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Office of Population Affairs
Office of the Assistant Secretary for Health
US Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201
VIA ELECTRONIC TRANSMISSION

Attn: Title X Rulemaking

Dear Ms. Marcella:

Every Body Texas is pleased to provide comments to the US Department of Health and Human Services' (HHS) notice of proposed rulemaking (NPRM), "Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services," RIN 0937-AA11.

Every Body Texas is a non-profit organization dedicated to ensuring that every person in Texas can access safe, unbiased, high-quality sexual and reproductive healthcare. As the statewide Title X Family Planning Program grantee for Texas, Every Body Texas funds a diverse network of 37 providers—including federally qualified health centers (FQHCs), public health departments, hospital-based clinics, and free-standing family planning clinics—that operates more than 175 service sites throughout Texas.

Every Body Texas greatly appreciates HHS' NPRM revoking the 2019 Title X regulations. Once finalized, the proposed rule would return Title X to its proper focus on "making comprehensive voluntary family planning services readily available to all persons desiring such services."[1]

As a result of the 2019 rule, more than 1,200 family planning providers in 34 states left the program.[2] Numerous states were left either with no Title X-funded programs or with programs unable to serve the entirety of the service areas they were funded to serve.[3] Despite assertions that the new regulations would cause new applicants to apply for Title X funding and result in

[1] Public Law 91-572 ("The Family Planning Services and Population Research Act of 1970"), section 2(1).
[2] Forty Title X programs projects across 34 states had service sites withdraw or have withdrawn completely from the Title X program due to the Trump Rule. *State of the Title X Network*, Nat'l Family Planning & Reproductive Health Ass'n (July 2020), https://www.nationalfamilyplanning.org/file/2020-state-one-pagers-new/Impact-of-the-Title-X-Rule-in-California.pdf.
[3] Mia Zolna et al., *Estimating the impact of changes in the Title X network on patient capacity*, Guttmacher Inst., 2 (Feb. 5, 2020), https://www.guttmacher.org/sites/default/files/article_files/estimating_the_impact_of_changes_in_the_title_x_network_on_patient_capacity_2.pdf; *see also Title X Family Planning Directory*, *supra* n.5.

"more clients being served,"[4] the Trump administration was unable to find new grantees to fill the gaps the regulations created, and large numbers of clients lost access to Title X services.

The 2019 rule forced Title X-funded providers that offered a full range of reproductive health services to choose between continuing to receive Title X funding and providing comprehensive, high-quality care consistent with professional and ethical duties. In addition, providers were forced to either forego Title X funding because they were financially or otherwise unable to comply with the 2019 rule's "physical separation" requirements, or to waste large sums attempting to comply with a sweeping, subjective mandate. The organizations that remained are being required to provide incomplete care and counseling, and many have struggled to replace providers in areas that are underserved.

The NPRM will help repair damage the 2019 regulations caused to the Title X program, its grantees—like Every Body Texas—and the clients our network serves. Every Body Texas supports finalization of the proposed rule as quickly as possible and offers these comments to help clarify and improve the proposed rule.

The 2019 Title X rule has caused great harm to public health in Texas.

Every Body Texas agrees with HHS' statement in the NPRM that "the 2019 rule was a solution in search of a problem, a solution whose severe public health consequences caused much greater problems."[5]

The 2019 rule caused nearly half of all Title X projects to lose providers from the program.[6] The results of these losses have been devastating: the government's preliminary data "indicate that only about 1.5 million clients were served" in FY 2020, down from 3.1 million in FY 2019 (in which the 2019 rule was in effect for about half of the year), and down from an annual average of 4 million clients served before the 2019 rule.[7]

In Texas, the 2019 rule has had a significant negative impact on the public's health. Every Body Texas was forced to make changes to its Title X project, including changes to its provider network, to ensure continued compliance with the Title X rule, resulting in loss of access in certain areas of the state and reduced client volume overall.

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[4] Compliance With Statutory Program Integrity Requirements, 84 Fed. Reg. 7,714, 7,723 (Mar. 4, 2019).
[5] "Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services," 86 Federal Register 19812, 19817 (April 15, 2021).
[6] *State of the Title X Network*, Nat'l Family Planning & Reproductive Health Ass'n (July 2020), https://www.nationalfamilyplanning.org/file/2020-state-one-pagers-new/Impact-of-the-Title-X-Rule-in-California.pdf.
[7] "Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services," 86 Federal Register 19812 (April 15, 2021).

Every Body Texas strongly supports the NPRM's focus on health equity.

