

No. _____

**In the
Supreme Court of the United States**

STATE OF OKLAHOMA,

Applicant,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
XAIVER BECERRA, in his official capacity as the Secretary of the U.S. Department
of Health and Human Services, JESSICA S. MARCELLA, in her official capacity as
Deputy Assistant Secretary for Population Affairs; and OFFICE OF POPULATION
AFFAIRS,

Respondents.

To the Honorable Neil M. Gorsuch, Associate Justice of the Supreme Court
of the United States and Circuit Justice for the Tenth Circuit

**Application from The United States Court of Appeals
for the Tenth Circuit (No. 24-6063)**

APPENDIX OF EXHIBITS TO

**EMERGENCY APPLICATION FOR WRIT OF INJUNCTION OR IN THE
ALTERNATIVE FOR STAY OF AGENCY ACTION**

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EXHIBIT 1

FILED
United States Court of Appeals
Tenth Circuit

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

July 15, 2024

Christopher M. Wolpert
Clerk of Court

STATE OF OKLAHOMA,

Plaintiff - Appellant,

v.

No. 24-6063

UNITED STATES DEPARTMENT
OF HEALTH AND HUMAN
SERVICES; XAVIER BECERRA, in
his official capacity as the Secretary
of the U.S. Department of Health
and Human Services; JESSICA S.
MARCELLA, in her official
capacity as Deputy Assistant
Secretary for Population Affairs;
OFFICE OF POPULATION
AFFAIRS,

Defendants - Appellees.

STATES OF MISSISSIPPI;
ALABAMA; ALASKA;
ARKANSAS; FLORIDA;
GEORGIA; IDAHO; INDIANA;
IOWA; KANSAS; KENTUCKY;
LOUISIANA; MISSOURI;
MONTANA; NEBRASKA; NORTH
DAKOTA; OHIO; SOUTH
CAROLINA; SOUTH DAKOTA;
TENNESSEE; TEXAS; UTAH;
WEST VIRGINIA; WYOMING; THE
AMERICAN ASSOCIATION OF
PRO-LIFE OBSTETRICIANS &
GYNECOLOGISTS; THE

CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS; THE CATHOLIC MEDICAL ASSOCIATION; THE NATIONAL ASSOCIATION OF CATHOLIC NURSES, USA; CONSTITUTIONAL ACCOUNTABILITY CENTER; AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION OF OKLAHOMA; CENTER FOR REPRODUCTIVE RIGHTS; LAWYERING PROJECT,

Amici Curiae.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. 5:23-CV-01052-HE)**

Zachary Paul West, Director of Special Litigation, Office of Attorney General, State of Oklahoma, Oklahoma City, Oklahoma (Garry M. Gaskins, II, Solicitor General, and Audrey A. Weaver, Assistant Solicitor General, Office of Attorney General, State of Oklahoma, Oklahoma City, Oklahoma; Barry G. Reynolds, R. Tom Hillis, J. Miles McFadden, Titus Hillis Reynolds Love, P.C., Tulsa, Oklahoma; and Anthony J. Ferate, Spencer Fane, Oklahoma City, Oklahoma, with him on the briefs), for Appellant.

Brian J. Springer, Attorney, Appellate Staff, Civil Division, U.S. Department of Justice (Brian M. Boynton, Principal Deputy Assistant Attorney General, Michael S. Raab and Courtney L. Dixon, Attorneys, Appellate Staff, Civil Division, with him on the briefs), Washington D.C., for Appellees.

Scott G. Stewart, Office of Attorney General for the State of Mississippi, (Lynn Fitch, Attorney General for the State of Mississippi, with him on the briefs), Jackson, Mississippi, on behalf of States of Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming; John J. Bursch, Erin Morrow Hawley, Christopher Paul

Schandavel, Alliance Defending Freedom on behalf of American Association of Pro-Life Obstetricians and Gynecologists, The Christian Medical and Dental Associations, The Catholic Medical Association, and The National Association of Catholic Nurses, USA; Miriam Becker-Cohen, Brianne J. Gorod, and Elizabeth B. Wydra, Constitutional Accountability Center on behalf of Constitutional Accountability Center; Andrew Beck and Ryan Mendias, American Civil Liberties Union Foundation on behalf of American Civil Liberties Union; Megan Lambert, American Civil Liberties Union of Oklahoma Foundation on behalf of American Civil Liberties Union of Oklahoma; Rabia Muqaddam and Alexander Wilson, Center for Reproductive Rights, on behalf of Center for Reproductive Rights; Jamila Asha Johnson and Paige Suelzle, Lawyering Project on behalf of Lawyering Project, filed amicus curiae briefs.

Before **BACHARACH**, **EBEL**, and **FEDERICO**, Circuit Judges.

BACHARACH, Circuit Judge.

This case involves a congressional program to award grants for family-planning projects. When the program was created, Congress instructed the Department of Health and Human Services to establish eligibility requirements. HHS complied, and its requirements included nondirective counseling and referrals for all family-planning options, including abortion.

The grant recipients included Oklahoma. But Oklahoma expressed concern to HHS about the eligibility requirements, insisting that new state laws prohibited counseling and referrals for abortions. HHS responded by proposing that Oklahoma supply individuals with neutral information about

family-planning options (including abortion) through a national call-in number. Oklahoma rejected this proposal, so HHS terminated the grant.

Oklahoma challenged termination of the grant and moved for a preliminary injunction. The district court denied the motion, determining that Oklahoma wasn't likely to succeed on the merits.

On appeal, Oklahoma argues that it would likely succeed for three reasons: (1) the spending power didn't allow Congress to delegate eligibility requirements to HHS, (2) HHS's eligibility requirements violated a statute known as *the Weldon Amendment*, and (3) HHS acted arbitrarily and capriciously. We reject these arguments:

1. **Spending Power:** The Constitution's spending power prohibits Congress from imposing ambiguous conditions on states in exchange for federal funds. Did the district court err in treating Title X of the Public Health Service Act as unambiguous? We answer *no*, concluding that the court didn't err when it determined that
 - Title X had likely been unambiguous in conditioning eligibility on satisfaction of HHS's requirements and
 - Oklahoma had likely acted knowingly and voluntarily in accepting HHS's requirements.
2. **The Weldon Amendment:** A federal law, known as *the Weldon Amendment*, prohibits distribution of funds to a federal or state agency that discriminates against a health-care entity for declining to provide referrals for abortions. *See* Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. F, § 508(d), 118 Stat. 2809, 3163 (2004). Did the district court err when it concluded that Oklahoma hadn't shown a likely violation of the Weldon Amendment? We answer *no*. HHS had proposed use of a national call-in number, which would supply neutral information about family-planning options, and

Oklahoma didn't show a likelihood that the sharing of this call-in number would constitute a *referral for* the purpose of an abortion.

3. **Arbitrary and Capricious Action:** Oklahoma argues that HHS acted arbitrarily and capriciously, raising three sub-issues.

The first sub-issue is whether HHS strayed from Title X in creating the eligibility requirements. We answer *no*, concluding that the district court didn't err when it concluded that the eligibility requirements had likely fallen within HHS's delegation of statutory authority.

The second sub-issue is whether Oklahoma demonstrated a likely violation of HHS's regulations. We answer *no*. In our view, the district court didn't err by rejecting Oklahoma's proof of a likely violation.

The third sub-issue is whether the district court erred by concluding that Oklahoma had failed to show a likely disregard of relevant factors. We answer *no*, concluding the district court didn't err by determining that HHS had likely considered all the relevant factors, such as recent changes in precedent on abortion and the impact on Oklahoma.

Background

1. **Congress empowers HHS to administer the Title X grant program.**

In 1970, Congress enacted Title X of the Public Health Service Act, which created a grant program for family-planning projects. 42 U.S.C. §§ 300(a), 300a-4(c); Family Planning Services and Population Research Act, Pub. L. No. 91-572, 84 Stat. 1504, 1508 (1970). Under Title X, Congress authorized HHS to determine eligibility requirements for the funds. 42 U.S.C. § 300a-4(a)–(b).

Most Title X funds flow to state and local governmental agencies, which distribute the funds to other entities providing health-care services. *See Nat'l Family Planning & Reproductive Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826, 828 (D.C. Cir. 2006). The grants initially last one year, but can be continued upon HHS's approval. 42 C.F.R. § 59.8(a)–(b). HHS may terminate a grant if the recipient violates the conditions, including any regulatory requirements. *See* 45 C.F.R. §§ 75.371(c), 75.372(a)(1).

2. HHS terminates Oklahoma's grant.

In 2021, HHS enacted a rule imposing conditions on the grant funds. *Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services*, 86 Fed. Reg. 56,144 (Oct. 7, 2021); *see* 42 C.F.R. § 59.1 *et seq.* In this rule, HHS renewed two earlier conditions¹:

1. **Nondirective Counseling:** Projects must “[o]ffer pregnant clients the opportunity” to receive “neutral, factual information and nondirective counseling” regarding various family-planning options, including abortion. 42 C.F.R. § 59.5(a)(5)(i)–(ii).
2. **Referral on Request:** Projects must also provide a referral regarding all options when requested. *Id.* § 59.5(a)(5)(ii). The referral may include the provider's name, address, phone number, and other factual information. 86 Fed. Reg. 56,144, 56,150 (Oct. 7, 2021). But the project “may not take further affirmative action . . . to secure abortion services for the patient,” like negotiating fees, making an appointment, or providing transportation. *Id.*

¹ Through this rule, HHS readopted the regulations in place from 2000 to 2019. 86 Fed. Reg. 56,144; 56,144 (Oct. 7, 2021).

In 2022, HHS approved a grant to Oklahoma’s health department for the period April 2022 to March 2023. In approving the grant, HHS reminded Oklahoma that it needed to comply with Title X and the 2021 rule.

While the grant was in place, the Supreme Court issued *Dobbs v. Jackson Women’s Health Organization*, stating that there is no constitutional right to an abortion. 597 U.S. 215 (2022). Following the decision, HHS informed grant recipients that *Dobbs* didn’t affect the obligation to continue offering nondirective counseling and referrals regarding all family-planning options, including abortions.

Months later, Oklahoma proposed to change its policies, citing changes in state law. HHS rejected Oklahoma’s proposal, saying that the changes had violated the 2021 rule. But HHS suggested that Oklahoma could satisfy the requirement by passing along a national call-in number, which would supply neutral information regarding various family-planning options.

In March 2023, Oklahoma accepted the grant and agreed to pass along the call-in number. So HHS approved continuation of the grant until March 2024. A short time later, however, Oklahoma decided to stop sharing information about the call-in number. With this decision, HHS informed Oklahoma that it was violating the 2021 rule. When Oklahoma

refused to continue telling individuals about the call-in number, HHS terminated the grant.

Discussion

1. We apply the abuse-of-discretion standard to the district court's denial of a preliminary injunction.

Oklahoma challenged HHS's termination and sought a preliminary injunction to keep the grant in place during the litigation. To obtain the preliminary injunction, Oklahoma needed to show that

- it was likely to succeed on the merits,
- the denial of the preliminary injunction would create irreparable harm,
- the balance of equities favored a preliminary injunction, and
- the preliminary injunction would be consistent with the public interest.

Derma Pen, LLC v. 4EverYoung Ltd., 773 F.3d 1117, 1119 (10th Cir. 2014). Applying these elements, the district court denied the motion for a preliminary injunction on the ground that Oklahoma hadn't shown likely success on the merits.

1.1 We apply the abuse-of-discretion standard to the district court's conclusions on likelihood of success.

Oklahoma sought judicial review under the Administrative Procedure Act, arguing that it was likely to succeed on the claims involving constraints involving the spending clause, violation of the Weldon Amendment, and arbitrariness and caprice in terminating Oklahoma's

grant. We review the district court’s decision on likelihood of success under the deferential abuse-of-discretion standard. *See, e.g., Diné Citizens Against Ruining Our Env’t v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016) (“Because each of these elements [including the likelihood-of-success element] is a prerequisite for obtaining a preliminary injunction, we will not reverse the district court’s denial of injunctive relief unless we are persuaded that the court abused its discretion as to all [elements].”); *Verlo v. Martinez*, 820 F.3d 1113, 1128–37 (10th Cir. 2016) (applying the abuse-of-discretion standard to review the district court’s determination on likelihood of success).

We apply this standard based on the realities of decisions on preliminary injunctions, where the “district court almost always faces an abbreviated set of facts and must hypothesize the probable outcome of a case.” *Resol. Tr. Corp. v. Cruce*, 972 F.2d 1195, 1198 (10th Cir. 1992); *see also FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1083 (D.C. Cir. 1981) (Ginsburg, J.) (noting that rulings on motions for a preliminary injunction often involve “time pressure” and incomplete records). Given these realities, we regard likelihood of success as only a tentative conclusion. *See Homans v. City of Albuquerque*, 366 F.3d 900, 904–05 (10th Cir. 2004) (“Courts repeatedly have emphasized that a decision as to the likelihood of success is tentative in nature and not binding at a subsequent trial on the merits.”). We generally leave these tentative conclusions to “the sound

discretion of the trial court.” *Resol. Tr. Corp.*, 972 F.2d at 1198. For issues involving questions of law, however, we conduct de novo review. *See Derma Pen, LLC v. 4EverYoung Ltd.*, 773 F.3d 1117, 1119–20, 1120 n.2 (10th Cir. 2014) (explaining that we apply de novo review to legal determinations involved in the inquiry on likelihood of success).

Because Oklahoma is seeking judicial review of agency action under the Administrative Procedure Act, the district court had to reach a tentative conclusion based on the standard that would govern the final decision. *See Aposhian v. Barr*, 958 F.3d 969, 978–79, 989 (10th Cir. 2020) (reviewing likelihood of success in light of the standard of review that would apply for the final decision), *abrogated on other grounds by Garland v. Cargill*, 602 U.S. 406 (2024). When reaching a final decision, the district court can set aside HHS’s termination of the grant only if HHS had acted in a way that was

- “procedurally defective,”
- “arbitrary or capricious in substance,”
- “manifestly contrary to [a] statute,” or
- unconstitutional.

Ukeiley v. EPA, 896 F.3d 1158, 1164 (10th Cir. 2018); *see United States v. Mead Corp.*, 533 U.S. 218, 227 n.6 (2001) (explaining that review under the Administrative Procedure Act includes constitutional questions); *People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife*

Serv., 852 F.3d 990, 999 (10th Cir. 2017) (same).² So in reviewing the district court’s tentative conclusions on likelihood of success, we consider the standard that will apply at the final stage.

2. The district court didn’t err in tentatively concluding that Oklahoma hadn’t proven a violation of the spending power.

Oklahoma argues that the spending power didn’t allow Congress to delegate eligibility to HHS. We reject this argument.

Under the spending power, Congress can “lay and collect Taxes, . . . to pay the Debts and provide for the common Defence and general Welfare of the United States.” U.S. Const. art. I, § 8. This language allows Congress to “fix the terms on which it shall disburse federal money to the [s]tates.” *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The disbursement creates a kind of contract, where states agree to federally imposed conditions in exchange for federal funds. *Id.* Given the contractual nature of the terms, two requirements exist:

1. Congress may impose conditions on federal grants only when the conditions are unambiguous.
2. The state must voluntarily and knowingly accept the terms of the “contract.”

² In the body of its opening brief, Oklahoma requests a stay pending appeal. Because we affirm the district court’s denial of the preliminary injunction, the motion for a stay is moot. *See, e.g., Walmer v. U.S. Dep’t of Def.*, 52 F.3d 851, 856 (10th Cir. 1995) (concluding that a stay was dissolved upon affirmance of the district court’s ruling on a preliminary injunction).

Id.

2.1 Title X likely authorizes HHS to impose the disputed condition.

Oklahoma argues that Title X is ambiguous, preventing HHS from imposing conditions related to counseling and referral. For this argument, Oklahoma relies on § 1008 of Title X, which prohibits the use of federal funds “in programs where abortion is a method of family planning.” 42 U.S.C. § 300a-6.

Oklahoma regards § 1008 as ambiguous based on the Supreme Court’s opinion in *Rust v. Sullivan*, 500 U.S. 173 (1991). There the Court had to decide whether § 1008 prohibited HHS from enacting a rule banning nondirective counseling and referrals. *Id.* at 179–80. For that decision, the Court concluded that congressional silence rendered § 1008 ambiguous on counseling and referrals. *Id.* at 184. Oklahoma relies on *Rust* to argue that Congress’s silence on counseling and referrals renders Title X ambiguous for purposes of the spending power.

Though § 1008 itself didn’t require the availability of counseling and referrals, Congress instructed HHS to determine eligibility for Title X grants. *See* 42 U.S.C. § 300a-4(a) (“Grants and contracts . . . shall be made in accordance with such regulations as the Secretary may promulgate.”); *id.* § 300a-4(b) (“Grants under this subchapter shall be . . . subject to such conditions as the Secretary may determine to be appropriate to assure that such grants will be effectively utilized for the purposes for which made.”).

The district court didn't err in tentatively concluding that this delegation to HHS wouldn't violate the spending power.

The Supreme Court considered a similar delegation to an agency in *Bennett v. Kentucky Department of Education*, 470 U.S. 656 (1985). There the agency tried to recoup a federal grant from a state, arguing that the state had knowingly and voluntarily accepted unambiguous conditions. *Id.* at 658–59.

The Supreme Court agreed with the agency. *Id.* at 669. Under the grant program, Congress authorized the agency to set grant conditions. 20 U.S.C §§ 241e(a), 241f(a)(1), 242(b) (1976). The Supreme Court allowed this delegation to the agency, explaining that Congress couldn't “prospectively resolve every possible ambiguity concerning particular applications of the requirements.” *Bennett*, 470 U.S. at 669; *see also W. Va. ex rel. Morrissey v. U.S. Dep't of the Treasury*, 59 F.4th 1124, 1148 (11th Cir. 2023) (“[W]e do not question an agency's authority to fill in gaps that may exist in a spending condition.”).³

³ When the spending power was adopted, Congress had already begun delegating grant conditions to the executive branch. For example, Congress created a benefits program for the army in 1790, stating that payments would follow “regulations . . . directed by the President.” Act of Apr. 30, 1790, ch. 10, § 11, 1 Stat. 119, 121; *see also* Act of Sept. 29, 1789, ch. 24, 1 Stat. 95, 95 (similarly delegating executive authority to administer a pension program for wounded Revolutionary War veterans).

Despite this authorization, the state grantee invoked the spending power, arguing that ambiguity in the law prevented deference to the agency’s interpretations. Br. for the Respondent at 24–30, *Bennett v. Ky. Dep’t of Educ.*, 470 U.S. 656 (1985) (No. 83-1798), 1984 WL 565692; *see also id.* at 22–27 (arguing that the recipient of the grant should not be penalized for interpreting an ambiguous statute differently than the agency).

But the Supreme Court held that the funding conditions were unambiguous based on the combination of the statute *and* the agency’s authorized regulations: “We agree with the [agency] that the [state grantee] clearly violated *existing* statutory *and* regulatory provisions” *Bennett*, 470 U.S. at 670 (emphasis added); *see id.* (considering exercises of the spending power based on both the “the statutory provisions” *and* “the regulations . . . and other guidelines provided by the [the agency] at th[e] time” that funding had been accepted); *see also Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 643 (1999) (holding that agencies’ unambiguous regulations satisfy the notice requirements under the spending power); *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (“Congress . . . has repeatedly employed the spending power ‘to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory *and* administrative

directives.” (emphasis added) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980))).

Bennett’s reasoning applies here. Like the statute in *Bennett*, Title X unambiguously authorized the agency to impose conditions for federal grants. See 42 U.S.C. § 300a-4(b);⁴ see also 86 Fed. Reg. 56,144, 56,154 (Oct. 7, 2021) (explaining the critical nature of nondirective counseling and referrals for the delivery of services under Title X). With this authorization, HHS established the conditions for Title X grants. So Oklahoma could make an informed decision based on the combination of Title X’s language and HHS’s conditions.

Oklahoma points to *West Virginia ex rel. Morrissey v. U.S. Department of the Treasury*, 59 F.4th 1124 (11th Cir. 2023). There the

⁴ In its reply brief, Oklahoma points to Congress’s authorization, arguing that it limits HHS’s rulemaking power. Appellant’s Reply Br. at 7–8 (discussing statutory language that instructs HHS to impose conditions to assure that grants are “utilized for the purposes for which made” (quoting 42 U.S.C. § 300a-4(b))). We need not address this argument because it didn’t appear in the opening brief. *United States v. Hunter*, 739 F.3d 492, 495 (10th Cir. 2013).

