

Federal Law Requirements for Women’s Reproductive Health Services at Health Centers

The purpose of this compendium is to provide federally-funded health centers with information regarding federal rules, regulations and statutes related to the provision of reproductive health services. These rules do not apply to Look-Alikes by virtue of Section 330 funding, however, may nonetheless apply to Look-Alikes through funding from Medicaid, Medicare, and Title X, as applicable. In particular, this compendium reviews the rules pertaining to the provision of women’s reproductive health services affecting health centers that receive federal grant funds under Section 330 of the Public Health Service Act, as well as rules related to other federal programs: (1) the Medicaid and Medicare Programs; (2) Title X of the Public Health Service Act; and (3) the AmeriCorps Program supported by the Corporation for National and Community Service.

It is important to remember that in addition to the federal rules described below, most states have enacted laws specific to the provision of certain reproductive health services, such as abortions and abortion-related activities. It is important that health centers consult with local counsel for information regarding state-specific laws and regulations. Health centers may also want to consult with their State or Regional Primary Care Association for additional information.

Requirements Pertaining to Health Centers that Receive Grants under Section 330 of the Public Health Service Act

The Hyde Amendment: Background and Application to Health Center Funds

Since 1976, the Hyde Amendment has been a statutory provision included as part of annual HHS Appropriations legislation, barring the use of appropriated funds to pay for abortions, with certain exceptions.¹ The current Hyde Amendment language, included as part of the FY2016 Labor-HHS-Education Appropriations legislation, specifies exceptions “if the pregnancy is the result of an act of rape or incest,” or “in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed.”²

The Hyde Amendment applies to the expenditure of the Health Center Program’s discretionary funds authorized under Section 330 as well as the funds awarded under the mandatory Community Health Center Fund, which was initially enacted under the Patient Protection and

¹ The Hyde Amendment does not define the term “abortion.” However, implementing regulations promulgated in 1978 by the HHS Public Health Service (“PHS”), which codify the Hyde Amendment restrictions on abortion, state that the use of federal funds is allowable “with respect to the cost of drugs or devices to prevent implantation of the fertilized ovum” See 42 C.F.R. §50.308.

² Pub. L. 114-113, Division H, Title V, Sec. 506-507.

Affordable Care Act (“ACA”)³ and subsequently extended through 2017 under the Medicare Access and CHIP Reauthorization Act of 2015 (“MACRA”).⁴

The Hyde Amendment was first extended to the Community Health Center Fund pursuant to Executive Order 13535 – *Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act*.⁵ With the extension of the Community Health Center Fund in MACRA, Congress included statutory language stating that the Hyde Amendment applies to all funds made available through the Community Health Center Fund.

See the text box below for the exact language of the 2016 Hyde Amendment.

³ Pub. L. 111–148.

⁴ Pub. L. 114-10, Sec. 221(a).

⁵ See E.O. 13535 of March 24, 2010; *see also*, 75 Fed. Reg. 15597, *et seq.* (March 29, 2010); <https://www.whitehouse.gov/the-press-office/executive-order-patient-protection-and-affordable-care-acts-consistency-with-longst>

The 2016 Hyde Amendment, included in H.R. 2029 – the Consolidated Appropriations Act, 2016, Division H, Title V (Pub. L. 114-113, Division H, Title V, Sec. 506-507), states the following:

SEC. 506. (a) None of the funds appropriated in this Act, and none of the funds in any trust fund to which funds are appropriated in this Act, shall be expended for any abortion.

(b) None of the funds appropriated in this Act, and none of the funds in any trust fund to which funds are appropriated in this Act, shall be expended for health benefits coverage that includes coverage of abortion.

(c) The term “health benefits coverage” means the package of services covered by a managed care provider or organization pursuant to a contract or other arrangement.

SEC. 507. (a) The limitations established in the preceding section shall not apply to an abortion—

- (1) if the pregnancy is the result of an act of rape or incest; or
- (2) in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed.

(b) Nothing in the preceding section shall be construed as prohibiting the expenditure by a State, locality, entity, or private person of State, local, or private funds (other than a State’s or locality’s contribution of Medicaid matching funds).

(c) Nothing in the preceding section shall be construed as restricting the ability of any managed care provider from offering abortion coverage or the ability of a State or locality to contract separately with such a provider for such coverage with State funds (other than a State’s or locality’s contribution of Medicaid matching funds).

(d)(1) None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.

(2) In this subsection, the term “health care entity” includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.

Coercion and Penalties under Statute

Separate and apart from the Hyde Amendment, the United States Code explicitly provides for fines and/or imprisonment for “any:

- (1) officer or employee of the United States;
- (2) officer or employee of any State, political subdivision of a State, or any other entity, which administers or supervises the administration of any program receiving Federal financial assistance; or
- (3) person who receives, under any program receiving Federal assistance, compensation for services,
who coerces or endeavors to coerce any person to undergo an abortion ... by threatening such person with the loss of, or disqualification for the receipt of, any benefit or service under a program receiving Federal financial assistance”⁶

As recipients of Federal financial assistance through the U.S. Department of Health and Human Services (“HHS”), health centers and their personnel are subject to the above statutory language. All health centers receiving federal funds from HHS should inform personnel about these restrictions and the potential liabilities of engaging in options counseling that could be classified as “coercive.”