Every Body Texas strongly supports the administration's emphasis on health equity in the proposed rule. The statutory requirements that Title X-funded health centers prioritize people with low incomes, and provide care regardless of ability to pay, ensure that the Title X program is well-positioned to advance health equity for the clients it serves. However, the onerous requirements of the 2019 rule diverted attention and resources from this important work and undermined Title X's mission to provide equitable, affordable, client-centered, quality family planning and sexual health services.

Every Body Texas strongly supports the additions the proposed rule makes to the definitions in the Title X regulations, including definitions for health equity and inclusivity. In particular, the transition from using the word "women" to the more inclusive "client" is greatly appreciated. Gender identity should never be a barrier to receiving the care one needs. The proposed rule's definitions help to illustrate key aspects of quality care including the importance of client-centeredness; culturally and linguistically appropriateness; and recognition of how trauma affects people. Defining how services should be provided is an important step toward a more equitable Title X program.

Another provision that strengthens equity is the returned focus on Title X's priority population—low-income clients—and removal of the 2019 rule's re-definition of "low income" to use the program to pay for contraceptive services for any people whose employers refuse to include coverage for such services in their employer sponsored insurance due to religious or moral objections. The NPRM defines "low income" consistent with a statutory aim of Title X—to "[e]nsure that economic status shall not be a deterrent to participation" in family planning.[8]

The proposed rule creates a new criterion for scoring applications for Title X service grants to take into account "the ability of the applicant to advance health equity." This criterion is consistent with the core mission of Title X to make high-quality "family planning services readily available to all persons desiring such services."[9] As a current service grantee, Every Body Texas believes this additional standard will underscore the importance of health equity among other key factors. However, it would be helpful for the Department to provide in funding announcements and supporting material more information or examples of how such ability would be successfully demonstrated in an application, just as it commonly elaborates on other matters in funding announcements. Such explanatory information would also provide valuable context to the

[8] 42 U.S.C. § 300a-4(c).
[9] *Planned Parenthood Federation of America, Inc. v. Heckler*, 712 F.2d 650, 651 (D.C. Cir. 1983) (quoting S. REP. NO. 91-1004, at 2 (1970)).

independent, expert review panels that participate in the review, evaluation and scoring of Title X applications.

The COVID-19 pandemic has laid bare the many inequities in our nation's health care system and highlighted how systemic racism and other forms of oppression have resulted in pervasive health disparities and disproportionately poor health outcomes for people of color. The Title X program has a significant role to play in combating these systemic barriers to care and ensuring that all people, regardless of their race, ethnicity, age, sexual orientation, gender identity, immigration status, employer, insurance status, or any other demographic, have timely access to comprehensive, high-quality family planning and sexual health services. The proposed rule's emphasis on health equity will further support these goals.

Particularly in the wake of CDC's recent declaration that racism is a threat to public health, Every Body Texas would like to see systemic racism explicitly included and addressed as part of the expectations related to health equity. Systemic racism and other forms of oppression have resulted in structural barriers to health care services. The Title X family planning program and today's provision of family planning services arose out of a history in our country that included reproductive coercion and a fundamental devaluing of the bodily autonomy of people of color and people with low incomes. This history has contributed to a justifiable mistrust of the health care system, particularly with respect to family planning. As the administration raises health equity as an important goal of Title X in the proposed rule Every Body Texas urges HHS to acknowledge and reckon with that history as a part of that work.

Every Body Texas strongly supports ensuring that Title X projects do not undermine the program's mission by excluding otherwise qualified providers as subrecipients.

Despite mounting evidence that expelling well-qualified, trusted family planning providers from publicly funded health programs like Title X has adverse effects on women's access to critical family planning and sexual health care, states in recent years have increasingly targeted family planning providers for exclusion from key federal health programs, including Title X. At least 15 states currently have laws on the books that could impact the Title X service delivery network should Title X funding flow through the state government; two more states have similar bills that are likely to become law this year. Tiering and other prohibitions against family planning providers often exclude the very providers that are the most qualified and best-equipped to help Title X clients achieve their family planning goals.

