MEMORANDUM

To: Interested Parties
From: Abigail English, Center for Adolescent Health & the Law
National Family Planning & Reproductive Health Association (NFPRHA)
Date: June 5, 2014
Re: Adolescent Confidentiality Protections in Title X

Introduction

Since the 1970s, federal law has required that both adolescents and adults be able to receive confidential family planning services in Title X-funded projects. The strong confidentiality protections for adolescents are derived from the Title X statute, regulations, and relevant case law. Developed over several decades, these protections remain in federal law today. They have been modified only to encourage, but not mandate, family involvement,[1] and to require Title X providers to comply with state child abuse reporting laws.[2] Efforts to require parental consent or notification for Title X-funded family planning services have been consistently rejected by the courts.

The recent revision of federal guidance for the Title X family planning program[3] has raised some concern as to whether Title X's protections of adolescent confidentiality remain in effect. In response, on June 5, 2014, the Office of Population Affairs (OPA) released an "OPA Program Policy Notice" clarifying that Title X's protections remain unchanged in the 2014 *Program Requirements for Title X Funded Family Planning Projects* (hereafter "2014 Title X Program Requirements").

This memorandum, which is intended to serve as a complement to the OPA Program Policy Notice on adolescent confidentiality, sets forth the legal requirements for Title X-funded projects to serve adolescents. It also explains the requirements in statute, regulation, and case law to protect confidentiality for adolescents who receive Title X-funded services. These requirements continue to be legally binding. They are consistent both with Title X's *2001 Program Guidelines for Project Grants for Family Planning Projects* (hereafter "2001 Title X Guidelines") and with the newly issued 2014 Title X Program Requirements.

Title X Statute

The Title X statute makes clear that Title X-funded projects must serve adolescents.[4] Title X was enacted in 1970 to make "comprehensive family planning services readily available to ***all persons*** desiring such services."[5] [Emphasis added.] Under the rubric of "all persons," Title X has served adolescents from the beginning. Nevertheless, Congress

expressed ongoing concern about the family planning and sexual health needs of adolescents.[6] In 1978, Congress amended the statute to make explicit the requirement to serve adolescents.[7] In 1981, Congress further amended the statute to encourage family involvement but, as discussed below, did not require it. The statute now reads:

> 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***). ***To the extent practical***, entities which receive grants or contracts under this subsection shall ***encourage*** family participation in projects assisted under this subsection.[8] [Emphasis added.]

Title X Regulations

The confidentiality protections for Title X are found in the regulations governing the program.[9] These regulations repeat the requirement that each Title X-funded project must provide "a broad range of acceptable and effective medically approved family planning methods … ***including services for adolescents*** …."[10] [Emphasis added.] They also require projects to protect individuals' dignity,[11] to provide services without regard to age or marital status (among other characteristics),[12] and to give priority to individuals from low-income families.[13]

The confidentiality protections in the Title X regulations are explicit and strong:

> All information as to personal facts and circumstances obtained by the project staff about individuals receiving services must be held confidential and must not be disclosed without the individual's documented consent, except as may be necessary to provide services to the patient or as required by law, with appropriate safeguards for confidentiality. Otherwise, information may be disclosed only in summary, statistical, or other form which does not identify particular individuals.[14]

The regulations themselves make clear that these confidentiality protections apply to adolescents. The regulations explain that "unemancipated minors who wish to receive services on a confidential basis must be considered on the basis of their own resources" and, if they are unable to pay for family planning services, they meet the definition of "low-income family" even if they are members of families whose annual income exceeds 100% of the federal poverty level.[15]

Court Decisions

Court decisions beginning in the late 1970s and spanning two decades have consistently affirmed that Title X must provide confidential family planning services to adolescents. These decisions have interpreted the existing statutory and regulatory requirements to preclude efforts at the federal and state levels to require parental consent or notification for Title X services. Taken together, these cases contain a clear and unambiguous prohibition on requiring parental consent or notice, regardless of whether such requirements are based on explicit provisions or on interpretations of state laws or federal law.

