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New Title X Regulations: Implications for Women and Family Planning Providers

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Key Takeaways

- The Trump Administration's new final regulations for the federal Title X family planning program make significant changes to the program and will:
  - Block the availability of federal funds to family planning providers that also offer abortion services;
  - Prohibit sites that participate in Title X from referring pregnant clients to abortion providers;
  - Eliminate current requirements for Title X sites to provide non-directive pregnancy options counseling that includes information about prenatal care/delivery, adoption, and abortion;
  - Prioritize providers that offer comprehensive primary health care services over those that specialize in reproductive health services; and
  - Encourage participation by "non-traditional" organizations such as those that only offer one method of family planning, such as fertility awareness-based methods.
- Sites that do not offer abortion services may still qualify for Title X funds, but may not participate in the program because of concerns about clinical standards of care, medical liability, and burdensome administrative requirements.
- If implemented, the changes to Title X will shrink the network of participating providers and could reduce the scope of services offered to low-income and uninsured people that rely on Title X-funded clinics for their family planning care.
- The attorneys general from 23 states, major family planning organizations and the American Medical Association have filed legal challenges in federal court to block the implementation of the regulations, claiming the new rules violate the Constitution and federal law. The courts will likely make a decision on whether to stay the implementation before May 3rd, when some of the provisions of the regulation are scheduled to take effect.

Introduction

On March 4, 2019, the Trump Administration published a new final regulation that restores Reagan-era restrictions regarding abortion and Title X. The primary goal of these regulations is to block the availability of federal funds to family planning providers, such as Planned Parenthood, that also offer abortion services with non-Title X funds and to prohibit sites that receive Title X funds from referring pregnant patients to other providers for abortion services. These regulations, if implemented will significantly shrink the network of clinics available to provide family planning services under Title X and weaken the scope of family planning services offered to low-income and uninsured women in many parts of the country. Without Title X funds, which on average make up 19% of the revenue of participating family planning clinics, some clinics may close, while other clinics will need to reduce staff and service hours and cut

professional development and training, which could reduce access to time-sensitive reproductive health care services.

The Department of Health and Human Services (HHS) maintains that banning Title X sites from referring for abortion services and requiring Title X sites to have complete physical and financial separation are necessary. They state that the prior regulations violate the Title X statute, which prohibits the inclusion of abortion as a family planning service. HHS also argues that requiring Title X projects to provide abortion referrals and nondirective pregnancy options counseling is inconsistent with federal conscience laws such as the Church, Coats-Snowe, and Weldon Amendments.

Key Facts–Title X Federal Family Planning Program

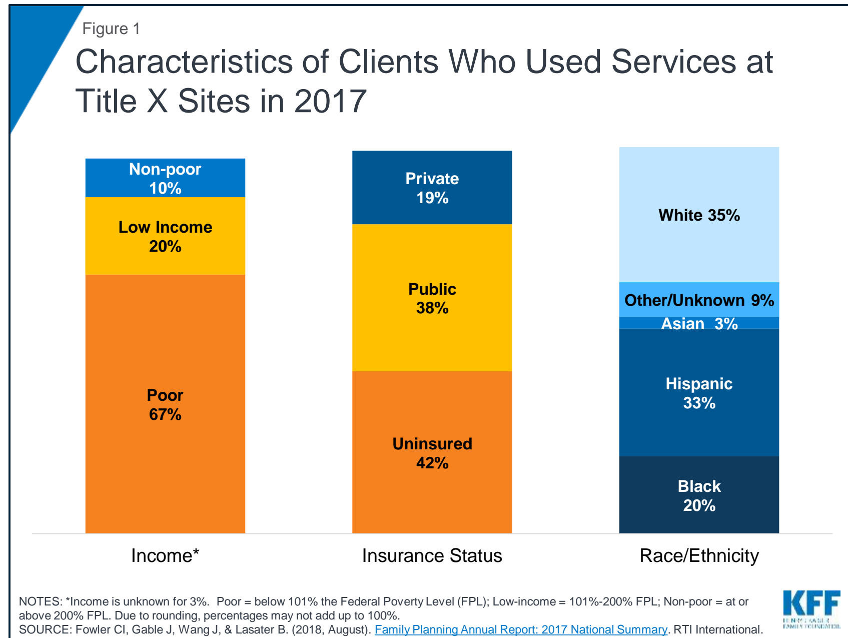
- Title X, enacted in 1970, is the only federal program specifically dedicated to supporting the delivery of family planning care.
- Administered by the HHS Office of Population Affairs (OPA), and funded at $286.5 million for Fiscal Year 2018, the program serves over 4 million low-income, uninsured, and underserved clients.
- In 2017, nearly 4,000 clinics nationwide relied on Title X funding to help serve 4 million people. The sites include specialized family planning clinics such as Planned Parenthood centers, community health centers, state health departments, as well as school-based, faith-based, and other nonprofit organizations.
- Title X grants made up about 19% of revenue for family planning services for participating clinics in 2017, providing funds to not only cover the direct costs of family planning services, but also pay for general operating costs such as staff salaries, staff training, rent, and health information technology.