Texas's experience with tiering and other prohibitions against family planning providers serves as a cautionary tale of the deeply harmful consequences that can result when particular safety net family planning providers are targeted. During its 2011 legislative session, Texas lawmakers made a series of funding and policy decisions that ultimately resulted in 82 family planning clinics (one out of every four in the state) closing or reducing hours, restricting access to critical reproductive health services across the state.[10] The intended target was safety net family planning providers that also provide abortion services or affiliate with abortion service providers—Planned Parenthood affiliates specifically. These providers were indeed blocked from participating in the family planning programs administered by the state. And the consequences reached much further: two-thirds of the clinics impacted were family planning providers that had no affiliation with abortion service providers,[11] and tens of thousands of Texans lost access to services. Coupled with the loss of the state's Medicaid family planning waiver, all state-funded family planning programs experienced a dramatic decline in the number of clients served,[12] and the further impact of reduced access to reproductive health services was quickly observed: contraceptive use decreased while the rates of unintended pregnancies and abortions increased.[13]

The NPRM rightfully recognizes that "state policies restricting eligible subrecipients unnecessarily interfere with beneficiaries' access to the most accessible and qualified providers," and that "denying participation by family planning providers that can provide effective services has resulted in populations in certain geographic areas being left without Title X providers for an extended period of time."[14] Every Body Texas strongly agrees with HHS that "state restrictions on subrecipient eligibility unrelated to the ability to deliver Title X services undermine the mission

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[10] Kari White, Kristine Hopkins, Abigail Aiken, Amanda Stevenson, Celia Hubert, Daniel Grossman, and Joseph E. Potter, The impact of reproductive health legislation on family planning clinic services in Texas, American Journal of Public Health 105(5):851-858 (2015) (finding that after the family planning budget was cut from $111 million to $38 million, 82 Texas family planning clinics closed or stopped providing family planning services). See also Joseph E. Potter and Kari White, Defunding Planned Parenthood was a disaster in Texas. Congress shouldn't do it nationally, Washington Post, February 7, 2017, https://www.washingtonpost.com/posteverything/wp/2017/02/07/defunding-planned-parenthood-was-a-disaster-in-texas-congress-shouldnt-do-it-nationally.

[11] White, et. al. (2015), *supra* note 10 (finding that following 2011 cuts two-thirds of the clinics that closed were not Planned Parenthood clinics).

[12] Id. (finding that following 2011 cuts 54% fewer clients were served).

[13] Joseph Potter & Kari White, Health Cuts by Legislature Have Made Texas Childbirth Riskier, Waco Tribune Herald (August 30, 2016), http://www.wacotrib.com/opinion/columns/guest_columns/joseph-e-potter-kari-white-texas-perspectives-health-cuts-by/article_53277ccc-5f33-5f80-9100-c7c8e7ed37f1.html. See also C. Woo, H. Alamgir, & J. Potter, Women's experiences after Planned Parenthood's exclusion from a family planning program in Texas, Contraception, 93(4), 298-302 (2016) (concluding that injectable contraception use was disrupted as a result of changes to the state-funded family planning program) and A.Stevenson, I. Flores-Vazquez, R. Allgeyer, P. Schenkkan, & J. Potter, Effect of removal of Planned Parenthood from the Texas Women's Health Program, New England Journal of Medicine, 374(9), 853-860 (2016) (concluding that the exclusion of Planned Parenthood affiliates from a state-funded replacement for a Medicaid fee-for service program in Texas was associated with adverse changes in the provision of contraception, a reduction in the rate of contraceptive continuation, and an increase in the rate of childbirth covered by Medicaid).

[14] "Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services," 86 Federal Register 19812, 19817 (April 15, 2021), citing Carter, M.W., Gavin, L., Zapata, L.B., Bornstein, M., Mautone-Smith, N., & Moskosky, S.B. (2016). Four aspects of the scope and quality of family planning services in U.S. publicly funded health centers: Results from a survey of health center administrators. Contraception. doi:10.1016/ j.contraception.2016.04.009.

of the program to ensure widely available access to services by the most qualified providers."[15] The intent of the Title X program is to help individuals—regardless of their economic status, but with a priority placed on 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 services.[16] As noted in the NPRM, "[P]roviders with a reproductive health focus often provide a broader range of contraceptive methods on-site and therefore may reduce additional barriers to accessing services."[17]

To best achieve the program's goals, Title X has historically funded a diverse network of service delivery providers—including state, county, and local health departments, as well as hospitals, family planning councils, Planned Parenthood affiliates, 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 client populations. It is therefore imperative that HHS "ensure that Title X projects do not undermine the program's mission by excluding otherwise qualified providers as subrecipients"[18] by including in its final Title X rule protections that fully enforce the statutory intent of the Title X program, the making of grant awards based on the ability of the applicant to effectively implement that program and its governing regulations, including as it engages subrecipients, and in allowing any public or private nonprofit entity to apply for Title X funds, including entities that provide and/or fund entities that provide abortions outside of Title X with non-Title X funds.[19]

Every Body Texas supports restoring and strengthening Title X's confidentiality protections.

