



THE ETHICS & RELIGIOUS
LIBERTY COMMISSION
OF THE SOUTHERN BAPTIST CONVENTION

Submitted Electronically

July 24, 2018

Office of the Assistant Secretary for Health
Office of Population Affairs
Attention: Family Planning
U.S. Department of Health and Human Services
Hubert H. Humphrey Building
Room 716G
200 Independence Avenue SW
Washington, DC 20201

Subj: Compliance with Statutory Program Integrity Requirements—Family Planning (Title X), RIN 0937-ZA00

Dear Sir or Madam:

On behalf of the United States Conference of Catholic Bishops (“USCCB”), Catholic Medical Association, and Southern Baptist Ethics and Religious Liberty Commission, we submit the following comments on the proposed rule, published at 83 Fed. Reg. 25502 (June 1, 2018), on compliance with statutory program integrity requirements in the Title X program.

We strongly commend the Administration for the proposed rule because it faithfully carries out Congress’s command that the Title X program not provide abortion or engage in abortion-related activities. Although the USCCB continues to have grave reservations about government promotion of contraceptives,¹ we have long supported enforcement of the abortion

¹See, most recently, the USCCB’s Comments on Religious Exemptions and Accommodations for Coverage of Certain Preventive Services under the Affordable Care Act, at 2-8 (Nov. 21, 2017) (noting that contraceptives do not cure or prevent disease and are associated with adverse health outcomes), <http://www.usccb.org/about/general-counsel/rulemaking/upload/Comments-Religious-Exemptions-From-Contraceptive-Mandate.pdf>. The USCCB has expressed similar reservations about government promotion of contraceptives in previous comments and amicus filings. See USCCB Comments on Interim Final Rules on Coverage of Certain Preventive Services Under the Affordable Care Act (Oct. 8, 2014), <http://www.usccb.org/about/general-counsel/rulemaking/upload/2014-hhs-comments-on-interim-final-rules-10-8.pdf>; USCCB Comments on Notice of Proposed Rulemaking on Preventive Services (Mar. 20, 2013), <http://www.usccb.org/about/general-counsel/rulemaking/upload/2013-NPRM-Comments->

funding restrictions in Title X, and we are pleased to see that the Administration has taken seriously its obligation to enforce those restrictions. In light of the important interest that parents have in the health and care of their children, we are also pleased that the proposed rule encourages parental involvement in their children’s decisions with respect to family planning.

Analysis

Section 1008 of the Public Health Service Act provides that “[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.” 42 U.S.C. § 300a-6. This provision has been part of Title X since its inception in 1970. In addition to being codified in permanent law, Congress has regularly reiterated the funding prohibition in appropriations for Title X. *E.g.*, Consolidated Appropriations Act, 2018, Pub. L. 115-141, Div. H., tit. II, 132 Stat. 349, 369 (2018) (stating that amounts provided to voluntary family planning projects under Title X “shall not be expended for abortions”). Thus, both Title X and the appropriations enactments that fund it draw a sharp distinction between family planning and abortion. The text and purpose of Title X, as this and earlier administrations have acknowledged, make clear that Congress intended to create “a wall of separation” between family planning and abortion by broadly prohibiting abortion-related activities. 83 Fed. Reg. at 25505-06 (preamble), quoting 53 Fed. Reg. 2922, 2922 (Feb. 2, 1988). The proposed rule would faithfully enforce this prohibition.²

If there were any ambiguity (there is none, in our view), legislative history resolves it in favor of a broad reading of the funding ban in Title X. *See generally Rust v. Sullivan*, 500 U.S. 173, 190 (1991) (“if one thing is clear from the legislative history, it is that Congress intended that Title X funds be kept separate and distinct from abortion-related activities”). As HHS correctly notes (83 Fed. Reg. at 25502), the Conference Report accompanying the original Title X legislation makes clear that “funds authorized under this legislation” would be—

used only to support preventive family planning services.... The conferees have adopted the language contained in section 1008, which prohibits the use of such funds for abortion, in order to make clear this intent.

H.R. Rep. No. 91-1667, at 8-9 (1970), *reprinted in* Cong. Rec. H39871, 39873 (Dec. 3, 1970).

