofit agencies through grants. Those grants support delivery of family planning services at almost 4,000 service sites.<sup>2</sup> As a program designed to provide voluntary family planning services, the Title X program helps women, men and adolescents make healthy and fully informed decisions about starting a family and determining the number and spacing of children.

Recognizing that the 2019 Final Rule is the active subject of litigation, this testimony summarizes how the 2019 Final Rule will ensure compliance with, and enhance implementation of, the statutory requirements of Title X if ultimately upheld by the courts.<sup>3</sup> The Title X program serves approximately 4 million clients every year. The Final Rule will ensure that grants and contracts awarded under this program fully comply with the statutory program integrity requirements, thereby fulfilling the purpose of Title X, so that more women, men, and adolescents can receive services that help them consider and achieve both their short-term and long-term family planning needs.

There are six important pillars within the 2019 Title X Final Rule.

First, the primary purpose of the Final Rule is to **ensure program integrity, consistency and compliance** with the ***original statutory intent of*** Title X.

From the start, Congress was clear that Title X funds cannot be used to support abortion. Since enactment, Title X has contained the following prohibition at section 1008: “None of the funds appropriated under this title shall be used in programs where abortion is a method of family planning.”<sup>4</sup>

Consistent with the statutory prohibition, the Department seeks to ensure that funds are neither directly nor indirectly used where abortion is a method of family planning. Therefore, the 2019 Final Rule provides for clear financial and physical separation between Title X services and the use of abortion as a method of family planning to reduce any confusion between the two.

The Final Rule protects against the co-mingling of Title X resources with non-Title X resources or programs. Physical and enhanced financial separation address several concerns of the Department. They address concerns over the fungibility of Title X resources and the potential use of Title X resources to support programs where, among other things, abortion is a method of family planning. They address the potential for ambiguity between approved Title X activities and non-Title X activities that support abortion as a method of family planning and the significant risk for public confusion over the scope of Title X services. And they address the concern that Title X resources could facilitate the development of, and ongoing use of, infrastructure for non-Title X activities, especially for abortion as a method of family planning.

The Department seeks to protect Title X (and Title X funds) as the discrete, domestic, Federal grant program focused solely on the provision of cost-effective family planning methods and

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<sup>2</sup> Fowler et al., *Family Planning Annual Report: 2017 National Summary* (Aug. 2018), <https://www.hhs.gov/opa/sites/default/files/title-x-fpar-2017-national-summary.pdf>.

<sup>3</sup> PHS Act § 1006; 42 U.S.C. § 300a-4.

<sup>4</sup> PHS Act § 1008, 42 U.S.C. § 300a-6.

services. The Final Rule thus requires physical and financial separation to protect the statutory integrity of the Title X program, to eliminate the risk of co-mingling or misuse of Title X funds.<sup>5</sup>

It is important to remember that the Department promulgated substantially similar regulations in 1988. 53 Fed. Reg. 2922 (1988). Those regulations “require[d] a ban on ... referral ... and advocacy [of abortion] within the Title X project” and “mandate[d] that Title X programs be organized so that they are physically and financially separate from [abortion-related] activities.” *Rust v. Sullivan*, 500 U.S. 173, 184, 188 (1991); *see also* 53 Fed. Reg. 2922 (1988). The Supreme Court upheld those regulations in *Rust*, concluding that they were lawful, on statutory and Constitutional grounds. *Id.* at 184, 192–203.

The 2019 Final Rule places a high priority on **preserving the provider/client relationship**, thereby promoting optimal health for every Title X client. To preserve open communication between the client and the provider, the regulation permits, but does not require, nondirective pregnancy counseling, including nondirective counseling on abortion. Consistent with the statutory requirement that no funds may be used where abortion is a method of family planning, this regulation affirmatively prohibits referral for abortion as a method of family planning. Those changes ensure compliance with Title X’s statutory purpose and ensure consistency with federal health-care conscience laws (Church,<sup>6</sup> Coats/Snowe,<sup>7</sup> and Weldon Amendments<sup>8</sup>), while still protecting the provider/client relationship.

The Final Rule **does not** preclude provision of medically necessary information. In requiring referrals for those conditions where treatment is deemed medically necessary, the Final Rule ensures quality care for all clients. The 2019 Final Rule requires medically necessary referrals, such as referrals for prenatal care for the health of the mother as well as the unborn baby. If a pregnant client presents with an emergent medical condition, such that emergency care is required, the Title X project is also required to refer the client immediately to an appropriate provider of emergency medical services under the Final Rule. Title X projects *may* refer for abortion for emergency care reasons, but may not refer for abortion as a method of family

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<sup>5</sup> Compliance with Statutory Program Integrity Requirements, 84 FR 7714, 7715 (2019).

<sup>6</sup> The Church Amendments, among other things, prohibit certain HHS grantees from discriminating in the employment of, or the extension of staff privileges to, any health care professional because they refused, because of their religious beliefs or moral convictions, to perform or assist in the performance of any lawful sterilization or abortion procedures. The Church Amendments also prohibit individuals from being required to perform or assist in the performance of any health service program or research activity funded in whole or in part under a program administered by the Secretary contrary to their religious beliefs or moral convictions. *See* 42 U.S.C. § 300a–7.