Two interrelated hallmarks of Title X have been the program's historically strong protections for client confidentiality and its commitment to serving adolescents. Since the 1970s, federal law has required that both adolescents and adults be able to receive confidential family planning services

[15] "Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services," 86 Federal Register 19812, 19817 (April 15, 2021).
[16] 42 U.S.C. § 300.
[17] "Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services," 86 Federal Register 19812, 19817 (April 15, 2021).
[18] "Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services," 86 Federal Register 19812, 19817 (April 15, 2021).
[19] 42 U.S.C. § 300(a). "The Secretary 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 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)." *See also* 42 C.F.R. § 59.3. "*Any* public or nonprofit private entity in a State may apply for a grant under this subpart." [emphasis added]

in Title X projects. Research shows these confidentiality protections are one of the reasons individuals choose to seek care at Title X sites.[20]

Family planning services address some of the most sensitive and personal issues in health care and therefore require strong confidentiality protections. Clients seeking family planning services encompass a broad spectrum of client populations.[21] Certain groups, including adolescents and young adults, and people at risk of domestic or intimate partner violence, have special privacy concerns that require particularly strong protection.[22]

The 2019 Title X rule weakened these protections by requiring providers to encourage family involvement even when it could be harmful; by giving the HHS Secretary oversight authority in the enforcement of complex and nuanced state reporting laws; and by adding new inappropriate reporting and documentation obligations on providers. In doing so, the 2019 rule undermined the provider-client relationship to the detriment of public health.

The NPRM would reinstate the Title X confidentiality regulations in place prior to the 2019 rule[23] while making important improvements. First, the NPRM eliminates the 2019 rule's unnecessary and harmful requirements to take and document specific actions to encourage family involvement in the family planning decision making of all adolescents, without including the statutory limitation "[t]o the extent practicable"[24] and with complete disregard for the expertise, training, and experience Title X providers already use in assisting adolescents to involve their families in decisions about family planning services and other key health care matters when realistic and appropriate.

Second, the NPRM eliminates the 2019 rule's attempt to give HHS substantial oversight over compliance with complex state reporting requirements concerning child abuse, child molestation, sexual abuse, rape, incest, or human trafficking. Combined with the 2019 rule's requirements to collect and document specific information in Title X records, as well as that rule's attempt to give HHS the authority to impose harsh penalties if HHS (not the state) believes a Title

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[20] Frost et al., *Specialized Family Planning Clinics in the United States*.
[21] Rachel B. Gold, *A New Frontier in the Era of Health Reform: Protecting Confidentiality for Individuals Insured as Dependents*, 16 GUTTMACHER POLICY REVIEW 2, 2 (2013), https://www.guttmacher.org/pubs/gpr/16/4/gpr160402.pdf.
[22] Pamela J. Burke et al., *Sexual and Reproductive Health Care: A Position Paper of the Society for Adolescent Health and Medicine*, 54 J. ADOLESCENT HEALTH 491, 491-496, (2014), https://www.adolescenthealth.org/SAHM_Main/media/Advocacy/Positions/Apr-14-Sexual-Repro-Health.pdf; Diane M. Reddy, Raymond Fleming, & Carolyne Swain, *Effect of Mandatory Parental Notification on Adolescent Girls' Use of Sexual Health Care Services*, 288 J. AM. MED. ASS'N 710, 710–714 (2002); Rachel K. Jones et al., *Adolescents' Reports of Parental Knowledge of Adolescents' Use of Sexual Health Services and Their Reactions to Mandated Parental Notification for Prescription Contraception*, 293 J. AM. MED. ASS'N 340, 340–348; Liza Fuentes, Meghan Ingerick, Rachel Jones, & Laura Lindberg, *Adolescents' and Young Adults' Reports of Barriers to Confidential Health Care and Receipt of Contraceptive Services*, 62 J. ADOLESCENT HEALTH 36, 36-43; *National Consensus Guidelines on Identifying and Responding to Domestic Violence Victimization in Health Care Settings,* Family Violence Prevention Fund (2004), http://www.futureswithoutviolence.org/userfiles/file/HealthCare/consensus.pdf.
[23] Title X's confidentiality requirements are currently largely codified at 42 C.F.R. § 59.11; the NPRM proposes reorganizing the Title X regulations so that the confidentiality section would now be § 59.10.
[24] 42 U.S.C. § 300.

X project is out of compliance, the 2019 rule pushed providers toward inappropriate screening and over-reporting that would harm clients and undermine the provider-client relationship, ultimately resulting in fewer clients seeking critical health services.