This new regulation comes in the midst of a funding cycle for grantees set to end March 31, 2019. Applicants have already applied for new grants expected to start on April 1, 2019 under the prior regulations, and those selected for funding will now need to decide whether they will comply with the new regulations or withdraw from the program. The regulations have been legally challenged by 23 states, a number of family planning organizations and state officials, and the American Medical Association on the basis of constitutional and statutory claims. This brief reviews the Trump Administration's new final Title X family planning regulations, compares them to the current program rules and discusses the implications of these changes for low-income women seeking family planning services and the providers that have been serving them with Title X support.

Background

For low-income women, publically funded clinics are an important source of family planning services. These critical services help women avoid unintended, mistimed or unwanted pregnancies as well as give them access to critical preventive care and STI screening and treatment. One in three low-income women reported that they obtained birth control from a publically-funded clinic, such as Planned Parenthood or another health center or public health clinic. In 2017, over 4 million individuals obtained family planning services at a Title X funded site. The majority of the clients (67%) had family incomes at or below the poverty level, 38% were covered by Medicaid or another public program, and nearly half (42%) were uninsured (**Figure 1**). Two thirds were women and men of color.

The statute governing Title X requires program funds to serve low-income populations at low or no cost, provide clients with a broad range of acceptable and effective family planning methods and services, and ensure that the services are voluntary. It also stipulates that funds may only go to entities where “abortion is not a method of family planning.” Regulations that have been in effect interpret this provision to mean that Title X projects are prohibited from using Title X funds to pay for abortions and must keep any abortion-related activities financially separate from their Title X activities. Title X projects are required to provide nondirective options counseling to pregnant people on prenatal care and delivery, infant or foster care, adoption, and abortion. Pregnant people desiring an abortion must be provided with a referral if asked, but the provider cannot promote abortion, schedule an appointment, negotiate rates, or arrange transportation for people desiring abortions.



New Regulations

On March 4, 2019, new final regulations for Title X grants were published in the Federal Register, with a phased-in implementation period that commences on May 3, 2019. The regulations make many changes to the requirements for Title X projects that will significantly reshape the program and provider network available to low-income people through Title X. Specifically, the regulations:

Prohibit federal Title X funds from going to any family planning site that also provides abortion services. The Title X statute specifies that no federal funds appropriated under the program “shall be used in programs where abortion is a method of family planning.” HHS has changed its interpretation of this provision over time, but throughout most of the history of the program, the ban has generally been understood to mean that Title X funds cannot be used to pay for or support abortion, as is the policy under the current regulations (**Appendix**).