Required Women’s Reproductive Health Services under Section 330

The federal law that authorizes the Health Center Program, Section 330 of the Public Health Service Act (“Section 330”), requires that health centers provide, either directly or through an established arrangement, a broad range of primary health care services.⁷ The list of required primary health care services includes several services related to reproductive health, including “health services related to ... obstetrics, or gynecology ...”⁸ as well as “preventive health services, including ... prenatal and perinatal services ... appropriate cancer screening.”⁹ The HHS Health Resources and Services Administration (“HRSA”), the agency that administers the Health Center Program, describes “appropriate cancer screening” in the resource *Service Descriptors for Form 5A* (the “Service Descriptor Guide”) as “screening for breast, cervix, and colorectal cancers (e.g., mammography, Pap testing, fecal occult blood testing, sigmoidoscopy, colonoscopy).”¹⁰

Included within the scope of required preventive health services are “voluntary family planning services.”¹¹ Voluntary family planning services are not defined by statute or regulations; however, HRSA defines voluntary family services in the Service Descriptor Guide as the following:

⁶ 42 U.S.C. §300a-8.

⁷ 42 U.S.C. §254b.

⁸ 42 U.S.C. §254b(b)(1)(A)(i)(I).

⁹ 42 U.S.C. §254b(b)(1)(A)(i)(III).

¹⁰ The Service Descriptor Guide at p. 8; the *Service Descriptors for Form 5A*, is available on the HRSA website, <http://bphc.hrsa.gov/about/requirements/scope/form5aservicedescriptors.pdf>.

¹¹ 42 U.S.C §254b(b)(1)(A)(i)(III)(gg).

“Voluntary family planning services are appropriate counseling on available reproductive options consistent with Federal, state, local laws and regulations. These services may include management/treatment and procedures for a patient's chosen method (e.g., vasectomy, subdermal contraceptive placement, IUD placement, tubal ligation).”¹²

Neither “appropriate counseling” nor “available reproductive options” is defined in Section 330, the implementing regulations, or HRSA guidance. However, as discussed below, the Title X Family Planning Program, which awards grants to support the establishment and operation of voluntary family planning programs and is administered by one of HRSA’s “sister” agencies – the HHS Office of Population Affairs (“OPA”) – does address the extent to which counseling can be conducted using federal funds. As described in greater detail below (in the section entitled “*Women’s Reproductive Health Requirements Pertaining to Title X of the Public Health Service Act*”), the Title X regulations state that Title X projects must provide “neutral, factual information and nondirectional counseling,” if such information and counseling is requested by the pregnant woman.¹³

While these criteria are not stated as part of the regulations affecting Section 330 grantees that do not also receive Title X funds, the Title X requirements noted above provide clarity into what criteria are deemed appropriate by HHS. Accordingly, health centers should ensure that discussion of available options is neutral, medically accurate, factual and voluntary (meaning non-coercive or non-directive in nature).

Further information on women’s reproductive health services under Title X is provided in the section of this compendium entitled “*Women’s Reproductive Health Requirements Pertaining to Title X of the Public Health Service Act*.”

On June 14, 2016, HRSA issued a “Technical Assistance Resource” (the “TA Resource”) entitled “*Family Planning and Related Services in Health Centers*.” This resource reiterates health centers’ requirements to provide obstetrics, gynecology, and voluntary family planning services, as well as the Hyde restriction on using federal funds to provide abortions. Specifically, the TA Resource states the following: “Pursuant to existing law, and consistent with Executive Order 13535 (75 FR 15599), health centers are prohibited from using federal funds to provide abortion (except in cases of rape or incest, or when the life of the woman would be endangered).”¹⁴

The TA Resource also links health centers to several additional resources “intended to assist health centers and address potential barriers to providing full-range FDA-approved contraceptive methods, including billing and reimbursement provider and team training needs, and patient awareness about the availability of a chosen contraceptive method.”¹⁵

¹² The Service Descriptor Guide at p. 10.

¹³ 42 C.F.R. §59.5(a)(5)(ii).

¹⁴ TA Resource at p. 3.

¹⁵ TA Resource at pp. 3-5.