Even if we were to consider this argument, we would reject it. The statute explicitly allows HHS to impose conditions that it “*determine[s] to be appropriate.*” 42 U.S.C. § 300a-4(b) (emphasis added). In the 2021 rule, HHS explained why it believed that the requirement for nondirective counseling and referrals would be critical to accomplish the purposes of Title X. See 86 Fed. Reg. 56,144, 56,154 (Oct. 7, 2021). We could disturb HHS’s determination only if it had been procedurally defective, arbitrary or capricious, or manifestly contrary to a statute. See Discussion–Part 1.1, above.

Eleventh Circuit said that the Treasury Department had violated the spending power by interpreting an ambiguous tax offset provision in a stimulus act. *Id.* at 1146–48. We aren’t bound by other circuits. *United States v. Carson*, 793 F.2d 1141, 1147 (10th Cir. 1986). But even if *Morrissey* were binding, its circumstances differed in two ways.

First, the Treasury Department created a regulatory framework for the statutory offset provision because the statute itself was confusing and ambiguous. *Morrissey*, 59 F.4th at 1133–34, 1146. But HHS’s requirements didn’t create a framework to apply a confusing and ambiguous statute.

Second, the Eleventh Circuit said that this generic statutory language hadn’t authorized the Treasury Department to interpret a major question of the stimulus act. *Id.* at 1147. The Eleventh Circuit explained that “[t]he Constitution does not allow the [Treasury Department] to supply content without which the [o]ffset [p]rovision literally could not function.” *Id.* at 1148. By contrast, HHS’s requirement governs only counseling and referrals, not the fundamental application of the grant program.

* * *

The district court didn’t err when it tentatively concluded that Oklahoma couldn’t show a violation of the spending power. Oklahoma points out that § 1008 is silent on counseling and referrals. But § 1008 rests alongside other provisions of Title X that unambiguously direct HHS to determine the eligibility requirements. So the district court didn’t err by

tentatively determining that the spending power hadn't prevented Congress's delegation of eligibility requirements to HHS.

2.2 Oklahoma likely agreed voluntarily and knowingly to HHS's requirement for nondirective counseling and referrals.

The Supreme Court has explained that even when the law is unambiguous, the spending power prohibits Congress from “surpris[ing] participating States with post acceptance or ‘retroactive’ conditions.” *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981). So we must consider the conditions that existed when the state accepted the federal funds. *See Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 670 (1985) (rejecting a challenge under the spending power because “the State agreed to comply with . . . the legal requirements in place when the grants were made”).

In our view, the district court didn't err when it tentatively determined that Oklahoma had knowingly and voluntarily agreed to the requirements for nondirective counseling and referrals. Oklahoma accepted the grants for 2022 and 2023 after HHS had enacted the 2021 rule, including the requirements regarding nondirective counseling and referrals.⁵ And Oklahoma continued complying with these requirements

⁵ Oklahoma points out that it objected to the conditions stated in HHS's 2021 rule. But the existence of an objection reflects awareness of HHS's conditions.

even after *Dobbs* had triggered a change in state law. When concerns emerged, HHS proposed use of a national call-in number and Oklahoma accepted the proposal. *See* Background–Part 2, above.⁶

Given these circumstances, the district court could tentatively conclude that Oklahoma had voluntarily and knowingly accepted the grant with awareness of HHS’s eligibility requirements.

2.3 The district court didn’t err in tentatively determining that HHS hadn’t violated Oklahoma’s sovereignty.

Finally, Oklahoma suggests that HHS’s 2021 rule violates the spending power by encroaching on state sovereignty.⁷ For this suggestion, Oklahoma assumes that HHS’s requirements force Oklahoma to violate state criminal law. But Oklahoma likely couldn’t use its state criminal law to dictate eligibility requirements for the grants. *See Planned Parenthood Fed’n of Am., Inc. v. Heckler*, 712 F.2d 650, 663 (D.C. Cir. 1983)

⁶ Oklahoma argues that acceptance of the 2022 and 2023 grants doesn’t matter because it would have been impossible to agree to the conditions for the 2024 grant period. Even if we were to credit this argument, Oklahoma’s challenge would fail. If we were to focus on the upcoming period, Oklahoma could simply decline the grant rather than accept HHS’s conditions. *See Rust v. Sullivan*, 500 U.S. 173, 199 n.5 (1991) (“The recipient is in no way compelled to operate a Title X project; to avoid the force of the regulations, it can simply decline the subsidy.”).

⁷ Oklahoma points out that the HHS Secretary publicly disagreed with the Supreme Court’s opinion in *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215 (2022), and surmises that HHS deliberately tried to circumvent the opinion. But Oklahoma doesn’t explain how HHS tried to circumvent *Dobbs*.

(“Although Congress is free to permit the states to establish eligibility requirements for recipients of Title X funds, Congress has not delegated that power to the states.”); *Valley Fam. Plan. v. North Dakota*, 661 F.2d 99, 102 (8th Cir. 1981) (deferring to HHS’s interpretation when state law conflicted with a regulation on referrals regarding abortions).⁸ After all, if compliance with the requirements would entail a state crime, Oklahoma could simply decline the grant. *See Rust v. Sullivan*, 500 U.S. 173, 199 n.5 (1991) (“The recipient is in no way compelled to operate a Title X project; to avoid the force of the regulations, it can simply decline the subsidy.”).⁹

* * *

We conclude that the district court didn’t err in its tentative conclusions that

- the combination of Title X and the HHS requirements doesn’t violate the spending power and
- Oklahoma had acted voluntarily and knowingly when accepting HHS’s conditions.

⁸ Oklahoma also suggests that by giving the funds to another entity, HHS encourages that entity to violate Oklahoma law. But the district court didn’t err in tentatively concluding that Oklahoma had failed to substantiate that risk. *See* Appellant’s Opening Br. at 29–30 (stating only that another grantee “*risks* violating Oklahoma law” (emphasis added)).

⁹ Under state law, Oklahoma generally can’t use a federal grant to encourage a woman to get an abortion “except to the extent required for continued participation in a federal program.” Okla. Stat. tit. 63 § 1-741.1(B). This law doesn’t “prohibit a physician from discussing options with a patient through nondirective counseling.” *Id.*

So we uphold the district court’s rejection of Oklahoma’s challenge under the spending power.

3. The district court didn’t err when tentatively concluding that HHS hadn’t violated the Weldon Amendment.

Oklahoma also relies on a statutory provision known as *the Weldon Amendment*. Since 2004, Congress has adopted the amendment every year when appropriating funds to HHS. *See Nat’l Family Planning & Reproductive Health Ass’n, Inc. v. Gonzales*, 468 F.3d 826, 827 (D.C. Cir. 2006).

Oklahoma argues that HHS violated the Weldon Amendment by

- subjecting Oklahoma’s health department (a health-care entity) to discrimination for declining to make referrals for abortions and
- forcing Oklahoma (a state government) to discriminate against other entities receiving funds under the statewide grant.

3.1 HHS’s proposal for the national call-in number was unlikely to constitute a referral for the purpose of facilitating an abortion.

The Weldon Amendment provides:

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.¹⁰

¹⁰ The Weldon Amendment says that federal funds will not “be made available” to a federal agency that discriminates against a grantee. *See* text accompanying note. Given this language, a violation could arguably result in a denial of funds to HHS. This is not the remedy that Oklahoma wants;

Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. F, § 508(d)(1), 118 Stat. 2809, 3163 (2004); *see also* Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. H, § 507(d)(1), 136 Stat. 4459, 4908 (2022) (enacting the amendment for the fiscal year ending September 30, 2023); Further Consolidated Appropriations Act, 2024, H.R. 2882, 118th Cong. div. D, § 507(d)(1) (2024) (enacting the amendment for the fiscal year ending September 30, 2024). Interpreting this language involves a legal question that we review *de novo*. *See, e.g., Sinclair Wyo. Refin. Co. v. EPA*, 887 F.3d 986, 990 (10th Cir. 2017). In conducting *de novo* review, we start with the Weldon Amendment’s language. *Thomas v. Metro. Life Ins. Co.*, 631 F.3d 1153, 1161 (10th Cir. 2011). We give this language its “ordinary, everyday” meaning unless the context suggests otherwise. *Navajo Nation v. Dalley*, 896 F.3d 1196, 1213 (10th Cir. 2018).

Based on the Weldon Amendment’s language, Oklahoma must prove two elements for success on the merits:

1. The entity claiming discrimination (the Oklahoma health department) constitutes a health-care entity.
2. The federal government has discriminated against the Oklahoma health department for declining to *refer* pregnant women *for abortions*.

Oklahoma wants to receive the grant rather than strip HHS of funding. But HHS doesn’t question Oklahoma’s right to the grant upon proof of discrimination. HHS instead argues that it didn’t violate the Weldon Amendment.

Oklahoma relies on the first element, insisting that its health department constitutes a *health-care entity*. But the district court relied on the second element, concluding that Oklahoma likely couldn't show discrimination for refusing to refer women for abortions.¹¹ In our view, this tentative conclusion fits the statutory language.

The Weldon Amendment would apply only if HHS had required the health department to make *referrals for abortions*. HHS recognized that Oklahoma had criminal laws prohibiting abortion. So HHS informed Oklahoma that it could inform pregnant women of a national call-in number. HHS explained that the number would provide neutral, nondirective information about family-planning options. When informed of this option, Oklahoma expressed dissatisfaction. But the district court didn't err by tentatively rejecting Oklahoma's argument that the mere act of sharing the national call-in number would constitute a referral for the purpose of facilitating an abortion.

¹¹ On appeal, the parties don't address the meaning of the phrase *refer for abortions*. But we must independently interpret the statutory phrase irrespective of the parties' positions. See *WWC Holding Co., Inc. v. Sopkin*, 488 F.3d 1262, 1276 n.10 (10th Cir. 2007) (“[W]e are not limited to the parties' positions on what a statute means, because we review a question of statutory construction *de novo*.”); see also *A.M. v. Holmes*, 830 F.3d 1123, 1146 n.11 (10th Cir. 2016) (stating that we can affirm based on our statutory interpretation even if the appellee had relied on a different ground to affirm).

To interpret the Weldon Amendment, we consider the use of prepositions limiting the scope of the provision. *See Kientz v. Comm’r, SSA*, 954 F.3d 1277, 1282 (10th Cir. 2020) (relying on the limiting function of the preposition *on* to interpret a statute). The amendment uses the preposition *for* to connect *abortion* with the *referral*. The preposition *for* means *because of* or *on account of*. 6 *Oxford English Dictionary* 25 (2d ed. 1989); *see also Merriam-Webster Dictionary*, <http://www.merriam-webster.com/dictionary/for> (last visited June 20, 2024) (defining *for* “as a function word to indicate purpose,” “an intended goal,” and “the object . . . of a perception, desire, or activity”). So we generally consider the preposition *for* to link conduct to a particular purpose. *See Muñoz v. Garland*, 71 F.4th 1174, 1177 (9th Cir. 2023) (interpreting the preposition *for* to indicate a purpose); *Chamber of Com. of U.S. v. U.S. Dep’t of Lab.*, 885 F.3d 360, 373 (5th Cir. 2018) (same); *Murfey v. WHC Ventures, LLC*, 236 A.3d 337, 346 (Del. 2020) (stating that the preposition *for* links the conduct at issue to a particular purpose).

The combined phrase (*refer for*) thus suggests that the Weldon Amendment prohibits discrimination against entities for refusing to refer individuals *for the purpose* of getting abortions. But HHS required only that the Title X project offer pregnant women “the opportunity to be provided information and counsel *regarding* . . . [p]regnancy termination.” 42 C.F.R. § 59.5(a)(5)(i)(c) (emphasis added). The term *regarding* is

neutral, unlike the term *for* in the Weldon Amendment. *See American Heritage College Dictionary* 1149 (3d ed. 1997) (defining the preposition *regarding* as “[i]n reference to; with respect to; concerning”). Given the neutral wording of the requirement, the district court didn’t err when it tentatively determined that reference to a national call-in number wouldn’t involve a *referral for* an abortion. Instead, the call-in number offered an opportunity to supply neutral information *regarding* an abortion. Oklahoma rejected the option of a national call-in number, but didn’t question the neutrality of the information provided.¹²

The dissent suggests two reasons why use of the call-in number would constitute a *referral for an abortion* based on a pregnant woman’s use of the information:

1. An Oklahoma provider would reasonably assume that any pregnant woman’s request for the call-in number would involve an interest in exploring the possibility of an abortion.
2. If a pregnant woman gets an abortion after using the national call-in number, her decision to get an abortion turns the referral into one for the purpose of getting an abortion.

¹² At oral argument, Oklahoma suggested that the call-in number hadn’t provided neutral information, citing evidence outside the record. We decline to consider this argument because it didn’t appear in Oklahoma’s appellate briefs and rested on evidence beyond the record. *See United States v. Anthony*, 22 F.4th 943, 952 (10th Cir. 2022) (“We do not consider arguments raised for the first time at oral argument.”); *United States v. Kennedy*, 225 F.3d 1187, 1191 (10th Cir. 2000) (“This court will not consider material outside the record before the district court.”).

These arguments rest on a misunderstanding of the call-in number, speculation about a caller's purpose, and disregard of the statutory focus on the referring entity's purpose rather than the pregnant woman's.¹³

HHS proposed use of the call-in number as a way for Oklahoma to provide pregnant women with information about various family-planning options. Apart from the dissent, no one has suggested

- that individuals will contact Oklahoma to obtain information about the call-in number or
- that Oklahoma would use the call-in number only for individuals asking about abortions.

See Verlo v. Martinez, 820 F.3d 1113, 1125–26 (10th Cir. 2016) (stating that when reviewing a district court's preliminary-injunction ruling, we restrict our inquiry to facts in the district court's record). To the contrary, HHS provided the national call-in number as a way for Oklahoma to answer questions about *all* options available to pregnant women. For example, a woman might ask: "I'm pregnant, what are my options?" Appellant's App'x vol. 3, at 591. Given that question, HHS would require Oklahoma to provide the call-in number for nondirective counseling about

¹³ The dissent states that the Weldon Amendment unambiguously renders use of the national call-in number a referral *for abortion*. But the dissent doesn't identify anything in the statutory text for this interpretation. Instead, the dissent relies solely on the possibility that a pregnant woman might decide to get an abortion after learning about her options. This reliance not only rests on speculation, but also disregards the statutory focus on the referring entity's purpose rather than how the pregnant woman would use the information.

“prenatal care, adoption, foster care . . . and also pregnancy termination.”

Id.

The pregnant woman’s ultimate decision doesn’t show a likelihood that the court will ultimately regard use of the national call-in number as a referral for an abortion. HHS said that the call-in number provided neutral information about abortions, and Oklahoma’s briefs and evidence presented no reason to question the neutrality of the information. Given the neutrality of the call-in information, the Weldon Amendment requires us to focus on the purpose of the referring entity (Oklahoma) rather than the pregnant women using the information. Otherwise, the act of sharing the call-in number would create both a referral *for* and *against* an abortion depending on the pregnant woman’s decision after getting the same information.

Based on the statutory language and the record, the district court didn’t err when tentatively concluding that the act of sharing the call-in number wouldn’t constitute a referral for pregnant women to get abortions.¹⁴ This interpretation is supported by the statutory sponsor of the

¹⁴ HHS points out that Congress annually reenacts the Weldon Amendment, including in the fifteen years that the amendment existed alongside HHS’s requirements in 2000 for nondirective counseling and referrals. *See* 86 Fed. Reg. 56,144, 56,153 (Oct. 7, 2021) (discussing the longstanding coexistence of the amendment and the nondirective counseling-and-referral requirement). HHS theorizes that this longstanding coexistence shows that Congress didn’t intend for the amendment to

Weldon Amendment. The sponsor explained that the Weldon Amendment wouldn't "affect access to abortion [or] the provision of abortion-related information or services by willing providers." 150 Cong. Rec. H10,090 (daily ed. Nov. 20, 2004) (statement of Rep. Weldon).¹⁵ We give substantial weight to the statutory sponsor's explanation of his amendment. *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976); *Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc.*, 764 F.3d 1199, 1232 (10th Cir. 2014).

The dissent characterizes Oklahoma's objection as *sincere*. Dissent at 20. Even if Oklahoma had sincerely considered use of the national call-in

abrogate HHS's requirements concerning counseling and referrals. But we need not address this theory.

¹⁵ In addition, the statutory sponsor explained that the amendment had two other objectives:

1. Protection of individual health-care providers like "nurses, technicians, and doctors" who don't want to "participate in an abortion, perform an abortion, or be affiliated with doing an abortion"
2. Protection of health-care entities from being forced by the government to provide abortion services, citing examples of state governments forcing hospitals to perform elective abortions or build abortion clinics

150 Cong. Rec. H10,090. In these ways, the statutory sponsor explained that the amendment would prevent action to force participation in abortions—not to prevent the sharing of neutral information about abortions.

number as a *referral for abortion* under the Weldon Amendment, the language in the amendment doesn't entrust health-care entities with the authority to define *referral for abortion*. Given the statutory language and the sponsor's explanation, the district court didn't err by tentatively concluding that the national call-in number wasn't a referral for the purpose of facilitating an abortion.

* * *

The statutory sponsor's explanation seems to fit the statutory phrasing, which addresses *referrals for abortions*. This language suggests a bar on referrals for the purpose of facilitating abortions rather than on the sharing of neutral information regarding all family-planning options. The district court thus didn't err when tentatively concluding that the act of sharing the call-in number wouldn't constitute a referral for the purpose of facilitating an abortion.

3.2 HHS likely didn't force Oklahoma to discriminate against other health-care entities.

Oklahoma also argues that HHS forced the state to discriminate against other health-care entities that refuse to make referrals for abortions. But HHS clarified that Oklahoma could distribute the grant funds to other health-care entities as long as Oklahoma itself passed along the call-in number. *See* 65 Fed. Reg. 41,270, 41,274 (July 3, 2000) (specifying that while "grantees may not require individual employees who

have objections to provide such counseling . . . in such cases the grantees must make other arrangements to ensure that the service is available to Title X clients who desire it”); 86 Fed. Reg. 56,144, 56,148, 56,153 (Oct. 7, 2021) (readopting this requirement with the 2021 rule). Given HHS’s clarification, the district court didn’t err in tentatively concluding that Oklahoma hadn’t compelled Oklahoma to discriminate against other health-care entities.

* * *

The district court didn’t err when it tentatively concluded that HHS hadn’t

- discriminated against Oklahoma for declining to make referrals for abortions or
- forced Oklahoma to discriminate against other health-care entities.

4. The district court didn’t err by tentatively concluding that HHS hadn’t acted arbitrarily and capriciously.

Finally, Oklahoma argues that HHS acted arbitrarily and capriciously in terminating the grant. But the district court didn’t err in tentatively rejecting Oklahoma’s characterization of HHS’s actions as arbitrary or capricious.

4.1 The district court didn’t err by tentatively concluding that HHS had complied with Title X.

Oklahoma argues that HHS misinterpreted § 1008 of Title X, which prohibits use of Title X for “programs where abortion is a method of

family planning.” 42 U.S.C. § 300a-6. Oklahoma and ten other states presented a similar argument in *Ohio v. Becerra*, 87 F.4th 759, 770–75 (6th Cir. 2023). But *Ohio* involved a facial challenge to HHS’s requirement. *Id.* Here Oklahoma presents an as-applied challenge, focusing on termination of a grant based on the state’s refusal to pass along the national call-in number.

Section 1008 is silent on the issue of counseling and referrals. *See Rust v. Sullivan*, 500 U.S. 173, 184 (1991) (“Title X does not define the term ‘method of family planning,’ nor does it enumerate what types of medical and counseling services are entitled to Title X funding.”). Given Congress’s silence, the Supreme Court held that HHS could enact requirements on counseling and referrals. *Id.* at 185.¹⁶

When a judgment is issued, the district court will presumably need to decide whether HHS strayed from Title X. But here our inquiry is limited, considering only whether the district court erred when tentatively concluding that HHS had complied with Title X. In our view, the district court’s tentative conclusion wasn’t erroneous. *See Ohio v. Becerra*, 87

¹⁶ In *Rust v. Sullivan*, the Supreme Court applied a two-part test that had been established in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Roughly two weeks ago, the Court overruled *Chevron*. *Loper Bright Enters. v. Raimondo*, 603 U.S. ___, Nos. 22-451, 22-1219, 2024 WL 3208360, at *21 (June 28, 2024). But the Court clarified that it was not “call[ing] into question prior cases that [had] relied on the *Chevron* framework.” *Id.*

F.4th 759, 772 (6th Cir. 2023) (relying on *Rust* to conclude that HHS can “treat referrals as either falling inside or outside § 1008’s prohibition, so long as [HHS] adequately explains its choice”).

