

Comment on Proposed Rule Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services

Date: May 17, 2021

To: The Honorable Xavier Becerra  
Secretary  
Department of Health and Human Services

In response to: Proposed Rule: Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services; published at 86 FR 19812

Reference: RIN 0937-AA11

Dear Secretary Becerra:

This correspondence is submitted in response to the Department of Health and Human Services (HHS)'s request for comment regarding a proposed rule published at 86 Fed. Reg. 19812 (Apr. 15, 2021) relating to Title X family planning services. The rule seeks to revise a rule issued on March 4, 2019, establishing standards for compliance for projects authorized by the federal family planning program established in Title X of the Public Health Service Act (1970). That rule was rightly promulgated to ensure compliance with the statutory requirement that no funds appropriated for Title X of the Public Health Service Act "shall be used in programs where abortion is a method of family planning" (42 U.S.C. 300a-6). In addition to requiring clear physical and financial separation between legitimate Title X family planning activity, and other activities outside the scope of the program, and implementing reporting requirements to provide transparency and good stewardship of taxpayer dollars among sub-recipients, the rule ensured that Title X regulations are consistent with federal conscience rights laws including the Church Amendments,<sup>1</sup> the Coats-Snow Amendment,<sup>2</sup> and the Weldon Amendment.<sup>3</sup>

The Heritage Foundation's support for the objectives of the 2019 regulation, conscience rights, and opposition to taxpayer dollars being entangled with abortion activity is a matter of public record.<sup>4</sup> Because the Department's current proposed rule seeks to rescind these and other important policies outlined in the 2019 regulation, this comment respectfully writes in opposition to the current proposed rule.

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<sup>1</sup> 42 U.S.C. 300a-7

<sup>2</sup> 42 U.S.C. 238n(a)

<sup>3</sup> Consolidated Appropriations Act, 2021, Public Law No. 116-260, Div. H, Sec. 507(d)

<sup>4</sup> Ex. see: Press Release: Heritage President Praises Trump Administration for Protect Life Rule, February 25, 2019, <https://www.heritage.org/press/heritage-president-praises-trump-administration-protect-life-rule> (accessed May 4, 2021); and, Melanie Israel, "What Congress and the Administration Can Do to Protect Conscience Rights," Issue Brief No. 4795, December 7, 2017, <https://www.heritage.org/civil-society/report/what-congress-and-the-administration-can-do-protect-conscience-rights> (accessed May 4, 2021); and, Melanie Israel, "Defending Life: Recommendations for the 117<sup>th</sup> Congress," Issue Brief No. 6060, March 22, 2021, <https://www.heritage.org/life/report/defending-life-recommendations-the-117th-congress> (accessed May 4, 2021)

## **The law requires a wall of separation between Title X activity and abortion**

The proposed regulation guts the 2019 regulation’s requirements that Title X regulations comply with the clear, unambiguous language of the Title X statute: “None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.”<sup>5</sup> The statute has remained unchanged for more than 50 years, and appropriations legislation that provides funding for the Title X program reiterates this requirement, most recently in the Consolidated Appropriations Act, 2021, which stipulates that funds appropriated for Title X “shall not be expended on abortion.”<sup>6</sup> The 1970 conference report for the legislation establishing the Title X program explains that funds are only to be used:

“to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities. The conferees have adopted the language contained in section 1008, which prohibits the use of such funds for abortion, in order to make clear this intent.”<sup>7</sup>

The 2019 regulation – a “materially indistinguishable version”<sup>8</sup> of a regulation upheld by the Supreme Court in *Rust v. Sullivan* (1991), recognized Congress’s clear intent. In the opinion, the Supreme Court was clear that “the legislative history demonstrates that Congress intended that Title X funds be kept separate and distinct from abortion-related activities.”<sup>9</sup>

Congressional intent is clear: abortion is not family planning, and Congress intended for there to be a clear wall of separation between abortion and Title X activity. The 2019 regulation rightly ensured compliance with the Title X statute by requiring clear physical and financial separation of Title X activity and abortion activity. The proposed rule wrongly eliminates that important firewall.