At the state level, numerous attempts to require parental consent or notification have been held invalid under Title X. For example, as early as 1979, a state policy in West Virginia of refusing family planning services to individuals under age 18 who did not have their parents' consent was found to violate the Title X statutory and regulatory requirements of comprehensive services and the prohibition of age discrimination.[16] In Utah, in 1983, a state law requiring parental notification before minors could receive contraceptives was found to violate Title X because it was damaging to federal policies of confidentiality and comprehensive assistance to sexually active minors.[17] More recently, in 1997, a federal court found, in a decision left standing by the US Supreme Court, that Title X prohibits a parental consent requirement for adolescents to receive Title X services even if the requirement is based on a Missouri state law.[18]

Federal attempts to require parental consent or notification for Title X family planning services have met a similar fate. When Congress enacted the 1981 amendment to the Title X statute requiring entities receiving grants or contracts "to the extent practical … to encourage family participation … ," the Secretary of Health and Human Services (HHS) issued regulations that would have virtually eliminated confidential services for minors. The regulations would have required Title X providers to notify parents within 10 days after a minor received prescription contraceptives, to comply with state laws requiring parental notice or consent for any contraceptive, and to consider minors wishing to receive services based on their parents' financial resources rather than their own. Despite strong opposition during the public comment period, the regulations were made final on January 26, 1983.[19]

NFPRHA and Planned Parenthood Federation of America (PPFA) filed two separate lawsuits to block enforcement of the regulations. The cases were consolidated by the federal district court into a single case, *Planned Parenthood Federation of America v. Heckler*. The federal district court granted preliminary and permanent injunctions halting enforcement of the regulations[20] and the case was appealed to the US Court of

Appeals for the District of Columbia Circuit. On July 8, 1983, the appellate court affirmed the lower court's ruling, finding that the regulations were not consistent with either the language of the Title X statute or the intent of Congress.[21]

In its decision, the appellate court conducted an extensive analysis of the Title X statute and legislative history, and found that Congress' intent with regard to the purpose of the Title X program and intent to provide confidential services to adolescents were clear. Although the Secretary argued that the 1981 family participation amendment imposed a nondiscretionary duty on Title X grantees to involve a minor's family, and therefore that the regulations were in line with congressional intent, the court strongly disagreed. The court wrote:

> Had Congress intended to mandate parental involvement, it could easily have done so with more appropriate and less ambiguous language . . . Indeed, the very concept of encouragement is further weakened by the use of a qualifier "to the extent practical." While no specific content may be given that phrase from the face of the statute, its use indicates Congress' intent that the goal of encouraging family participation may well have to give way to other, more practical considerations.[22]

Citing the Conference Committee report from the amendment's enactment—which stated that while family involvement was not mandated, family participation was to be encouraged—the court found that Congress' intent was "crystal-clear and unequivocal" and that Congress "did not intend to mandate family involvement. . . . Thus, to the extent that the parental notification requirement of the new regulations operate to require family involvement, it is inconsistent with Congress' intent."[23]

With regard to the regulation's requirement that Title X grantees comply with state parental consent and notification law, the appellate court agreed with the district court that although Congress can allow states to establish eligibility requirements for participants in Title X, it "has not delegated that power to the states."[24] Therefore, the appellate court noted, unless Congress expressly authorized HHS to give the states the power to set such criteria, the Secretary lacked the power to do so.[25]

Finally, the appellate court ruled that since the parental notification requirement was invalid, so too was the requirement that minors' eligibility be calculated based on their parents' income: "Clearly, if a minor must obtain financial information from her parents to determine her own eligibility for family planning services, the regulation denies her the requisite confidentiality and operates as a de facto parental notification requirement."[26]

"Exceptions" to Title X Confidentiality

The Title X confidentiality requirements are clear and unambiguous and they apply to minors as well as adults. To the extent that exceptions to these requirements as they apply to minors exist, they are narrowly circumscribed. Specifically, beyond the statute and regulations, Title X grantees are required to comply with provisions of successive congressional legislative appropriations for HHS. One of these is the requirement that grantees certify that they will encourage family participation, a requirement already included in the statute. Another is a requirement that grantees comply with state child abuse reporting requirements.

As previously discussed, the statutory requirement for Title X-funded projects to encourage family participation does not operate as an actual exception to the confidentiality protections. Indeed, as interpreted by the court in *Planned Parenthood Federation of America v. Heckler*, the requirement to encourage family participation is consistent with the confidentiality requirement, which allows for disclosure if a patient consents. Thus, if a minor is encouraged to involve her family and agrees to do so, the regulation has been complied with; if the minor declines to involve her family, her privacy is protected by the requirement to maintain confidentiality.

The other exception falls under the provision of the confidentiality regulation allowing disclosure "as required by law." Congress has determined that Title X grantees are not exempt from compliance with state reporting laws for child abuse and related acts.[27] Although the interpretation of state child abuse reporting laws, and their relationship to related laws criminalizing sex with a minor, is often confusing, this exception to Title X confidentiality is a limited one that does not undermine the broad principle that adolescents' confidentiality is protected in Title X.