4.2 The district court didn’t err by tentatively finding compliance with HHS’s regulations.

Oklahoma also argues that HHS acted inconsistently with its own requirements, pointing to three snippets:

1. The phrase *allowable under state law* in 42 C.F.R. § 59.5(b)(6)
2. The phrase *in close physical proximity* in 42 C.F.R. § 59.5(b)(8)
3. Two sentences in HHS’s preamble

An agency acts arbitrarily and capriciously when it violates its own regulations. *N.M. Farm & Livestock Bureau v. U.S. Dep’t of Interior*, 952 F.3d 1216, 1231 (10th Cir. 2020). We grant substantial deference to an agency’s interpretation of its own regulations unless the interpretation is unreasonable, plainly erroneous, or inconsistent with the plain language. *Oxy USA Inc. v. U.S. Dep’t of Interior*, 32 F.4th 1032, 1044 (10th Cir. 2022).

Oklahoma first relies on an HHS regulation that requires Title X projects to provide for performance of family-planning services “under the direction of a clinical services provider, with services offered within their scope of practice and *allowable under state law*, and with special training or experience in family planning.” 42 C.F.R. § 59.5(b)(6) (emphasis

added). According to Oklahoma, this regulation prohibits HHS from forcing Oklahoma to violate its laws.

Even if Oklahoma were correct, its argument would turn on the meaning of HHS’s phrase *allowable under state law*. HHS interpreted this phrase to ensure that non-physician health-care providers can direct family-planning programs so long as the providers are qualified under state law. HHS’s explanation is supported by the commentary accompanying the 2001 rule. *See* 86 Fed. Reg. 56,144, 56,163–64 (Oct. 7, 2021) (explaining that HHS added this regulatory language, including the phrase *allowable under state law*, because “other healthcare providers . . . have authority to direct family planning programs and should be included within the regulation”). This commentary indicates that the phrase *allowable under state law* is meant to expand the categories of qualified providers. Given HHS’s explanation and the commentary, the district court didn’t err by tentatively concluding that HHS had correctly interpreted its regulation.

Oklahoma also points to a second HHS regulation, which requires Title X projects to “[p]rovide for coordination and use of referrals and linkages with [other health-care entities], *who are in close physical proximity to the Title X site, when feasible . . .*” 42 C.F.R. § 59.5(b)(8) (emphasis added). According to Oklahoma, the use of a national call-in number would violate the requirement of *close physical proximity*. But the regulation requires physical proximity only *when feasible*. *See* Appellant’s

App’x vol. 3, at 457 (HHS guidance on the 2021 rule, stating that “[t]here are no geographic limits for Title X recipients making referrals for their clients”). Oklahoma hasn’t explained how it would be feasible to make referrals in close proximity to a Title X site within the state.

Oklahoma also argues that the call-in number can’t be *feasible* when the requirement forces a state to violate its own criminal law. This argument likely rests on a misreading of the regulation.

The regulation appears to modify the physical-proximity requirement, which would permit referrals to distant providers when nearby referrals aren’t possible; the language doesn’t necessarily modify the basic requirements regarding nondirective counseling and referrals. In these circumstances, the district court didn’t err by tentatively concluding that HHS’s regulatory interpretations hadn’t been arbitrary or capricious.

Finally, Oklahoma points to two stray sentences from the preamble to the 2021 rule:

1. “[O]bjecting providers or Title X grantees are not required to counsel or refer for abortions.”
2. “[O]bjecting individuals and grantees will not be required to counsel or refer for abortions in the Title X program in accordance with applicable federal law.”

86 Fed. Reg. 56,144, 56,163 (Oct. 7, 2021).

We reject arguments based on snippets of a preamble when the regulatory language is otherwise clear. *See Sierra Club v. EPA*, 964 F.3d

882, 893 (10th Cir. 2020) (rejecting an agency’s argument relying “on snippets from the regulation’s preamble”); *Peabody Twentymile Mining, LLC v. Sec’y of Lab.*, 931 F.3d 992, 998 (10th Cir. 2019) (“[T]he limitations that appear in the preamble do not appear in the language of the regulation, and we refuse to engraft those limitations onto the language.”).¹⁷

HHS interprets its requirements to allow a Title X project to issue its own grants to objecting health-care entities as long as the project otherwise provides nondirective counseling and referrals. This interpretation is supported by the regulatory language and HHS’s guidance. With that support, the district court didn’t err by tentatively concluding that HHS’s interpretation of its requirements hadn’t been arbitrary or capricious.

4.3 The district court didn’t err by tentatively concluding that HHS had considered all important aspects of the problem.

Finally, Oklahoma alleges various errors and omissions, suggesting that HHS ignored two important aspects of the problem.¹⁸

First, Oklahoma alleges that HHS ignored federalism concerns, including the importance of the Supreme Court’s 2022 opinion in *Dobbs v.*

¹⁷ At oral argument, Oklahoma agreed, conceding that preamble language isn’t binding.

¹⁸ In its appellate briefs, Oklahoma cites various other state laws, suggesting that they show a broad policy against abortions. But Oklahoma concedes that it didn’t refer to these laws in district court. So we decline to

Jackson Women’s Health Organization, 597 U.S. 215 (2022). But HHS issued extensive guidance about the effect of *Dobbs* on the requirements regarding counseling and referrals. Given that guidance, the district court didn’t err by tentatively concluding that HHS had adequately considered *Dobbs*. Though *Dobbs* had addressed the constitutional right to an abortion, the opinion had not expressly addressed the power of the federal government to set conditions on federal grants. *See id.* at 231.

Even if the Supreme Court’s opinion had addressed this power, the district court could tentatively conclude that HHS’s requirements wouldn’t prevent Oklahoma from regulating abortions. “The recipient is in no way compelled to operate a Title X project; to avoid the force of the regulations, it can simply decline the subsidy.” *Rust v. Sullivan*, 500 U.S. 173, 199 n.5 (1991).

Second, Oklahoma argues that HHS failed to consider how termination of Oklahoma’s grant would affect the state. But HHS considered the impact on Oklahoma patients, funding other providers who could fill the gap.

* * *

address Oklahoma’s new suggestion of a broad policy reflected in these laws. *See Bass v. Potter*, 522 F.3d 1098, 1107 n.9 (10th Cir. 2008) (“Because ‘the theory in question was not presented . . . to the district court,’ the issue ‘is not properly before us’ and we need not comment further.”).

The district court didn't err in tentatively concluding that HHS had (1) correctly interpreted Title X and the regulations and (2) considered all important aspects of the problem.

Conclusion

The district court acted within its discretion by concluding that Oklahoma hadn't shown a likelihood of succeeding on its claims involving constraints under the spending power, violation of the Weldon Amendment, or arbitrariness and caprice in HHS's application of its regulations and Title X. So we affirm the denial of a preliminary injunction.¹⁹

¹⁹ Given Oklahoma's failure to show a likelihood of success, we need not consider the other elements of a preliminary injunction. *Warner v. Gross*, 776 F.3d 721, 736 (10th Cir. 2015); see Discussion—Part 1, above.

No. 24-6063, *Oklahoma v. HHS, et al.*
FEDERICO, Circuit Judge, dissenting.

For more than 50 years, the Oklahoma State Department of Health (“OSDH”) received federal grant money under Title X of the Public Health Service Act, 42 U.S.C. § 300 *et seq.*, to provide family planning health care for Oklahomans. This money was primarily used to ensure that low-income and rural patients had access to reproductive and family planning care. Congress appropriated the federal grant money, which was dispersed through a regulatory scheme developed by the United States Department of Health and Human Services (“HHS”).

Since Title X’s inception in 1970, Congress has been explicit that “[n]one of the funds appropriated under [Title X] shall be used in programs where abortion is a method of family planning.” 42 U.S.C. § 300a-6. Beginning in 2004 and every year thereafter, Congress included the so-called “Weldon Amendment” as an annual appropriations rider to every HHS appropriations bill. *See Further Consolidated Appropriations Act, 2024*, Pub. L. No. 118-47, div. D, tit. V, § 507, 138 Stat. 460, 703. Relevant here, the Weldon Amendment prohibits disbursement of grant money to government agencies that discriminate against any health care entity that “does not provide, pay for, provide coverage of, or refer for abortions.” Pub. L. No. 118-47, div. D, tit. V, § 507(d)(1), 138 Stat. 460, 703.

As the majority explains, this appeal arises from HHS’s regulatory requirement that all Title X grantees, such as OSDH, provide referrals to patients who desire information on their full range of pregnancy options, including pregnancy termination (“referral requirement”). 42 C.F.R. § 59.5(a)(5). The Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215 (2022), triggered an abortion ban under Oklahoma law, see Okla. Stat. Ann. tit. 21, § 861, and Oklahoma determined that OSDH providers and grantees cannot comply with the referral requirement without categorically running afoul of Oklahoma state law and policy. Because HHS disagreed with OSDH’s assessment, it terminated OSDH’s Title X grant.

On its face, the Weldon Amendment covers the more common situation in which funding cannot be denied to *individual* providers who raise conscience objections to the referral requirement. This case, however, presents a wholesale objection by a grantee who, under my reading of the Weldon Amendment, also qualifies as a health care entity as an *institutional* provider.

To determine whether the Weldon Amendment’s discrimination prohibition applies to this case, we must define its use of the phrase “refer for abortions.” Applying the natural reading of the Amendment’s language to the facts of this case, Oklahoma has shown a likelihood of success in proving that HHS’s termination of the Title X grant to OSDH was unlawful discrimination against its providers who cannot and will not comply with the referral

requirement. I would therefore reverse the district court with instructions to grant the preliminary injunction, and thus, I respectfully dissent.

I

A

To contextualize the motion for preliminary injunction that was before the district court, we must consider HHS’s historical implementation of Title X and OSDH’s history as a program grantee. In 1970, Congress enacted Title X, which authorizes HHS 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 . . . offer a broad range of acceptable and effective family planning methods and services.” 42 U.S.C. § 300(a). Title X grants “shall be made in accordance with such regulations as the [HHS] Secretary may promulgate,” *id.* § 300a-4(a), and “shall be payable . . . subject to such conditions as the Secretary may determine to be appropriate to assure that such grants will be effectively utilized for the purposes for which made,” *id.* § 300a-4(b).

HHS has discretion under its regulations to determine the allocation of Title X grant funds among the applicants. *See* 42 C.F.R. § 59.7(a) (stating that “the Secretary *may* award grants” (emphasis added)). Title X funds must be spent in accordance with applicable regulations, *see id.* § 59.9, and HHS may terminate a grant if a recipient fails to comply with the terms and conditions,

including any incorporated regulatory requirements, *see* 45 C.F.R. §§ 75.371(c), 75.372(a)(1).

For much of the Title X program’s existence, HHS has required – as it does now – that Title X projects offer pregnant patients the choice to be provided information and “nondirective ‘options counseling’” about “prenatal care,” “adoption and foster care,” and “pregnancy termination (abortion),” “followed by referral for [any of] these services if [the patient] so requests.” 53 Fed. Reg. 2922, 2923 (Feb. 2, 1988) (describing regulatory history); *see* 42 C.F.R. § 59.5(a)(5)(i)(C), (a)(5)(ii) (describing current project requirements, including “offer[ing] pregnant clients the opportunity to be provided information and counseling regarding . . . [p]regnancy termination,” and “[i]f requested” to “provide neutral, factual information and nondirective counseling,” as well as “referral upon request”). HHS requires that patients receive “complete factual information about all medical options and the accompanying risks and benefits.” 65 Fed. Reg. 41281, 41281 (July 3, 2000).

Notably, § 1008 of Title X states that “[n]one of the funds appropriated . . . shall be used in programs where abortion is a method of family planning.” 42 U.S.C. § 300a-6. Consistent with § 1008, HHS has explained that a Title X project may not “promote[] abortion or encourage[] persons to obtain [an] abortion.” 65 Fed. Reg. at 41281. Any referral for an abortion may consist of “relevant factual information” such as a provider’s “name, address, [and]

telephone number,” but Title X projects may not take “further affirmative action (such as negotiating a fee reduction, making an appointment, [or] providing transportation) to secure abortion services for the patient.” *Id.*

On two occasions, HHS has promulgated rules requiring the inverse of the current rule, by placing strict restrictions on the type of counseling and referrals that Title X grantees may provide. First, in 1988, HHS issued a rule that prohibited grantees from discussing or referring for abortions. *See* 86 Fed. Reg. 19812, 19813 (Apr. 15, 2021) (describing 1988 rule). In *Rust v. Sullivan*, 500 U.S. 173, 184–90 (1991), the Supreme Court upheld the 1988 rule as a “permissible construction” of the statute in light of the “broad directives provided by Congress in Title X,” but the rule was “never implemented on a nationwide basis.” 65 Fed. Reg. 41270, 41271 (July 3, 2000). HHS issued an interim rule in 1993 that suspended the 1988 prohibitive rule and returned to the pre-1988 standards. 58 Fed. Reg. 7462, 7462 (Feb. 5, 1993). It then issued a rule in 2000 that required nondirective options counseling and a referral for options the patient requested. *See* 65 Fed. Reg. at 41271. This rule remained in effect until 2019. *Id.*

In 2019, HHS “essentially revive[d]” the 1988 rule that restrained the ability of Title X projects to provide pregnancy options counseling and prohibited Title X projects from referring for abortion. *Mayor of Balt. v. Azar*, 973 F.3d 258, 271 (4th Cir. 2020) (en banc). The Ninth Circuit upheld the rule’s

restrictions, *California ex rel. Becerra v. Azar*, 950 F.3d 1067, 1101–04 (9th Cir. 2020) (en banc), while the Fourth Circuit enjoined its operation in Maryland, *Mayor of Balt.*, 973 F.3d at 276–81, 283–90, 296.

In October 2021, HHS promulgated a final rule, which remains in effect today, restoring the counseling and referral requirements that have governed grantees “for much of the program’s history.” 86 Fed. Reg. 56144, 56150 (Oct. 7, 2021). HHS determined that the 2019 rule’s restrictions on counseling and referrals had “interfered with the patient-provider relationship,” *id.* at 56146; had “compromised [the] ability to provide quality healthcare to all clients,” *id.*; and had “shifted the Title X program away from its history of providing client-centered quality family planning services,” *id.* at 56148.

Following the 2021 rule’s promulgation, Oklahoma and several other States sued and brought a facial challenge against it in federal court in the Southern District of Ohio, including the referral requirement. *See Ohio v. Becerra*, 87 F.4th 759, 767–68 (6th Cir. 2023). The district court in *Becerra* denied the States’ request to enjoin the referral requirement, and the Sixth Circuit affirmed, reasoning that the requirement is based on a permissible construction of Title X and HHS adequately explained its decision to restore the requirement. *Id.* at 770–75.

B

OSDH has been a recipient of Title X grants for decades,¹ including during the years in which the HHS regulations required Title X projects to offer nondirective options counseling and referrals for abortion upon a patient's request. And in March 2022, HHS again awarded OSDH a Title X grant for the period of April 1, 2022, through March 31, 2023.

In June 2022, the Supreme Court issued its decision in *Dobbs*, which overturned precedent recognizing a constitutional right to abortion. 597 U.S. 215. Following that decision, HHS advised Title X grantees that the counseling and referral requirements remained in effect. Aplt. App'x III at 58–66; *see also id.* at 68 (“[A]ll Title X recipients continue to operate under the federal requirements of the 2021 Title X rule, including the requirement to provide nondirective pregnancy options counseling in the event of a positive pregnancy test and client-requested referrals.” (emphasis removed)). HHS reiterated that Title X projects are required to offer pregnant patients nondirective options counseling and a referral upon the patient's request, including for abortion. HHS stated that projects may also make out-of-state referrals.

¹ There are 68 clinics and entities that receive Title X grant funds in Oklahoma. *See* Aplt. App'x II at 41 (Declaration of Tina Johnson, MPH, RN ¶ 12).

The same day that *Dobbs* was decided, Oklahoma’s law outlawing abortion, § 861, took effect. *See* ACLU, *et al.* Am. Br. at 31 (discussing Letter from John O’Connor, Okla. Att’y Gen., to J. Kevin Stitt, Okla. Governor (June 24, 2022)). And in August 2022, OSDH sought to modify its counseling and referral policies because § 861 became state law.

HHS determined that Oklahoma’s first proposed policy modification did not comply with federal regulatory requirements, but it offered Oklahoma the option of submitting an “alternate compliance proposal” with specific examples of acceptable arrangements, including by providing Title X patients the number for a national call-in hotline where operators would supply the requisite information. Aplt. App’x III at 71–72. Initially, Oklahoma agreed to comply with its counseling and referral obligations by providing nondirective counseling on all pregnancy options by its staff or through the hotline. And on March 14, 2023, Oklahoma submitted written assurance of its compliance with the 2021 rule and program materials showing that patients were being made aware of the hotline. Based on Oklahoma’s assurances, HHS approved an award for April 1, 2023, through March 31, 2024.

Shortly after HHS awarded funding, on May 5, 2023, Oklahoma reversed course, notifying HHS that it had made changes to its Title X project. Under the new policy, OSDH would “[p]rovide neutral, factual information and nondirective counseling on pregnancy options in Oklahoma by OSDH staff

(except for options the client indicated she does not want more information on),” but would no longer provide counseling through a referral to the hotline. Aplt. App’x I at 90. In response, HHS informed Oklahoma that this policy “does not comply with the Title X regulatory requirements and, therefore,” violates “the terms and conditions of [its] grant.” *Id.* at 91.

HHS then suspended Oklahoma’s award but allowed it 30 days to bring its program into compliance. Oklahoma, however, “indicated that it would not be able to comply with the Title X regulation[,] citing state law.” *Id.* HHS was unmoved and terminated Oklahoma’s grant. Because Oklahoma “had ample notification of what is required to maintain compliance with the Title X regulation,” HHS concluded that termination was “in the best interest of the government” given Oklahoma’s “material non-compliance with [grant] terms and conditions.” *Id.* at 91–92. And in September 2023, HHS redirected Oklahoma’s \$4.5 million award to two entities in Missouri. Oklahoma appealed the termination action to an administrative review panel within HHS. Shortly before oral argument in this appeal, HHS denied Oklahoma’s administrative appeal.

After filing a complaint against HHS, Xavier Becerra,² Jessica Marcella,³ and the Office of Population Affairs (“Defendants”) in the Western District of Oklahoma, Oklahoma moved for a preliminary injunction seeking to enjoin Defendants from redirecting the award to other entities. The district court held a hearing on the motion in March 2024, and, during the hearing, provided its reasoning orally for denying the motion. The district court determined that Oklahoma had not shown a likelihood of success on the merits, that it had shown irreparable injury, and that the merged remaining factors were neutral.

II

We review the district court’s denial of a preliminary injunction for abuse of discretion. *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003). The district court’s factual findings are reviewed for clear error and its legal determinations are reviewed de novo. *Id.* Though I agree with most of the majority’s opinion,⁴ I take issue with its interpretation of a federal statute (the

² Becerra is the Secretary of HHS. Oklahoma sues him in his official capacity.

³ Marcella is the Deputy Assistant Secretary for the Office of Population Affairs. Oklahoma sues her in her official capacity.

⁴ I agree with the majority that the district court did not abuse its discretion by concluding that the 2021 HHS rule did not violate the Spending Clause or by concluding that HHS did not otherwise act arbitrarily and capriciously.

Weldon Amendment), so my review is best framed as whether the district court abused its discretion by committing an error of law in interpreting and applying that statute. *Att’y Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 775 (10th Cir. 2009). To this end, “it is well-established that ‘committing a legal error . . . is necessarily an abuse of discretion.’” *Berdiev v. Garland*, 13 F.4th 1125, 1132 (10th Cir. 2021) (quoting *Elzour v. Ashcroft*, 378 F.3d 1143, 1150 n.9 (10th Cir. 2004)).

To obtain a preliminary injunction, Oklahoma must show:

(1) [it] is substantially likely to succeed on the merits; (2) [it] will suffer irreparable injury if the injunction is denied; (3) [the] . . . threatened injury [to it] outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction [is] not . . . adverse to the public interest.

Fish v. Kobach, 840 F.3d 710, 723 (10th Cir. 2016) (internal quotation marks omitted) (quoting *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009)). When, as here, the government is the opposing party, factors three and four merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Because it concludes that Oklahoma is not likely to succeed on the merits, the majority analyzes this first factor only.

Additionally, under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, “[a] person⁵ suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702. And relevant here, “final agency action for which there is no other adequate remedy in a court” is subject to our review. *Id.* § 704. An agency action is “final” for purposes of § 704 when the action marks the consummation of the agency’s decision-making process, *Chic. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948), and is one by which the rights or obligations have been determined, or from which legal consequences will flow, *Port of Bos. Marine Terminal Ass’n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970). This case presents a final agency action subject to our review because HHS terminated OSDH’s Title X grant and allocated it elsewhere, despite an ongoing administrative appeal.

The scope of our review of the agency action is determined by statute. 5 U.S.C. § 706. “Informal agency action must be set aside if it fails to meet statutory, procedural or constitutional requirements or if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

⁵ “Person” includes “an individual, partnership, corporation, association, or public or private organization other than an agency.” 5 U.S.C. § 551(2).

Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1575 (10th Cir. 1994) (internal quotations omitted) (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413–14 (1971)); 5 U.S.C. § 706(2)(A)–(D).

III

Like the majority, I now consider whether the district court abused its discretion by denying the extraordinary remedy of a preliminary injunction. Unlike the majority, however, I respectfully conclude that it did. Further, not only do I conclude Oklahoma has demonstrated it is substantially likely to succeed on the merits of its claim that the agency action was unlawful, but I also conclude that the other preliminary injunction factors weigh in Oklahoma’s favor.

A

Oklahoma has demonstrated a substantial likelihood of success on the merits. HHS’s decision and action to terminate OSDH’s Title X grant was not lawful because that final agency action violated the Weldon Amendment. It did so because HHS discriminated against a health care entity that programmatically determined that it could not follow the referral requirement because doing so would violate state law and policy.

This case presents a question of first impression. Indeed, no conscience-based objections were made under the Weldon Amendment until 2017 – more than a decade after its creation. So, although we are not guided by a large body

of case law to apply the statute to these facts and circumstances, my analysis is guided by what I believe to be the best reading of the statutory text.

1

When interpreting a statute, “we start with the statutory text.” *Tanzin v. Tanvir*, 592 U.S. 43, 46 (2020). The Weldon Amendment states:

(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.

Pub. L. No. 118-47, div. D, tit. V, § 507, 138 Stat. 460, 703. The only defined term in the Weldon Amendment is “health care entity.” But like reading any statute, “we look first to its language, giving the words used their ordinary meaning.” *Artis v. D.C.*, 583 U.S. 71, 83 (2018) (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)); *Republic of Sudan v. Harrison*, 587 U.S. 1, 8 (2019) (noting that courts should strive to find “the most natural” reading of statutory text); *Maslenjak v. United States*, 582 U.S. 335, 336 (2017) (reviewing statutory text for “the most natural understanding” of its language).

As the majority explains, Oklahoma must prove two elements to show it will succeed on the merits: (1) OSDH is a “health care entity,” and (2) HHS discriminated against OSDH for declining to refer pregnant patients for abortions. The majority skips the first element because it decides the issue on the second. However, the first element is worthy of exploration because it is a prerequisite for, and properly frames the analysis of, the second element.⁶

2

I first consider whether OSDH is a “health care entity” within the definition of that term in the Weldon Amendment. All parties agree that OSDH is a Title X grantee, and I conclude that the Weldon Amendment’s definition of a “health care entity” also covers OSDH because it is a “health care facility, organization, or plan.” Pub. L. No. 118-47, div. D, tit. V, § 507(d)(2), 138 Stat. 460, 703. As fleshed out during oral argument, OSDH qualifies as such a “facility, organization, or plan” because it engages in direct patient care at OSDH clinics. Oral Argument at 3:40–3:55, 4:45–4:55, 5:00–7:20; *see also* Aplt. App’x II at 39 (Johnson Declaration ¶ 3, describing job positions at OSDH, including public nursing at county health clinics).⁷

⁶ The district court briefly considered the first question without drawing any specific conclusions of law, but noted it is a “threshold matter.” *See* Aplt. App’x III at 213–15.

⁷ The OSDH clinics can be located by county on the OSDH website.

During the back-and-forth discussions about compliance with the referral requirement, OSDH communicated to HHS that its staff provides direct patient care. In May 2023, OSDH stated its family planning policy would “[p]rovide neutral, factual information and nondirective counseling on pregnancy options in Oklahoma *by OSDH staff.*” Aplt. App’x I at 90 (emphasis added). In other words, OSDH has facilities to see patients and administer health care, is an organization that provides health care, and is an institutional plan with individual medical professionals who provide health care. The district court also noted the Weldon Amendment “means the provider of the services.” Aplt. App’x III at 213. I agree and conclude that such language describes OSDH.⁸

There is nothing in the statutory text of the Weldon Amendment that prohibits a grantee from also being a protected “health care entity.” Indeed, HHS itself recognizes that grantees and health care entities may be one and the same in the context of making objections to the referral requirement, having noted that “objecting individuals and grantees will not be required to counsel or refer for abortions in the Title X program.” 86 Fed. Reg. at 56153.

⁸ In *Becerra*, the Sixth Circuit noted it was “somewhat puzzled about the interaction between the [2021] Rule’s referral requirement and . . . the Weldon Amendment[] as applied to State grantees.” 87 F.4th 759, 774 n.8. But it did not have to resolve this point because the States did not pursue it on appeal or before the district court. *Id.*

Thus, because OSDH is an institutional health care entity protected by the Weldon Amendment, it cannot be discriminated against on the basis that it does not refer patients for abortions.

3

I now turn to the second inquiry: whether HHS violated the Weldon Amendment by discriminating against OSDH for declining to refer pregnant patients for abortions. The key statutory phrase at issue is the meaning of “refer for abortions.” That is, HHS cannot discriminate by denying funding against any health care entity (such as OSDH) that does not refer its patients for abortions. This phrase is not defined in the Weldon Amendment, so as stated above, we must consider the ordinary or most natural understanding of this language.

The majority’s primary focus on this issue is the preposition “for” in the phrase “refer for abortions” within the Weldon Amendment, using dictionary definitions to conclude the language means to refer a pregnant patient *for* the *particular purpose of* getting an abortion. In my view, to best understand the phrase “refer for abortions” in this context, we must consider the provider-patient interaction where the Oklahoma patient requests a referral from OSDH or other individual provider to discuss all pregnancy options. There is only one option that is unlawful in Oklahoma – abortion. If the patient desires information about options that are not abortion, there would be no need for a

referral to a national hotline. On the other hand, if a patient requests a referral, an Oklahoma provider would reasonably assume it is solely to explore the option of pregnancy termination, which OSDH concluded would run afoul of Oklahoma law and policy.

From OSDH's perspective, if only one patient in Oklahoma called the "All-Options Talkline" proposed by HHS to comply with the referral requirement, and ultimately decided to obtain an abortion, this would be a referral for the purpose of obtaining an abortion under the majority's reading of the Weldon Amendment. It would require OSDH providers to anticipate whether a referral would result in an abortion, potentially violating Oklahoma law and policy. And not only would such a reading possibly violate Oklahoma law and policy, but it may also violate conscience-based objectors' rights.

The majority calls this speculative and unsupported by the record. However, when discussing the referral requirement for the Title X grant, OSDH communicated to HHS that it would "[p]rovide neutral, factual information and nondirective counseling on pregnancy options in Oklahoma by OSDH staff (except for options the client indicated she does not want more information on)," but would no longer provide counseling through a referral to the hotline. *Aplt. App'x I* at 90. Thus, OSDH was saying explicitly to HHS that it could not comply for the reason explained above – because the only pregnancy option not available in Oklahoma is abortion.

Also, the majority finds fault in this reasoning by saying it disregards the statutory focus on the referring entity's purpose rather than the pregnant patient's reason or purpose for a request for a referral. The statute says nothing, not even a hint, about the referring entity's purpose. Rather, the statute is a command to government agencies or programs that they cannot discriminate against health care entities. The statute's focus is on the agency that controls the funds, not the entity that is applying to receive them.

Although one point of contention in this litigation is whether the referral requirement violates state law, no authority has been uncovered that would require Oklahoma to prove its legal position is correct to be protected from discrimination by the Weldon Amendment. During oral argument before the district court, Oklahoma informed the court that its Attorney General had deemed the referral requirement to be unlawful in Oklahoma. *Aplt. App'x III* at 159–60. In this context only, why isn't that enough? The Weldon Amendment is silent as to whether a health care entity must state its basis for objecting, or why it does not refer for abortions. Rather, as an objector, the Amendment plainly protects OSDH from discrimination through funding termination.

And though “[w]hen construing statutes, we begin with the plain language of the text itself,” “[p]roper interpretation of a word ‘depends upon reading the whole statutory text, considering the purpose and context of the

statute.” *United States v. Ko*, 739 F.3d 558, 560 (10th Cir. 2014) (quoting *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006)). Here, the text and purpose of the Weldon Amendment align to put the focus on agency discrimination, not a detailed probe as to why an entity does not refer for abortions. The record supports that OSDH raised a sincere objection to compliance with the referral requirement, which HHS disregarded by terminating the grant.

The majority relies upon HHS’s regulation that requires Title X projects to offer pregnant patients “the opportunity to be provided information and counseling regarding . . . [p]regnancy termination.” 42 C.F.R. § 59.5(a)(5)(i)(C). But Oklahoma’s claim here is a violation of the Weldon Amendment, not an agency regulation, so the agency regulation is of little consequence. With the passage of the Weldon Amendment, Congress did not delegate to HHS or any other agency the authority to clarify its meaning. Rather, the text of the Amendment stands on its own, making it the statutory duty of the courts to determine its meaning when conducting a review of agency action. *See* 5 U.S.C. § 706; *see also* *Sherley v. Sebelius*, 689 F.3d 776, 786 (D.C. Cir. 2012) (Henderson, J., concurring) (The Weldon Amendment “reveals no express delegation of authority—implicit or explicit—to any agency to administer its provisions—which is unsurprising given that the [amendment] itself confers no substantive authority on any agency to do anything; it simply—and plainly—prohibits the Departments of Labor, Health and Human Services and

Education, as well as [r]elated [a]gencies, from using the appropriated funds for the specifically enumerated purposes.” (internal quotation marks omitted)).

In reviewing the district court’s interpretation and application of the Weldon Amendment, I do not find it to be the best reading of the statute. Rather, I read the statute to conclude that HHS’s termination action violated it. Indeed, in sum, I conclude the best reading of the Weldon Amendment is: (1) OSDH is a health care entity; and (2) HHS discriminated against OSDH on the basis that it does not provide, pay for, provide coverage of, or refer for abortions. OSDH’s non-compliance with the referral requirement was raised as a legitimate objection to not run afoul of state law and policy. There is nothing in the Weldon Amendment, the record of this case, or the parties’ arguments that requires more to trigger the anti-discrimination prohibition.

Finally, to support its conclusions, the majority gives weight to the Weldon Amendment’s legislative history. But I see the legislative history as a mixed bag. Representative (“Rep.”) Weldon stated the following regarding the Weldon Amendment:

The reason I sought to include this provision in the bill is my experience as a physician, and I still see patients, is that the majority of nurses, technicians and doctors who claim to be pro-choice who claim to support *Roe v. Wade* always say to me that they would never want to participate in an abortion, perform an abortion, or be affiliated with doing an abortion. This provision is meant to protect health care entities from discrimination because they choose not to provide abortion services.

* * *

This provision is intended to protect the decisions of physicians, nurses, clinics, hospitals, medical centers, and even health insurance providers from being forced by the government to provide, refer, or pay for abortions.

150 Cong. Rec. 25044–45 (2004).

Rep. Weldon also stated the following:

This provision is intended to protect the decisions of physicians, nurses, clinics, hospitals, medical centers, and even health insurance providers from being forced by the government to provide, refer, or pay for abortions.

* * *

This provision only applies to health care entities that refuse to provide abortion services. Furthermore, the provision only affects instances when a government requires that a health care entity provide abortion services. Therefore, contrary to what has been said, this provision will not affect access to abortion, the provision of abortion-related information or services by willing providers or the ability of States to fulfill Federal Medicaid legislation.

Id.

First, this legislative history was made eighteen years before *Dobbs* extinguished the constitutional right to abortion, which had for decades been ensconced by *Roe*. Second, as pointed out in *City and County of San Francisco v. Azar*, “Representative Weldon used the term ‘refer for’ as separate from the provision of information, and further explicitly clarified that the Amendment was not meant to apply to the provision of abortion-related information.” 411 F. Supp. 3d 1001, 1021 (N.D. Cal. 2019). But “the provision of any information

by a ‘health care entity’ that could reasonably lead to a patient obtaining the procedure at issue would be considered a ‘referral.’” *Id.* In other words, the statements of the legislator who sponsored and whose name appears on this Amendment, even if given substantial weight, do not clearly resolve what was intended with the words “refer for abortions” because he drew a distinction between referrals and the provision of abortion-related information that is not in the statutory text. The legislative history should not be used here to muddy the meaning of the statutory text, especially given the muddiness of the history itself. *See Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 436 (2019) (noting that legislative history may “muddy” the meaning of clear statutory language).

B

Having determined that Oklahoma is substantially likely to succeed on the merits of its claim regarding the Weldon Amendment, I turn now to the second preliminary injunction factor – irreparable harm. Oklahoma asserts that the district court properly found that Oklahoma faces irreparable harm because it will lose \$4.5 million in Title X funding absent an injunction.

To constitute irreparable harm, an injury must be certain, great, actual “and not theoretical.” *Heideman*, 348 F.3d at 1189 (quoting *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). Irreparable harm is more than

“merely serious or substantial” harm. *Prairie Band of Potawatomi Indians*, 253 F.3d at 1250.

To make this showing, Oklahoma must establish “a significant risk that [it] will experience harm that cannot be compensated after the fact by monetary damages.” *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003) (quoting *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484–85 (3d Cir. 2000)). And “[w]hile not an easy burden to fulfill,” “a plaintiff who can show a significant risk of irreparable harm has demonstrated that the harm is not speculative.” *Id.* Finally, to be irreparable, “the injury must be ‘likely to occur before the district court rules on the merits.’” *New Mexico Dep’t of Game & Fish v. U.S. Dep’t of the Interior*, 854 F.3d 1236, 1250 (10th Cir. 2017) (quoting *Yellowstone Coal*, 321 F.3d at 1260).

Oklahoma argues it “will not likely be able to recoup the funds as monetary damages due to sovereign immunity.” Aplt. Br. at 60. And, indeed, Oklahoma’s argument succeeded in *Becerra*, 87 F.4th at 782–83. There, the Sixth Circuit held that economic injuries caused by agency action are unrecoverable because the APA does not waive the federal government’s sovereign immunity in this context. *Id.* I agree with the Sixth Circuit’s take on the issue. The termination of the financial grant is actual, irreparable harm

that will occur before the district court rules on the merits of the case, warranting relief.⁹

C

Merging the third and fourth factors that are necessary to merit a preliminary injunction, I also find they favor Oklahoma. On HHS's side of the scale, the public has an interest in Title X grantees complying with agency regulations to receive public funds. The funds, however, are already appropriated by Congress in this context, so whether they go to a grantee in Oklahoma or are redirected to Missouri as occurred here, the net result monetarily is a neutral transaction.

Weighing against HHS's interest is the reality that the termination of the grant to OSDH reduces access to health care for those who need it most: patients who visit OSDH clinics for health care because, by virtue of resources or geography, that is the only option available to them. Additionally, both the Weldon Amendment and Oklahoma state law § 861 were enacted by elected representatives in the respective legislatures, federal and state, so compliance

⁹ The parties filed a motion for expedited review of this appeal because a decision is needed to obligate funds for the next fiscal year, should an injunction be granted. The need to expedite this appeal further demonstrates irreparable harm, as what is at stake is the funding of OSDH clinics to provide health care to low-income and rural patients.

and respect for the law is an interest that commands significant weight. Oklahoma prevails on this factor as well.

D

Finally, and for the same reasons stated above, I would grant Oklahoma a stay under 5 U.S.C. § 705. Section 705 provides:

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

Id. (emphases added).

Oklahoma has satisfied § 705's requirements. Not only has it demonstrated a substantial likelihood of success on the merits, but it also has demonstrated that it would suffer irreparable harm absent an injunction.

IV

This case presents circumstances that ripened only after *Dobbs* was decided and Oklahoma's abortion ban took effect. These two events gave rise to a change in OSDH's longstanding policy, as it concluded it could no longer follow the referral requirement set forth in 42 C.F.R. § 59.5(a)(5) without running afoul of state law and policy. But rather than complying with its statutory obligations, HHS terminated OSDH's grant in violation of the

Weldon Amendment. Because I conclude that Oklahoma has met its burden, I would reverse the district court and remand with instruction to grant the preliminary injunction motion. Accordingly, I respectfully dissent.

EXHIBIT 2

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

July 15, 2024

Christopher M. Wolpert
Clerk of Court

STATE OF OKLAHOMA,

Plaintiff - Appellant,

v.

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES;
XAVIER BECERRA, in his official
capacity as the Secretary of the U.S.
Department of Health and Human Services;
JESSICA S. MARCELLA, in her official
capacity as Deputy Assistant Secretary for
Population Affairs; OFFICE OF
POPULATION AFFAIRS,

Defendants - Appellees.

No. 24-6063
(D.C. No. 5:23-CV-01052-HE)
(W.D. Okla.)

STATES OF MISSISSIPPI; ALABAMA;
ALASKA; ARKANSAS; FLORIDA;
GEORGIA; IDAHO; INDIANA; IOWA;
KANSAS; KENTUCKY; LOUISIANA;
MISSOURI; MONTANA; NEBRASKA;
NORTH DAKOTA; OHIO; SOUTH
CAROLINA; SOUTH DAKOTA;
TENNESSEE; TEXAS; UTAH; WEST
VIRGINIA; WYOMING; THE
AMERICAN ASSOCIATION OF PRO-
LIFE OBSTETRICIANS &
GYNECOLOGISTS; THE CHRISTIAN
MEDICAL & DENTAL
ASSOCIATIONS; THE CATHOLIC
MEDICAL ASSOCIATION; THE
NATIONAL ASSOCIATION OF
CATHOLIC NURSES, USA;
CONSTITUTIONAL

ACCOUNTABILITY CENTER;
AMERICAN CIVIL LIBERTIES UNION;
AMERICAN CIVIL LIBERTIES UNION
OF OKLAHOMA; CENTER FOR
REPRODUCTIVE RIGHTS;
LAWYERING PROJECT,

Amici Curiae.

JUDGMENT

Before **BACHARACH, EBEL, and FEDERICO**, Circuit Judges.

This case originated in the Western District of Oklahoma and was argued by counsel.

The judgment of that court is affirmed.

Entered for the Court



CHRISTOPHER M. WOLPERT, Clerk

EXHIBIT 3

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
vs.)	NO. CIV-23-1052-HE
)	
UNITED STATES DEPARTMENT OF)	
HEALTH AND HUMAN SERVICES,)	
<i>et al.</i> ,)	
)	
Defendants.)	

ORDER

For the reasons stated on the record at the hearing on March 26, 2024, plaintiff’s Motion for Preliminary Injunction [Doc. #23] is **DENIED**.

IT IS SO ORDERED.

Dated this 26th day of March, 2024.



 JOE HEATON
 UNITED STATES DISTRICT JUDGE

EXHIBIT 4

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IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
vs.)	Case No. CIV-23-1052-HE
)	
UNITED STATES DEPARTMENT OF)	
HEALTH AND HUMAN SERVICES,)	
et al.,)	
)	
Defendants.)	

* * * * *

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOE HEATON
UNITED STATES DISTRICT JUDGE
MARCH 26, 2024
AT 1:30 P.M.
MOTION FOR PRELIMINARY INJUNCTION

* * * * *

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

A P P E A R A N C E S

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25

1 (Proceedings held on March 26, 2024.)

2 THE COURT: I seem to have some imbalance of counsel
3 here. Do you guys want to spread out?

4 Well, good afternoon, everyone. We're here on Oklahoma
5 vs. U.S. Department of Health and Human Services.

6 Let me have appearances by counsel, please.

7 MR. HILLIS: Tom Hillis for the State of Oklahoma, and
8 with me is Barry Reynolds, my partner Miles McFadden, my
9 partner A.J. Ferate, and Audrey Weaver with the attorney
10 general's office.

11 I would also like to introduce Ellen Carr, intern with the
12 A.G.'s office, Your Honor.

13 THE COURT: Let's have her just present this, why
14 don't we?

15 MR. HILLIS: She would do better than me, Judge.

16 THE COURT: All right. Mr. Hillis, are you going to
17 be the lead counsel here on this?

18 MR. HILLIS: Yes, Your Honor.

19 THE COURT: All right. And who's here on behalf of
20 the defendant?

21 MR. CLENDENEN: Good afternoon, Your Honor. Michael
22 Clendenen from the Department of Justice.

23 THE COURT: It's Clendenen?

24 MR. CLENDENEN: Yes. Yes, Your Honor.

25 THE COURT: All right. This is in connection with the

1 State's request for preliminary injunction. Let me ask just as
2 a threshold matter: I think I had mentioned in the order
3 setting the hearing that I wanted everyone to let me know if
4 there was going to be evidence to be offered, and as I
5 understand it from I think the State's submission, the plan is
6 no testimonial evidence, but essentially the various exhibits
7 that have been presented are coming in by agreement; is that
8 essentially what the agreement is?