Referrals for Reproductive Health Services under the Hyde Amendment

As noted above, Section 330 requires health centers to provide a broad range of primary health services. The list of required primary health care services includes “[R]eferrals to providers of medical services (including specialty referral when medically indicated) and other health-related services (including substance abuse and mental health services).”¹⁶ While “referrals” are not defined separately by statute or regulations, the Service Descriptor Guide indicates that they are included in general primary medical care:

“At a minimum, these services include assessment, diagnosis, screening, education and treatment; **referrals**; and follow-up of such services Any referrals are based on the provider’s documented assessment of the health center patient, indicating the medical necessity for referral(s) to other health-related services” (emphasis added).¹⁷

The Hyde Amendment does not address referrals for abortion services. Nevertheless, similar to the counseling requirements addressed above, the Title X Family Planning Program does include requirements related to referrals for abortions. Title X guidance included in a Federal Register notice from 2000 states that “[W]hile a Title X project may provide a referral for abortion, which may include providing a patient with the name, address, telephone number, and other relevant factual information (such as whether the provider accepts Medicaid, charges, etc.) about an abortion provider, the project may not take further affirmative action (such as negotiating a fee reduction, making an appointment, providing transportation) to secure abortion services for the patient.”¹⁸

Further information on women’s reproductive health services under Title X is provided in the section of this compendium entitled “*Women’s Reproductive Health Requirements Pertaining to Title X of the Public Health Service Act.*”

Providing Services Outside of the Section 330-Supported Program

HRSA has long-recognized that health centers may provide certain services or programs outside of their Section 330-Supported Programs (or outside of their “scope of project”). In its scope of project policy from 2008, HRSA indicated that:

“A section 330 grantee’s approved scope of project may be part of a larger health care delivery system and, as such, must be distinctly defined within that context. Section 330 funded health centers may carry out other activities (i.e., other lines

¹⁶ 42 U.S.C §254b(b)(1)(A)(ii); *see also* 42 C.F.R. §51c.102(h)(1) which includes referrals as an element of required primary health services.

¹⁷ The Service Descriptor Guide at p. 6.

¹⁸ 65 Fed. Reg. 41270, 41274 (July 3, 2000); 65 Fed. Reg. 41281 (July 3, 2000).

of business) that are not part of their scope of project and, thus, are not subject to section 330 requirements and expectations.”¹⁹

It is important to remember that if a health center is operating certain services outside of its Section 330-Supported Program, it cannot support such “out-of-scope” services with Section 330 funds and it must ensure that the costs, revenues, and operation of such services are appropriately segregated from the Section 330-Supported Program consistent with appropriate grants management rules.

Federal Interest in Real Property

Section 330 grantees may take advantage of various federal funding opportunities for construction or major renovation of their health center sites. The federal government retains a federal reversionary interest in all real property acquired or improved with federal funds.²⁰ “Federal interest” is defined as “the dollar amount that is the product of the: (1) [F]ederal share of total projects costs; and (2) current fair market value of the property, improvements, or both, to the extent the costs of acquiring or improving the property were included as project costs.”²¹ If the federal government has a federal interest in a health center grantee’s real property, the health center grantee must use the real property “for the originally authorized purpose as long as needed for that purpose, during which time the non-Federal entity must not dispose of or encumber its title or other interests.”²²

If the health center grantee determines that the real property is no longer needed for the purpose of the original project, it must “obtain written approval from the HHS awarding agency for the use of real property in other federally-sponsored projects” or for other “programs that have purpose consistent with those authorized for support by the HHS awarding agency.”²³

Whether this federal interest would restrict the ability of the health center to provide services outside of its Section 330-Supported Program in said facility would require an examination of several factors, such as the language in the federal funding opportunity announcement and the general and specific terms and conditions of the notice of grant awards. Additionally, health center grantees that receive a grant award for some construction or improvement projects may also be required to file a notice regarding the federal government’s reversionary interest in the real property in the county or district office in which the facility is located.²⁴ HHS has included a sample notice of federal interest in certain construction and improvement grant awards which lists restrictions on how the acquired or improved property may be used, “specifically, the property may not be (1) used for any purpose inconsistent with the statute and any program regulations governing the award under which the property was acquired.”²⁵

¹⁹ HRSA Policy Information Notice (PIN) #2008-01: *Defining Scope of Project and Policy for Requesting Change* (December 31, 2007, as amended January 13, 2009) at p. 3.

²⁰ 45 C.F.R. § 75.2.

²¹ 45 C.F.R. § 75.2.

²² 45 C.F.R. § 75.318(b)(1).

²³ 45 C.F.R. § 75.318(b)(2).

²⁴ HHS Grants Policy Statement – January 2007, Section II-67.

²⁵ HRSA-12-115, Appendix B: Sample of Notice of Federal Interest.