2001 Title X Guidelines

Consistent with the Title X statute, regulations, and case law, OPA issued the 2001Title X Guidelines, which combined program requirements and clinical program guidelines. These guidelines contained a three-paragraph section specifically on adolescent confidentiality, which included explicit statements regarding parental notice and consent. The third paragraph of Section 8.7 of the 2001 Title X Guidelines specifically addressed the question of parental consent and notice, stating:

> Adolescents must be assured that the counseling sessions are confidential and, if follow-up is necessary, every attempt will be made to assure the privacy of the individual. However, counselors should encourage family participation in the decision of minors to seek family planning services and provide counseling to minors on resisting attempts

> to coerce minors into engaging in sexual activities. **Title X projects may not require written consent of parents or guardians for the provision of services to minors. Nor can the project notify parents or guardians before or after a minor has requested and received Title X family planning services.**[28] [Emphasis added.]

The 2001 Title X Guidelines are being retired now that the 2014 Title X Program Requirements have been issued, but the principles articulated in Section 8.7 are still valid, as they are consistent with existing statute, regulations, and case law.

Title X Confidentiality and Other Federal Laws

The Title X confidentiality requirements contained in statute, regulation, and case law are consistent with other relevant federal laws. For example, the Medicaid program requires that family planning services be provided to beneficiaries, including "adolescents who can be deemed to be sexually active"; Medicaid also includes confidentiality protections.[29] In addition, the federal Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule recognizes that some minors are allowed to give consent for their own health care and treats those minors as individuals who can exercise rights over their own protected health information. Specifically, on the issue of parents' access to a minor's protected health information, the HIPAA Privacy Rule explicitly defers to "state and other applicable law."[30] Thus, according to the HIPAA Privacy Rule, when minors receive Title X–funded family planning services, the Title X confidentiality protections apply to information about those services.

2014 Title X Program Requirements

The newly issued guidance for Title X programs—the 2014 Title X Program Requirements[31]—is also consistent with current Title X confidentiality requirements contained in statute, regulation, and case law that extend protections to adolescents. For example, Section 8.4.5 specifies that eligibility for discounts for unemancipated minors who receive confidential services must be based on the income of the minor. Section 9.8 specifies that all projects must provide services for adolescents. Section 10 incorporates the confidentiality requirements contained in regulations. Additionally, the OPA Program Policy Notice released on June 5, 2014, restates the 2001 program guideline language on adolescent confidentiality, reiterating these long-standing protections.

2014 CDC and OPA Clinical Recommendations

In addition to the 2014 Title X Program Requirements, the Centers for Disease Control and Prevention (CDC) and OPA issued clinical guidelines for all family planning

providers, including Title X.[32] Although these recommendations do not have the force of law, they contain clear guidance applicable to Title X providers that protect adolescents' access to confidential family planning services. For example, the background discussion in the guidelines states that:

> Providers of family planning services should offer confidential services to adolescents and observe all relevant state laws and any legal obligations, such as notification or reporting of child abuse, child molestation, sexual abuse, rape, or incest, as well as human trafficking. Confidentiality is critical for adolescents and can greatly influence their willingness to access and use services. As a result, multiple professional medical associations have emphasized the importance of providing confidential services to adolescents. Providers should encourage and promote communication between the adolescent and his or her parent(s) or guardian(s) about sexual and reproductive health.[33]

A specific recommendation is included that: "Confidential family planning services should be made available to adolescents, while observing state laws and any legal obligations for reporting."[34]

Conclusion

The law is clear. The historic protections for adolescent confidentiality in Title X that are contained in statute, regulations, and case law remain in place. These protections have been elaborated and explained over several decades in guidelines that have consistently reaffirmed that adolescents must be able to obtain confidential family planning services in Title X. This continues to be true today.

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[1] Abigail English and Carol Ford, "The HIPAA Privacy Rule and Adolescents: Legal Questions and Clinical Challenges," Perspectives on Sexual and Reproductive Health, Volume 36, Number 2, March/April 2004, Guttmacher Institute, http://www.guttmacher.org/pubs/journals/3608004.html.

[2] Rebecca Gudeman and Sarah Madge, "The Federal Title X Family Planning Program: Privacy and Access Rules for Adolescents," Youth Law News, Volume XXX, Number 1, January-March 2011, National Center for Youth Law, http://www.youthlaw.org/publications/yln/2011/jan_mar_2011/the_federal_title_x_family_planning_program_privacy_and_access_rules_for_adolescents/.