9 MR. HILLIS: Yes, Your Honor.

10 MR. CLENDENEN: Yes, Your Honor.

11 THE COURT: All right. Okay. Then we'll proceed with
12 the case here just as -- on the basis that it's essentially
13 oral argument.

14 I have spent a fair amount of time in the briefs in this
15 case. It's got some thorny, many-faceted issues to it, but it
16 did seem to me that it was involved enough and involving enough
17 substantial theories that don't come before me in your average
18 employment discrimination case or felon in possession case that
19 it would be helpful to have some argument from counsel to
20 assist me in making a determination.

21 So Mr. Hillis, why don't you step to the podium and let's
22 hear from you first and we can start working through this.

23 I guess at the very outset, I just -- to be very clear on
24 it, in terms of the specific injunction that the State's asking
25 for here, as I understand it, the circumstances are there was a

1 grant made, and then based on later developments, the grant was
2 terminated.

3 So is the State's request essentially a mandatory
4 injunction asking me to restore a funding flow or what?

5 MR. HILLIS: It's not necessarily restore -- I'm
6 sorry, maybe a little loud.

7 But what we have, Your Honor, we have yearly grants that
8 are made under Title X. And it's my understanding that those
9 grants are documented on April 1st of every year, with the
10 funds flowing in, I believe, July or August of each year.

11 So that's the need for the preliminary injunction, is to
12 prohibit the HHS from denying Oklahoma a grant solely on the
13 basis that Oklahoma will not require referrals for abortion
14 under Title X.

15 THE COURT: Maybe I'm splitting hairs here, and it may
16 not make any difference, but I gather, though, that the --
17 based on the termination letter from the federal department,
18 that the grant has been terminated, so in effect, this would be
19 a declaration or something to reinstate the grant?

20 MR. HILLIS: To reinstate the grant and to allow us to
21 apply this fiscal year without requiring us to have the program
22 require abortion referrals.

23 THE COURT: Now, the -- some of the submissions here,
24 I don't recall whose they were, talked in terms of a five-year
25 funding cycle that happens on this Title X program.

1 I assume we're -- based on what you're saying, that we're
2 now, what, one year into that five-year cycle, but it's just a
3 question of making the further request for the --

4 MR. HILLIS: Yeah. And it's a little odd. I don't
5 know if it's for accounting reasons, but the grants are for a
6 five-year period, but then there are yearly renewals of that
7 grant.

8 And so they've taken away the four and a half million
9 already, but what we're here today is to say that the federal
10 government cannot deny us a future grant solely on the basis
11 that we will not refer for abortions.

12 So in this April -- it's my understanding the grants are
13 announced on April 1. And what we're saying is that the
14 federal government cannot deny Oklahoma a grant solely on the
15 basis that Oklahoma will not refer for abortions.

16 THE COURT: But the urgency of the April 1 deadline is
17 the State's view that if you're not on the list that's
18 announced April 1, you can't ever get it back later?

19 MR. HILLIS: That's my understanding, Your Honor. I'm
20 not here as a government grants expert, but we have had
21 detailed communications with the Department of Justice, and
22 that's the understanding that I have, Your Honor.

23 So the critical deadline is April 1st to be awarded a
24 grant that will be funded in July or August of this year.

25 THE COURT: Well, in that connection, let me ask, I

1 think there's -- there was an indication in the -- in your
2 papers that after the termination letter was received from the
3 feds -- I frankly have debated about how to refer to the
4 parties here. You know, we've got enough HHSs on both ends
5 that it gets -- so I may refer to the State and the feds. That
6 may seem less respectful than might be the case otherwise,
7 but --

8 MR. HILLIS: And in my mind, I do State and then HHS,
9 I'm meaning --

10 THE COURT: All right. State and HHS is probably a
11 better way to do it.

12 But at any rate, the suggestion was that after HHS sent
13 the termination letter, there was an appeal --

14 MR. HILLIS: Yes.

15 THE COURT: -- that was filed by the State that I
16 gather is still pending.

17 MR. HILLIS: My understanding, Your Honor, yes.

18 THE COURT: Does that preserve something in terms of
19 potential entitlement to being funded, if the decision here
20 should ultimately be in the State's favor?

21 MR. HILLIS: I don't know that we can recoup the funds
22 that have been paid to the Missouri outfit, but that's not what
23 we're seeking now.

24 What we're seeking now is just a declaration to HHS that
25 says you cannot mandate that Oklahoma have an abortion referral

1 in its Title VII -- or Title X, I'm sorry -- Title X
2 application. And that would put us in line to get another
3 grant on the next grant cycle.

4 THE COURT: All right. All right. Go ahead.

5 MR. HILLIS: Okay.

6 May it please the Court. Appreciate the Court's attention
7 to this very serious matter for the people of the state of
8 Oklahoma.

9 I do want to commend the Department of Justice for their
10 collegiality in this case. With the cooperation of the
11 Department of Justice, we have a very finite issue for Your
12 Honor.

13 And literally, that finite issue is: Is it lawful for
14 health and human services to require Title X grantees to refer
15 patients who request to abortion providers. That's the issue
16 in front of Your Honor.

17 And that's a crystallized issue that we think is very
18 clearly decided in Oklahoma's favor.

19 You'll see, just a brief history, Oklahoma has been a
20 Title X grantee for at least four decades. With that, the
21 State of Oklahoma funds very vital family planning services
22 through a network established through the Oklahoma Department
23 of Health.

24 The State of Oklahoma funds 68 separate county health
25 departments to provide crucial and necessary funding for the

1 people of the state of Oklahoma.

2 THE COURT: What are the ones that don't -- that
3 aren't in the 68? Is it like the city-county health
4 departments in the major metro areas that are not part of the
5 mix?

6 MR. HILLIS: My guess is some of the health
7 departments cover multiple counties, because we've got 68 of
8 the 77 counties, so -- but I can't say that I'm conversational
9 on that. But there are 68 separate health departments that are
10 funded with Title X funds.

11 With that, Oklahoma is able to provide very valuable
12 family planning services to people largely who would not get
13 access to that.

14 Oklahoma is largely a rural state. We have two major
15 metropolitan areas: Tulsa and Oklahoma City, obviously. But
16 then the rest of the state -- and I'm from Lawton, so that's
17 not a major metropolitan area, but is a metropolitan area --
18 but you have large swaths of Oklahoma that are rural without
19 access to quality care.

20 While that -- those gaps in those, particularly in the
21 rural counties are funded by the State of Oklahoma Department
22 of Health, and literally you have people with no access to
23 medical care, but their county health department. So this
24 issue is critical for the state of Oklahoma.

25 Oklahoma has adopted this program. It was last reviewed

1 in 2016. We have that as -- I believe our review is attached.
2 Yeah, it's Exhibit 2 to our preliminary injunction.

3 You will see that Oklahoma was commended for its Title X
4 program in Exhibit 2. Matter fact, it was so good, that
5 review, that the next review was not even granted or was not
6 even required until 2024.

7 So Oklahoma has a well-developed, long-standing Title X
8 program that was very, very effective for the people of the
9 state of Oklahoma.

10 Obviously, the tension in this case comes in 2022. And
11 that's when the United States Supreme Court overruled decades
12 of precedent in the *Dobbs* decision.

13 All of a sudden, *Dobbs* returned legislation with respect
14 to abortion to the states, where for decades, it had been
15 purely a federal issue. And so that triggered a whole series
16 of events that gets us here today.

17 And that requirement, it goes back to vacillating HHS
18 regulations on abortion referrals.

19 Title X is very clear in 1008 that Title X funds cannot be
20 used in a program where abortion is a method of family
21 planning. Crystal clear, no one's arguing that.

22 HHS has taken, again, a vacillating position, and I think
23 both the U.S. Government and the state government agree on that
24 vacillation.

25 HHS went from requiring referrals to prohibiting referrals

1 to requiring referrals. Again, solely on the backdrop of 1008,
2 which says that abortion can't -- funds can't be used in a
3 program where abortion is a method of family planning.

4 The issue in front of Your Honor was never ripe before
5 *Dobbs*. Because prior to *Dobbs*, Oklahoma could not make illegal
6 referrals for abortion. Again, that changed completely with
7 the *Dobbs* decision.

8 With the *Dobbs* decision, all of a sudden Oklahoma could,
9 in fact, regulate abortion. Oklahoma's elected leaders have
10 elected -- made the policy decision that not only we're going
11 to outlaw abortion, we're going to outlaw counseling for
12 abortion.

13 THE COURT: What are you basing that on?

14 MR. HILLIS: The statute, 861 is the -- 21 O.S. 861,
15 Your Honor.

16 THE COURT: Well, all right. Go ahead.

17 MR. HILLIS: Okay. So that creates a tension that
18 didn't exist in this case. So the State Department of Health
19 then looked at the regulations that now have ping-ponged back
20 to having abortion referrals being mandated.

21 And the State looked at the regulation, which is 42 CFR
22 59.5, and I'm in A, that requires a Title X program to refer
23 for abortion, if requested.

24 But what 59(b) (6) provides, contradictory to that mandate,
25 59(b) (6) provides that "Provide that family planning medical

1 services will be performed under the direction of a clinical
2 service provider, with services offered within their scope and
3 practice and allowable under state law."

4 So in Oklahoma's mind, those are contradictory. That
5 there's a thou shalt require abortion referrals, but then
6 there's also a carve out that the services have to be allowable
7 under state law.

8 So Oklahoma, in their -- they've already been approved for
9 the grant, but now they're doing their yearly approval, they
10 then modify that Oklahoma will comply with the abortion
11 referral, if it's allowable under state law.

12 THE COURT: Let me ask just I guess partly as a matter
13 of being clear on the timeline, but I think it relates
14 potentially to maybe help focus on where the conflict
15 ultimately came from.

16 This version of the rule, this 42 CFR 59.5 was adopted in
17 October of 2021 --

18 MR. HILLIS: Yes, sir.

19 THE COURT: -- right? And then the grant from -- or
20 the application from the State of Oklahoma under Title X got
21 approved in March of 2022?

22 MR. HILLIS: Yes.

23 THE COURT: And then I'm saying this based on what
24 was, I think, in some of the letters back and forth and that
25 were describing the history, but at least it said that in

1 August of 2022, this would be after the award had been
2 approved, that Oklahoma proposed changes in how the
3 nondirective options counseling was to be provided and wanted
4 to shift to just providing clients with a link to the HHS
5 website.

6 And, apparently, HHS rejected that, which triggered some
7 kind of an appeal, but at any rate, they rejected that and
8 asked for maybe an alternative proposal.

9 I mean, is all that accurate as you understand it up to
10 that point?

11 MR. HILLIS: Well, I think Oklahoma vacillated a
12 little bit here because we initially thought we could lawfully
13 do the link --

14 THE COURT: Well, that's what I'm getting to.

15 MR. HILLIS: Yeah.

16 THE COURT: The -- they talk about wanting some
17 alternative proposals which, apparently, in February of 2023,
18 Oklahoma did make an alternative proposal that proposed that
19 counseling on all pregnancy options, which I assume would
20 include abortion, could come either through the department of
21 health staff or from this All Options Talk Line. That was
22 Oklahoma's proposal.

23 MR. HILLIS: Tertiary proposal, yes.

24 THE COURT: I thought tertiary had to do with oil
25 wells.

1 MR. HILLIS: Well, the first one. I shouldn't use
2 75-cent words. I'm sorry.

3 THE COURT: Anyway, but apparently, then, as I
4 understand it, HHS concluded that that was okay, that that --

5 MR. HILLIS: Initially.

6 THE COURT: That that alternative proposal would meet
7 the requirements for the grant.

8 And then there's an indication that it's -- that in May of
9 2023, Oklahoma advised that it had a change required in our
10 family planning program policy effective late afternoon of
11 4-27-23.

12 MR. HILLIS: Yes, you have the chronology correct,
13 Your Honor.

14 THE COURT: So I guess my question is what happened on
15 the afternoon of 4-27-23?

16 MR. HILLIS: I'm reading tea leaves here, but what
17 happened, I think, is that *Dobbs* was a complete sea change for
18 the State of Oklahoma. Well, all 50 states. And so it just
19 took some time to work through that.

20 And so the 4-27 is the ultimate position of the State that
21 we believe it's unlawful to refer for abortion. So I think
22 that was --

23 THE COURT: I guess the thing that strikes me as odd
24 about that is, I'm quoting this directly when it says that this
25 thing happened late afternoon of 4-27-23. I mean, maybe that's

1 when the lightbulb went off, I don't know.

2 But it would seem to me like there must have been
3 something more specific than that that was being alluded to
4 with that level of specificity.

5 MR. HILLIS: I think that that is, you know, decisions
6 are events, but they're preceded by processes. And I think the
7 4-27 was the culmination of a process that the State went
8 through in deciding the impact of the *Dobbs* decision, looking
9 at the extant state law and that that was the culmination, that
10 we don't think that referrals for abortions are lawful under
11 the State of Oklahoma law.

12 THE COURT: And that's based on the 21 O.S. 861 you're
13 talking about?

14 MR. HILLIS: Yes, Your Honor.

15 THE COURT: Well, let me ask you about that.

16 That's what I was looking for previously when I was trying
17 to get it, but the language of that statute makes it criminal
18 to advise a woman to take medication or employ some other means
19 to terminate a pregnancy or to procure the abortion, obviously,
20 but I guess the thing that -- or at least the question that
21 comes to my mind is when it says -- or what is criminalized is
22 advising the woman to go do something.

23 MR. HILLIS: Right. Or counsel, I believe is in -- I
24 don't have the statute.

25 THE COURT: There isn't any reference to counseling,

1 but I guess that's my point. It doesn't say you can't bring up
2 the subject. It just says you can't advise them to take a
3 particular course of action.

4 So I guess my question would be, as I understand it in
5 terms of what this referral requirement is, it keeps talking in
6 terms of -- what is it -- a nondirective provision of basic
7 information, that if it's nondirective, why would you
8 interpret -- if the nondirective provision of information is
9 what they're talking about, that's what's a referral, then I'm
10 having trouble seeing how that violates the statute.

11 I mean, statute seems to contemplate somebody advising the
12 woman to do something.

13 MR. HILLIS: Right. And that's the position of the
14 attorney general of the State of Oklahoma, that the referral
15 would run afoul of 21 O.S., Section 861.

16 THE COURT: Well, you mean -- is it the attorney
17 general's position that, let's just say you've got a pregnant
18 woman sitting in the -- you know, the local health department
19 office in Lawton and she says, "I'm pregnant, what are my
20 options?" If the health department personnel -- if the health
21 department person sitting there says, "Well, abortion's not
22 legal in Oklahoma unless your life's in danger, but you can
23 call this number to get some other information."

24 MR. HILLIS: I believe the attorney general takes the
25 position that that's unlawful.

1 THE COURT: Seriously?

2 MR. HILLIS: Yes, Your Honor.

3 THE COURT: Really?

4 MR. HILLIS: Yes.

5 THE COURT: Well, okay.

6 MR. HILLIS: So ...

7 THE COURT: Does he think it's unlawful to mention the
8 word "abortion"?

9 MR. HILLIS: I don't think mention, but I think that
10 goes into would that be considered advising or counseling an
11 abortion.

12 THE COURT: You think -- would it be a crime for
13 someone to say abortion's legal in Colorado? Is that a crime?

14 MR. HILLIS: I'm not a criminal lawyer, but no, I
15 would not think that would be -- run afoul of 861, to make a
16 factual -- if that's a factual statement.

17 THE COURT: So if that's not a crime, why would it be
18 a crime to refer somebody to a phone number that might tell
19 them that it was legal in Colorado?

20 MR. HILLIS: Because that's the purpose, is to promote
21 abortions. And that's what the State of Oklahoma, through its
22 elected legislatures, don't want to do.

23 THE COURT: But it's Oklahoma's position that anything
24 that mentions the possibility of abortion is thereby promoting
25 it?

1 MR. HILLIS: I don't think it goes that far, but to
2 give someone abortion providers would at least potentially run
3 afoul of advising someone to get an abortion. And that's the
4 part that is problematic for the State of Oklahoma.

5 THE COURT: But as I understand it, the referral
6 requirement only applies if the client or the patient, whatever
7 the right word would be, requests it.

8 MR. HILLIS: That's the way the reg is written.
9 You're right.

10 THE COURT: And that would suggest that the impetus
11 for the idea of thinking about it is not coming from HHS, it's
12 coming from the client.

13 MR. HILLIS: The initial one, but then the genesis
14 could always be beyond the person advising it.

15 The genesis doesn't matter. It's the fact of saying,
16 "Here are abortion providers that you can lawfully get an
17 abortion from." That's the problem that potentially runs afoul
18 of 861.

19 THE COURT: It would seem to me the question is
20 whether at what point you're advising somebody to do something.

21 MR. HILLIS: Right. If you're a state official or in
22 a state program and you're handing out something that says, you
23 know, Dr. Smith in Grand Island, Colorado, performs abortion,
24 to me, I can see why the State of Oklahoma, with its policy
25 against abortion, would not want people using state-directed

1 funds to do that. I think that's a legitimate regulatory ask
2 post *Dobbs*.

3 THE COURT: Well, may well be a legitimate regulatory
4 ask. I'm not sure that's the same thing as saying it's
5 criminal.

6 MR. HILLIS: But there's at least litigious
7 uncertainty over that. And that's the part where, you know,
8 we're entitled to construe our state statutes and to direct our
9 county officials on what's lawful and what's not lawful.

10 And at least there's litigious uncertainty, and, you know,
11 I can't cite you, you know, *State v. Smith*, the Court of
12 Criminal Appeals said yea or nay, but there's at least
13 litigious uncertainty over there. And discretion being the
14 better a part of valor, I can understand why the department of
15 health said, no, we can't comply with that.

16 Particularly, in light of — if you read the rest of the
17 regulation, Your Honor, I think it becomes clear, because as
18 the government noted in their brief, one part of the regulation
19 says — and this is on page 12 of their brief. This is 59 —
20 42 CFR 59.5(a) (5), "Objecting providers or Title X grantees are
21 not required to counsel or refer for abortions." That's their
22 own regulation. That's their own quote right out of their
23 statute or right out of their brief.

24 THE COURT: Is that the regulation they say's been
25 vacated?

1 MR. HILLIS: I don't believe so.

2 THE COURT: Somewhere in a brief there's a footnote —

3 MR. HILLIS: There was one. I don't believe it's
4 59.5(a), because that's the one they're trying to tie us up
5 with.

6 And so I'm fast forwarding. My argument would have
7 proceeded differently, but here, their regulation first of all
8 says, thou shall refer for abortion referrals. But then that
9 same regulation says, "Objecting providers or Title X grantees
10 are not required to counsel or refer for abortions." And I'm
11 quoting right now out of their own brief.

12 And so those are conflicting right there. And that
13 obviates one of their arguments about the necessary clarity
14 that is needed for a funding requirement.

15 So the real issue here is: Is the requirement that Title
16 X grantees — and Oklahoma is a Title X grantee. The grant
17 that we submitted in our paper denominates the State of
18 Oklahoma as a grantee.

19 Can Title X grantees be denied funding based on a funding
20 condition that is not in the statute? That's the issue in
21 front of Your Honor.

22 THE COURT: Well, if that's the statute, that sounds
23 like a facial challenge to the regulation to me.

24 MR. HILLIS: Well, right now what we have is not a
25 facial challenge to the regulation. We've had \$4.5 million

1 yanked away from us.

2 THE COURT: I understand it has actual consequences,
3 but it does seem to me that if -- to the extent that you're
4 just saying, you know, they didn't have the authority to
5 promulgate the regulation they came up with, that's already
6 been resolved, hadn't it?

7 MR. HILLIS: No.

8 THE COURT: What significance --

9 MR. HILLIS: If you're referring to the *State of Ohio*.

10 THE COURT: Yes, I am.

11 MR. HILLIS: Okay. And the *State of Ohio* case, Sixth
12 Circuit --

13 THE COURT: Right.

14 MR. HILLIS: That was a facial challenge to the
15 regulation. We're a vastly different area right now because we
16 are --

17 THE COURT: Well, I assume you would agree, though,
18 that to the extent anything you're doing now is a facial
19 challenge, it's barred by the *Ohio* decision.

20 MR. HILLIS: It's contrary to the *Ohio* decision. The
21 government has not taken the position that that's collateral
22 estoppel in this case.

23 THE COURT: Why doesn't that obviously flow here?

24 MR. HILLIS: Because it was an as-applied or it was a
25 facial challenge and this is an as-applied challenge.

1 Because --

2 THE COURT: No, but my question is to the extent that
3 it is a facial challenge in substance, isn't it precluded by
4 the *Ohio* decision?

5 MR. HILLIS: It's contrary to the *Ohio* decision. I
6 have not been faced with the government arguing that the *Ohio*
7 court or the Sixth Circuit is binding on Your Honor or binding
8 on the State of Oklahoma.

