October 7, 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 Center for Reproductive Rights respectfully submits the following comments on the Proposed Rule regarding compliance with Title X requirements. We commend the US Department of Health and Human Services' (HHS) Office of Population Affairs (OPA) for this proposal to update the regulations governing the Title X family planning program. We strongly support 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.

About the Center for Reproductive Rights

Founded in 1992, the Center is the only global legal advocacy organization dedicated to reproductive rights, with expertise in both U.S. constitutional and international human rights law. The Center's litigation and advocacy over the past twenty-five years have expanded access to reproductive health care around the nation and the world.

Title X is a Vital Program

The Title X family planning program is a vital source of family planning and related preventive care for low-income, uninsured, and young people across the country. Every year, more than 4 million women, men and young people access vital care such as birth control, cancer screenings, and testing for sexually transmitted infections (STIs) including HIV at Title X-funded health centers.[1] Safety-net providers that focus on delivering reproductive health care are optimally qualified to furnish the range of Title X-funded services according to national standards of care, and play a critical role in meeting the need for publicly funded family planning. Fulfilling the purpose of Title X becomes all but impossible if these experienced, reputable reproductive health care providers are arbitrarily barred from being fairly considered for Title X support.

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

[1] Fowler at al, "Family Planning Annual Report: 2015 National Summary," RTI International, (Aug. 2016), available at http://www.hhs.gov/opa/pdfs/title-x-fpar-2015.pdf.

services.[2] To best achieve the program's goals, Title X funds a diverse network of service delivery providers designed by communities for communities. This includes a range of provider types—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 principle, including language in a recent competitive grant announcement 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."[3]

State Efforts to Block Qualified Family Planning Providers

An increasing number of states have tried to block trusted reproductive health care providers, including providers that offer abortion care with non-Title X dollars, from participating in Title X. Since 2011, at least 13 states have approved restrictions that could impact the Title X network, should Title X funds flow through the state government.[4] Mounting evidence shows that the exclusion of reproductive health care providers from publicly funded health programs harms health outcomes, widens disparities, and erects new barriers to care.[5] When the very providers that are best suited to deliver Title X-funded services are targeted for exclusion based on factors wholly unrelated to the program's objectives, federal health care resources are poorly and inefficiently distributed and care is less likely to reach individuals in need of publicly funded family planning services.

Ideologically motivated restrictions on family planning funding and trusted, highly qualified providers often disadvantage or exclude the very providers that are the most qualified and best-equipped to help Title X patients achieve their family planning goals. Of particular concern are states' "tiering" policies, wherein certain provider types, usually public health departments and FQHCs, are prioritized in distributing Title X funds, while providers that specialize in reproductive health are disadvantaged or even disqualified from funding. 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. Furthermore, these restrictions undermine health care access and jeopardize the health of the patients these programs serve. Title X patients deserve the opportunity to obtain high-quality family planning care from the providers that are best equipped to provide it.

For example, in 2011, Texas reduced its contribution to family planning services, and also re-competed subawards of Title X funds using a tiered approach.[6] The combination of these actions drastically reduced

---

[2] 42 U.S.C. § 300(a).

[3] Office of Population Affairs. "Announcement of Anticipated Availability of Funds for Family Planning Services Grants" http://www.hhs.gov/opa/pdfs/fy-13-services-announcement.pdf.

[4] *See* Compliance With Title X Requirements by Project Recipients in Selecting Subrecipients, 81 Fed. Reg. 61639 (Sept. 7, 2016) (proposing to amend 45 C.F.R. part 59), https://www.gpo.gov/fdsys/pkg/FR-2016-09-07/pdf/2016-21359.pdf.

[5] *See, e.g.*, Stephenson et al., "Effect of Removal of Planned Parenthood from the Texas Women's Health Program," *New England Journal of Medicine*, (March 2016), available at http://www.nejm.org/doi/full/10.1056/NEJMsa1511902; Lu, Yao and Slusky, David Jason Gershkoff, "The Impact of Family Planning Funding Cuts on Preventive Care," Princeton Center for Health and Wellbeing Working Paper, (May 20, 2014), available at http://ssrn.com/abstract=2442148; Texas Policy Evaluation Project, *Research Brief: Barriers to Family Planning Access in Texas*, (May 2015), available at http://www.utexas.edu/cola/orgs/txpep/_files/pdf/TxPEP-ResearchBrief_Barriers-to-Family-Planning-Access-in-Texas_May2015.pdf.