## **Importance of Conscience Protections**

The Department opens the proposed rule with an acknowledgement that Congress has, on multiple occasions, enacted statutes protecting conscience rights in the context of abortion. Such laws include the Weldon Amendment, which prohibits (among other things) discrimination on the basis that a health care entity does not refer for abortions. However, the Department makes no such acknowledgement or mention of such civil rights in the proposed regulatory text. According to § 59.5 (What requirements must be met by a family planning project?) (a)(5)(i)(C), projects must offer pregnant clients the opportunity to be provided with information about abortion. Continuing, § 59.5 (a)(5)(ii) requires that projects provide abortion referral upon request.

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<sup>5</sup> 42 U.S.C. 300a-6.

<sup>6</sup> Public Law No: 116-260

<sup>7</sup> See Congressional Record H39871, 39873 (Dec. 3, 1970)

<sup>8</sup> Docket No. 20-429, *American Medical Association v. Becerra*, brief for the Federal Respondents, filed Nov. 4, 2020

<sup>9</sup> 500 U.S. 173 (1991)

The proposed rule is inconsistent with longstanding federal civil rights law protecting rights of conscience. While the Department is entitled to take a position on abortion, it cannot force Title X projects to communicate a message that directly contradicts and undermines their beliefs (in addition to being against the plain text of the law).

If an otherwise qualified potential grantee decides that they cannot, in good conscience, agree to provide the information about abortion outlined in § 59.5 (a)(5)(i) and § 59.5 (a)(5)(ii), and is precluded from applying for program funding, then the Department has missed an opportunity to review and award grants to a diverse pool of applicants. Every day, thousands of Americans freely choose to seek health care at high-quality clinics that are not enmeshed with the abortion industry. The Department's proposed rule would mean that these Americans would be unable to access Title X program activity at a site that aligns with their choices and personal values.

### **Additional Considerations: “Unmet Need” and Family Involvement**

The Department uses the term “unmet need for family planning services” but does not define the term or specify what constitutes an unmet need. Not every person who wishes to avoid pregnancy, for example, desires to use a contraceptive method. Some individuals are open to, but not explicitly trying to, have a child. In these examples, would the Department consider there to be an “unmet need” for family planning? Clarifying basic indicators is necessary to ensure that program activity is focused and targeted toward individuals' stated needs, not a broader advocacy agenda.

We are also concerned about the proposed rule's silence on parental involvement requirements. The Department acknowledges the Title X statute's requirement – and Congressionally-imposed conditions within appropriations legislation – that grantees encourage family participation in projects, particularly with regards to minors (see 86 Fed. Reg. at 19813). The 2019 regulation addresses this requirement at § 59.5 (a)(14), but the proposed rule is silent on this topic. The Department should not implicitly discourage parental involvement, and the current regulation's provision on this topic should be retained.

### **Regulatory Impact Analysis**

Federal law requires agencies<sup>10</sup> to issue guidelines for “ensuring and maximizing the quality, objectivity, utility, and integrity of information” (including statistical information) disseminated in rulemaking.<sup>11</sup> Such standards of information quality are necessary to strengthen the accuracy and credibility of public policy.

In its guidance on information quality,<sup>12</sup> the Office of Management and Budget defines “objectivity” as “a measure of whether disseminated information is accurate, reliable, and unbiased and whether that information is presented in an accurate, clear, complete and unbiased

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<sup>10</sup>Agencies that are subject to the Paperwork Reduction Act.

<sup>11</sup>44 U.S. Code §3516. The Information Quality Act was enacted as Section 515 of the Treasury and General Government Appropriation Act of FY 2001.

<sup>12</sup>Office of Management and Budget, Information Quality Guidelines, October 1, 2002, [https://obamawhitehouse.archives.gov/omb/info\\_quality\\_igq\\_oct2002/](https://obamawhitehouse.archives.gov/omb/info_quality_igq_oct2002/)

manner.” The term “utility” refers to “the usefulness of the information for the intended audience’s anticipated purposes.” OMB regards “integrity” as “the security of information—the protection of the information from unauthorized, unanticipated, or unintentional modification—to prevent information from being compromised through corruption or falsification.”