9 But you are right, the State of Oklahoma was a party in
10 the Sixth Circuit litigation.

11 THE COURT: Well, I mean, it does seem to me that, you
12 know, ordinarily if I was having to consider a Sixth Circuit
13 case, I would give it whatever weight I thought it deserved
14 based on how persuasive it was. I mean, it doesn't bind me
15 like something out of the Tenth Circuit would.

16 MR. HILLIS: Out of Denver, right.

17 THE COURT: But it does seem to me that it's a
18 pertinent distinction here that Oklahoma was a party to that
19 case.

20 MR. HILLIS: Yes. I agree. I have to distinguish
21 *Ohio*. I will agree with that.

22 But we can readily distinguish *Ohio*, because *Ohio*, again,
23 as you noted, was a facial challenge. There's a vast
24 difference between a facial challenge and an as-applied
25 challenge in this case.

1 Because the as-applied challenge, the government, the
2 federal government does not get the benefit of *Chevron*
3 deference. That's crucial in this case.

4 Because if you read the *Ohio* opinion, its premise is
5 *Chevron* deference. If you took away *Chevron* deference, I'll
6 submit the *Ohio* justices would have reached a different
7 decision, and they should have.

8 Because in this case, we've had four and a half million
9 dollars taken away from the State of Oklahoma. So we have an
10 as-applied challenge.

11 As-applied challenges --

12 THE COURT: Well, what is the difference in terms
13 of -- well, go ahead and finish your sentence.

14 MR. HILLIS: In a facial challenge, the skin -- the
15 cat hadn't been skinned. In applied challenges, the cat's been
16 skinned. The money is gone from the State of Oklahoma. So we
17 can challenge: Is that funding condition, is it statutorily
18 based?

19 You have to apply the law without giving deference to the
20 government in this case.

21 That is absolutely crucial, because if you look at
22 *Pennhurst*, *Pennhurst* is a Judge -- Justice Rehnquist opinion
23 that sets up what Your Honor should do when facing a funding
24 decision by the government.

25 And *Pennhurst* is absolutely clear that funding conditions

1 must come from the text of the statute.

2 THE COURT: This is your Spending Clause argument?

3 MR. HILLIS: Spending Clause. Article I, Section 8.
4 *Pennhurst* is crystal clear that that clarity must come from the
5 statute. That differentiates the *Ohio* case entirely, because
6 the *Ohio* case, if you'll read it, they spend a lot of pages, a
7 lot of ink and paper on the *Chevron* deference.

8 But here, the answer, I think, for Your Honor is decided
9 in an as-applied challenge by the *Rust* decision. Because *Rust*
10 clearly holds on all fours that Title X does not either
11 maintain or proscribe abortion referrals. It's just completely
12 agnostic, so there's nothing in that regulation.

13 THE COURT: Well, it says as a matter of *Chevron*
14 deference that you have to, at least as to that statute, accord
15 deference to the agency's interpretation, which can change over
16 the years. And it has changed.

17 MR. HILLIS: In an as-applied challenge under *Rust*.
18 But remember, the holding of *Rust* is impactful.

19 The holding of *Rust* is that the Secretary could, because
20 of the language of 1008, prohibit abortion referrals. That is
21 very consistent with the language of 1008 that says that
22 projects cannot use abortion as a method of family planning.

23 And so that's just a logical outreach in a facial
24 challenge that the Secretary was okay to ban entirely abortion
25 referrals. That's consistent with the text of 1008.

1 *Rust* did apply *Chevron* deference to get to that point, but
2 what *Rust* does not stand for is that if a statute is silent as
3 to a funding requirement, can the agency make it up.

4 THE COURT: Well, but what do you do in a situation
5 like we've got here where the statutes that are part of Title X
6 explicitly says the Secretary can prescribe conditions.

7 MR. HILLIS: Right. And so you look at that and see,
8 does that give the Secretary carte blanche to come up with
9 whatever rules or regulations that they want.

10 And if you look at the case law, and this -- we've got to
11 get down into the weeds here, and I apologize for that. But if
12 you look at the case law, the case law is clear --

13 THE COURT: Well, you don't have to look --

14 MR. HILLIS: -- that that general delegation does not
15 give the Secretary carte blanche to come up with funding
16 conditions that are not in the statute.

17 And very clearly, abortion referrals are not in the
18 statute. That's crystal clear --

19 THE COURT: So you're saying you think the law is that
20 we don't even have to get to the point of worrying about the
21 presence or absence of *Chevron* deference, because it doesn't
22 count anyway?

23 MR. HILLIS: Yeah, you don't get there because the
24 Secretary was not empowered to exercise legislative function
25 when Congress chose not to do it.

1 Cases are clear, they can't fill in that legislative gap.
2 And I can walk you through the cases to get you there.

3 THE COURT: Well, they've been filling in that gap for
4 30 years.

5 MR. HILLIS: Well, but remember, for 30 years, there
6 was no tension. The tension shows up in 2022 with the *Dobbs*
7 decision.

8 THE COURT: The *Dobbs* decision didn't invent the
9 Spending Clause at that point. The Spending Clause --

10 MR. HILLIS: Right. But there were no challenges to
11 it because it was lawful in every state. Now we at least have
12 serious concern that abortion referrals are unlawful in the
13 State of Oklahoma.

14 THE COURT: But if that was the case, wouldn't that
15 have come up in the *Ohio* decision?

16 MR. HILLIS: Not in a facial challenge, because you
17 have *Chevron* deference. The crucial part of -- and I hope
18 you -- I'm making myself clear.

19 The *Ohio* case was entirely dependent on *Chevron* deference.
20 We don't have *Chevron* deference in an as-applied challenge.

21 THE COURT: My point is the *Ohio* case said, based on
22 what they viewed as having been determined in *Rust* and the
23 nature of -- what is it -- 1008, that *Chevron* deference did
24 apply and that that included not only the result in *Rust* where
25 they said it's within the permissible zone of regulatory

1 regulation-making to ban referrals, but it's also within the
2 permissible zone to require them.

3 MR. HILLIS: Right.

4 THE COURT: So if that's all the case, I mean --

5 MR. HILLIS: But that's not all the case, because it
6 only gets to that point based on *Chevron* deference.

7 You take that *Chevron* deference away and apply the
8 as-applied Article I, Section 8 challenge cases, that's when
9 you see the Secretary does not have the authority to exercise
10 legislative functions. That's crystal clear under every case,
11 and I'm going to unfortunately have to walk you through a
12 relatively tedious exposé, because it is necessary.

13 The cases that we rely on crystal clear, *Pennhurst* says
14 that the funding conditions must be unmistakably clear. If you
15 look at the *Morrisey* case out of --

16 THE COURT: Well, let me ask you about one that I was
17 looking at, because I think it's maybe cited in your brief or
18 somebody's brief, but it's the *Arlington Central School*
19 *District* case that was talking about an attorney's fee statute,
20 as I remember.

21 MR. HILLIS: Yes. That was in my hit list here.

22 THE COURT: And the statute, whatever the federal
23 statute was, said you could recover attorney's fees. And --

24 MR. HILLIS: Expert fees weren't costs, yeah.

25 THE COURT: And it wasn't a situation, though, of

1 where, you know, there were suddenly new regulations that came
2 out. It didn't involve regulations. So I guess I'm having
3 trouble seeing how this whole argument fits.

4 If there is statutory authority for the Secretary to do
5 something and they've done something, I mean, you know, these
6 cases that you've cited on the Spending Clause thing are,
7 basically, it seems to me, saying, you know, you can't enter
8 into what amounts to a contract with the State and then later
9 come in and superimpose requirements on them after the fact.
10 Isn't that the essence of it?

11 MR. HILLIS: That's part of it.

12 But I don't know if you're referring to the *Bennett* case,
13 but if you look at each of these cases, and the government
14 cited four principal cases for what I call a general delegation
15 to the administrator. Can -- under a general delegation, can
16 the agency head exercise legislative functions. And the cases
17 are all crystal clear: You absolutely cannot.

18 The first case they cite is the *Bennett v. Kentucky*
19 *Department of Education* case, which is a Justice O'Connor
20 opinion under I believe it was Title I of the Elementary
21 Education Act.

22 And in that case, the federal government provided
23 educational funds to developmentally disabled individuals.

24 The agency head then came up with a regulation that
25 prohibited, it's called "supplanting," that the State couldn't

1 use the federal funds and then just yank away the extant State
2 funds that were spent for developmentally disabled, so they had
3 to spend their money and then the federal money was an add-on.

4 But in *Bennett*, what happened, Congress amended Title I to
5 adopt the supplanting language.

6 And Justice O'Connor said, "In order to assure that
7 federal funds would be used to support additional services that
8 would not otherwise be available, the Title I program from the
9 outset prohibited the use of federal grants to replace state
10 funds. This prohibition initially was contained in regulations
11 and explained in the program. Congress responded by amending
12 Title I in 1970 to add a provision that specifically prohibited
13 supplanting."

14 So Congress came in and adopted that as the law of the
15 land. That's what made that appropriate.

16 And if you look at the text of Justice O'Connor's opinion,
17 she says at page -- I believe it's 47 U.S. 666, "The requisite
18 clarity in this case is provided by Title I." Not the
19 regulation. Title I.

20 So in that case, Justice O'Connor did not look at the
21 general delegation, she looked at the text of the statute.

22 If you look at the federal government cites *Biden v.*
23 *Missouri*, a case wholly not on point. It was a delegation
24 doctrine case using COVID funds.

25 The final two cases they rely on are *Gruver* and

1 *Mississippi Commission*. Those two cases are coercion cases.
2 They're not requirements cases. So they're not on point.

3 So none of the cases stand for the proposition the
4 government cites them for you, that a general delegation to the
5 agency allows it to exercise funds.

6 The fallacy of their argument should be readily apparent
7 because the only case law that's out there that a general
8 delegation is sufficient to allow the agency to exercise
9 legislative functions is the Tennessee case, Justice McDonough,
10 about ten days ago.

11 But the important thing -- so you have to look at the --
12 what undergirds Justice -- Judge McDonough's opinion to see if
13 it's worth following or not.

14 He cites three primary cases; none of the cases that the
15 government cited here. So Judge McDonough didn't even think
16 they were authoritative. He first of all cites to *Jackson v.*
17 *Board of Education*. Again, a Justice O'Connor opinion.

18 In that case, we were dealing with Title IX of funding and
19 whether you could imply a cause of action based on the
20 statute's language.

21 The language Justice O'Connor uses is -- and this is, I
22 believe, at page 179 or 178. "We reach this result based on
23 the statute's text. In step with *Sandoval*, we hold that
24 Title IX's private right of action encompasses suits for
25 retaliation because retaliation falls within the statutes

1 prohibited prohibition of intentional discrimination on the
2 basis of sex."

3 So Justice O'Connor is saying the authority does not come
4 from the regulator, it comes directly from the statute.

5 And what the ultimate opinion was, that Congress
6 prohibited discrimination. The Court's construed
7 discrimination to include unlawful retaliation. So that's just
8 putting meaning to the words that Congress used.

9 THE COURT: But when we're dealing with a situation
10 like what we have here, where Congress has essentially enacted
11 a grant program --

12 MR. HILLIS: Yes.

13 THE COURT: -- and it's for the purpose of promoting
14 family planning projects or whatever, is it your position that
15 any requirement that might relate to that simply is
16 unenforceable, unless it's in the statute?

17 MR. HILLIS: There has to be a statutory -- a
18 nongeneral delegation to the regulator. And that's what the
19 cases say.

20 THE COURT: Well, I assume you've looked at 59.5 that
21 has a whole bunch of requirements that these plans or projects
22 have to have. You're saying they're all invalid?

23 MR. HILLIS: The only one we're here on is the
24 abortion referral. I've not studied the other ones, Judge.

25 THE COURT: But isn't that the logical consequence of

1 what you're saying, since none of them are in the statute?

2 MR. HILLIS: No, the one that's crystal clear is that
3 *Rust* tells us abortion referrals are not in Title X. That's
4 binding on every court. And *Rust* says it's not in Title X, and
5 so that's what's binding. And if it's not in Title X, HHS
6 cannot maintain it. And if you look at the cases, that's what
7 it says.

8 The other case that they rely on is *Davis v. Monroe*.
9 Again, a Justice O'Connor opinion.

10 She says, "The language of Title IX itself, particularly
11 when viewed in conjunction with the requirement -- prohibition
12 of Title IX's prohibition to be liable in damages, also cabins
13 the range of misconduct."

14 So throughout *Jackson* and *Monroe*, Justice O'Connor is
15 citing not to regulations, she's citing to the text of
16 Title IX.

17 They also cite to, curiously -- or Justice McDonough
18 curiously cites the case of -- it was a Judge Alito case, I'm
19 sorry. I've lost it here in my book. *Arlington Central v.*
20 *Murphy*, where Justice Alito doesn't discuss regulations at all
21 in the majority opinion.

22 But what's telling is the dissent, Justice Breyer's
23 dissent. And he tells us why, when you're looking at
24 implication of private rights of action, that that does not
25 have the same scrutiny as funding conditions under *Pennhurst*.

1 Justice Breyer says, "To the contrary, we have held that
2 *Pennhurst* requirement that Congress unambiguously set out a
3 condition on the grant of federal money does not necessarily
4 apply to legislating setting forth the remedies available
5 against a noncomplying state."

6 So that makes sense when you look at the difference
7 between Article I, Section 1 and Article I, Section 8.

8 Article I, Section 1 is the delegation doctrine. And you
9 can have under an Article I, Section 1 delegation, you can have
10 a general delegation of authority to the executive branch.
11 That makes sense because the executive branch enforces the
12 laws.

13 The analogy the Courts use is Article I, Section 1 is
14 basically the sword. And the sword is utilized by the
15 executive branch. Article I, Section 8 challenges, however,
16 are the purse. And the purse is quintessentially exercised by
17 the legislature. That's the problem that we have here.

18 And if you look at the cases that are on point, that being
19 *Pennhurst*, *Morrisey* and the District Court of Colorado case
20 that is slipping my mind right now, and you've got *Yellen*.

21 If you look at -- particularly instructive is the *Morrisey*
22 case. Because *Morrisey* dealt with specifically an as-applied
23 funding condition challenge.

24 It says, "The Supreme Court's leading authority on the
25 limits of Spending Clause is *Pennhurst*," obviously. And it

1 says, "And Congress must speak unambiguously and with a clear
2 voice when it imposes conditions on federal funds. We explain
3 that Congress must spell out a condition clearly enough for the
4 states to make an informed choice."

5 And here is the part that I think is instructive, and why
6 a general delegation of authority -- and that's all we have
7 here, we have a general delegation. That general delegation
8 cannot include legislative functions. And this is right out of
9 the *Morrisey* case, second -- "An agency cannot exercise
10 legislative power or otherwise operate independently of the
11 statute that authorized it."

12 I'm going to skip a cite. "The Constitution gives
13 Congress, not the executive branch, the power to tax and spend
14 through the exercise of its legislative powers. It follows,
15 therefore, that Congress, not an executive agency, must
16 exercise that power constitutionally."

17 Congress cannot delegate under Article I, Section 8 its
18 legislative powers to tax and spend. That's a killer for the
19 government's argument in this case because it's clearly a
20 funding condition that is sans the statute. Under *Rust*, that's
21 crystal clear.

22 *Morrisey* goes on to state, "Allowing an executive agency
23 to impose a condition that is not otherwise ascertainable in
24 the law Congress enacted would be inconsistent with the
25 Constitution's meticulous separation of powers, therefore, the

1 needed clarity under the Spending Clause must come directly
2 from the statute."

3 You don't get there with a general delegation of
4 authority. The Colorado case, it's *Colorado v. Department of*
5 *Justice*, exact same thing. And that's a District Court of
6 Colorado case from 2020.

7 It says, "However, agency-imposed grant conditions, even
8 if they, themselves, are unambiguous, cannot be constitutional
9 under the Spending Clause unless the statute from which they
10 originate is also unambiguous," citing *City of Philadelphia*
11 case.

12 "Spending Clause ambiguity cases generally involve
13 statutory construction, not interpretations of conditions
14 imposed by the agency."

15 So the binding authority here, they have zero authority in
16 this case, Your Honor, for the proposition that a general grant
17 of regulatory functions can serve to allow them to exercise
18 legislative functions. That's a violation of the separation of
19 powers.

20 And here what you've got to look at, the government made
21 it easy on you and on page 21 of their brief, they cite to a
22 regulation, a delegation of authority, one which did not grant
23 legislative authority and one that they claim does grant
24 legislative authority. I'll read those to you because, there's
25 no meaningful difference.

1 THE COURT: Well, we've been going for a little better
2 than an hour here. Why don't you kind of wrap up your end of
3 this in the next few minutes and I would like to hear from the
4 government.

5 MR. HILLIS: Yeah, let me then transition.

6 The other thing that's impactful under why *Ohio* does not
7 apply is *Ohio* expressly did not consider the Weldon Amendment.

8 THE COURT: They say your complaint doesn't, either.
9 What's the consequence of that?

10 MR. HILLIS: It's none. We don't have to specifically
11 mention the Weldon Amendment. The Weldon Amendment is law.

12 We said their actions are unlawful, but if the only thing
13 we're doing is forcing me to amend my petition and coming right
14 back here, when they've been on notice the whole time, because
15 it was in our appeal as well. So I didn't catch the government
16 flatfooted. And so but I think that's --

17 THE COURT: I suspect you're right about that. Get to
18 the merits.

19 MR. HILLIS: The Weldon Amendment, every dollar that
20 has been spent, including the dollars that were taken away from
21 us, pass through the Weldon Amendment.

22 And the Weldon Amendment is clear that you can't
23 discriminate against grantees who refuse to refer for abortion.
24 That's the congressional intent that you can look at under
25 *Pennhurst* to see does that comply or does it not comply.

1 And I think the Weldon Amendment is specifically pertinent
2 here in the application of the *Ohio* case, because *Ohio*
3 specifically -- the *Ohio* case, the Sixth Circuit said, We
4 wonder why the Weldon Amendment wasn't raised? I do too.

5 But here, we have raised it. It's impactful. It tells
6 you what the legislative intent was and it is very contrary to
7 the abortion mandate.

8 And I do appreciate you letting me go long, Your Honor. I
9 do have some arbitrary and capricious argument that I want to
10 add, but I'm mindful of the Court's schedule.

11 THE COURT: Take a couple minutes and tell me. I've
12 read the briefs.

13 MR. HILLIS: You have read the briefs. But here, what
14 you have is the application -- here is what we consider the
15 government is doing, it is looking at one regulation and
16 ignoring two others. It is ignoring the regulation in the same
17 regulation that says that Title X grantees don't have to refer
18 for abortion.

19 How do you square that with they yanked our funding, so
20 for the singular reason that we will not refer for abortion.

21 So that's arbitrary and capricious, because they're
22 applying one regulation and they're ignoring another one.

23 It's also arbitrary and capricious because that same
24 regulation likewise says that the services have to be allowable
25 under state law.

1 The agency told you they did not consider the impact of
2 *Dobbs* in the '21 rule or when they redid it.

3 We think there's litigious uncertainty, at a minimum, on
4 if abortion referrals are lawful under state law. And if we're
5 right, then they've run afoul of that regulation as well.

6 So we think the application is unlawful because they're
7 applying one regulation that overrides all the other
8 regulations, and they're ignoring -- and they also ignored the
9 Weldon Amendment.

10 So the Weldon Amendment is crucial, both for is *Ohio*
11 impactful to Your Honor, and the Weldon Amendment's crucial in
12 light of the as-applied to Oklahoma.

13 THE COURT: Insofar as you're saying essentially that
14 their regulations are internally inconsistent, I recall the
15 briefs talking about some other kind of deference that,
16 frankly, I hadn't heard referred to before. But as I
17 understand it, it's essentially saying, look, if the question
18 is how they're interpreting their own regulations, then there's
19 deference entitled -- that they're entitled to deference on
20 that. I mean, after all, it's their regulations.

21 MR. HILLIS: But they can't just ignore one and
22 they're ignoring one. Because we are a Title X grantee and we
23 are being required to refer for abortion. That's contrary to
24 their regulation.

25 And it's also contrary to services allowable under state

1 law. You've got -- you can't just ignore that. You can't put
2 blinders on and say, We're going to do the bidding of the
3 executive here, and the bidding of the executive wants to
4 expand abortion. That's not an appropriate exercise of agency
5 discretion, particularly in light of 1008, which at best, is
6 hostile to abortion.

7 THE COURT: Well, doesn't it make some difference
8 here, though, that we're dealing with a grant program? I mean,
9 you know, it would seem to me that if the federal government
10 came in and tried to, I don't know, impose some rule that said
11 we're going to just flat require you, whether you like it or
12 not, to go do an abortion referral. It seems to me that's
13 different than saying if you don't want to do it, that's up to
14 you, but if you want this grant, you have to do it.