The final regulation requires that Title X funded activities have full physical and financial separation from abortion-related activities. In addition to separate accounting and electronic and paper health records, providers need to have separate treatment, consultation, examination and waiting rooms, office entrances and exits, workstations, signs, phone numbers, email addresses, educational services, websites, and staff. This new requirement essentially disqualifies any provider from receiving Title X funds if they also

offer abortions. It also prohibits Title X projects from using Title X funds to participate in a variety of "activities that encourage abortion" including lobbying, attending an event during which they engage in lobbying, or paying dues to a group that uses the funds for lobbying or supporting a candidate for office. The proposed regulations are nearly identical to regulations issued under President Reagan (**Appendix**), which were legally challenged by Title X projects and providers, and were ultimately upheld by the Supreme Court in Rust v. Sullivan in 1991 (**Box 1**). However, the Reagan era regulation was never fully implemented as President Clinton issued an executive order to suspend the regulations and then issued new regulations that were in place until the new regulation was published on March 4, 2019.

Box 1 – Legal Challenges to the Title X Regulations

Many provisions in the Trump Administration's regulation mirror those issued in 1988 by the Reagan administration. Those regulations were challenged by Title X grantees and doctors in a lawsuit that ultimately reached the U.S. Supreme Court in Rust v. Sullivan. In 1991, the Supreme Court held that the regulations were a permissible interpretation of the statute and did not violate the First or Fifth Amendments.

The Court ruled that the government may favor childbirth over abortion and allocate funds consistent with this viewpoint without violating a woman's right to choose to terminate her pregnancy. After the Supreme Court's decision, Congress voted to repeal the prohibitions on counseling and referring for abortion, but lacked the votes to override President George H.W. Bush's veto.

The Reagan era regulation, however, was never fully implemented. The Clinton Administration issued regulations that have been in effect since then that have permitted Title X providers to refer for abortions and allow sites that also provide abortion services to participate in Title X, so long as there is financial separation between the Title X funds and funds used for abortion services.

Twenty-three states, several family planning organizations, and the American Medical Association have sued to block the implementation of the new regulations based on both statutory and constitutional claims. The federal courts may weigh these new statutory claims and decide to block the implementation of the regulations until the cases can be heard. The courts will need to act on the request for a stay before May 3, 2019. Ultimately, the Supreme Court may again take up the Title X family planning regulations and decide if the Trump Administration regulations violate the federal statutes or the Constitution or are within their agency rights.

Ban sites from providing pregnant clients with referrals for abortions: Under the regulations in place from 2000 to 2019, Title X grantees were required to provide pregnancy options referrals upon request. The new final regulations interpret referrals for abortion to be activities that are considered providing "abortion as a method of family planning" and prohibit Title X grantees and subrecipients from providing, promoting, referring for, supporting, or presenting abortion services to patients. Under the new regulations only a medical doctor or an advanced practice provider (defined as including physician assistants and advanced practice registered nurses) are permitted—but not required—to provide pregnant people with a list of health care providers that offer comprehensive primary health services, that also includes prenatal care. The rules also stipulate that some—but not the majority—of providers on the list, may also provide abortion. The Title X doctor or advanced practice provider may not indicate which of the listed providers also offer abortion services.

Eliminate the requirement for nondirective pregnancy options counseling that also includes discussion of abortion as an option: Under the previous regulations, Title X grantees were required to offer pregnant women the opportunity to be provided information and counseling regarding prenatal care and delivery; infant care, foster care, or adoption; and pregnancy termination. If asked for information and

counseling, providers were required to provide nondirective counseling on each of the options. The decision about whether to offer pregnancy options counseling is now left up to each site and organization that participates (which may include those that do not support abortion) to decide whether to mention abortion as an option to pregnant people who seek counseling. Only a medical doctor or advanced practice provider is permitted to provide nondirective pregnancy options counseling. However, the regulations specify that all pregnant people must be referred to prenatal care, regardless of their stated wishes.

Add new primary care requirements for Title X projects: Title X projects are required to offer "comprehensive primary health services onsite or have a robust referral linkage with primary health providers who are in close physical proximity." There is no definition of the term "close physical proximity" in the regulations.

