July 30, 2018

ADM Brett Giroir, M.D.
Assistant Secretary for Health
Department of Health and Human Services
Office of Population Affairs
Independence Avenue, SW
Washington DC 20201

Attention: HHS–OS–2018–0008

RE: Comments on Title X Family Planning Program Proposed Rule

On behalf of the American Bar Association (ABA) and its more than 400,000 members, I write to submit comments regarding the Department of Health and Human Services proposed rule regarding Title X family planning program regulations, titled “Compliance with Statutory Program Integrity Requirements,” Docket No: HHS–OS–2018–0008, RIN 0937-ZA00. While we will restrict our comments to § 59.5 and § 59.14 of the proposed regulations, which address limitations on counselling and referral services, we note at the outset that the proposed regulations generally seek to reinstate short-lived regulations from the 1990s that were dubbed the domestic “gag rule” because they prevented Title X recipients from providing information to their patients on any abortion-related service.

The proposed regulations are premised on the assertion that counseling regarding pregnancy-termination options or referral to abortion providers upon request violates the statute’s prohibition against using Title X funds to encourage or promote abortion as a method of family planning. (The proposal also states that such activity conflicts with recently enacted federal health care conscience statutes.) This is a significant departure from the current, long-standing regulatory interpretation of this core prohibition. At present, Title X clinics offer patients medically accurate counseling and referrals for all pregnancy options, including prenatal care, adoption, and abortion.

Section 59.5 of the proposed regulation eliminates the current requirement that Title X clinics offer pregnant women the opportunity to receive information and nondirective counselling regarding prenatal care and delivery; infant care, foster care, and adoption; and pregnancy termination. Instead of assuring that all patients receive counselling on all aspects of pregnancy, the proposed regulation states that no Title X provider may promote, refer for, support, or present abortion as a method of family planning.
The proposed regulations contain a new § 59.14 that expressly prohibits referrals for abortion “as a method of family planning” or affirmative actions that may assist a patient in securing an abortion. The proposal requires all pregnant patients to be referred to qualified service providers for prenatal care and allows for one limited exception to the prohibition on abortion referral: if a pregnant woman first clearly states that she has decided to have an abortion and asks for a referral to an abortion provider, a doctor may -- but is not required to -- provide a list of licensed, qualified comprehensive prenatal service providers, some of which also provide abortion services. However, the list cannot designate which provider offers such services.

The proposed regulation goes on to state that nothing in that section should be construed to prohibit the provision of information medically necessary to assess the risks and benefits of different methods of contraception provided that the provision of such information does not otherwise promote abortion as a method of family planning. This appears to be the only guidance offered with regard to permissible counselling.

Our opposition to regulations that limit the content of physician communication with patients at Title X clinics dates back to 1991, when the ABA adopted policy supporting legislation that ensures the right of patients at federally funded family planning clinics to receive full counselling and referrals on all medical options relating to pregnancy, and the right of health care professionals to advise their patients in accordance with their best medical judgement and professional ethics. Following the emergence of statutory healthcare refusal clauses, the ABA adopted policy in 2005 that affirmed and expanded the 1991 policy. It states that the ABA opposes governmental actions and policies that interfere with patients’ abilities to receive from their healthcare providers in a timely fashion all relevant and medically accurate information necessary for fully informed healthcare decision-making as well as information regarding their access to medically appropriate care, whether or not the provider chooses to offer such care.

These two policies provide the basis for our opposition to the proposed regulations. The physician-patient relationship should be first and foremost grounded in trust and should remain above the fray of politics. As part of that trust, patients should expect that their health care providers will discharge their obligations to provide complete and accurate information about treatment options and about the benefits and risks of each option, even when the providers do not offer such treatment themselves. Being provided with accurate and comprehensive information regarding medical options should not be limited to only those women who can afford private physicians.

The ABA urges you to eliminate the restrictions on abortion counselling and referral in § 59.5 and § 59.14 of the proposed regulations.

Sincerely,

Thomas M. Susman