15 MR. HILLIS: It may seem contradictory, but the most
16 exacting review is when an agency spends money. That's the
17 Article I, Section 8 review that the requirements have to be
18 unmistakably clear. That's the standard.

19 And if they're trying to say that the regulations can make
20 that be unmistakably clear, well, they're not, because you've
21 got two diametrically opposed regulations. They're not
22 unmistakably clear.

23 Even if they could get across that huge gulf of them
24 exercising legislative functions, which is just prohibited
25 under *Morrisey*, *Kentucky v. Yellen*, every Supreme Court case

1 that's out there, so ...

2 I know I've been long-winded. I appreciate Your Honor's
3 attention. This is a very crucial matter for the people of the
4 state of Oklahoma. We desperately need these funds and it's
5 just categorically unfair to withhold funds --

6 THE COURT: Let me ask you about that, just to be
7 certain that I understand the circumstances.

8 I recall at some point in the briefs there were, you know,
9 some kind of suggestion that if this grant doesn't come
10 through, that all these 68 counties are going to be deprived of
11 services and people are going to, you know, not get what they
12 need.

13 I mean, as I understand it from the affidavit from your
14 deputy director, the legislature has appropriated supplemental
15 money to backstop this if you don't get the grant, right?

16 MR. HILLIS: They have, but, Your Honor, that goes
17 right into -- and I should have addressed this.

18 That goes right into irreparable harm. Because Oklahoma
19 has a constitutional balance budget requirement.

20 So necessarily implicit or empirically, if we're spending
21 four and a half million dollars that should come from the
22 federal government, we're not spending that four and a half
23 million dollars somewhere else. We're robbing Peter to pay
24 Paul. That's irreparable harm.

25 The other thing is, you know, you need --

1 THE COURT: I don't understand what you just said
2 about the balanced budget. I don't understand how that --

3 MR. HILLIS: Oklahoma can only spend as much money --
4 Oklahoma has to balance its budget, unlike the federal
5 government. We can't borrow money to fund obligations.

6 So if we're going to spend four and a half million
7 dollars, we've got to take it from somewhere. So it may come
8 from the highway fund that we can't -- program that we can't
9 fund --

10 THE COURT: Well, my point is the family planning
11 services that are being delivered through the local departments
12 of health are going to continue to be delivered, correct?

13 MR. HILLIS: For at least this year, but whether
14 Oklahoma can afford to fund that going forward, we don't know.

15 THE COURT: And so the question, when we're -- I mean,
16 to the extent we're trying to balance harms here or whatever,
17 the harm is not that there are going to be services not
18 provided, it's just a matter of the State not being able to be
19 reimbursed for up to the extent of the grant.

20 MR. HILLIS: Right. But read all of *Ohio*. There's
21 part of *Ohio* that you may not have read. *Ohio* was a facial
22 challenge to the funding requirement. That's what we've talked
23 about here.

24 It was also a challenge to -- you've got to separate
25 abortion clinics from Title X clinics.

1 THE COURT: The integrity part.

2 MR. HILLIS: Yeah.

3 THE COURT: I read that.

4 MR. HILLIS: Okay. And so they granted the injunction
5 on that, but they granted the injunction because the State of
6 Ohio lost \$1.7 million. State of Ohio is much bigger than the
7 state of Oklahoma.

8 But more importantly -- and I don't mean to point at you.
9 But more importantly, they still had 80 percent of their
10 funding. And that was irreparable harm, according to the Sixth
11 Circuit.

12 Well, if 10 percent or 20 percent, I'm sorry, of a state's
13 funding that amounts to \$1.7 million is irreparable harm,
14 taking away all of Oklahoma's funding necessarily has to be
15 irreparable harm. But I don't think that's --

16 THE COURT: And we're talking here about -- what is
17 it -- four and a half million? Is that --

18 MR. HILLIS: Yeah, we lost four and a half million,
19 Ohio lost 1.7 million. But Ohio still got -- I can't do math
20 in my head like that, but Ohio still got eight million or so,
21 maybe seven.

22 But what the Sixth Circuit said is that that deprivation
23 of 20 percent of your Title X funds is irreparable harm.

24 THE COURT: But I assume what makes it irreparable is
25 that there isn't a mechanism as against sovereign immunity to

1 recover it from the feds?

2 MR. HILLIS: Yes.

3 THE COURT: Is that it? All right.

4 MR. HILLIS: I do appreciate Your Honor. Thank you
5 for your time.

6 THE COURT: All right. Mr. Clendenen.

7 MR. CLENDENEN: Good afternoon. May it please the
8 Court. Michael Clendenen for the defendants.

9 For years, Oklahoma has accepted millions of dollars in
10 federal grant funding to support its family planning project.
11 These funds were expressly conditioned on the project's
12 provision of abortion counseling and referrals upon a patient's
13 request. And for years, Oklahoma willingly accepted and
14 complied with this condition.

15 But starting in 2023, Oklahoma refused to satisfy the same
16 condition. Oklahoma still wants the federal funds, it wants
17 them free of the condition and wants this Court to order the
18 federal agency to provide that funding, all despite the State's
19 disavowal of its prior agreement with the agency.

20 This Court should deny that request, just as the Tennessee
21 court denied a motion for preliminary injunction on similar
22 claims earlier this month.

23 I would start with some of the threshold questions that
24 Your Honor asked of the plaintiffs about what sort of relief
25 they're seeking, the State is seeking.

1 First, I would just note that I didn't see any proposed
2 order anywhere. The plaintiffs haven't, you know, submitted —
3 they basically haven't shown what they're asking for, just they
4 say they want a preliminary injunction.

5 And it is their burden to, you know, submit a proposed
6 injunction that makes sense for the Court to order, if it finds
7 that they have met the requirements for a preliminary
8 injunction.

9 But as far as what an order could look like, if the
10 plaintiffs were successful, in the defendants' view, the only
11 thing that would really make sense is an order that says the
12 agency has to set aside funds for Oklahoma if they are — if
13 they prevail on a final judgment.

14 This is just a preliminary injunction motion that we're
15 dealing with, so it doesn't make sense to have a declaration
16 that says the federal agency has to provide the funds now to
17 Oklahoma.

18 I would also just clear up a couple things. There was
19 questions about a five-year funding cycle. I think that's
20 referring to the continuation grants.

21 So all of the Title X are for one year at a time. Funding
22 is always given to all grantees one year at a time, but some
23 grantees are given a continuation grant, which means basically
24 that their application is approved for up to five years,
25 assuming they — you know, they still meet the requirements of

1 the program, they don't have to reapply each year for those
2 five years. And that's what Oklahoma had here, except for the
3 termination.

4 THE COURT: So the five-year cycle means every five
5 years, somebody comes in and does a big analysis of the details
6 of everything and if that's okay, then each of the succeeding
7 years is a more truncated procedure, I guess?

8 MR. CLENDENEN: No, Your Honor, I don't think that's
9 quite correct. It's really a matter of when the grantee has to
10 apply.

11 So in this case, Oklahoma applied I think in 2022, and
12 HHS, the federal agency, approved their grant application for a
13 continuation grant for five years, meaning that unless they did
14 something that made them not in compliance, they would continue
15 to get that grant funding for each of the next five years.

16 The funding still only goes out one year at a time, but
17 they would not have to reapply until five years down the road.

18 Also, I do want to address the April 1st deadline.

19 I think plaintiffs are correct when they say just as a
20 general matter that HHS usually obligates these funds on
21 April 1st and that they go out generally in July or August, but
22 by statute, the agency does have until the end of the fiscal
23 year to provide the funding.

24 So the only statutory requirement is that the funding go
25 out by September 30th. The April 1st deadline and the

1 July-August time frame is not set in stone. It can be
2 adjusted.

3 THE COURT: Well, does the pendency of the appeal have
4 any impact on this? I mean, have they somehow preserved their
5 rights to do something later?

6 MR. CLENDENEN: Your Honor, I'm not 100 percent sure,
7 but I don't think that the agency interprets the pendency of an
8 appeal to preserve funding, necessarily. The funding could
9 still go out, notwithstanding the fact that there's an
10 administrative appeal.

11 THE COURT: As I understand Mr. Hillis' argument, he
12 says part of the urgency or the magic on April 1 is that it's
13 not a matter of HHS potentially holding it, but it potentially
14 turning around and giving the money out to other grantees.

15 MR. CLENDENEN: Yes, Your Honor. And as a general
16 matter, that is usually the time frame that HHS would do that,
17 but it's not required by statute. It's not required by any
18 regulation either.

19 THE COURT: Are you telling me that HHS is committed
20 not to do it here?

21 MR. CLENDENEN: Your Honor, no, HHS isn't committed to
22 not -- not doing anything on April 1st. But --

23 THE COURT: Well, you're not doing much to allay their
24 panic, if you're not in a position to do that.

25 MR. CLENDENEN: Understood, Your Honor. I just wanted

1 to make the point that it's not necessarily going to happen.

2 THE COURT: All right.

3 MR. CLENDENEN: So first I'll address their statutory
4 claims.

5 The Court correctly adduced that — that their arguments,
6 at least with respect to Section 1008, are just a rehash of
7 their arguments from the *Ohio* case, to which Oklahoma was a
8 plaintiff.

9 That was a facial challenge, but they haven't raised any
10 sort of factual distinction that would take this case out of
11 the ordinary case that *Ohio* dealt with.

12 So as a matter of legal analysis, there's nothing in their
13 statutory arguments that wasn't addressed in *Ohio* or at least
14 that they couldn't have raised in the *Ohio* case.

15 The only sort of twist that they had is the Weldon
16 Amendment, which wasn't specifically raised in the *Ohio* case,
17 but they could have raised it.

18 Weldon has been around since I believe 2004. It hasn't
19 been changed, so there's no reason why Oklahoma couldn't have
20 raised it in that case. It's just another facial challenge
21 based on the statute. There's nothing about the as-applied
22 facts here that make it particular to the Weldon Amendment
23 arguments.

24 As the Court noted, they didn't raise it in their
25 complaint. They raised it only in their preliminary injunction

1 motion, which was filed after the *Ohio* decision came out. The
2 complaint was filed before the *Ohio* decision.

3 One note on the Weldon Amendment: Oklahoma and the
4 plaintiffs in the *Ohio* case did at one point in their briefing
5 say that they didn't think that states were covered by these
6 conscientious statutes and that states couldn't be healthcare
7 providers.

8 So the docket for the *Ohio* Sixth Circuit appeal is Case
9 Number 21-4235. And on Document Number 47, which I believe is
10 the brief of the appellants, they said that, "The district
11 court in that case doubted this constituted any irreparable
12 injury, noting that federal statutes protecting conscientious
13 and/or civil rights may exempt some, quote/unquote, providers,
14 from complying with the referral requirements," and they quote
15 the order. And then they say, "But the states are not
16 protected under any of those statutes. While individual
17 doctors working for the states might be, no statute would free
18 a government grantee from complying with the federal
19 requirement." So that -- they've already --

20 THE COURT: What about this regulation that Mr. Hillis
21 has referred to that I gather does refer to grantees?

22 MR. CLENDENEN: So, Your Honor, that's a different
23 regulation. That's part of the 2021 Rule. It's not part of
24 the Weldon Amendment, if I'm understanding what you're
25 referring to.

1 They talk about --

2 THE COURT: Well, I think he's talking about the part
3 he says is inconsistent with the other provisions of the rule,
4 but it's the --

5 MR. CLENDENEN: Yeah, where they say, "Objecting
6 providers or Title X grantees are not required to counsel or
7 refer for abortions," is that the part that?

8 So that comes from the 2021 Rule, 86 Fed. Reg. at 56,153.

9 So that sentence is a reference to objecting providers and
10 grantees, but as we just -- I just said, states can't be
11 objecting providers or grantees. They are not healthcare
12 entities that are protected by the Weldon Amendment.

13 The healthcare M.D.s are basically, you know, institutions
14 or individual providers. They can't be a government agency.

15 THE COURT: Let me ask: I was talking to -- at the
16 beginning of Mr. Hillis' presentation, I was walking him
17 through a timeline to try to get a sense of exactly when the --
18 you know, when the decision was made and what the decision was
19 to -- that became the basis for the termination.

20 And I guess it has to do with this -- the hotline or
21 whatever that was called, that at one point Oklahoma had said
22 we'll do the hotline, and then changed its mind and wouldn't.

23 Is the -- in terms of complying with the rule's
24 requirement that there be a referral on request, does HHS view
25 providing that link to the hotline as complying with that?

1 MR. CLENDENEN: Yes, Your Honor.

2 THE COURT: In other words, if you've done that,
3 you've done the referral?

4 MR. CLENDENEN: Yes, Your Honor.

5 And I would just add that it's at least unclear that doing
6 so, just providing the phone number, is a violation of Oklahoma
7 law. So it's, at the very least, not clear that providers in
8 the state couldn't comply with the requirements of the
9 regulation and with Oklahoma state law.

10 THE COURT: All right.

11 MR. CLENDENEN: I do also want to address the argument
12 about the regulation that the services be allowable under state
13 law. We addressed this on Page 13 of our brief. It's also
14 thoroughly discussed in the Tennessee opinion.

15 But the language of the part they're quoting under 42 CFR
16 Section 59.5(b) (6) says that each Title X project must affirm
17 that, "family planning medical services will be performed under
18 the direction of a clinical services provider, comma, with
19 services offered within their scope of practice and allowable
20 under state law, comma, and with special training or experience
21 in family planning."

22 So this is a change of language that also took place in
23 the 2021 rule, the same rule that's being challenged here.

24 Where it says "clinical services provider," that had
25 previously said "physician." And the change to add -- to

1 change it to "clinical services provider" and then add the
2 phrase "allowable under state law" was meant to be an expansion
3 to allow for providers to be a physician -- sorry -- a
4 physician's assistant or a nurse practitioner or anyone along
5 those lines, if they're allowed to practice medicine under
6 state law.

7 It's not meant to be an expansion of the program that
8 services always has to be allowed under state law. It just
9 refers to whether or not the provider is, you know, basically
10 medically certified to provide these services under state law.

11 And the Tennessee court addressed this and it found that
12 the regulation unambiguously means what HHS is saying it means,
13 but even if the Court thought it was ambiguous, it would be
14 subject to a *Kisor* deference, which also referred to as *Auer*
15 deference.

16 THE COURT: That's the deference -- *Auer* deference,
17 that's the one I had not at least seen it described that way
18 before.

19 MR. CLENDENEN: Yes, Your Honor. *Auer* deference has
20 been around for a few decades, I'm not sure exactly what year
21 it was, and then in 2019, the Supreme Court reaffirmed it in
22 *Kisor v. Wilkie*, which we cite in our brief.

23 Also for the Spending Clause analysis, I'm happy to answer
24 any questions the Court has about that. But I do think the
25 Tennessee court got it 100 percent correct in that case and it

1 would be the exact same analysis here.

2 Again, it's just a facial challenge. Oklahoma could have
3 raised it in the Sixth Circuit case in -- or sorry, in *Ohio*.
4 They didn't do so. It's a facial challenge. There's no
5 difference between this argument and what Tennessee addressed.

6 But if there's any questions on that, I'm happy to.

7 And then just a couple of other points on that.

8 At one point the plaintiffs, I think they said there's no
9 *Chevron* deference in an as-applied challenge. I didn't see
10 that raised anywhere in a brief and I don't believe there's any
11 citation to that argument. I don't believe that's correct.
12 *Chevron* deference is the framework, whether it's an as-applied
13 challenge or a facial challenge.

14 The *Ohio* decision already applies *Rust*, which is a *Chevron*
15 case, and it would be the same here as it is in *Ohio*.

16 Also, it seemed as though the plaintiffs were trying to
17 raise a nondelegation challenge, basically saying that a
18 statute is unconstitutional if it delegates legislative power
19 from Congress to an agency. That's not raised in the complaint
20 or any of their briefing.

21 So if that's -- the Court shouldn't entertain the claim,
22 since it wasn't raised, but to the extent that the Court is
23 interested in the merits, the Tennessee opinion does address
24 this in a footnote also.

25 I'm happy to address any other points the Court has, but

1 otherwise, I would rest my time.

2 THE COURT: Well, I do have, I guess, one further
3 question, and that has to do with the hotline thing.

4 If somebody calls the hotline --

5 MR. CLENDENEN: Yes, Your Honor.

6 THE COURT: -- who is on the other end of it and what
7 do they learn?

8 MR. CLENDENEN: Your Honor, I'm not entirely sure who
9 is answering the phone. I do know it's out of state. It's not
10 located in Oklahoma.

11 They are given nondirective counseling on all options,
12 which is exactly what the HHS regulation says.

13 So if a patient calls and says, I'm pregnant, what are my
14 options? They will give nondirective counseling about prenatal
15 care, adoption, foster care, that sort of option, and also
16 pregnancy termination.

17 It's nondirective, meaning they're not pushing one option
18 or another. They're just giving neutral, factual information.

19 If the patient is interested in, you know, abortion, any
20 questions, the person on the phone would very likely say, Well,
21 there's no providers in the state of Oklahoma because it's not
22 legal there, but Kansas and Colorado have providers.

23 And then if the patient requests for a referral, then the
24 person on the hotline would give a referral. Again, it's not
25 directive. They're just basically providing address and phone

1 number. They're not setting up transportation or anything like
2 that. They're just giving the address and phone number for a
3 provider that would give those services.

4 THE COURT: This is your chance.

5 MR. CLENDENEN: Your Honor, I think I covered
6 everything.

7 Again, the Tennessee opinion goes through basically all
8 the same arguments and there's no reason why the Court should
9 reach a different result.

10 THE COURT: All right.

11 Anything else you want to add, Mr. Hillis?

12 MR. HILLIS: I do. That may not surprise you.

13 THE COURT: I'll give you 45 seconds to wrap it up.

14 MR. HILLIS: I'll confine myself to two points. I
15 won't get it done in 45 seconds, though.

16 The issue in front of Your Honor is weighty and unique,
17 because what you're being asked to do is to do something that
18 only one court to date that we've been able to determine has
19 done. And that is to hold that a general delegation to an
20 agency includes legislative powers.

21 Approximately nine days ago, there were zero authority for
22 that, and I'm guessing when Judge McDonough issued his opinion.

23 But before his, the government couldn't cite you a case
24 that says that a general delegation suffices under the law to
25 allow them to attach funding conditions that are clearly sans

1 the statute.

2 So that's the issue that they're asking you is to follow
3 Judge McDonough.

4 THE COURT: But how do you say here that it's clearly
5 sans the statute, when the --

6 MR. HILLIS: *Rust*.

7 THE COURT: -- when the statute that applies to Title
8 X says we're going to do a grant program designed to enhance
9 family planning services, and you're saying unless every single
10 element of what constitutes a family planning service is not
11 spelled out in the statute, it's not valid?

12 MR. HILLIS: No. What I'm saying is when the Supreme
13 Court has said explicitly that 1008 Title X does not have a
14 referral mandate, that that is insufficient to allow an
15 as-applied challenge under Article I, Section 8 of the United
16 States Constitution.

17 And just so you'll know, on page 25 is the -- one of these
18 delegations was found by Morrissey to be not sufficient and then
19 one is in Title X.

20 (Reading:) Providing that grants shall be subject to
21 conditions as the Secretary may determine to be appropriate to
22 assure that such grants will be effectively utilized for the
23 purposes for which made, that's Title X.

24 And the one that was not found appropriate, (reading:) The
25 Secretary shall have the authority to issue such regulations as

1 may be necessary or appropriate to carry out this section.

2 There's no difference between those two. There's no --
3 no. No material difference between those two.

4 And very clearly, the law before Tennessee was that a
5 general delegation to the agency does not allow it to deny
6 funding under Article I, Section 8 under the power of the purse
7 because that is quintessentially a legislative function.

8 The other issue -- so if you'll just look at those two and
9 recognize that there's no published authority. And I'm
10 assuming Judge McDonough has not published his case, but if it
11 is, he's the only one.

12 And that ought to give you great pause when the referral
13 requirement -- I don't want to demean it, so I'm trying to
14 choose -- is picayune compared to all the services that
15 Oklahoma offers with Title X funds.

16 And literally, it is score keeping by the federal
17 government. It's, State of Oklahoma, you're going to bow to
18 our wishes. Not that that materially helps anybody, because
19 anyone with Google and an iPhone can just Google abortion
20 providers.

21 And so that's what we're talking about. They're denying
22 \$4.5 million in funding to Oklahoma just because we won't hand
23 out a card to give the authority of the State to say, here's
24 your abortion referral.

25 Doesn't matter all the other great things that we can do

1 with this money to the people of the state of Oklahoma. That's
2 the singular reason.

3 And so that's why you need to pay really attention --
4 close attention and determine does the Secretary have the
5 authority for that picayune of an issue to deny Oklahoma its
6 Title X funds.