After careful Heritage Foundation expert analysis, the proposed rule fails to meet OMB’s basic standards of objectivity, utility and integrity for the reasons detailed below (among others).

According to HHS, implementation of the 2019 Title X Final Rule prompted 18 agencies (representing 19 grants and 231 sub-recipients) to discontinue participation in the program, eliminating 945 Title X-funded service sites.<sup>13</sup> The Department contends that re-adoption of the 2000 regulations (with modifications) would “strengthen the program and ensure access to equitable, affordable, client-centered, quality family planning services for all clients, especially for low-income clients.” In turn, the expansion of the patient base would—presumably—prevent a host of costly reproductive health conditions, thereby eliminating negative consequences and their costs to society.<sup>14</sup>

The data upon which these and other policy conclusions are based is empirically flawed and unreliable. This undermines the rationale for the proposed rule.

1. The Department fails to replicate the calculations used to derive its forecast of the reduced costs to taxpayers that would result from the proposed rule. In the absence of such calculations, the public is unable to judge the credibility of the policy rationale—which is the primary function of public notice and comment.
2. The Department fails to account for patients who may have received services from alternate service providers after some Title X grantees (including sub-recipients and service sites) withdrew from the program.
3. The Department’s estimate of 2,512,066 clients served as the baseline annual impact of the 2019 Title X rule “corresponds to the number of clients served in 2019 among remaining grantees as of March 2021.” This figure fails to account for the consequential effects of COVID on the number of service providers as of March 2021.

According to research by The Commonwealth Fund, “The COVID-19 pandemic has dramatically changed how outpatient care is delivered in health care practices.”<sup>15</sup> The report states that service providers have been deferring elective and preventive visits to decrease the risk of virus transmission among patients and health care workers. The researchers also documented that many patients have been avoiding clinic visits because they do not want to risk

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<sup>13</sup>Eight other agencies (representing nine grants) reached the end of their funding period.

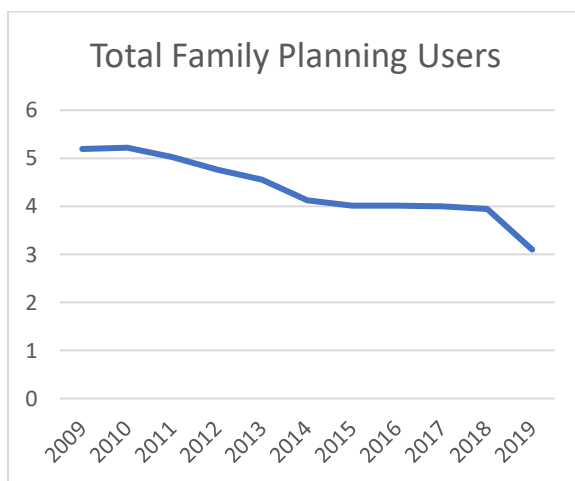
<sup>14</sup>According to the Department, “Services of the type provided under Title X likely result in reduced costs to taxpayers as a result of a reduction in unintended pregnancies, pre-term and low-birthweight births, sexually transmitted infections, infertility, and cervical cancer. This report 49 estimates that each dollar spent on these services results in a net Government saving of \$7.09.”

<sup>15</sup>Ateev Mehrotra, Michael Chernew, David Linetsky, Hilary Hatch, David Cutler, The Impact of the COVID-19 Pandemic on Outpatient Visits: Practices Are Adapting to the New Normal, The Commonwealth Fund, June 25, 2020, [Impact COVID-19 Pandemic Outpatient Visits: Adapting New Normal | Commonwealth Fund](#)

exposure. “The number of visits to ambulatory practices declined nearly 60 percent by early April,” according to the study.<sup>16</sup> Although a partial rebound has occurred, the Department’s data does not account for the changes.