[3-20-final.pdf](#); USCCB Comments on Advance Notice of Proposed Rulemaking on Preventive Services (May 15, 2012), <http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-on-advance-notice-of-proposed-rulemaking-on-preventive-services-12-05-15.pdf>; USCCB Comments on Interim Final Rules on Preventive Services (Aug. 31, 2011), <http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hhs-on-preventive-services-2011-08-2.pdf>; USCCB Comments on Interim Final Rules Relating to Coverage of Preventive Services (Sept. 17, 2010) (discussing why contraceptives should not be included in the list of mandated preventive services under ACA) <http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hhs-on-preventive-services-2010-09.pdf>; *see also* Brief Amicus Curiae of USCCB et al., at p. 7 n.10, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119 & 15-191) (noting health risks and successful tort litigation arising out of contraceptive use), <http://www.usccb.org/about/general-counsel/amicus-briefs/upload/Zubik-v-Burwell.pdf>.

² Congress’s decision not to fund or promote abortion in Title X is consistent with its decision not to fund or promote abortion in federal programs generally (Medicaid being the primary, but not sole, example).

Congressman Dingell, a principal sponsor of section 1008, stated: “With the ‘prohibition of abortion’ amendment—Title X, Section 1008—the committee members clearly intend that abortion is not to be encouraged or promoted in any way through this legislation....” 116 Cong. Rec. 37375 (1970). This was Congress’s stated understanding in 1970, and it remained Congress’s stated understanding in subsequent years. In 1978, for example, during debate on possible amendments to Title X, Congressman Dornan proposed amending the statute for the claimed purpose of strengthening the abortion funding restriction, as follows:

No grant or contract authorized by this title may be made or entered into with an entity which directly or indirectly provides abortion, abortion counseling, or any abortion referral services.

Cong. Rec. H13289 (daily ed. Oct. 13, 1978). The House rejected the amendment on the ground that section 1008 *already* encompassed the proffered prohibitions. Congressman Rogers, a member of the Public Health & Welfare Subcommittee at the time Title X was enacted, stated:

Abortion is not a method of family planning. Abortion comes after pregnancy—after pregnancy. And the gentleman misses the point of what we are doing in Title X. It’s before—before. It is to let people know how to avoid pregnancy. We cannot use any funds for abortion. The amendment is not needed.

Id.

The current Title X regulations, however, *require* Title X programs to provide information, counseling, and referrals for abortion. 42 C.F.R. § 59.5(a) (stating that a program “must ... [o]ffer pregnant women the opportunity to be provided information and counseling regarding ... [p]regnancy termination” and “referral upon request”). This requirement, which the current proposed rule would rescind, was a serious breach in the firewall between the funding of family planning and abortion that Congress intended. In addition, as the Department concedes now and conceded ten years ago, this requirement runs afoul of federal conscience statutes. 83 Fed. Reg. at 25506 (preamble) (citing the Church, Coats-Snowe, and Weldon amendments); 73 Fed. Reg. 78072, 78087 (Dec. 19, 2008). The new proposed rule correctly and appropriately remedies this problem by stating that a Title X project shall “[n]ot provide, promote, refer for, support, or present abortion as a method of family planning.” 83 Fed. Reg. at 25530 [proposed 42 C.F.R. § 59.5]; *accord* 83 Fed. Reg. at 25531 [proposed 42 C.F.R. § 59.14(a)] (stating that a Title X project “may not perform, promote, refer for, or support, abortion ... nor take any other affirmative action to assist a patient to secure such an abortion”).

We strongly agree with HHS that section 1008’s funding prohibition—

includes any action that directly or indirectly facilitates, encourages, or supports in any way the use of abortion as a method of family planning. That interpretation follows from the text and purpose of the statute.

83 Fed. Reg. at 25505 (preamble).

We also strongly concur with the proposed rule's requirement that a Title X project be organized so as to ensure complete physical and financial separation between a grantee's Title X activities and its abortion activities. Both the prohibition on abortion referral and the requirement of physical and financial separation find ample support in the text and legislative history of Title X. *Rust v. Sullivan* upheld these very requirements. We applaud HHS for reinstating them.

Lastly, we are pleased that the proposed rule encourages parents' involvement in their children's decisions with respect to family planning. 83 Fed. Reg. at 25530 [proposed 42 C.F.R. § 59.5]. As the Department correctly notes (83 Fed. Reg. at 25525), parental involvement is required by the statute, and this proposed regulatory provision will help to ensure compliance. Parents are the primary teachers and caregivers of their children, and it is entirely appropriate that they should be involved in any decision regarding their children's health and care.

Conclusion

We strongly commend the Administration for these proposed rules, which faithfully carry out Congress's command that the Title X program not provide or fund abortion or abortion-related activities, and which will encourage parents' involvement in their children's decisions with respect to family planning.

Sincerely,

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