Professionals providing services in Title X-funded sites are aware of their reporting obligations, already receive training on them, and make reports in compliance with these requirements. Every Body Texas takes seriously its reporting obligations and its responsibility to protect its clients from real risks of exploitation and abuse.[25]

Determinations regarding compliance with state reporting laws properly rest with state authorities. State reporting laws are complex and vary widely from state to state.[26] They seek a nuanced balance between the need to protect those who experience abuse and ensure that law enforcement can bring victimizers to justice with the need to ensure that clients are able to seek critical health care services they might avoid if they do not trust their health care provider. Thus, many state laws include both specific requirements that clearly trigger an obligation to make a report and others that allow for the exercise of discretion by health care professionals.

Third, the NPRM adds important clarification to how Title X-funded entities are to balance client confidentiality with the program's statutory requirement that "no charge will be made in such project or program for services provided to any person from a low-income family except to the extent that payment will be made by a third party (including a government agency) which is authorized or is under legal obligation to pay such charge."[27]

In that regard, Every Body Texas welcomes the NPRM's addition of language codifying a longstanding practice that had been included in the 2014 Title X Program Requirements that reasonable efforts must be made to "collect charges without jeopardizing client confidentiality," along with a new requirement that clients be informed of "any potential for disclosure of their confidential health information to policyholders where the policyholder is someone other than the client."[28] HHS is right to recognize the potential for harm from varied state and local laws regarding the accessibility of client information to insurance policyholders that are not the client. As more and more clients have access to insurance, the potential risks of disclosure of sensitive information have increased. These proposed additions to the Title X regulations will help to ensure that confidentiality remains paramount in Title X.

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[25] Position Paper of the American Academy of Family Physicians, American Academy of Pediatrics, American College of Obstetricians and Gynecologists & Society for Adolescent Health and Medicine, *Protecting Adolescents: Ensuring Access to Care and Reporting Sexual Activity and Abuse*, 35(5) J. ADOLESCENT HEALTH 420-23 (2004).

[26] *See, e.g.*, Rebecca Gudeman & Erica Monasterio, *Mandated Child Abuse Reporting Law: Developing and Implementing Policies and Training*, National Center for Youth Law and Family Planning National Training Center for Service Delivery (2014), http://www.cardeaservices.org/documents/resources/Mandated-Child-Abuse-Reporting-Law-GUIDE-20140619.pdf.

[27] 42 U.S.C. § 300a-4.

[28] "Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services," 86 Federal Register 19812, 19820 (April 15, 2021).

The NPRM proactively addresses the potential within the Title X regulations themselves for harm related to disclosure of a client's sensitive information to third parties such as policyholders who are not the client. In addition, HHS should evaluate Title X's interaction with other laws and regulations for possible conflicts that could undermine Title X clients' confidentiality and potentially subject them to harm.

For example, the final rule, "21st Century Cures Act: Interoperability, Information Blocking, and the ONC Health IT Certification Program"[29] (ONC rule), contains information-blocking provisions that went into effect April 5, 2021. The ONC rule requires that a broad range of electronic health information (EHI) be made immediately available to clients and bans the withholding of EHI as "information blocking." Title X clients could be harmed if third parties gain access to EHI containing sensitive information that is disclosed pursuant to the information-blocking ban. However, the information-blocking ban contains several exceptions, including a "privacy exception" that allows information to be withheld to comply with state or federal privacy laws.

Every Body Texas presumes that if sensitive information were withheld in compliance with Title X's confidentiality protections, that would fall within the ONC rule's privacy exception and would not constitute information blocking.[30] To avoid any confusion, it would be helpful for HHS to make this presumption explicit in the final version of this NPRM or through another regulatory vehicle.

Additionally, Every Body Texas urges HHS to include language clarifying that longstanding prohibitions on requiring parental notice and consent in Title X remain in effect. Efforts to require parental consent or notification for Title X-funded family planning services have been consistently rejected by the courts. Consistent with the Title X statute, regulations, and case law, the 2001 Title X Guidelines,[31] which combined program requirements and clinical program guidelines, contained a three-paragraph section specifically on adolescent confidentiality and explicit statements regarding parental notice and consent. When the 2001 Title X Guidelines were replaced by the 2014 Title X Program Requirements,[32] the explicit language was removed even though the principles articulated in the 2001 Title X Guidelines were then and are still valid. To assuage widespread concerns whether the protections remained in effect following removal of the language, on June 5, 2014, the Office of Population Affairs (OPA) released an "OPA Program

[29] 85 Federal Register 25642 (May 1, 2020).
[30] A Title X provider's actions in compliance with Title X's confidentiality protections would almost certainly meet the ONC rule's privacy exception. In the alternative, given the importance of Title X's confidentiality protections in preventing physical and/or emotional harm to clients, the withholding of EHI might also not be considered information blocking because it would fall under the ONC rule's "preventing harm" exception.
[31] Office of Population Affairs, Program Guidelines for Project Grants for Family Planning Services, Section 8.7, January 2001, http://www.hhs.gov/opa/pdfs/2001-ofp-guidelines.pdf.
[32] Office of Population Affairs, Program Requirements for Title X Funded Family Planning Projects, Version 1.0, April 2014, http://www.hhs.gov/opa/pdfs/ogc-cleared-final-april.pdf.