Public Health Service Regulations

In 1978, HHS promulgated regulations to implement the Hyde Amendment. The regulations are generally applicable to all grant programs and projects supported in whole or in part by federal funds (whether by grant or contract), which are appropriated to HHS and administered by the Public Health Service (“PHS”).²⁶ These programs / projects include health centers funded under Section 330. Subpart C of those regulations addresses “Abortions and Related Medical Services in Federally Assisted Programs of the Public Health Service.”²⁷

In general, Subpart C prohibits the use of federal funds “for the performance of an abortion in programs or projects to which this subpart applies” with certain exceptions.²⁸ The regulatory exceptions are consistent with those found in the Hyde Amendment – when the life of the mother is endangered, and when someone is a victim of rape or incest.²⁹ The PHS regulations explicitly state the following:

“§50.304 **Life of the mother would be endangered.**

Federal financial participation is available in expenditures for an abortion when a physician has found, and so certified in writing to the program or project, that on the basis of his professional judgment, the life of the mother would be endangered if the fetus were carried to term. The certification must contain the name and address of the patient.”³⁰

“§50.306 **Rape and incest.**

Federal financial participation is available in expenditures for medical procedures performed upon a victim of rape or incest if the program or project has received signed documentation from a law enforcement agency or public health service stating:

- (a) That the person upon whom the medical procedure was performed was reported to have been the victim of an incident of rape or incest;
- (b) The date on which the incident occurred;
- (c) The date on which the report was made, which must have been within 60 days of the date on which the incident occurred;
- (d) The name and address of the victim and the name and address of the person making the report (if different from the victim); and

²⁶ See 42 C.F.R. Part 50 *et seq.*

²⁷ See 42 C.F.R. §§50.301 – 50.310.

²⁸ 42 C.F.R. §50.303.

²⁹ See generally 42 C.F.R. §§50.304 and 50.306. The PHS regulations pre-date the current version of the Hyde Amendment which broadened the “life of the mother” exception to include a physical disorder, physical injury, or physical illness that would place the woman in danger of death unless an abortion is performed. Nevertheless, the documentation and record retention requirements included in the regulations remain intact.

³⁰ 42 C.F.R. §50.304.

(e) That the report included the signature of the person who reported the incident.”³¹

The documentation requirements described above are unnecessary if the life of the rape or incest victim would be endangered by carrying the pregnancy to term, provided that such determination is based on a physician’s professional judgement, which is codified in a written certification submitted to the program / project prior to payment.³²

In all cases, federal funds will not be available “if the program or project has paid without first having received the certifications and documentation specified in those sections.”³³ Further, in addition to the documentation requirements described above, the PHS regulations also require that “[P]rograms or projects to which this subpart applies must maintain copies of the certifications and documentation specified in §§ 50.304 and 50.306 for three years pursuant to the retention and custodial requirements for records 45 CFR 75.361, *et seq*”³⁴, which states:

“Financial records, supporting documents, statistical records, and all other non-Federal entity records pertinent to a Federal award must be retained for a period of three years from the date of submission of the final expenditure report or, for Federal awards that are renewed quarterly or annually, from the date of the submission of the quarterly or annual financial report, respectively, as reported to the HHS awarding agency or pass-through entity in the case of a subrecipient. HHS awarding agencies and pass-through entities must not impose any other record retention requirements upon non-Federal entities.”³⁵

This three (3) year retention period may be extended through written notification from HHS or HRSA. Further, if an audit, claim, or litigation regarding the services is started prior to the end of the three (3) year retention period, the health center should retain the certifications until the audit, claim, or litigation has been resolved and final action has been taken.³⁶

Relevant HHS Grants Management & HRSA Policy

The Hyde Amendment’s ban on the use of federal funds for abortions is reiterated in the HHS Grants Policy Statement, which states that “HHS funds may not be spent for an abortion.”³⁷ The HRSA Notice of Award (NoA) for funds awarded pursuant to Section 330 also includes the following term: “Pursuant to existing law, and consistent with Executive Order 13535 (75 FR 15599), health centers are prohibited from using Federal funds to provide abortion services (except in cases of rape or incest, or when the life of the woman would be endangered).”

³¹ 42 C.F.R. §50.306.

³² *Id.*

³³ 42 C.F.R. §50.307.

³⁴ 42 C.F.R. §50.309.

³⁵ 45 C.F.R. §§75.361(a).

³⁶ 45 C.F.R. §§75.361(b).

³⁷ *See* HHS Grants Policy Statement – January 2007, Section II-22.

Contraceptive Drugs and Devices

The Hyde Amendment does not address contraception; however, the PHS regulations explicitly state:

“Federal financial participation is available with respect to the cost of drugs or devices to prevent implantation of the fertilized ovum, and for medical procedures necessary for the termination of an ectopic pregnancy.”³⁸

Contraceptives (including emergency contraceptives, such as the “Plan B” pill) act by either delaying or inhibiting ovulation, inhibiting or disrupting fertilization, or preventing implantation of the fertilized egg. In all of those circumstances, contraceptives prevent a pregnancy from occurring. Accordingly, neither the Hyde Amendment nor the PHS regulations (nor the HHS / HRSA policies) cited above prohibit a health center from using federal Section 330 grant funds to cover the cost of regular or emergency contraceptive drugs or devices.