<sup>7</sup> The Coats-Snowe Amendment bars the federal government and any State or local government that receives federal financial assistance from discriminating against a health care entity, as that term is defined in the Amendment, who refuses, among other things, to provide referrals for induced abortions. *See* 42 U.S.C. § 238n (a).

<sup>8</sup> The Weldon Amendment was added to the annual 2005 health spending bill and has been included in subsequent appropriations bills. *See* Consolidated Appropriations Act, 2018, Public Law 115–141, Div. H, sec. 507(d), 132 Stat. 348, 764; Consolidated Appropriations Act, 2017, Public Law 115–31, Div. 507(d), 131 Stat. 135, 562. The Weldon Amendment bars the use of appropriated funds on a federal agency or programs, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not, among other things, refer for abortions. HHS’s longstanding policy has been, and continues to be, to not apply or enforce the provisions set forth in 42 C.F.R. § 59.5(a)(5), promulgated in 65 Fed. Reg. 41,270 (July 3, 2000), as those provisions relate to abortion referrals, to Title X providers with religious objections to such referrals.

planning. Consistent with the statutory requirement on nondirective pregnancy counseling, the Final Rule permits Title X projects to provide nondirective counseling on abortion.

HHS is committed to the women, men, and adolescents served by the Title X program and wants them to receive the best possible care available. Therefore, these priorities are designed to improve the breadth of services, especially for those unserved or underserved. That is why, in addition to their Title X funded family planning services, we encourage grantees and sub-recipients to ensure that comprehensive primary health care services are accessible, preferably in the same location or through nearby referral providers.

The third purpose of the Final Rule is to incorporate a stronger focus on **protecting women and children from being victimized** by child abuse, child molestation, sexual abuse, rape, incest, intimate-partner violence, and trafficking. The Final Rule requires that all Title X clinics provide annual training for staff to ensure compliance with state reporting laws, as well as on appropriate interventions, strategies and referrals to improve the client's current situation. The Rule also ensures consistency of care, and protection under the law, for women or children who have experienced any form of abuse.

The Department believes that Title X programs can best serve minors and other vulnerable populations by ensuring Title X providers have a plan for reporting abuse as required by State and local reporting laws. To ensure compliance with the annual appropriations rider mandating compliance with State notification or reporting laws<sup>9</sup>, the Final Rule requires all Title X clinics to provide annual training for staff and to have a site-specific protocol in place to report crime and protect victims. As such, the rule helps ensure that Title X clinics are adequately identifying and addressing the laws and support needed for those who have been or are currently being abused. In addition, the Final Rule requires protocols to ensure that minors are provided with counseling on how to resist attempts to coerce them into engaging in sexual activity, to ensure compliance with another annual appropriations rider.

The Rule advises Title X projects and participating entities that they should comply with these reporting requirements and document the measures taken to comply, much as health care providers do in other contexts. The Rule ensures that confidentiality is not used as a reason for non-reporting of suspected abuse, without infringing in any way on client confidentiality, thereby protecting the most vulnerable.

The fourth purpose of the 2019 Final Rule is to **boost meaningful family communication, especially in adolescent family planning**. Title X programs are not permitted to require parental consent or notification before adolescents can obtain Title X services; however, Congress through statutory<sup>10</sup> and appropriation acts<sup>11</sup>, made it clear that family participation in the family planning decisions, especially of minors, must be encouraged. The Final Rule requires clinics to meaningfully encourage parent/child communication while also recognizing

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<sup>9</sup> See Consolidated Appropriations Act, 2018, Public Law 115–141, Div. H, sec. 208, 132 Stat. 348, 737.

<sup>10</sup> PHS Act § 1001; 42 U.S.C. § 300(a)

<sup>11</sup> See Consolidated Appropriations Act 2018, Public Law 115–141, Div. H, sec. 207, 132 Stat. 348, 736.

that there are situations in which such encouragement would not be appropriate. The requirement would not apply if the Title X provider documents in their records that (1) the adolescent is suspected of being the victim of child abuse or incest, and (2) it has, consistent with applicable State or local law, reported the situation to the relevant authorities.

The fifth purpose is to **expand coverage, partnerships, and innovative approaches** through provisions designed to increase the number of clients served within the Title X programs. The 2019 Final Rule focuses on innovative approaches to expand Title X services and make inroads into sparsely populated areas that have historically lacked Title X services. By increasing innovation, expanding diversity of grantees, and clarifying the flexibility program directors have to provide services the rule increases the ability to reach more unserved and underserved areas.

The Final Rule is also intended to help **ensure reliability and certainty in the grant selection process**, while maintaining an open process similar to the selection process for other grants at HHS. Under Title X of the Public Health Service Act, 42 U.S.C. § 300 *et seq.*, the Secretary of HHS is authorized “to make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects.” 42 U.S.C. § 300(a). Once an applicant successfully demonstrates compliance with the Title X regulations, HHS considers each applicant fairly and competitively according to the scoring criteria set forth in the regulations.