Extend federal oversight, enforcement, and recordkeeping: The regulations grant enforcement and oversight authority of grantees and subrecipients to the Secretary of HHS. In the past, grantees were subject to review by HHS, but all subrecipients were under the authority of the grantee organization. In addition, there are new and significant informational requirements of the grantees including reporting detailed information about all subrecipients, and agencies or individuals providing referral services, including a description of the extent of the partnership and the process by which the grantee will "ensure adequate oversight and accountability for quality and effectiveness of outcomes." Title X grantees and subrecipients would also be required to maintain and report records indicating the age of minor clients and the age of their sexual partners as specified under state notification laws.

Define family planning: While the regulations that have been in effect do not define family planning, OPA has required grantees to offer a broad range of FDA-approved contraceptive methods onsite and follow the CDC and OPA recommendations for providing Quality Family Planning (QFP) services. The new final regulations define family planning as including abstinence, natural family methods and effective contraceptive methods, but exclude abortion services. The regulations do not incorporate any of the other elements of CDC and OPA recommendations.

Re-define who is "Low-income" for purposes of program eligibility: Low-income under Title X has been historically defined as income below 100% of the federal poverty level. The final regulations adapt this definition to allow a Title X project director to consider the insurance status of women who receive employer-sponsored insurance offered by an employer who refuses to cover contraceptives in their plan due to religious or moral objections. The project must also "consider other circumstances affecting her ability to pay" but may "consider her annual income as being reduced by the total annual out-of-pocket costs of contraceptive services she uses or seeks to use… or estimate them at $600" in calculation of her eligibility for free or reduced cost services.

This new definition is an attempt to address concerns raised in litigation challenging the Trump Administration's final ACA regulations to significantly broaden the ability of employers to be exempt from the Affordable Care Act's (ACA) contraceptive coverage requirement based on a religious or moral

objection to contraceptives. The Trump Administration's ACA contraceptive coverage regulations, if implemented, would take away the ACA's guarantee of no cost coverage of contraceptives from women insured by employers with religious or moral objections. Several states have legally challenged these regulations, and there is currently a stay blocking their implementation pending the outcome of the litigation. The Trump Administration contends that women affected by the ACA regulation could be able to obtain contraceptive services at Title X clinics. However, the revised Title X definition of "low-income" would probably not assist many women denied contraceptive coverage by their employers. For example, even women earning minimum wage may still not qualify as "low-income" and few women would probably be aware that they could potentially qualify for Title X services when they have employer coverage.

Implications for Providers and Patients

Access to family planning services is still a challenge for many low-income women. The impact of the final regulations will be far reaching and change the network of providers that are eligible to participate, limiting rather than expanding access.

Disqualifying family planning providers that also perform abortions from Title X program eligibility will significantly reduce the network of family planning providers and resources available to serve low-income and uninsured people under the program. The provisions that require physical and financial separation would make it impossible for clinics like Planned Parenthood and any other family planning provider that also offers abortion services to comply with the new requirements of the program.

The impact of banning federal Title X funds to Planned Parenthood, in conjunction with the prohibition on providing referrals to abortion services, will vary across the country. In 13 states, Planned Parenthood clinics were the site of care for over 40% of women who obtained publicly funded contraceptives (**Figure 2**). Research has shown that blocking Planned Parenthood from receiving public funds can reduce low-income women's access to contraceptives. In 2013, the Wisconsin legislature approved family planning cuts directed at Planned Parenthood, which resulted in the closure of five Planned Parenthood clinics in rural areas. Women who used the Planned Parenthood clinics were referred to other clinics that were usually further away, with waiting lists, and that did not provide the full range of contraceptive methods. A study conducted by Health