On the other hand, drugs and devices that are used for “medication” abortions would be prohibited under the Hyde Amendment because they terminate an early pregnancy (up to 70 days from the date of the woman’s last menstrual cycle) rather than prevent implantation. RU-486 is the name commonly used in referring to such medication abortions, although the abortion consists of the administration of two drugs – RU 486 (Mifepristone or Mifeprex) and Misoprostol. RU-486 is an artificial steroid that blocks progesterone, a hormone needed to continue the pregnancy. In guidance issued by the Centers for Medicare and Medicaid Services (“CMS”), CMS recognizes that Mifepristone (Mifeprex or RU-486), a contraceptive designed to prevent a pregnancy, “is not considered an abortion.”³⁹ By contrast, CMS has also recognized that Mifepristone, when used in combination with Misoprostol, results in the termination of a pregnancy.⁴⁰ Because of the combination of the two drugs results in the termination of a pregnancy, health centers should not expend federal funds in support of medication abortions.

Further information on the implications of the above on the Medicaid program is provided in the section of this compendium entitled “*Women’s Reproductive Health Requirements Pertaining to the Medicaid and Medicare Programs.*”

³⁸ 42 C.F.R. §50.308.

³⁹ See, e.g., CMS Medicaid Budget and Expenditure System/CHIP Budget and Expenditure System Category of Service Line Definitions.

⁴⁰ Department of Health and Human Services, Health Care Financing Administration, Center for Medicaid and State Operations, State Medicaid Director Letter (“SMDL”), March 30, 2001, <https://www.medicare.gov/federal-policy-guidance/federal-policy-guidance.html/downloads/smd033001.pdf>.

Women’s Reproductive Health Requirements Pertaining to the Medicaid and Medicare Programs

The Medicaid program is subject to the Hyde Amendment. Medicaid regulations “[P]rohibit the use of Federal funds to pay for abortions, except when the continuation of the pregnancy would endanger the mother’s life.”⁴¹ According to regulations, this means that the federal financial participation (“FFP”) portion of Medicaid funds cannot be used to pay for abortions, subject to certain exceptions that must be reasonably documented.⁴²

The Medicaid regulations explicitly state the following:

“§441.203 **Life of the mother would be endangered.**

FFP is available in expenditures for an abortion when a physician has found, and so certified in writing to the program or project, that on the basis of his professional judgment, the life of the mother would be endangered if the fetus were carried to term. The certification must contain the name and address of the patient.”⁴³

The Medicaid regulations do not include an exception for victims of rape or incest; nevertheless, in 1998, Medicaid program guidance provided to State Medicaid Directors (the “SMD Letter”) recognized that abortions permitted under the Hyde Amendment (i.e., abortions when the life of the mother is endangered as well as for pregnancies resulting from acts of rape or incest) are considered “medically necessary services” and thus, are eligible for FFP when provided by States.⁴⁴ In all cases, FFP will not be available “for abortions or other medical procedures otherwise provided for under § 441.203 if the Medicaid agency has paid without first having received the certifications and documentation specified in that section.”⁴⁵

The SMD Letter recognizes that while States may impose reasonable reporting or documentation requirements on recipients or providers to ensure that the abortion was to terminate a pregnancy caused by an act of rape or incest, the reporting or documentation requirements cannot result in denying or impeding Medicaid coverage for such procedures. To ensure access in accordance with the aforementioned requirements, State reporting and documentation requirements must be waived and the procedure must be considered reimbursable under Medicaid if the treating physician provides certification as to its medical necessity.⁴⁶

⁴¹ 42 C.F.R. §441.200.

⁴² See 42 C.F.R. §§441.200-441.208.

⁴³ 42 C.F.R. §441.203.

⁴⁴ Department of Health and Human Services, Health Care Financing Administration, Center for Medicaid and State Operations, *Dear State Medicaid Director Letter* (“1998 SMDL”), February 12, 1998, <http://www.medicaid.gov/Federal-Policy-Guidance/downloads/smd021298.pdf>.

⁴⁵ 42 C.F.R. §441.206.

⁴⁶ 1998 SMDL.

With respect to documentation retention, the Medicaid regulations require that “Medicaid agencies must maintain copies of the certifications and documentation specified in § 441.203 for 3 years under the recordkeeping requirements at 45 CFR 75.361”⁴⁷, which states:

“Financial records, supporting documents, statistical records, and all other non-Federal entity records pertinent to a Federal award must be retained for a period of three years from the date of submission of the final expenditure report or, for Federal awards that are renewed quarterly or annually, from the date of the submission of the quarterly or annual financial report, respectively, as reported to the HHS awarding agency or pass-through entity in the case of a subrecipient. HHS awarding agencies and pass-through entities must not impose any other record retention requirements upon non-Federal entities.”⁴⁸

This three (3) year retention period may be extended through written notification from HHS or HRSA. Further, if an audit, claim, or litigation regarding the services is started prior to the end of the three (3) year retention period, the health center should retain the certifications until the audit, claim, or litigation has been resolved and final action has been taken.⁴⁹

While the regulations specify that “Medicaid agencies” must retain the documentation, it is advisable that health centers maintain copies as well.

