



July 30, 2018

Department of Health and Human Services
Office of the Assistant Secretary for Health
Office of Population Affairs
[SUBMITTED ELECTRONICALLY]

Re: Family Planning and the Protect Life Rule, ID: HHS-OS-2018-0008-0001

Family Policy Alliance is a national pro-family organization that partners with a network of over 40 state-based family policy groups. Together, we advance policy at state capitols, help elect statesmen who share our values, and equip churches and grassroots networks to advocate for family-centered policies across the country.

We represent millions of Americans who believe public policy should reflect the truth that all life, from the moment of conception, is a gift from God. Protecting life honors God, and leads to the creation of stable, safe, and nurturing families. Thriving families are the building blocks of a prosperous society.

For these reasons we are submitting this comment in strong support of HHS-OS-2018-0008-0001, known as the Protect Life Rule.

We applaud the Department's commitment to honor the original and true intent of Congress to make family planning services available to all Americans through Title X of the Public Health Service Act.¹

Title X Compliance and Support of Proposed § 59.13

Since the Nixon-era, this Department has interpreted Section 300a-6 (which prohibits funding programs where abortion is a method of family planning) to include a prohibition on funding methods of promoting, encouraging, and advocating abortion.

According to the intent of Congress, abortion is not and can never be a part of true family planning.² Family planning services “should help men, women, and adolescents make healthy and fully informed decisions about starting a family and determine the number and spacing of children.”³

¹ TITLE X OF THE PUBLIC HEALTH SERVICES ACT, 42 U.S.C. §§ 300-300a-6 (1988).

² 42 U.S.C. §§ 300a-6 (1988), *Rust v. Sullivan*, 500 U.S. 173, 192 (1991).

³ COMPLIANCE WITH STATUTORY PROGRAM INTEGRITY REQUIREMENTS, P.R. HHS-OS-2018-0008 83 FED. REG. 25502 (Proposed June 1, 2018) (to be codified at 42 CFR part 59, subpart A, B, & C).

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Section 59.13 will require project applicant disclosure of important details necessary for project transparency. It will also allow a more comprehensive review of Title X project applications. In addition, Section 59.13 will provide the Secretary with the authority necessary to deny Title X funds to non-compliant programs that cannot demonstrate their activities do not in any manner promote, encourage, or advocate abortion. The Secretary will also have the authority to deny funds to programs that violate statutory conscience protections.⁴

Proposed Section 59.13 reinforces the hard work many states have already done to ensure Title X funds are distributed according to the spirit and letter of the statute. These states require that program applicants not be abortion providers as a condition to eligibility for Title X funds.⁵

Abortion Referrals and Support of Proposed § 59.14

Abortion referrals promote and encourage abortion contrary to the plain language of Title X and run afoul of Congress' intent to "favor childbirths over abortions" in its administration of Title X Funds.⁶

The Department's previous and specious interpretation in the 2000 Regulations, that "non-directive" pregnancy counseling must include abortion referrals upon request, was not in compliance with the statutory requirement that pregnancy counseling be *non-directive*.⁷ Referrals for abortions are inherently *directive* because they make use of Title X funds to *promote* and *encourage* abortion.

Several states have also passed laws in conformity with the conclusion that abortion referrals are directive. States such as Nebraska, South Carolina, and Wisconsin proscribe Title X funds from going to entities that provide abortion referrals and counseling.⁸

Furthermore, this Department has acknowledged abortion referrals are in violation of conscience protection statutes, declaring, "the current regulatory requirement that grantees must provide counseling and referrals for abortion upon request (42 C.F.R. 59.5(a)(5)) is inconsistent with the health care provider conscience protection statutory provisions and this regulation. [The OPA] is aware of this conflict with the statutory

⁴ See e.g. The Church Amendment 42 U.S.C. § 300A-7; Coats-Snowe Amendment 42 U.S.C. § 238n; Weldon Amendment e.g. Public Law 115-31 (2017).

⁵ See e.g. IOWA CODE § 217.41B(2).

⁶ *Rust*, 500 U.S. at 192.

⁷ 42 C.F.R. § 59.5; 65 FED. REG. 41270, "2000 REGULATIONS", (July 3, 2000).

⁸ See e.g., Nebraska 105th Legislature, Neb. LB 944, 2018 NEB. LAWS 944, (Neb. 2018)(enacted); S.C. CODE ANN. § 44-44-30 (2018); WIS. STAT. § 20.9275 (2018).

requirements and, as such, would not enforce this Title X regulatory requirement on objecting grantees of applicants.”⁹

It is imperative that this Department immediately adopt Section 59.14 to come into compliance with conscience protection provisions.¹⁰ There should be absolutely no delay when current department regulations sacrifice and diminish the constitutional rights of our healthcare workers, violating their ability to freely practice their faith. The Department must rectify this wrong.