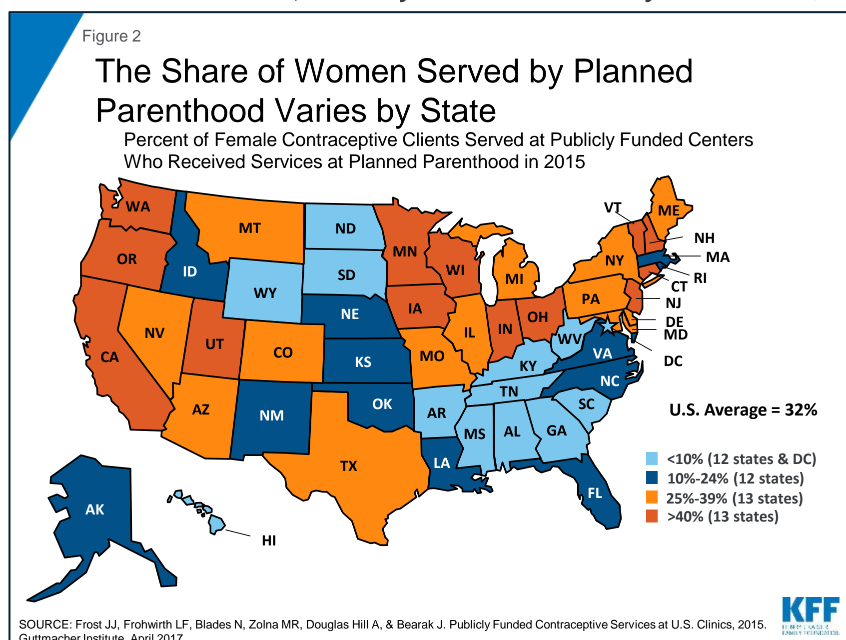


Figure 2

The Share of Women Served by Planned Parenthood Varies by State

Percent of Female Contraceptive Clients Served at Publicly Funded Centers Who Received Services at Planned Parenthood in 2015

SOURCE: Frost JJ, Frohwirth LF, Blades N, Zolna MR, Douglas Hill A, & Bearak J. Publicly Funded Contraceptive Services at U.S. Clinics, 2015. Guttmacher Institute. April 2017.

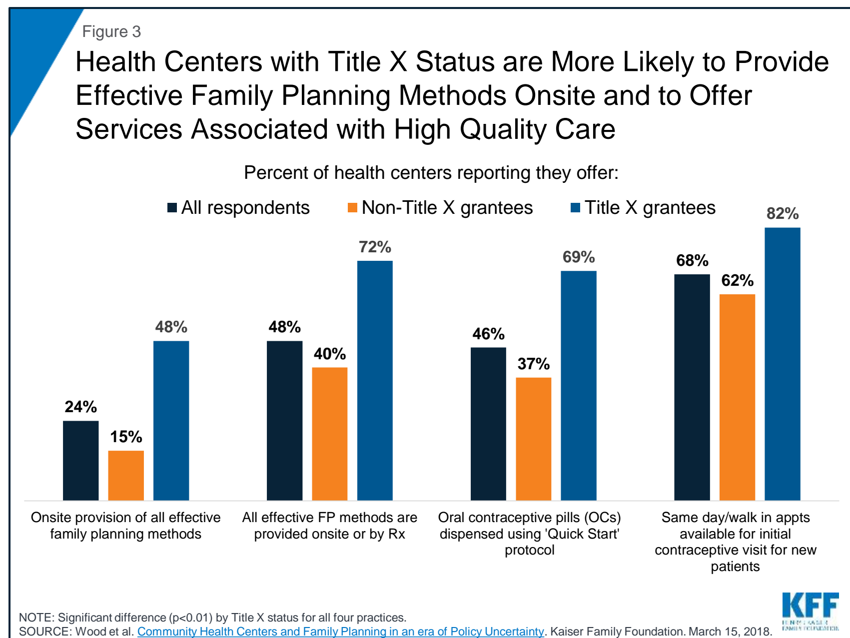
Management Associates for Planned Parenthood concluded that women in seven Wisconsin counties would have no alternative family planning provider should Planned Parenthood centers close there.

