Q&A: Recent Action Undermines Title X Program and Threatens Women's Health

By Candace Gibson & Catherine McKee

Recently, in a major attack on women's health, President Trump signed a measure (H.J. Res. 43) rescinding an important 2016 rule amending existing Title X regulations. The 2016 rule clarified that Title X grantees are not permitted to exclude providers from their Title X projects as subrecipients for reasons unrelated to the goals of Title X. Media coverage of the change has been somewhat confusing and even misleading, with headlines claiming that states now have broad power to "defund Planned Parenthood." The questions and answers below explain H.J. Res. 43 and its potential effect on low-income individuals.

Question: What is Title X?

Answer: Title X is the only federal funding dedicated solely to family planning in the United States. Enacted in 1970, Title X of the Public Health Service Act authorizes the Secretary of the Department of Health and Human Services (HHS) to make grants to private nonprofit or public entities to establish and operate voluntary family planning projects.[1] These projects provide the educational, comprehensive medical, and social services necessary to help individuals freely determine the number and spacing of their children.[2] Thus, Title X projects must offer a wide range of acceptable and effective contraceptive methods and services.[3]

[1] *See* 42 U.S.C. § 300 - 300a-6. The Secretary may also award Title X grants to provide training for personnel working in family planning service projects, to conduct research related to family planning, and to develop family planning educational materials. *See id.* §§ 300a-1 - 300a-3.
[2] 42 C.F.R. § 59.1
[3] 42 U.S.C. § 300(a); 42 C.F.R. § 59.5(a)(1).

When selecting grant recipients, the Secretary must consider:

- the number of patients to be served;
- the extent to which family planning services are needed locally;
- the relative need of the applicant; and
- its capacity to make rapid and effective use of such assistance.[4]

In addition, the statute makes clear that while state agencies may apply for these grants, local and regional entities have the right to apply as well.[5] Grant recipients, which are often state agencies, may provide Title X services directly, award funds to subrecipients to provide these services, or do both.[6]

Title X funds may not be used for the promotion or provision of abortion services.[7] However, Title X projects must offer pregnant women the opportunity to receive information and counseling about: prenatal care and delivery; infant care, foster care, or adoption; and pregnancy termination. Upon request, projects must provide neutral, factual information and nondirective counseling regarding each of these options, as well as referrals.[8] In addition, providers who receive Title X funds may provide abortion services as long as they do not use the Title X funds to promote or encourage abortion as a method of family planning in their Title X projects.[9] Importantly, Title X providers must maintain a patient's confidentiality.[10]

Providers receiving Title X funds must prioritize low-income individuals when furnishing family planning services.[11] Low-income individuals receive services at low-or-no-cost depending on their family income.[12] Thirty-five percent of patients seen at health centers that receive Title X funding are enrolled in Medicaid or other public health insurance.[13] In addition, many patients receiving services from Title X providers are from communities of color: 21 percent identify as Black or African American and 32 percent

[4] 42 U.S.C. § 300(b); § 42 C.F.R. 59.7. Within HHS, the Health Resources and Services Administration (HRSA) awards Title X grants.
[5] 42 U.S.C. § 300(b); 42 C.F.R. § 59.3(a).
[6] *See* Compliance With Title X Requirements by Project Recipients in Selecting Subrecipients, 81 Fed. Reg. 91852 (Dec. 19, 2016) (to be codified at 42 C.F.R. pt. 59).
[7] 42 U.S.C. § 300a-6.
[8] 42 C.F.R. § 59.5(a)(5).
[9] *See* Standards of Compliance for and Provision of Abortion-Related Services in Family Planning Services Projects; Final Rule and Notice, 65 Fed. Reg. 41270, 41276 (July 3, 2000).
[10] 42 C.F.R. § 59.11.
[11] 42 U.S.C. §300a-4(c)(1); 42 C.F.R. § 59.5(a)(6).
[12] 42 U.S.C. § 300a-4(c)(2); 42 C.F.R. § 59.5(a)(7)-(8).
[13] NAT'L FAMILY PLANNING & REPROD. HEALTH ASS'N, TITLE X: AN INTRODUCTION TO THE NATION'S FAMILY PLANNING PROGRAM (2017), https://www.nationalfamilyplanning.org/file/Title-X-101-February-2017-final.pdf.

identify as Hispanic or Latino/a.[14]

Question: What did the 2016 rule do?

Answer: In 2016, HHS amended existing Title X regulations to clarify that grantees may not prohibit providers from participating in their Title X projects as subrecipients for reasons other than their ability to provide services.[15] As a result of the change, the Title X regulations prohibited grantees from excluding providers from their Title X projects on the basis that they offer abortion services or contract or affiliate with providers who offer abortion services.

Question: Why was the 2016 rule necessary?

Answer: In recent years, a number of states have taken steps to prevent Planned Parenthood health centers and other family planning providers who perform abortion services or affiliate with other providers who do so from participating in their Title X projects. States have used two main approaches to exclude providers: (1) implementing "tiering" requirements, which prioritize providers by category, for distributing Title X funds; and (2) explicitly prohibiting certain providers from being eligible to receive Title X funds.