Physical and Financial Separation and Support of Proposed § 59.15

Currently, major abortion providers are not required to have their abortion facilities and services separate and distinct from their Title X funded family planning services; only bookkeeping services must be different. Weak regulations have compromised the integrity of Title X funds and have resulted in the co-mingling of Title X funds with abortion services, fraudulent billing, and deceptive misuse of funds.¹¹

The Reagan-era Department interpretation of Title X (as upheld by the Supreme Court in *Rust v. Sullivan*) required projects receiving funding to be “physically and financially separate” from abortion activities.¹² The Secretary was entitled to interpret Title X to include “separate facilities”—an interpretation that was considered legal and reasonable in the eyes of the Supreme Court.¹³ Yet, over the years, this Department has moved away from this interpretation and Congressional intent.

States have attempted to step in and reinstitute this interpretation through state law. States such as Arizona, Colorado, and Kentucky have attempted to defend the true intent of Title X to favor family planning services by prohibiting Title X funds from flowing to organizations that provide abortions.¹⁴ Other states, like Ohio and Michigan, have prioritized Title X for family planning services by authorizing local departments of health to give first consideration of grant money to organizations that fulfill the mission of Title X, which does not include providing elective abortions or abortion referrals.¹⁵

In its April 20, 2018 letter, Congress urged the Department of Health and Human Services to reconsider “permitting Title X clinics to be ‘co-located’ within the same

⁹ 73 Fed. Reg. 708072, 78087 (December 19, 2008).

¹⁰ 42 U.S.C. §§ 300A-7; 42 U.S.C. § 238n; PUB. L. 115-31 (2017).

¹¹ *Supra* note 3.

¹² *Rust*, 500 U.S. at 180.

¹³ *Rust*, 500 U.S. at 188.

¹⁴ *See e.g.*, ARIZ. REV. STAT. § 35-196.02 (LexisNexis 2018); COLO. REV. STAT. § 25.5-4-415 (2018); KY. REV. STAT. ANN. § 311.715 (LexisNexis 2018).

¹⁵ *See e.g.*, OHIO REV. CODE ANN. § 3701.046 (LexisNexis 2018), MICH. COMP. LAWS SERV. § 333.1091 (LexisNexis 2018)

facility as an entity that provides abortion.”¹⁶ Members of Congress were also deeply concerned that the largest abortion provider, Planned Parenthood, “received \$170 million from the Title X program” between 2013 and 2015.

The Supreme Court has ruled, “The Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected and [Congress] may validly choose to fund childbirth over abortion”.¹⁷ “The Government has no affirmative duty to ‘commit any resources to facilitating abortions.’”¹⁸

Taxpayers cannot and should not be forced to underwrite the activities of abortion providers in conflict with the plain language of the law, Congressional intent, and in violation of religious beliefs that all life is precious and worth protecting.

Prayer for Relief

Now is the time for taxpayers to stop funding abortion providers through regulatory loopholes. It is an absurdity that program funds for family planning and pre-conceptive care are being used for abortion services.

P.R. HHS-OS-2018-0008 does not reduce funding and does not prevent anyone from accessing abortion. But abortion access must not be funded through Title X.

The Congressional Research Service found that there are many more Federally Qualified Health Care Centers (FQHCs) than there are abortion facilities, specifically those affiliated with Planned Parenthood. “FQHCs provide far more services in a given year than the [abortion facilities].”¹⁹ In the year 2015, abortion provider Planned Parenthood and its affiliates, only provided 2.5 million services compared to the 27.5 million services provided by FQHCs.²⁰ FQHC’s are also required to locate in medically underserved areas.²¹ There are only 661 Planned Parenthood Affiliated Health Center locations compared to the well over 10,000 locations for FQHC’s that serve medically underserved populations.²² Title X funds that go to where they are most needed, such as Title X qualified FQHCs, will certainly have a more far-reaching beneficial impact on families.

We respectfully request the Department of Health and Human Services to adopt P.R. HHS-OS-2018-0008 to ensure organizations like community and rural health centers,

¹⁶ MEMBERS OF CONGRESS, 115TH CONG., LETTER TO SECRETARY AZAR, (April 30, 2018).

¹⁷ *Rust*, 500 at 201.

¹⁸ *Webster v. Reprod. Health Serv.* 492 U.S. 490, 511 (1989).

¹⁹ P.11 Elayne J. Heisler et. al., CONG. RESEARCH SERV., R44295, FACTORS RELATED TO THE USE OF PLANNED PARENTHOOD AFFILIATED HEALTH CENTERS (PPAHS) AND FEDERALLY QUALIFIED HEALTH CENTERS (FQHCs) (May 18, 2017).

²⁰ *Id.* at 11 n. 49.

²¹ *Id.* at 19.

²² *Id.*

that support life and true family planning, will rightfully receive funding under Title X and keep money out of the hands of abortion providers.

Sincerely,

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