Policy Notice" (PPN)[33] clarifying that Title X's protections remain unchanged in the 2014 *Program Requirements for Title X Funded Family Planning Projects*. While these protections exist in that sub-regulatory guidance, they are absent from the actual Title X regulation.

To alleviate any confusion, Every Body Texas recommends the following language, which is identical to PPN 2014-1 and the 2001 program guidance, be added to the end of § 59.10 as follows:

> "Title X projects may not require consent of parents or guardians for the provision of services to minors, nor can any Title X project staff notify a parent or guardian before or after a minor has requested and/or received Title X family planning services."

Every Body Texas strongly supports the NPRM's return to the core mission of Title X and adherence to nationally recognized standards of care.

Title X was expressly created in 1970 to make "comprehensive family planning services readily available to all persons desiring such services."[34] Specifically, many low-income women had more children than they desired, because both the pill and the other most effective contraceptive method at the time, the copper intrauterine device (IUD), were available only through medical professionals and at a high cost, both for the contraceptive itself and for medical visits. President Richard M. Nixon therefore called on Congress to "establish as a national goal the provision of adequate family planning services … to all those who want them but cannot afford them," stressing that "no American woman should be denied access to family planning assistance because of her economic condition."[35]

Congress responded with overwhelming bipartisan support, enacting Title X to help people living with low incomes who desired but could not access the contraceptive methods that more affluent members of society could access. Congress noted that these individuals were "forced to do without, or to rely heavily on the least effective nonmedical techniques for fertility control unless they happen to reside in an area where family planning services are made readily available by public health services or voluntary agencies."[36] Congress emphasized that the "problems of excess fertility for the poor result to a large extent from the inaccessibility of family planning information and services."[37] At the same time, Congress emphasized that it sought to establish a comprehensive family planning program and to make quality services readily available to those

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[33] Office of Population Affairs, OPA Program Policy Notice 2014-01—Confidential Services to Adolescents, June 5, 2014, https://opa.hhs.gov/grant-programs/title-x-service-grants/about-title-x-service-grants/program-policy-notices/opa-program-policy-notice-2014-01-confidential-services-to-adolescents.

[34] *Planned Parenthood Federation of America, Inc. v. Heckler*, 712 F.2d 650, 651 (D.C. Cir. 1983) (quoting S. REP. NO. 91-1004, at 2 (1970)).

[35] Richard Nixon, Special Message to the Congress on Problems of Population Growth (July 18, 1969).

[36] S. REP. NO. 91-1004, at 9 (1970).

[37] H.R. Rep. No. 91-1472, at 6 (1970).

with low incomes—not simply expand the number of individuals served.[38] Congress also recognized that, in this area of individuals' reproductive decision-making, Title X required "explicit safeguards to [e]nsure that the acceptance of family planning services and information relating thereto must be on a purely voluntary basis by the individuals involved."[39]

Thus, through Title X, Congress sought to provide people with low incomes with biomedical contraceptives, with equal access to high-quality family planning medical care, and with the true freedom to make their own decisions about whether and when to have children. The statute thus requires Title X projects to "offer a broad range of acceptable and effective family planning methods and services," and that persons from low-income families be given priority in the Title X program and that no charge may be made for the services and supplies provided for those persons. In the decades since it first began, and prior to the 2019 Rule, Title X programs provided high-quality, up-to-date services that were considered the gold standard of family planning care.

As a relatively new Title X grantee, Every Body Texas has built the foundation of our Title X project upon the Quality Family Planning ("the QFP") guidelines, published by the Office of Population Affairs and the Centers for Disease Control and Prevention in 2014. In doing so, our organization and our network of sub-recipients make a commitment to administering Title X funding in Texas with the highest integrity. This is proven by the quality and effectiveness of the services our sub-recipients deliver to their clients and communities. Studies of the Texas family planning safety net conducted prior to the 2019 Rule found that client-centered, non-directive pregnancy options counseling was more common among Title X sub-recipients than state-only funded organizations[40] and that Title X sub-recipients were less likely to report practices and barriers preventing women from receiving their preferred contraceptive method in a timely manner than state-only funded organizations.[41] The exacting quality assurance and monitoring activities and the training and technical assistance on best practices that we offer—and which the 2019 rule limited our ability to provide—are critically important to our success as a Title X grantee in serving clients and communities across Texas.