A tiering requirement gives specific entities, usually public agencies such as local health departments, followed by those that offer a full-range of primary care services, a preference when competing for Title X funding as subrecipients. For example, Wisconsin enacted a state law requiring the state health department to apply to HHS for Title X funds and to then distribute these funds to state, county, and local health departments and health clinics.[16] If any funds remain, the law directs the health department to distribute them to hospitals and federally qualified health centers that provide comprehensive primary care services.[17] In effect, tiering requirements like Wisconsin's preclude providers who solely offer reproductive health services from receiving Title X funds from the state, despite the fact that studies show that they deliver higher quality family planning services and achieve Title X programmatic goals more efficiently than other providers.[18]

Other states have passed laws that explicitly block Title X funding from going to providers who offer abortion services or their affiliates. For example, in 2016, Louisiana

[14] *Id.*
[15] 81 Fed. Reg. at 91860 (codified at 42 C.F.R. § 59.3(b)).
[16] A.B. 310, 2015 -2016 Leg., (Wis. 2016), http://docs.legis.wisconsin.gov/2015/related/acts/151.
[17] *Id.*
[18] *See e.g.,* Marion W. Carter et al., *Four Aspects of the Scope and Quality of Family Planning Services in US Publicly Funded Health Centers: Results From a Survey of Health Center Administrators*, 94 CONTRACEPTION 340 (2016).

enacted a law prohibiting the state from providing any public funding to an entity that performs abortions or contracts with an entity that performs abortions in the state.[19] The law would prevent the state's Title X grantee, the Louisiana Department of Health and Hospitals,[20] from providing Title X funds to family planning providers who deliver abortion services.[21]

These kinds of state restrictions on Title X funding - many of which have been successfully challenged in court - have led to inconsistency in how states distribute Title X funds to subrecipients.[22] More importantly, state laws that have gone into effect have blocked low-income individuals from accessing Title X services. For example, after Texas both reduced state funding for family planning services and implemented a tiering requirement, the number of individuals served by Title X decreased dramatically, from 259,606 in 2011 to 166,538 in 2015.[23] These funding reductions and restrictions may have contributed to an increase in the maternal mortality rate in Texas.[24] In addition to these attacks, family planning providers have faced other funding constraints that have undermined their ability to provide services, underscoring the need for the 2016 rule. [25]

[19] H.B. 606, 2016 reg. Sess. (La. 2016), http://www.legis.la.gov/legis/ViewDocument.aspx?d=1006654.
[20] OFFICE OF POPULATION AFFAIRS, TITLE X FAMILY PLANNING DIRECTORY OF GRANTEES (2016), https://www.hhs.gov/opa/sites/default/files/title-x-directory-grantees.pdf.
[21] The law is the subject of ongoing litigation. *See June Medical Services v. Gee*, No. 3:16-cv-00444-BAJ-RLB (M.D. La. July 1, 2016) (complaint).
[22] *See* 81 Fed. Reg. at 91853.
[23] *See* CHRISTINA FOWLER ET AL., RTI INT'L, FAMILY PLANNING ANNUAL REPORT: 2011 NATIONAL SUMMARY, B-3, (2012), https://www.hhs.gov/opa/sites/default/files/fpar-2011-national-summary.pdf; CHRISTINA FOWLER ET AL., RTI INT'L, FAMILY PLANNING ANNUAL REPORT: 2015 NATIONAL SUMMARY, B-3, (2016), https://www.hhs.gov/opa/sites/default/files/fpar-2011-national-summary.pdf.
[24] One study shows that Texas' maternal mortality rate doubled between 2011 and 2012. *See* Marian F. MacDorman, et al., *Is the United States Maternal Mortality Rate Increasing? Disentangling Trends from Measurement Issues*, 128 OBSTETRICS & GYNECOLOGY 447 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5001799/pdf/nihms810951.pdf. According to the Maternal Mortality and Morbidity Task Force of Texas, Black women face the greatest risk for maternal death in the state. MATERNAL MORTALITY AND MORBIDITY TASK FORCE AND DEPARTMENT OF STATE HEALTH SERVICES, JOINT BIENNIAL REPORT, 1, (2016).
[25] For example, Congress has cut Title X funding even as demand for Title X services has increased. Kinsey Hasstedt, *Funding Restrictions on the US Family Planning Safety Net* 19 GUTTMACHER POL'Y REV. 67, 68 (2016), https://www.guttmacher.org/sites/default/files/article_files/gpr1906716.pdf. In addition, a number of states have moved to exclude Planned Parenthood and other providers from their Medicaid programs, in violation of the Medicaid Act.

Question: What exactly did H.J. Res. 43 do?

Answer: The Congressional Review Act (CRA) gives Congress the power to overturn certain regulations.[26] In short, if Congress passes a joint resolution disapproving a particular rule within a specified timeframe, and the president signs it into law, the rule is rescinded. The federal agency may not issue a substantially similar rule in the future unless Congress gives the agency the authority to do so.[27]

Pursuant to the CRA, Congress passed a joint resolution (H.J. Res. 43) disapproving the 2016 Title X rule, which President Obama had signed. As a result, the 2016 rule has been rescinded. Thus, the lack of clarity and uniformity regarding selection criteria for Title X subrecipients persists.