Similar to the PHS regulations discussed above, the Medicaid regulations recognize that FFP also is available for the costs of “drugs or devices to prevent implantation of the fertilized ovum and for medical procedures necessary for the termination of an ectopic pregnancy.”⁵⁰ As noted above, in guidance, CMS recognizes that Mifepristone (Mifeprex or RU-486), a contraceptive designed to prevent a pregnancy, “is not considered an abortion.”⁵¹ By contrast, CMS has also recognized that Mifepristone, when used in combination with Misoprostol, results in the termination of a pregnancy.⁵² Federal financial participation for mifepristone is available only when consistent with the applicable Hyde Amendment restrictions (namely, the restrictions that limit federal funds to pay for abortions except in cases of rape, incest or endangerment to the mother’s life).⁵³

Both the SMD Letter and the plain language of the Hyde Amendment indicate that the Hyde Amendment does not prohibit a State from paying for an abortion with state-only funds. However, many States have enacted their own laws prohibiting the use of State funds to pay for abortions and abortion-related activities. In these States, neither the federal nor the state portions

⁴⁷ 42 C.F.R. §441.208.

⁴⁸ 45 C.F.R. §§75.361(a).

⁴⁹ 45 C.F.R. §§75.361(b).

⁵⁰ 42 C.F.R. §441.207.

⁵¹ *See, e.g.*, CMS Medicaid Budget and Expenditure System /CHIP Budget and Expenditure System Category of Service Line Definitions.

⁵² Department of Health and Human Services, Health Care Financing Administration, Center for Medicaid and State Operations, State Medicaid Director Letter (“SMDL”), March 30, 2001, <https://www.medicare.gov/federal-policy-guidance/federal-policy-guidance.html/downloads/smd033001.pdf>.

⁵³ SMDL No. 01-018 at 1.

of Medicaid funds (nor other state funds that support for Medicaid services) would be available for abortions, subject to the federal and any applicable state exceptions.

In Medicare, abortions are not covered procedures, except if the pregnancy is the result of an act of rape or incest or in the case where a woman suffers from a physical disorder, physical injury or physical illness, including a life-endangering physical condition by or arising from the pregnancy itself that would, as certified by a physician, place the woman in danger of death unless an abortion is performed.⁵⁴

⁵⁴ Pub. L. 114-113, Sec. 506-507 and National Coverage Determination for Abortion 140.1.

Women’s Reproductive Health Requirements Pertaining to Title X of the Public Health Service Act

The Family Planning Program authorized under Title X of the Public Health Service Act (“Title X”), provides grants to assist in establishing and operating voluntary family planning projects.⁵⁵ The Title X Family Planning Program is overseen by the U.S. Department of Health and Human Services’ Office of Population Affairs (“OPA”).

A “Title X project” sets forth the activities described in the Title X grant application and any incorporated documents supported under the approved budget. The scope of the Title X project, as defined in the funded application, consists of activities that the total approved grant-related project budget supports.⁵⁶

Health centers that receive grants under Title X, either directly from OPA or as sub-recipients to another entity, are subject to Title X-related requirements, in addition to the Hyde Amendment restrictions discussed above. These requirements are described below. Title X restrictions apply solely to the Title X project and not to all activities conducted by the health center. A Federal Register notice issued on July 3, 2000 described how the Title X project can be distinguished from other activities furnished by the Title X provider, as follows:

“A grant applicant may include both project and nonproject activities in its grant application, and, so long as these are properly distinguished from each other and prohibited activities are not reflected **in the amount of the total approved budget**, no problem is created” (emphasis added).⁵⁷

Further discussion regarding the separation of activities can be found in the last section of this compendium.

General Family Planning Services under Title X

According to the Title X regulations, Title X projects are required to “[P]rovide a broad range of acceptable and effective medically approved family planning methods (including natural family planning methods) and services (including infertility services and services for adolescents).”⁵⁸ The Title X regulations further specify that Title X projects are required to “[P]rovide for medical services related to family planning (including physician’s consultation, examination prescription, and continuing supervision, laboratory examination, contraceptive supplies)” and to “provide for the effective usage of contraceptive devices and practices.”⁵⁹

⁵⁵ 42 U.S.C. §300, *et seq*; Project Grants and Contracts for Family Planning Services; implementing regulations at 42 C.F.R. Part 59, subpart A.

⁵⁶ OPA *Program Requirements for Title X Funded Family Planning Projects*, Version 1.0, April 2014.

⁵⁷ 65 Fed. Reg. 41281, 41282 (July 3, 2000).

⁵⁸ 42 C.F.R. §59.5(a)(1).

⁵⁹ 42 C.F.R. §59.5(b)(1).