[3] 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.

[4] 42 U.S.C. §§ 300 et seq.

[5] Pub. L. No. 91-572, § 2, 84 STAT. 1506 (1970) (statement of the "purpose of this Act").

[6] Planned Parenthood Federation of America, Inc. v. Heckler, 712 F.2d 650 (DC Cir. 1983), citing H.R.Rep. No. 1161, 93d Cong., 2d Sess. 14 (1974) ("certain population groups requiring these services are not being reached * * * include[ing] teenagers) and S.Rep. No. 29, 94th Cong., 1st Sess. 55 (1975).

[7] *See* Planned Parenthood Federation of America, Inc. v. Heckler, 712 F.2d 650 (DC Cir. 1983), citing S.Rep. No. 822, 95th Cong., 2d Sess. 24 (1978) ("the added language clearly reflected Congress' intent to place 'a special emphasis on preventing unwanted pregnancies among sexually active adolescents.'")

[8] 42 U.S.C. § 300(a) (as amended).

[9] 42 C.F.R. Part 59.

[10] 42 C.F.R. § 59.5(a)(1).

[11] 42 C.F.R. § 59.5 (a)(3).

[12] 42 C.F.R. § 59.5(a)(4).

[13] 42 C.F.R. § 59.5 (a)(6).

[14] 42 C.F.R. § 59.11.

[15] 42 C.F.R. § 59.2.

[16] Doe v. Pickett, 480 F. Supp. 1218 (S.D.W.Va. 1979)

[17] Planned Parenthood Association v. Matheson, 582 F. Supp. 1001 (D.C. Utah 1983).

[18] County of St. Charles v. Missouri Family Health Council, 107 F.3d 682 (8th Cir. 1997), rehearing denied (8th Cir. 1997), cert. denied 522 U.S. 859 (1997).

[19] Parental Notification Requirements Applicable to Projects for Family Planning Services, 48 Fed. Reg. 3600, 3614 (Jan. 26, 1983).

[20] Planned Parenthood Federation of America, Inc. v. Schweiker, 559 F. Supp. 658 (D. D.C. 1983).

[21] Planned Parenthood Federation of America v. Heckler, 712 F.2d 650 (D.C. Cir. 1983) (hereafter Planned Parenthood v. Heckler). A separate action was filed by New York State, the New York State Health Department and several physicians. See New York v. Heckler, 719 F.2d 1191 (2d Cir. 1983).

[22] Planned Parenthood v. Heckler, 712 F. 2d 650, 656 (D.C. Cir. 1983).

[23] Planned Parenthood v. Heckler, 712 F. 2d 650 (DC Cir. 1983). See also S.Rep. No. 29, 94th Cong., 1st Sess. 55 (1975) ("This policy . . . is not intended to restrict or discourage the provision of voluntary family planning services to those adolescents who want them, but only to try to enhance communication within the family unit.")

[24] Planned Parenthood v. Heckler, 712 F.2d 650, 663 (D.C. Cir. 1983), quoting Planned Parenthood Federation of America, Inc. v. Schweiker, 559 F. Supp. At 669 (D. D.C. 1983).

[25] Planned Parenthood v. Heckler, 712 F.2d 650, 663 (D.C. Cir. 1983).

[26] Ibid at 664.

[27] See, e.g., Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 State 3034, 3257-3257 (2009) ("Notwithstanding any other provision of law, no provider of services under title X of the Public Health Service Act shall be exempt from any State law requiring notification or the reporting of child abuse, child molestation, sexual abuse, rape, or incest."). See also 2014 Title X Program Requirements, section 9.12, Version 1.0, April 2014.

[28]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.

[29] 42 U.S.C. §§ 1396a(a)(7), 1396d(a)(4)(C). 42 C.F.R. § 441.20.

[30] Abigail English and Carol Ford, "The HIPAA Privacy Rule and Adolescents: Legal Questions and Clinical Challenges," Perspectives on Sexual and Reproductive Health, Volume 36, Number 2, March/April 2004, Guttmacher Institute.

[31] 2014 Title X Program Requirements.

[32] Providing Quality Family Planning Services: Recommendations of the CDC and the U.S. Office of Population Affairs. MMWR, Recommendations and Reports, Volume 63, Number 4, April 25, 2014, http://www.cdc.gov/mmwr/pdf/rr/rr6304.pdf.

[33] Ibid at 13.

[34] Ibid at 38.