The statute provides a set of non-exclusive factors that the Department may use in making grants. These include: “the number of clients to be served, the extent to which family-planning services are needed locally, the relative need of the applicant, and its capacity to make rapid and effective use of such assistance.” 42 U.S.C. § 300(b). The Final Rule should be comprehensive and rigorous, so that the strongest prospective grantees are more likely to be selected, and less qualified applicants would be less likely to garner high scores. The Department is focused on ensuring compliance with the statutory Title X requirements including the program integrity provisions in the appropriations riders; expanding the type and nature of the Title X providers and ensuring the diversity of such providers, so as to fill gaps in and expand family planning services offered through Title X; and using review criteria as a meaningful instrument to assess the quality of the applicant and the application. These goals are achieved under the Final Rule by more fully specifying the application criteria, while still adhering to the statutory requirement that certain factors be considered.

The agency makes grant decisions using a three-step process; this has been longstanding agency practice. First, the agency reviews application packages for compliance with application requirements, such as that they contain the necessary information and comply with procedural requirements, such as page limits. Generally, applications that do not meet these procedural requirements do not proceed to peer review.

Second, independent review panels, composed of outside experts, score the applications using the criteria set out in the Funding Announcement. Over the years, the scoring criteria have

largely tracked the seven factors required by the 2000 regulations.<sup>12</sup> The descriptions of the criteria in the Funding Announcements have regularly expanded on the regulatory language. For example, previous funding announcements have included focusing on priorities such as natural family planning, encouraging family participation and preventive health services. The panels do not determine whether an applicant will receive funding, but rather rate the applications to assist the Deputy Assistant Secretary for Population Affairs (DASPA) in making the final decision as to what grants to award. The scores represent non-binding recommendations to the DASPA.

Third, in the final step, the DASPA will make final award selections to be recommended to the Grants Management Officer for risk analysis. This is based on an independent determination, taking into account the review panel scores, as well as other broader considerations set out in the Funding Announcement, such as the geographic distribution of services within the identified service area and the extent to which projects best promote the purposes of the statute.

The sixth purpose of the 2019 Final Rule is to **return Title X flexibility to states and other grantees**. By formally revoking the 2016 regulation that limited the ability of states and other grantees to exercise flexibility in choosing their sub-recipients, the Final Rule restores the states' ability to prioritize funding according to the needs of the populations, and is consistent with Title X statutory and regulatory guidelines.

In 2016, the Department finalized a rule that amended Title X eligibility requirements, prohibiting any grantee/recipient making service sub-awards as part of its Title X project from excluding an entity from receiving a sub-award for reasons other than its ability to provide Title X services. Compliance with Title X Requirements by Project Recipients in Selecting Sub-recipients, 81 FR 91852, 91859– 91860 (Dec. 19, 2016) (adding paragraph (b) to 45 C.F.R. § 59.3) (the “2016 regulation”). The Department’s stated reason for issuing the rule was to respond to new approaches to competing or distributing Title X funds that were being employed by several States. *Id.* at 91858–91859. The 2016 regulation took effect on January 18, 2017, but was nullified under the Congressional Review Act on April 13, 2017, when the President signed House Joint Resolution 43. *See* Public Law 115–23, 131 Stat. 89. Consistent with the joint resolution of disapproval, the Final Rule repeals the 2016 regulation and, thus, permits States and other Title X grantees freely to select Title X sub-recipients so long as they comply with the statutory, regulatory, and policy provisions in the funding announcement.

In summary, OPA, in the Office of the Assistant Secretary for Health, issued the Final Rule to revise the regulations that govern the Title X family planning program authorized by Title X of the Public Health Service Act 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

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<sup>12</sup> Agency regulations provide that the Secretary “may award grants” that “tak[e] into account: (1) The number of patients, and, in particular, the number of low-income patients to be served; (2) The extent to which family planning services are needed locally; (3) The relative need of the applicant; (4) The capacity of the applicant to make rapid and effective use of the federal assistance; (5) The adequacy of the applicant’s facilities and staff; (6) The relative availability of non-federal resources within the community to be served and the degree to which those resources are committed to the project; and (7) The degree to which the project plan adequately provides for the requirements set forth in these regulations.” 42 C.F.R. § 59.7(a).

where abortion is a method of family planning. OPA amended the Title X regulations to clarify grantee responsibilities under Title X, to remove the requirement for nondirective abortion counseling and referral, to prohibit referral for abortion, and to clarify compliance obligations with state and local laws. In addition, Title X regulations were amended to clarify access to family planning contraceptive services where an employer exercises a religious or moral objection. Finally, Title X regulations were amended to require physical and financial separation to ensure clarity regarding the purpose of Title X and compliance with the plain text of the statute, and to encourage family participation in family planning decisions, as required by Federal law. In its entirety the revisions to the rule, and the selection of grant recipients, will allow us to continue to place the well-being of women and families across the nation first and foremost.

Chair DeGette, Ranking Member Guthrie, and distinguished Members of the Subcommittee, this concludes my written testimony. Thank you for the opportunity to appear before you, and I would be pleased to respond to your questions.