Counseling Services under Title X

In regard to pregnancy diagnosis and counseling, the Title X regulations specify that Title X projects must “[O]ffer pregnant women the opportunity to be provided information and counseling regarding each of the following options:

- prenatal care and delivery;
- infant care, foster care, or adoption; and
- pregnancy termination.”⁶⁰

The Title X regulations further specify that if a woman requests to receive such information and options counseling, the Title X project must “provide neutral, factual information and non-directive counseling on each of the options, and referral upon request, except with respect to any option(s) about which the pregnant woman indicates that she does not wish to receive such information and counseling.”⁶¹

According to the Federal Register notice issued on July 3, 2000, a “Title X project may not provide pregnancy options counseling which promotes abortion or encourages persons to obtain abortion, although the project may provide patients with complete factual information about all medical options and the accompanying risks and benefits.”⁶²

In addition, according to the Federal Register notice issued on July 3, 2000, a “Title X project may not promote or encourage the use of abortion as a method of family planning through advocacy activities such as providing speakers to debate in opposition to anti-abortion speakers, bringing legal action to liberalize statutes relating to abortion, or producing and/or showing films that encourage or promote a favorable attitude toward abortion as a method of family planning.”⁶³ The Federal Register notice further sets forth that “[F]ilms that present only neutral, factual information about abortion are permissible.”⁶⁴

According to the Title X regulations, Title X projects must “[P]rovide services without subjecting individuals to any coercion to accept services or to employ or not to employ any particular methods of family planning.”⁶⁵ In addition, “[A]cceptance of services must be solely on a voluntary basis and may not be made a prerequisite to eligibility for, or receipt of, any other services, assistance from or participation in any other program.”⁶⁶

Referrals for Abortion Services under Title X

The Federal Register notice issued on July 3, 2000 sets forth that “[W]hile a Title X project may provide a referral for abortion, which may include providing a patient with the name, address,

⁶⁰ 42 C.F.R. §59.5(a)(5)(i).

⁶¹ 42 C.F.R. §59.5(a)(5)(ii).

⁶² 65 Fed. Reg. 41281 (July 3, 2000).

⁶³ 65 Fed. Reg. 41281, 41282 (July 3, 2000).

⁶⁴ *Id.*

⁶⁵ 42 C.F.R. §59.5(a)(2).

⁶⁶ *Id.*

telephone number, and other relevant factual information (such as whether the provider accepts Medicaid, charges, etc.) about an abortion provider, the project may not take further affirmative action (such as negotiating a fee reduction, making an appointment, providing transportation) to secure abortion services for the patient.”⁶⁷

Notwithstanding the above, the Title X regulations specify that Title X projects are required to provide “necessary referral to other medical facilities when medically indicated.”⁶⁸ According to the Federal Register notice issued on July 3, 2000, “[W]here a referral to another provider who might perform an abortion is medically indicated because of the patient’s condition or the condition of the fetus (such as where the woman’s life would be endangered), such a referral by the Title X project is not prohibited by [statute] and is required by [the Title X regulations].”⁶⁹

Abortion under Title X

Title X explicitly excludes abortions from federally-funded required family planning services, stating that “[N]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.”⁷⁰ Further, the Consolidated Appropriations Act, 2016, included a proviso to the family planning appropriation that “amounts provided to said projects under such title shall not be expended for abortions.”⁷¹ Accordingly, a Title X-supported program is prohibited from providing or offering abortion as a method of family planning.

⁶⁷ 65 Fed. Reg. 41281 (July 3, 2000).

⁶⁸ 42 C.F.R. §59.5(b)(1).

⁶⁹ 65 Fed. Reg. 41281 (July 3, 2000), referencing 42 U.S.C. 300a-6 and 42 C.F.R. §59.5(b)(1).

⁷⁰ 42 U.S.C. §300a-6; 42 C.F.R §59.5(a)(5).

⁷¹ Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, §§ 506-507, 129 STAT. 2242, 2649 (2015).

Women’s Reproductive Health Requirements Pertaining to the AmeriCorps Program

The AmeriCorps Program is one of several national service programs founded in 1994 under the National and Community Service Trust Act of 1993,⁷² whose funding is authorized to and overseen by the Corporation for National and Community Service (“CNCS”). CNCS awards funds to programs in several focus areas including education, economic opportunity, disaster services, environmental stewardship, veterans/military families and health care.

The Edward M. Kennedy Serve America Act of 2009 (the “Serve America Act”), which was signed into law on April 21, 2009, re-authorized CNCS and the national service programs administered by it through 2014.⁷³ The Serve America Act also authorized expansions of these programs, by amending both the National and Community Service Act of 1990 and the Domestic Volunteer Service Act of 1973.

Statutory and Regulatory Restrictions

Health centers that receive grants through the AmeriCorps Program, either directly from CNCS or as sub-recipients to another entity, are subject to specific requirements regarding the provision of certain women’s reproductive health services and related activities. In particular, the Serve America Act amended the National and Community Service Act by codifying the long-standing list of activities in which AmeriCorps members may not engage when acting under their “approved national service position.” In addition to those activities already prohibited at the time of enactment, the Serve America Act included language stating that AmeriCorps members may not engage in the provision of “abortion services or referrals for receipt of such services.”⁷⁴

The AmeriCorps regulations were amended in 2009 to incorporate the statutory revisions from the Serve America Act, including the restriction on abortion services and referrals for such services.⁷⁵ Preamble language to the Federal Register notice indicates that “No member, including currently serving members, may engage in this newly added prohibited activity during AmeriCorps service hours on or after October 1, 2009.” Specifically, the AmeriCorps regulations provide the following:

“§2520.65: What activities are prohibited in AmeriCorps subtitle C programs?”