Similarly, research published in the *Journal of the American Medical Association* documented that COVID-19 had a negative effect on 97 percent of 724 medical practices surveyed by the Medical Group Management Association.<sup>17</sup> The Texas Medical Association reported that 68 percent of practicing physicians in that state had cut their work hours, and state medical associations in Indiana and New York reported similar effects of the pandemic on medical practices.<sup>18</sup>

4. Compounding these errors, the Department adopts as its baseline (to calculate the effects of the proposed rule) various data on service provision that fails to account for either service substitutions or the pandemic. For these reasons, the Department’s benefit-cost analysis is erroneous.
5. The Department fails to account for long-term trends in the declining number of family planning clients, sub-recipients and service sites. Based on data from the OPA’s Title X Family Planning Annual Report,<sup>19</sup> the number of grantees increased by 12 percent between 2009 and 2019 (89 to 100). The number of sub-recipients decreased by 8 percent between 2009 and 2019 and the number of service sites decreased by 15 percent despite a 12-percent increase in grantees.

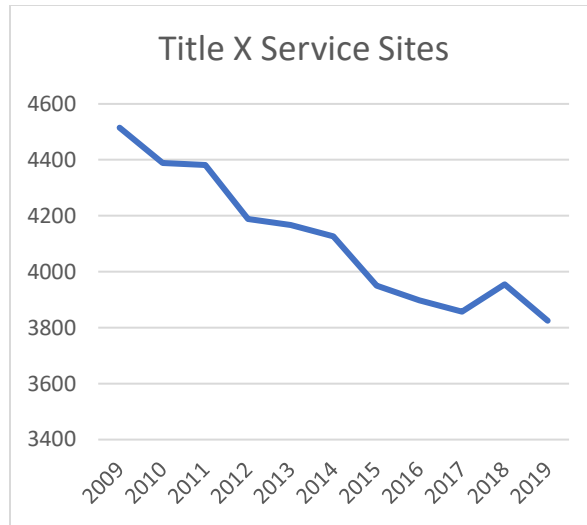


<sup>16</sup>Ateev Mehrotra, Michael Chernew, David Linetsky, Hilary Hatch, David Cutler, The Impact of the COVID-19 Pandemic on Outpatient Visits: A Rebound Emerges, The Commonwealth Fund, February 22, 2021, <https://www.commonwealthfund.org/publications/2021/feb/impact-covid-19-outpatient-visits-2020-visits-stable-despite-late-surge>

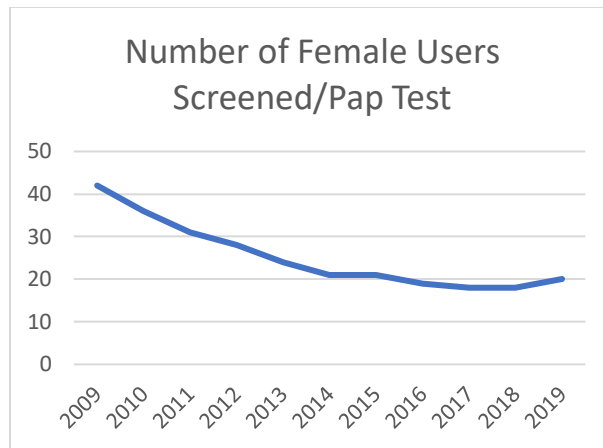
<sup>17</sup>Rita Rubin, COVID-19’s Crushing Effects on Medical Practices, Some of Which Might Not Survive, *Journal of the American Medical Association*, June 18, 2020, <https://jamanetwork.com/journals/jama/fullarticle/2767633>

<sup>18</sup>Rita Rubin, COVID-19’s Crushing Effects on Medical Practices, Some of Which Might Not Survive, *Journal of the American Medical Association*, June 18, 2020, <https://jamanetwork.com/journals/jama/fullarticle/2767633>

<sup>19</sup>Office of Population Affairs, Title X Family Planning Annual Report 2019, September 2020, <https://opa.hhs.gov/sites/default/files/2020-09/title-x-fpar-2019-national-summary.pdf>



- The Department fails to account for trends in the increased use of long-acting contraceptive methods, as well as changes in cervical cancer screening guidelines that reduce the number of clinic visits.