The ban on referrals for abortions compromises the quality of family planning care women receive through Title X providers. The Institute of Medicine's landmark study on health care quality identified six dimensions of quality: safety, timeliness, patient-centeredness, effectiveness, efficiency, and equity. Providers that withhold information about abortion and, if provided, limit the list of providers that pregnant people seeking abortion are offered would compromise the quality of care they provide. Care offered under those restrictions would not be patient-centered, could lead to delayed care, and would be inequitable. Adherence to medical standards of care requires providers to offer patients referrals to the highest quality providers that can offer care in the timeliest manner and respects a patient's decision to seek that care. The provider cannot indicate which of the licensed comprehensive primary health care and prenatal care providers also offer abortion. This list would primarily be comprised of hospitals and doctor's offices that include prenatal care. Hospitals account for roughly half of the abortion-providing facilities, but only provide about 5% of all abortion procedures. In contrast, abortion clinics and nonspecialized clinics provide 90% of abortions.

Banning referrals to abortion services could place participating providers at risk of medical liability. Providers who still qualify for Title X funds because they do not offer abortion may find themselves facing a medical liability risk if they opt to participate in the program that prohibits referrals for abortions. As Rosenbaum and her colleagues cite, the case of *Wickline v. State of California* finds that it is "no defense in a medical liability case to argue that physicians simply have followed a payer's instructions," which in this case, would be the Title X program. They argue that because Title X participating providers will be required to withhold information about services and referrals to qualified providers, they could be held liable and potentially jeopardize other funding they receive through the program that funds the federal Community Health Center program. Some community health centers may decide to discontinue their Title X participation because of concerns about medical liability and because this regulation would force them to offer their patients poorer quality care by restricting their ability to offer referrals for abortions desired by their patients and refer instead to prenatal care.

A Kaiser Family Foundation and George Washington University study illustrates the difference that having Title X support makes in terms of the quality and range of family planning services offered by Federally Qualified Health Centers (FQHCs) (**Figure 3**). Because they have been required to adhere to the QFP guidelines, Title X-funded sites consistently offer patients a broader range of onsite contraceptive methods, including natural family planning instruction and emergency contraception. Title X-funded health centers offer all seven of the most effective contraceptive methods onsite at three times the rate of sites not receiving Title X funding (48% to 15% respectively). Title X-funded sites also consistently show greater incorporation of evidence-based best practice methods, such as use of the "quick start" method for oral contraception that ensures that women who seek it have rapid access to effective contraceptive services.

Some stand-alone family planning clinics, particularly in rural communities, may not be in close proximity to other primary health providers, and therefore may not qualify for funding. Excluding family planning clinics because they do not offer comprehensive primary care or are not near a primary care provider could make it more difficult for women, particularly in rural areas, to access the full range of family planning services that are available under the current program. Prioritizing comprehensive primary care providers over specialized reproductive health providers may compromise quality. Specialized family planning clinics have been shown to provide a wider range of contraceptive methods and higher quality family planning care than clinics providing comprehensive care, such as community health centers.



The new regulation could channel new federal family planning funds to 'non-traditional" organizations that only offer natural family planning/fertility-awareness based methods or abstinence and do not provide other contraceptive services. The regulation permits and encourages the participation of these single method providers, so long as they are part of a Title X project that provides a broad range of family planning methods, and does not require that other contraceptive services be offered onsite. While these types of organizations were not disqualified from participating under the prior regulations, OPA prioritized clinical providers that offered women the full range of contraceptive methods, particularly those methods that are most effective rather than calling out the inclusion of organizations that only offer a single method.