The 2019 Rule undermined this longstanding standard of care in a variety of ways: It eliminated the term "medically approved" from the longstanding regulatory requirement that projects provide "a broad range of acceptable and effective medically approved family planning methods;"[42] included overly permissive language that opened the door to participation in the

[38] See H.R. Rep. No. 91-1472, at 10 (1970); 84 Stat. 1504.
[39] S. Rep. No. 91-1004, at 12.
[40] Kari White, Katelin Adams, and Kristine Hopkins, Counseling and referrals for women with unplanned pregnancies at publicly funded family planning organizations in Texas, Contraception 99(1) 48-51 (2019).
[41] Kari White, Elizabeth Ela, Kristine Hopkins, and Joseph E. Potter, Providers' Barriers to Offering Contraception in the Healthy Texas Women (HTW) Program, Texas Policy Evaluation Project Research Brief (2019), https://liberalarts.utexas.edu/txpep/research-briefs/htw-provider-evaluation-brief.php.
[42] 83 Fed. Reg. at 25530.

program by providers who object to fundamental tenets of the Title X program, and diverged from the nationally recognized clinical standards, the QFP guidelines. Furthermore, the 2019 rule made drastic changes to pregnancy counseling by Title X providers that violated Congress's explicit, repeated mandates; contradicted central principles of medical ethics; and, attempted to enlist clinicians in deceiving and delaying clients who seek information about or access to abortion providers.

Every Body Texas applauds HHS for the proposed rule's return to the core mission of the Title X program and will once again match clients' expectations that they will receive high-quality client-centered care that includes comprehensive, medically accurate counseling and information, and referrals for any other services sought.

As a result of the 2019 Rule, pregnancy diagnosis and nondirective pregnancy counseling were excluded from our Title X project effective July 15, 2019. Because these services were no longer funded by Title X, Every Body Texas also ended all quality assurance monitoring (including data collection) of pregnancy diagnosis and nondirective pregnancy counseling encounters. This included monitoring of referrals that may have occurred during counseling encounters. As previously noted, prior to the 2019 Rule a study found that client-centered, non-directive pregnancy options counseling was more common among Title X sub-recipients than state-only funded organizations[43]—so we are eager to promptly restore aspects of our Title X project that were modified to ensure compliance with the 2019 Rule, including the reinstatement of pregnancy diagnosis and nondirective pregnancy counseling as Title X-funded services.

In particular, Every Body Texas supports the following changes and urges HHS to swiftly finalize them:

- The inclusion of "FDA-approved contraceptive services" and reinstatement of the term "medically approved" to the proposed definition of family planning services;
- The restoration of adherence to and explicit reference in the rulemaking to nationally recognized standards of care (the QFP, as periodically updated), standards by which OPA can once again monitor and evaluate Title X project performance in furtherance of the core mission of Title X;
- The recognition that "offering only a single method of family planning could unduly limit Title X clients, especially low-income clients, by reducing access to a client's method of choice," and the new requirement that sites which do not offer "the broad range of methods on-site" provide clients with a client-centered referral to a provider that does offer the client's method of choice;[44]

[43] Kari White, Katelin Adams, and Kristine Hopkins, Counseling and referrals for women with unplanned pregnancies at publicly funded family planning organizations in Texas, Contraception 99(1) 48-51 (2019).
[44] "Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services," 86 Federal Register 19812, 19819 (April 15, 2021).

- The focus on providing services "in a manner that is client-centered, culturally and linguistically appropriate, inclusive, and trauma-informed; protects the dignity of the individual; and ensures equitable and quality service delivery consistent with national recognized standards of care;"[45]
- The reinstatement of the requirement to offer nondirective options counseling to pregnant clients upon request on all options relating to their pregnancy, including abortion referral;
- The revocation of the prohibition on referrals for abortion; the requirement that providers refer pregnant clients for prenatal care, regardless of their expressed wishes; the erroneous declaration that prenatal care is "medically necessary" for all pregnant persons; the requirement that Title X providers maintain physical, staff, and administrative system separation from locations that provide abortion as a method of family planning and from other abortion-related activities; and the requirement that counseling be provided only by physicians or "advanced practice providers," meaning "medical professional[s] who receive[] at least a graduate level degree in the relevant medical field"; and
- The restoration of the statutorily based criteria for awarding Title X grants, and the elimination of the discretion the 2019 rule sought to provide HHS to disqualify Title X grant applicants even before the competitive review process begins if the agency deemed an applicant to have insufficiently described how it will satisfy all regulatory requirements.