Question: Are states now free to block Planned Parenthood health centers or other family planning providers who offer abortion services from participating in their Title X projects?

Answer: Not entirely. H.J. Res. 43 will certainly embolden states that are inclined to limit eligibility for subrecipients of Title X funding. However, states that have taken such steps in the past have faced legal challenges. Although the outcomes of these cases have been mixed, several courts have determined that the Title X statute sets the eligibility criteria for participation in Title X and states may not establish additional standards.[28] Other courts have found that certain state restrictions on access to various sources of public funding violate the First Amendment.[29]

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[26] *See* 5 U.S.C. §§ 801-808. For more information about the detailed provisions of the CRA, *see* MAEVE P. CAREY, ALISSA M. DOLAN, CHRISTOPHER M. DAVIS, CONGRESSIONAL RESEARCH SERV.,THE CONGRESSIONAL REVIEW ACT: FREQUENTLY ASKED QUESTIONS (2016), https://fas.org/sgp/crs/misc/R43992.pdf.

[27] 5 U.S.C. § 801(b)(2).

[28] *See Planned Parenthood of Houston & Se. Tex. v. Sanchez,* 403 F.3d 324, 337-38 (5th Cir. 2005) (determining that state statute, if construed to prevent providers who perform abortions or contract with or fund providers who perform abortions from receiving Title X funding, would likely be preempted by Title X statute and implementing regulations); *Planned Parenthood Fed'n of America v. Heckler*, 712 F.2d 650, 663 (D.C. Cir. 1983) (invalidating federal regulation requiring Title X grantees to comply with state parental notification and consent laws on grounds that Congress did not delegate authority to HHS "to in turn empower the states to set eligibility criteria" for Title X grantees); *Planned Parenthood of Cent. N.C. v. Cansler*, 877 F. Supp. 2d 310 (M.D.N.C. 2012); *Planned Parenthood of Billings, Inc. v. Montana*, 648 F. Supp. 47 (D. Mont. 1986). *But see Planned Parenthood of Kan. & Mid-Mo. v. Moser*, 747 F.3d 814 (10th Cir. 2014) (finding that Supremacy Clause does not give Planned Parenthood private cause of action for injunctive relief against state law allegedly contrary to Title X statute).

[29] *See Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d 1245 (10th Cir. 2016), *Planned Parenthood of Sw. & Cent. Fla. v. Philip,* 194 F. Supp. 3d 1213 (N.D. Fl. 2016), *Planned Parenthood of Greater Ohio v. Hodges*, 188 F. Supp. 3d 684 (S.D. Oh. 2016), *Planned Parenthood of Cent. N.C. v. Cansler*, 877 F. Supp. 2d 310 (M.D.N.C. 2012). *But see Planned Parenthood of Kan. & Mid-Mo. v. Moser*, 747 F.3d 814

Question: Will rescinding the 2016 rule affect Medicaid enrollees?

Answer: Medicaid covers family planning services and supplies for all enrollees of childbearing age who desire such services.[30] H.J. Res. 43 does not directly affect the Medicaid program. However, Title X is a critical source of support for family planning providers.[31] To the extent that states are able to prevent certain family planning providers from receiving Title X funding, they will also reduce access to high quality reproductive health services for low-income individuals, including individuals enrolled in Medicaid.

In addition, a number of states have also taken steps to exclude Planned Parenthood and/or other providers who offer abortion services or affiliate with providers who do so from their state Medicaid programs. Such steps violate the Medicaid Act, which guarantees Medicaid enrollees the right to receive services from the qualified Medicaid provider of their choice.[32] As a result, a number of federal courts have stopped these state actions.[33]

(10th Cir. 2014); *Planned Parenthood of Ind., Inc. v. Comm'r of Indiana State Dep't of Health*, 699 F.3d 962 (7th Cir. 2012), *Planned Parenthood Ass'n of Hidalgo Cty. Tex., Inc. v. Suehs*, 692 F.3d 343 (5th Cir. 2012).

[30] *See* 42 U.S.C. §§ 1396a(a)(10)(A); 1396d(a)(4)(C).

[31] *See* BURKE HAYS, NAT'L FAMILY PLANNING & REPRODUCTIVE HEALTH ASS'N, TITLE X IN CONTEXT: UNDERSTANDING THE DIVERSE FUNDING SOURCES THAT SUPPORT THE PUBLICLY-FUNDED FAMILY PLANNING NETWORK (2016), https://www.nationalfamilyplanning.org/file/documents---policy-briefs/Title-X-in-Context.pdf.

[32] *See* 42 U.S.C. § 1396a(a)(23).

[33] *See, e.g., Planned Parenthood of Gulf Coast, Inc. v. Gee*, 837 F. 3d 477, 489 (5th Cir. 2016); *Planned Parenthood of Ariz v. Betlach*, 727 F.3d 960, 963 (9th Cir. 2013); *Planned Parenthood of Ind. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 974 (7th Cir. 2012).