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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 prohibited Title X projects from referring clients for abortion as a method of family planning. It also required physical 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>.

On October 7, 2021, HHS published a new final rule in the *Federal Register*, <https://go.usa.gov/xMfQy>. Effective November 8, 2021, the new rule, among other things, revokes the 2019 rule in its entirety and largely reinstates the program's pre-2019 guidance and regulations. This In Focus summarizes the 2019 rule and may be of historical interest.

Overview of the 2019 Final Rule

HHS required compliance with the 2019 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 eventually took effect in all states except Maryland, where it was enjoined. This section summarizes selected regulatory changes made by the 2019 rule.

Family Planning Definition

Prior regulation. "Family planning" was not defined.

2019 rule. The rule introduced 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 could 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 required 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 did not require family planning methods and services to be "medically approved." The rule did not require Title X projects to provide every acceptable and effective family planning method or service. The rule stated 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 its preamble, the rule allowed 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 required Title X projects to be "physically and financially separate" from prohibited activities, including providing, referring, encouraging, promoting, or advocating for abortion. The rule required, 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 could not be used to build infrastructure for prohibited abortion-related activities. The preamble to the rule stated that abortion-providing organizations could still apply for and receive Title X grants, provided they complied 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 encouraged 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 removed the requirements described above. It added 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 stated that prenatal care is medically necessary for all pregnant clients.

The rule allowed 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 permitted, but did not require, the abovementioned list to include some primary care providers who also performed abortion. The list and project staff could not identify which providers on the list perform abortion. The rule generally prohibited projects from referring patients for abortion as a method of family planning. However, the preamble to the rule stated that abortion referrals were permitted in certain circumstances, including emergencies and cases of rape and incest. The rule permitted, but did not require, physicians and advanced practice providers to give nondirective pregnancy counseling, which could include nondirective counseling on abortion. The preamble stated that nondirective counseling involved presenting options “in a factual, objective, and unbiased manner.”

Services for Minors

Prior and 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 did not change the above law or guidance, but it added 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 had new documentation requirements. For example, certain minors’ medical records were to indicate their sexual partners’ ages. Title X projects were to 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 had added a provision that allowed, but did not require, Title X project directors to use the “good reasons” exception to offer free or discounted contraceptive services to certain clients who could not 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.

Program Participation After 2019 Rule

According to HHS, 945 service sites immediately withdrew from the Title X program after the 2019 rule’s implementation, and Title X ultimately lost about a quarter (more than 1,000) of its 2019 service sites. HHS estimates that the 2019 rule may have led to 181,477 unintended pregnancies, see <https://go.usa.gov/xHWMb>. Title X served 1.5 million clients in 2020, compared with 3.1 million in 2019 and 3.9 million in 2018. According to the *Family Planning Annual Report*, an estimated 63% of this decrease since 2018 was due to the rule’s implementation and 37% was due to the COVID-19 pandemic, see <https://go.usa.gov/xMNHb>.

Congressional Activity

During the 116th Congress, the House Energy and Commerce Subcommittee on Oversight and Investigations held a June 19, 2019 hearing on the 2019 rule, <https://go.usa.gov/xdVG>. Also, during the 116th Congress, the House passed H.R. 2740 and H.R. 7617, two appropriations bills that would have prohibited the final rule’s implementation in FY2020 and FY2021, respectively. Neither bill became law.

In the 117th Congress, the House passed FY2022 appropriations bill H.R. 4502, which would require Title X projects to offer pregnant clients information, nondirective pregnancy counseling, and referral upon client request, on each of these options: prenatal care and delivery; infant care, foster care, or adoption; and abortion.

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