Many elements of this regulation will add costly administrative burdens for grantees and subrecipients. The program, in its current state, already has significant reporting requirements and oversight, and this final rule would go far beyond current practice. Subrecipients do not typically oversee the policies and referral practices of the organizations that they refer to for other services. The documentation and reporting requirements for minors could provide a disincentive for minors to seek services because of their concerns about confidentiality. The regulation cites many areas where the grantees and the subrecipients will need to incur new costs as a result of the new program requirements. HHS estimates that $36.08 million will be needed for sites to comply with the new physical separation requirements. Other year one costs are for new training ($2.71 million), learning the rule's requirements ($3.11 million), documentation ($11.69 million), coming into programmatic compliance ($1.2 million), monitoring and enforcement ($8.53 million) and documentation of encouragement of parental involvement

in the medical record ($2.93 million). While they are not summed in the regulation, the total costs, based on the estimates outlined in the rule, equal $66.25 million in the first year. This accounts for one quarter of the $260 million annual budget for the program. Using one quarter of the grantees' budget for administrative and compliance purposes will significantly decrease resources available for care under the program that will likely translate into reductions in clinic hours, staffing and access.

Looking Ahead

If fully implemented, the changes to Title X could have major repercussions on access to family planning services for low-income people who rely on sites that have been receiving Title X support for their care. The states and family planning organizations challenging the regulations are hoping the federal courts will block the implementation of the regulations before May 3rd, the date some of the provisions, including the ban on referrals for abortion services, becomes effective. The regulations eliminate the requirement to provide non-directive pregnancy options counseling, ban referrals for abortions, and encourage participation from "nontraditional" organizations that may object to providing one or more contraceptive methods. In addition to the abortion-specific provisions, other changes in the regulations are administratively burdensome and costly, weaken the advances in clinical standards of family planning care offered by Title X providers, and redefine programmatic eligibility standards to promote Administration priorities.

If implemented, the regulation will restrict the size, scope and quality of the Title X network and place considerable burdens on the providers who opt to stay in the program, but who may not be able to keep up with demand for care. In the 2017 Kaiser Family Foundation and George Washington University survey, many community health centers reported a limited ability to take on new patients given current staffing and space constraints, suggesting that these health centers may not have the capacity to provide services to patients formerly seeking care at specialized family planning clinics like Planned Parenthood.

At the same time that the need for publicly-supported family planning services is growing, clinics that have been offering women the highest quality reproductive health care with the help of Title X funds may be faced with the reality that they will need to either lay off staff, reduce services or hours, or in some cases, close their doors. These regulations will leave more women with fewer options to obtain time-sensitive, affordable, and high quality family planning care that allows them to achieve their reproductive goals -- which runs counter to the stated objective of the Title X program.

Appendix: Federal Rules for Title X Projects on Abortion Services and Activities			
	1988 (only in effect for one month due to litigation and subsequent change of Administration)	**1993-Present**	**2019 Regulations**
Counseling for Pregnancy Options	Prohibited.	Nondirective counseling required for pregnant people addressing: prenatal care & delivery, infant care, foster care, adoption, pregnancy termination.	Only a doctor or advanced practice provider, though not required to do so, is permitted to provide nondirective counseling on abortion.
Referral for Abortion Services	Prohibited.	Must offer referral for abortion if asked but cannot: • promote abortion; • schedule an appointment; • negotiate a rate; or • arrange transportation.	All pregnant people must be referred to prenatal services regardless of their stated wishes. A medical doctor or advanced practice provider may provide a list of comprehensive health service providers, the majority of which do not also provide abortion.
Requirements For How Abortion Activities Supported By Non-Title X Funds Must Be Handled			
Financial	Separate accounting records.	Separate accounting records.	Separate accounting records, electronic and paper health records.
Facility	Separate treatment, consultation, waiting rooms.	Shared waiting room permissible as long as costs are properly pro-rated.	Separate treatment, consultation, examination, and waiting rooms, office entrances and exits, workstations, signs, phone numbers, email addresses, educational services, and websites.
Staff	Separate staff.	Shared staff permissible as long as all abortion related activities are financed separately from the Title X project.	Separate staff.
SOURCE: Kaiser Family Foundation analysis of federal regulations.			