(a) While charging time to the AmeriCorps program, accumulating service or training hours, or otherwise performing activities supported by the AmeriCorps program or the Corporation [for National and Community Service], staff and members may not engage in the following activities: ... (10) providing abortion services or referrals for receipt of such services.

(b) Individuals may exercise their rights as private citizens and may participate in the activities listed above on their initiative, on non-AmeriCorps

⁷² Pub. L. 103-82 (Sep. 21, 1993), 107 Stat. 785.

⁷³ Pub. L. 111-13.

⁷⁴ 42 U.S.C. §12584a(a)(9).

⁷⁵ 74 Fed. Reg. 46499, 46506 (Sept. 10, 2009).

time, and using non-Corporation funds. Individuals should not wear the AmeriCorps logo while doing so.”⁷⁶

Terms and Conditions Applicable to AmeriCorps Grants

The 2016⁷⁷ AmeriCorps State and National Mandatory Guidance includes a list of prohibited activities that reflect the statutory/regulatory prohibitions including, but not limited to “providing abortion services or referrals for receipt of such services.” Further, the guidance states the following:

“AmeriCorps members may not engage in the above activities directly or indirectly by recruiting, training, or managing others for the primary purpose of engaging in one of the activities listed above. Individuals may exercise their rights as private citizens and may participate in the activities listed above on their initiative, on non- AmeriCorps time, and using non-CNCS funds.”⁷⁷

CNCS Guidance and Practical Application of Restrictions

Neither “abortion services” nor “referrals” were defined in the Serve America Act, the regulations, or the grant terms and conditions. On November 9, 2015, CNCS provided advice to the National Association of Community Health Centers (“NACHC”) in a letter that appears to clarify some of the outstanding questions. CNCS advised that AmeriCorps Members are prohibited from providing abortion services or referrals for receipt of such services, which include any activity that:

- Directly or indirectly counsels or provides information about the availability of abortion services, and/or
- Involves providing services to a patient seeking or considering abortion services, including but not limited to—
 - Escorting, in-processing or preparing patients or potential patients for a procedure,
 - Assisting in or attending any part of the procedure, or
 - Providing any post-procedure support, processing or assistance.

These prohibitions differ from the Section 330 and Title X restrictions. As stated above, these restrictions apply **solely** to AmeriCorps members when they are charging time to the AmeriCorps Program, accumulating service or training hours, or otherwise performing activities supported by AmeriCorps or CNCS. If a health center receives volunteers or service participants from a third-party agency (such as United Way or another non-profit volunteer group) it is

⁷⁶ 45 C.F.R. §§2520.65(a)(10) and 2520.65(b).

⁷⁷ 2017 AmeriCorps State and National Mandatory Supplemental Guidance, pg. 9. Of note, in addition to the prohibition cited in the 2017 guidance, the 2016 Terms and Conditions for AmeriCorps State and National Grants (Section V.C.) also indicated that when engaging in prohibited activities on non-AmeriCorps time and supported with non-CNCS funds “[I]ndividuals should not wear the AmeriCorps logo when doing so.” Insofar as the Specific Terms and Conditions for the 2017 grants have not yet been issued as of the date of this Compendium, it is unclear whether the 2017 grants will include such additional guidance.

advisable for the health center to check with the agency as to whether those persons are supported by AmeriCorps or any other CNCS program, such as VISTA or Senior Corps. Determining upfront the source of funds and relevant restrictions could help avoid confusion at a later date.

Conclusion

Federal law lays out a number of limitations and restrictions on health centers' ability to use federal funds to provide abortions and related services (including but not limited to referrals and counseling). The extent of those restrictions differs based on the source(s) of funding received by the health center. The Hyde Amendment, the PHS regulations, and the Medicaid / Medicare regulations and supplemental guidance generally prohibit the use of federal funds appropriated to HHS to support the provision of abortions, with specific, limited exceptions. The Title X Program includes explicit restrictions on both directive counseling and active participation in making referrals to secure abortion services for patients; the AmeriCorps Program in its recent interpretation of "abortion services" and referrals (by letter to NACHC) prohibits any involvement whatsoever by an AmeriCorps member before, during, or after an abortion procedure as well as referrals, direct/indirect counseling, and the provision of information about the availability of abortion services during an individual's AmeriCorps service hours.

Given these differing parameters, it is important to be able to identify and to know the details associated with each separate funding source. Further, while the Hyde Amendment and PHS regulations do not explicitly discuss either counseling or referrals, it is advisable for health centers to proceed cautiously and steer clear of any activities funded in whole or in part with federal funds that could be interpreted as directive counseling and/or taking an active role in assisting patients in getting abortions.