- The Department asserts that the proposed rule “would also enhance the equity and dignity associated with access to family planning services provided by Title X.” In support of that broad claim, the Department cites “a recent research brief ... providing suggestive evidence that birth control has an important positive impact on women’s lives.”

The “research brief” lacks methodological validity. It simply summarizes nonrandom telephone interviews with 30 women by the Urban Institute.<sup>20</sup> Participants were selected based on indications that they had faced insurance or cost-related barriers to accessing birth control and/or were concerned about their ability to pay for birth control in the coming year.<sup>21</sup>

<sup>20</sup>Rebecca Peters, Sarah Benetar, Brigitte Courtot, and Sophia Yin, “Birth Control is Transformative,” Urban Institute, [https://www.urban.org/sites/default/files/publication/99912/birth\\_control\\_is\\_transformative\\_1.pdf](https://www.urban.org/sites/default/files/publication/99912/birth_control_is_transformative_1.pdf)

<sup>21</sup>Rebecca Peters, Sarah Benetar, Brigitte Courtot, and Sophia Yin, “Birth Control is Transformative,” Urban Institute, [https://www.urban.org/sites/default/files/publication/99912/birth\\_control\\_is\\_transformative\\_1.pdf](https://www.urban.org/sites/default/files/publication/99912/birth_control_is_transformative_1.pdf)

8. The Department asserts that the 2019 Final Rule “may have led to up to 181,477 unintended pregnancies” as a result of the decrease in clients receiving Title X services. The calculation was based on “a hypothetical scenario” devised by the Guttmacher Institute that rests on complex assumptions.<sup>22</sup> To calculate the number of unintended pregnancies, the Institute adopted the failure rates of contraception used by women “similar” to those for whom Title X services became unavailable. However, the data relate to contraception and pregnancy rates that are more than a decade old, and the proxy population did not use publicly funded contraceptive services in the prior year but were presumed to be “likely to need them in the future.” The total number of clients served by Title X has steadily declined over the last decade – and mostly under the 2000 regulations that the proposed rule largely mirrors. By ignoring the broader context of the decreasing number of clients served (as well as once again failing to acknowledge that clients previously utilizing Title X services may have received services elsewhere), the assertion about the number of unintended pregnancies is flawed.
  
9. The Department states that following “the implementation of the 2019 Title X Final Rule, 19 Title X grantees out of 90 total grantees, 231 subrecipients, and 945 service sites immediately withdrew from the Title X program. Overall, the Title X program lost more than 1,000 service sites. Those service sites represented approximately one quarter of all Title X-funded sites in 2019.” However, those numbers conflict with the figures cited in the Family Planning Annual Report 2019, which shows an increase of one grantee between 2018 and 2019; a decrease of 68 subrecipients; and a decline of 129 service sites.<sup>23</sup> The Department provides no explanation for this apparent conflict in data.

## **In conclusion**

Title X of the Public Health Service Act is clear: funds may not “be used in programs where abortion is a method of family planning.” The proposed rule’s justification for allowing comingling of Title X programs and physical and financial resources related to abortion is inadequate. Furthermore, the proposed rule contradicts longstanding civil rights law respecting rights of conscience. The 2019 final rule rightly sought to uphold what the law requires with respect to good stewardship of taxpayer dollars and freedom of conscience related to compelled speech, and the Department should not revise these important policies. The proposed rule relies on flawed and unreliable data, undermining the rationale for the proposed rule.

Respectfully,

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<sup>22</sup>For example, failure rates were discounted based on the difference between the number of pregnancies predicted by those rates and the actual number of pregnancies experienced by all contraceptive method users in the United States in 2011—that is, a decade ago.

<sup>23</sup> Office of Population Affairs, Title X Family Planning Annual Report 2019, September 2020, <https://opa.hhs.gov/sites/default/files/2020-09/title-x-fpar-2019-national-summary.pdf>