Modernizing the Title X regulations is important to the program's future success.

Despite the Title X program's success over the course of the program's history, including the nearly two decades spent operating under the 2000 regulations that serve as the basis of this NPRM, changes in the health care delivery landscape necessitate updates to the Title X regulations to account for the context in which services currently are delivered in the family planning safety net. The initial enactment of this program made clear that an essential purpose was to ensure access to comprehensive, high-quality family planning care for all, and not have Title X clients subject to outdated or cost-based limits on their health care. Moreover, medical care continues to evolve in important ways and Title X clients should not be left out of care advances now or in the future.

[45] "Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services," 86 Federal Register 19812, 19830 (April 15, 2021).

The NPRM makes an important update in § 59.5(b)(1) in recognition that medical services in many Title X-funded health centers can be and are provided by health care providers who are not physicians. In fact, the NPRM preamble specifically mentions physician assistants and nurse practitioners as the types of health care providers that provide consultation in Title X settings. Indeed, nurse practitioners, certified nurse midwives, and physician assistants accounted for 67% of the Title X program's full-time equivalent (FTE) Clinical Services Provider (CSPs) in 2019; physicians and registered nurses with an expanded scope of practice accounted for 24% and 9% of all CSP FTEs, respectively. Every Body Texas's Title X project is supported by a similar mix of clinical service providers (72% nurse practitioners, certified nurse midwives, and physician assistants and 28% physicians).

However, it is important to note that "consultation by a [healthcare] provider" is not and should not be limited only to the examples cited by HHS, as these CSPs represent only one facet of health care providers in Title X settings.[46] In 2019, 23%—or more than 1.07 million—of family planning encounters fell under the primary responsibility of other service providers, including registered nurses practicing within a standard scope of practice, licensed practical nurses, health educators, and social workers.[47] These professionals not only account for a substantial number of Title X encounters on their own, but also provide critical support to CSPs in team-based care models typical to modern health care delivery. They are more likely to be Black, Indigenous, and People of Color (BIPOC)—racial/ethnic groups that are both persistently underrepresented in health care professions and more reflective of clients served through the Title X program.[48] Every Body Texas encourages HHS to elevate the critical role these health care professionals play in the Title X program.

Among enhancements it proposes to the 2000 regulations through the NPRM, HHS also specifically highlights "telemedicine." The importance of telehealth, more broadly, has been growing in recent years and has become particularly clear in the context of the COVID-19 public health emergency. Since spring 2020, use of telehealth modalities has allowed tens – if not hundreds – of thousands of Title X users to remotely access many Title X services without placing themselves at increased risk for potential COVID-19 exposure.

That said, the Department's use of the term "telemedicine" in the NPRM instead of "telehealth" is of concern, with "telehealth" referring to a broader scope of remote health care services than telemedicine and includes non-clinical services like counseling and education. Accordingly, in addition to its change from "physician" to "[health care] provider" in § 59.5(b)(1), HHS can further

[46] C Fowler, J Gable, B Lasater, and K Asman, *Family Planning Annual Report: 2019 National Summary* (Washington, DC: Office of Population Affairs, 2020).
[47] C Fowler, J Gable, B Lasater, and K Asman, *Family Planning Annual Report: 2019 National Summary* (Washington, DC: Office of Population Affairs, 2020).
[48] E Salsberg, C Richwine, and S Westergaard S, et al, "Estimation and Comparison of Current and Future Racial/Ethnic Representation in the US Health Care Workforce," *JAMA Netw Open.* 2021;4(3):e213789. doi:10.1001/jamanetworkopen.2021.3789.

improve the Title X regulations by explicitly naming and defining "telehealth" in that same section as follows:

> 59.5(b)(1): Provide for clinical and other qualifying services related to family planning (including consultation by a healthcare provider, family planning counseling and education, examination, prescription, and continuing supervision, laboratory examination, contraceptive supplies), in person or via telehealth, including audio-only modalities, regardless of the patient's or provider's setting, and necessary referral to other medical facilities when medically indicated, and provide for the effective usage of contraceptive devices and practices.

For 50 years, the Title X family planning program has been a critical underpinning of the public health safety-net infrastructure that serves millions of people with low incomes each year.

Every Body Texas appreciates the opportunity to comment on the NPRM, "Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services." If you require additional information about the issues raised in these comments, please contact Kami Geoffray at kami.geoffray@everybodytexas.org or (512) 448-4857.

Sincerely,

Kami Geoffray
Chief Executive Officer