[6] *See* Compliance With Title X Requirements by Project Recipients in Selecting Subrecipients, 81 Fed. Reg. 61639 (Sept. 7, 2016) (proposing to amend 45 C.F.R. part 59), https://www.gpo.gov/fdsys/pkg/FR-2016-09-07/pdf/2016-21359.pdf.

the availability of family planning services in the state, especially in rural areas. One year later, the Center for Reproductive Rights, along with the National Latina Institute for Reproductive Health, went on a fact finding mission the Rio Grande Valley of Texas to uncover the impact of the loss of health care services. After speaking to nearly 200 women in private interviews and focus groups, we found widespread violations of Latinas' human rights to life and health, non-discrimination and equality, autonomy, and privacy in reproductive decision-making. Over half of adult women of reproductive age in the Lower Rio Grande Valley lack health insurance, making them disproportionately reliant on safety net programs like Title X. Furthermore, women living in border counties have less access to women's health care than the general population; for example, they are less likely to have an OB/GYN visit in the past year.[7] The Valley was disproportionately impacted by the funding reductions and changes to the state's implementation of Title X. "In the four counties of the Valley, nine out of 32 DSHS-funded family planning clinics closed in the two-year period from 2011-2012. The remaining clinics in the Valley reduced their hours, with some only able to stay open one day per week. Many no longer provide a range of contraception… The clinics that remain open have to serve more people with less funding, and consequently are forced to decrease services or charge fees for services that were formerly free."[8]

We strongly support HHS's proposal to reinforce that grantees must select subrecipients based on their ability to provide care to Title X patients in an effective manner—not based on the political preferences of state lawmakers. 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.[9] 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.[10]

<u>The final rule should maximize oversight and enforcement while minimizing administrative burdens.</u>

Further clarity is required in how OPA will assess the selection of subrecipients to ensure compliance with § 59.3 and in how 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. This is best achieved by carefully calibrating OPA's compliance monitoring and enforcement processes.

Compliance processes and/or documentation required by OPA to ensure compliance with § 59.3 should be integrated into existing Title X project award processes. At the same time, a complaint process should be developed so that 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. OPA should evaluate properly alleged complaints on a case-by-case basis and institute procedures to ensure that these complaints are resolved promptly and fairly. In the event that noncompliance is identified, OPA should swiftly take

---

[7] Center for Reproductive Rights and the National Latina Institute for Reproductive Health. "Nuestro Texas: A Reproductive Justice Agenda for Latinas," Center for Reproductive Rights, (January 2015), available at http://www.nuestrotexas.org/wp-content/uploads/2015/01/CRR_ReproJusticeForLatinas_v9_single_pg.pdf

[8] Center for Reproductive Rights and the National Latina Institute for Reproductive Health. "Nuestro Texas: The Fight for Women's Reproductive Health in the Rio Grande Valley," Center for Reproductive Rights, p. 18 (November 2013), available at http://www.nuestrotexas.org/pdf/NT-spread.pdf

[9] 81 Fed. Reg. 61639, 61646.

[10] *Id*. at 61639

appropriate action to remedy the noncompliance in order to minimize potential interruptions in family planning services and preserve the integrity of Title X, including but not limited to terminating and redirecting project funds to a suitable alternative entity that will cover the relevant service area in compliance with the rule where appropriate.

<u>OPA should amend the final rule to fully codify Title X's longstanding confidentiality protections.</u>

Federal law has long 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. However, when the 2001 Title X Guidelines were replaced by the 2014 Title X Program Requirements, explicit language on adolescent confidentiality was removed, which has led to concern from some providers even though the principles articulated in the 2001 Guidelines are still valid and consistent with existing statute, regulations, and case law. 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 to confirm that Title X projects may not require written consent or otherwise notify parents or guardians when a minor has requested or has received family planning services.

<u>Conclusion</u>

We appreciate this opportunity to provide input. The proposed regulation is a critically important step toward protecting the integrity of the Title X network. We offer these comments in support of these protections and to further strengthen the proposed rule's effectiveness in ensuring access to Title X-funded services and providers.

We ask that you expeditiously finalize these protections in their strongest possible form in order to safeguard access to the Title X program and continue its success.

If you require additional information about the issues raised in this letter, please contact Amy Friedrich-Karnik, Senior Federal Policy Advisor at afriedrich@reprorights.org.

Signed, Center for Reproductive Rights