7 The other issue I want to hit just real quickly, and I
8 know I'm going a little long, but I like Mike and he does a
9 good job and I do want to say it's been a pleasure working with
10 the DOJ. I had my fears, but they've been nothing but
11 collegial and cooperative and I appreciate that.

12 But he made a comment that I think ought to be impactful
13 to you --

14 THE COURT: He didn't say you had been nice to him.

15 MR. CLENDENEN: They have been nice, Your Honor, yes.

16 MR. HILLIS: It depends on your ruling, Judge.

17 THE COURT: He's not standing up, even now.

18 MR. HILLIS: There was a joke I'm glad I didn't tell.

19 This table knows it.

20 When he candidly admits to say it's not clear that
21 Oklahoma law prohibits referrals, that's telling. Because that
22 impacts allowable under state law.

23 And surely, an agency should not be allowed to force a
24 Title X requirement that even potentially is not allowable
25 under state law. There's, at a minimum, litigious uncertainty

1 whether a referral is authorized under Oklahoma law. And with
2 that, the agency was duty-bound to exempt Oklahoma because of
3 that litigious uncertainty.

4 THE COURT: Do you think the federal government is
5 obliged to not impose any condition that might even relate to
6 an area where there is litigious uncertainty?

7 MR. HILLIS: When their regulation that they're
8 foisting on us says services have to be allowable under state
9 law, that's the tension. It's not just a general Oklahoma is
10 bigger than the feds, because we're clearly not.

11 But when their very regulation that they're trying to
12 foist on Oklahoma says services must be allowable under state
13 law, that if there's litigious uncertainty there, then they
14 should say there's litigious uncertainty there, then you have
15 to go back to is the funding requirement unambiguously clear.

16 It's not unambiguously clear, because he said it was not
17 clear whether referrals are prohibited by Oklahoma law.

18 So that right there, even if they had the legislative
19 mantle that they could use the power of the purse, that
20 uncertainty in and of itself mandates that they cannot require
21 Oklahoma to refer for abortions lawfully.

22 And we would request the Court enter a preliminary
23 injunction in this case that says that HHS is prohibited from
24 using the abortion referral as a requirement that denies
25 Oklahoma participation in Title X funding.

1 So I do appreciate the time and attention of the Court and
2 thank you, Your Honor.

3 THE COURT: Well, this is certainly an involved set of
4 issues that we're dealing with here, and offhand, I don't know
5 of any set of public policy questions that's any more
6 contentious probably than ones involving the abortion issue
7 that's played out in multiple ways over the last, what, 30 or
8 40 years.

9 I saw in the paper that I think the Supreme Court was
10 today entertaining oral argument on some other aspect of the
11 same general topic, so it continues to be a very contentious
12 matter. And it's been helpful to me to have the comments of
13 the parties, in addition to the extensive written work product
14 that you've submitted.

15 I debated whether to, you know, attempt to generate a
16 lengthy written order or simply to tell you what I'm inclined
17 to do. I think I am in a position basically to tell you here
18 what -- the way I see the issue. I do that partly because
19 we're getting up here very close to the end of March.

20 There does appear to be some urgency from the State's
21 standpoint to have either a favorable determination from me or,
22 presumably, an opportunity to seek relief from the appellate
23 courts before the April 1st deadline runs.

24 And so I think it makes sense for me to go ahead and
25 essentially rule now as to the pending motion.

1 The pending motion, of course, is one for preliminary
2 injunction that requires Oklahoma to establish the elements
3 that we are, I think, all familiar with in general.

4 One's the likelihood of success on the merits that there's
5 irreparable injury if the injunction is not issued, a judgment,
6 that the threatened injury to, and this state, the State, would
7 outweigh any injury to the federal government if the injunction
8 was not issued, and then finally, the requirement that it be
9 not contrary to the public interest to issue the injunction.

10 There is, I think, some of the cases indicate that when
11 we're dealing with a situation like this one where the
12 injunction is sought against the federal government, the
13 elements relating to balancing the injury and the public
14 interest essentially merge. And I do think that ultimately
15 what we're talking about here is the interest of both the
16 federal government and the State in getting, you know, a proper
17 application of the law.

18 So I don't know that the -- either of those factors cut
19 significantly in either direction, although I would say that
20 were I evaluating or to the extent that I'm evaluating the
21 threatened injury to the State of Oklahoma from nonissuance of
22 the injunction, that among the things that jumps out at me is
23 that the State's position here is ultimately premised on what
24 it says Oklahoma law requires. That is, apparently, the basis
25 for the change of position that Oklahoma took in the course of

1 the grant administration process. And, frankly, it is my view
2 that that is simply overblown.

3 I have an extraordinarily difficult time seeing how the
4 implementation of the referral process as contemplated by the
5 regulation here could translate into a violation of Oklahoma
6 law.

7 Essentially, it seems to me what that says, if that is
8 true, that means that it would violate the Oklahoma statute
9 which bans, essentially, urging someone to get an abortion.
10 For a department of health worker to say to the client sitting
11 across the table, once they request information on abortion and
12 they say, Well, it's not legal in Oklahoma, but if you want to
13 look at other options, call this number. I cannot believe that
14 any serious prosecutor would think that warranted prosecution
15 under the statute.

16 And it seems to me the consequence of that is that this is
17 not a situation where Oklahoma's position is driven by what the
18 law compels it to do, but it's rather the policy basis for why
19 Oklahoma would rather not do it.

20 And wanting to not do it is not to me quite the same thing
21 as saying that it would be conduct that would violate the law
22 if they did.

23 So I do think that it seems to me that the posture that
24 Oklahoma finds itself in here is at least, in part, a matter
25 of -- it's a circumstance of its own choosing. Because it

1 would appear to me that there is a path that was always
2 available to Oklahoma whereby it could comply with the
3 provisions of the grant process and do so without requiring
4 anybody to violate Oklahoma law.

5 So as I say, that, I suppose, impacts my assessment of the
6 relative harms here and to some degree it impacts, I suppose,
7 some of the likelihood of success arguments.

8 But as I say, it does seem to me that to the extent it's
9 premised on the assumption that the limited referral
10 contemplated here by the regulations would violate Oklahoma
11 law, let's just say that's less than obvious to me and that
12 impacts some of the rest of this as well.

13 The element of the -- whether irreparable injury has been
14 shown or not, I think to the extent that is the basis for it,
15 that I think Oklahoma's made a sufficient showing here of
16 irreparable injury.

17 As Mr. Hillis points out, the *Ohio* case concluded that,
18 involving less money than is involved here. And, frankly, I'm
19 reluctant to accept the federal government's invitation to say
20 that \$4.5 million isn't substantial enough to worry about.

21 I'm reminded of the comment of some senator a few years
22 ago, he said, you know, you start talking about this budget
23 stuff, you got a billion here and a billion there and pretty
24 quick, you're talking about real money.

25 Well, you know, this isn't billions, but it seems to me,

1 for purposes of sufficient showing of irreparable injury, that
2 4.5 million is enough.

3 But, of course, as is often the case in these sorts of
4 circumstances, the challenge, it seems to me here, ultimately
5 turns on or disposition of the motion turns on the question of
6 the likelihood of success on the part of the State.

7 It strikes me that in making that determination, I mean,
8 there's been reference made to things that are unique about
9 this litigation. It seems to me that there are at least a
10 couple of things that are unique about it that are not involved
11 in your average, you know, fighting over who's got the
12 authority to do what between units of government.

13 One is the fact that there has already been litigation
14 between the parties on substantially the issues arising out of
15 this same dispute. And, of course, I'm talking about the
16 litigation that resulted in what we've referred to as the *Ohio*
17 case, *Ohio v. Becerra*, the Sixth Circuit case.

18 Ordinarily, a Sixth Circuit opinion wouldn't be binding on
19 me. It isn't binding here, I suppose, in the sense that a
20 Tenth Circuit decision would be, but it seems to me that it
21 does implicate, because Oklahoma was a party there, that it
22 limits what they're in a position to come here in a second
23 court and re-litigate.

24 Whether it's -- you refer to it as *res judicata* or claim
25 preclusion or whatever, it seems to me the rule rather clearly

1 is that to the extent that the particular claim was litigated
2 in a prior forum, that the State is precluded by the doctrine
3 from re-litigating it here, which is to say that they're not in
4 a position to either, you know, reargue the same argument that
5 was made there or to raise other theories that might ultimately
6 support the same claim.

7 So it seems to me that res judicata claim preclusion does
8 preclude at least part of the arguments that the State is
9 relying on here, particularly those where there are, you know,
10 comments like the statute doesn't even authorize this kind of a
11 regulation or something.

12 It seems to me that those are the kinds of arguments that
13 are essentially precluded by the litigation that has already
14 occurred between the parties.

15 Now, I do recognize that the *Ohio* case involved a facial
16 challenge to the regulation. And that the focus there was on
17 the 1008 language, but it does seem to me that in terms of how
18 the doctrine of res judicata claim preclusion applies, that to
19 the extent we're talking about a facial challenge to the
20 regulation, that the *Ohio* decision would preclude re-litigation
21 on any theory that was advanced or that might have been
22 advanced, at least to the extent that it's the basis for a
23 facial challenge.

24 And as I say, I think some of the arguments that have been
25 made here today essentially are that. They're a facial

1 challenge that's barred by the litigation that has already
2 occurred, like, for example, whether they have exceeded their
3 authority by issuing this regulation at all or whether the
4 counseling requirement's outside the scope of Title X.

5 I mean, those are, in my view, facial-type arguments and I
6 don't think you can avoid the impact of just -- just by saying,
7 well, we're doing it as-applied.

8 You know, certainly, the application of any rule has
9 consequences, but if it, at a fundamental level, is going to
10 facial attack, then I think it's precluded for that reason.

11 The other thing that strikes me as being unique about the
12 circumstances here is that we're not dealing with a regulation
13 that just got thought up in 2021 or 2022, whenever the current
14 version of the rule was adopted.

15 We're dealing with an area of the law that has obviously
16 reflected the substantial pulling and hauling that's been going
17 on for 30 years over this difficult issue of abortion. And the
18 question of the kinds of requirements that are to be imposed in
19 connection with this grant program have changed over time.

20 The *Ohio* court, of course, describes in some detail that
21 history. I won't repeat it here, other than to acknowledge
22 what I think we're all aware of. And that is that depending on
23 which administration was in the power, the regulatory -- or the
24 regulations pursuant to Title X have varied in their treatment
25 of the counseling requirement and the provision of information

1 that would potentially be the basis for referral. Sometimes
2 it's been required, sometimes it's been prohibited.

3 And I think what is clear from *Rust* is that at least to
4 the extent that we're tying it to the language of 1008, we're
5 dealing with an ambiguous area where *Chevron* deference applies.

6 But I do think that the fact that we have this lengthy
7 history of prior incarnations of substantially the same
8 requirements, as are now at issue in this case, translates into
9 making it a very difficult lift for the State to come in and
10 show arbitrary and capricious regulations when it has that
11 history.

12 I understand there are a couple of aspects that have been
13 mentioned here this morning that maybe differ from it, but at
14 least in terms of the fundamental underlying requirement for
15 the — imposing a condition on the Title X grant that the
16 grantee has to be providing this nondirective information and
17 potentially referral information on request, that's not new.
18 It's not something that is, it strikes me as being, you know,
19 something new and exotic.

20 So I think, as I say, the fact that we have that history
21 makes the whole lift that Oklahoma's attempting here a very
22 difficult one.

23 But that said, I think ultimately evaluating the
24 individual arguments that Oklahoma's offered here on balance, I
25 simply am not persuaded that Oklahoma has a reasonable prospect

1 of prevailing on these arguments.

2 The arguments about the Spending Clause that Mr. Hillis
3 has referenced, I confess I am thoroughly unpersuaded by.

4 We're dealing here not with simply a matter of random
5 delegation of legislative authority, but we're dealing with a
6 grant program. We're dealing with a grant program in a
7 particular context and for a particular purpose where Congress
8 has specifically said that we expect the agency to promulgate
9 rules to flesh it out.

10 I don't think, as I read the cases, that in those
11 circumstances, that the -- whether it's the Spending Clause or,
12 frankly, I'm not sure we're talking about the same thing when
13 we're talking about the Spending Clause versus a nondelegation
14 doctrine. I suspect those may be different.

15 But, in any event, I'm unpersuaded by that argument. I
16 mean, the cases that talk about the Spending Clause issues
17 recognize that the notice to the -- essentially they say, look,
18 if they're going to be conditions imposed on a grant, or on
19 federal spending, that the State is entitled to know what those
20 conditions are. You can't mousetrap the State or another
21 grantee by imposing them after the fact.

22 Here, it seems to me, there's no serious argument to be
23 made that the State of Oklahoma didn't know what the conditions
24 were that the HHS folks were going to insist on as a basis for
25 participation in the grant program.

1 The State, of course, had, as I understand it, commented
2 on the regulations. They had at some point got involved in the
3 *Ohio* litigation to challenge it. And the regulations
4 themselves, in terms of the particular requirement that's at
5 issue here, the counseling and referral part, was clearly in
6 place at the point where the grant application process went
7 forward.

8 The cases, as I read them, say that in terms of putting
9 the State on notice of what the conditions are, those can come,
10 not only from the statute, but from the regulations pursuant to
11 the statute.

12 And so it seems to me that the -- that this is simply not
13 a circumstance where the State can plausibly say, Well, gee,
14 we've been subjected to these conditions when we didn't know
15 what the deal was.

16 What the deal was has been obvious, it seems to me. The
17 State doesn't agree with those conditions, and certainly that's
18 -- they're certainly entitled to take a different view. But
19 that, it seems to me, is something different than saying, Well,
20 we were sufficiently mousetrapped by the conditions, that we
21 ought to be relieved from them now, even though we don't comply
22 with them.

23 So it seems to me that the Spending Clause argument
24 doesn't hunt -- and I frankly think that is probably one that
25 we don't even need to get into the weeds on it, because to the

1 extent that the argument is that regulations on these kinds of
2 things go beyond the -- what's permitted by the Spending Clause
3 or what's permitted by the delegation -- the nondelegation
4 doctrine, it seems to me that's facial in nature. That goes to
5 whether the regulations can properly approach it at all.

6 And as I said earlier, if it is essentially a facial
7 challenge, it seems to me that's precluded by *Ohio* and the
8 particular litigation context that we've got here.

9 I think to the extent that the State is relying here on an
10 argument that it violates Title X itself, I assume that's
11 essentially an argument about 1008 and that, of course, is
12 exactly what *Ohio* addressed and resolved.

13 And I don't see anything about the circumstances here that
14 in terms of it being -- the fact that it's been applied here,
15 if the underlying objection to it is facial in nature, I don't
16 think you create an opportunity to re-litigate it based on
17 that.

18 So at any rate, it seems to me that the *Ohio* litigation
19 has already concluded that the particular regulation that we're
20 dealing with here is within the scope of what's permissible as
21 against the language of Title X itself.

22 With respect to the termination being based -- or being
23 contrary to the provision of the Weldon Amendment, that is
24 maybe a closer question, just because some of this is not as
25 clear, I think, as some of the other provisions. But I am

1 frankly not persuaded that the State can establish that one,
2 either.

3 The question I think is essentially one of whether or not
4 the various provisions of -- well, whether the language in the
5 appropriation bill saying that there can't be discrimination
6 against a healthcare entity that refuses to refer for abortion,
7 I think the question there is a threshold matter as what
8 constitutes a healthcare entity.

9 Mr. Clendenen says, well, that means the provider of the
10 services. I frankly think that is probably the more plausible
11 interpretation of that than to say that the State can object.

12 It strikes me as a very substantial step to say
13 essentially that a state can get the benefit of what's
14 essentially a conscience-protecting kind of amendment just
15 because the particular regulatory requirement is contrary to
16 state policy.

17 I -- from what I have seen of the history of that
18 regulation, it does appear to be focused essentially on
19 assuring that providers are not required to perform some --
20 either perform an abortion or refer -- do something related to
21 abortions contrary to their own conscience or religious beliefs
22 or whatever.

23 And it does seem to me that that's something different
24 than what we've got here, which is essentially the State
25 saying, look, we see -- we prefer a different policy and we

1 don't want to follow it because it conflicts with state policy.

2 So I am skeptical whether the State can ultimately
3 establish that as a basis for showing the Weldon Amendment is
4 somehow eliminating the need for the State to comply with or
5 making it improper for HHS to insist on compliance with the
6 referral portion of that.

7 Again, with the Weldon Amendment, I can't help thinking
8 that, frankly, at least in part, that's in the nature of a
9 facial challenge, more than it is in substance an as-applied
10 challenge.

11 But to the extent that it is as-applied, in the sense that
12 the feds are applying requirement to require the State to at
13 least give a potential -- to give the pregnant woman
14 information via a hotline, it seems to me that, if anything,
15 that as-applied approach to the regulation is a more forgiving
16 standard in terms of what it's requiring from the State than
17 might arguably be required by the regulation.

18 I mean, to be sure the regulation itself says nondirective
19 information, suggesting that it can't be, you know, somebody
20 campaigning for an abortion or trying to urge somebody to do
21 it. But it does seem to me that, you know, the feds might
22 plausibly seek more than just giving out a phone number.

23 But, ultimately, it appears that the circumstances here
24 are simply by supplying a phone number, the State could meet
25 its referral obligations, as contemplated by the grant terms.

1 And so it seems to me that even to the extent that we try
2 to apply the Weldon Amendment beyond that to in some as-applied
3 circumstance, that you have a hard time translating that into a
4 violation here.

5 That leaves, finally, the issue of whether or not this
6 regulation is -- and particularly its application to Oklahoma
7 through the termination for failure to do referrals, is
8 arbitrary and capricious under the APA.

9 It seems to me that, as I said at the outset, that in
10 terms of the explanation for the particular requirement that
11 the rule's explanation of it is ample. It's more or less the
12 same rationale that was in place for, what was it, '81 to
13 '89 or whatever the time period was, where essentially the same
14 rule was in place.

15 I certainly recognize that there are respectable different
16 views as to what the best regulation should be or what a good
17 regulation would be as it applies to this issue, and it's
18 obviously changed over the years, but to suggest that the
19 present regulation is arbitrary and capricious I think simply
20 falls short.

21 The explanation has been given in the order continuing the
22 rules as to the basis for it. It seems to me that is plainly
23 within the scope of the agency's discretion to make that.

24 I don't think it -- that to say, well, that there's
25 litigious uncertainty about it; that's not the test for whether

1 it's arbitrary and capricious. There's plenty of litigious
2 uncertainty about everything.

3 It does not translate into a basis for concluding here
4 that the particular regulation was arbitrary and capricious.

5 The Tennessee case that the parties have referred to, I
6 think goes into more detail in terms of the history of the rule
7 and so on and I'm -- I am in substantial agreement with that
8 case's treatment of the arbitrary and capricious issue.

9 To the extent that the State here is relying on the
10 language in the rule that talks about the allowable under state
11 law provision, it does seem to me that it most plausibly makes
12 sense to understand that as relating to the professional
13 qualifications of the providers that are involved, simply
14 because that's a construction of it or an interpretation of it
15 that avoids the conflict that arguably would otherwise exist
16 with the other provisions.

17 I think under the various deference standards that apply
18 to particularly an agency's interpretations of its own
19 regulations, as opposed to interpretation of a statute, *Chevron*
20 is -- *Chevron* is interpreting regulations based on a statutory
21 command.

22 We're talking here about whether a -- the HHS's
23 interpretation of the regulations, of their own regulations is
24 entitled to deference and it seems to me that it is. Which is
25 to say that the language that appears in -- that's been

1 referred to about allowable under state law doesn't have the
2 meaning that the State would prefer to attach to it here, so as
3 to suggest some general requirement that state law is going to
4 generally trump all other regulatory provisions that might
5 apply.

6 So, in any event, it does seem to me that on multiple
7 grounds, that the State is unlikely to be able to prevail here,
8 and as a result, I'm going to deny the request for a
9 preliminary injunction.

10 What I would ask is that -- I don't know precisely how the
11 parties will go forward in light of this determination. I
12 assume the State will seek some kind of relief from the
13 circuit. If you do, then, obviously, that will govern the
14 direction in which the case goes forward, consistent with what
15 the circuit decides.

16 If you decide not to do that or the circuit denies relief,
17 then I would like the parties to think through where that
18 leaves us. If there is magic to this April 1st deadline and it
19 isn't met, for whatever reason, does that make the case moot or
20 not? I don't know. It simply potentially impacts how we go
21 forward as a scheduling matter with the balance of the case.

22 So what I would ask is that the parties file something
23 within the next let's say three weeks to give me your
24 respective positions as to how we go forward, if at all here,
25 in light of whatever you may seek from the circuit or whatever

1 they may do in the meantime.

2 Questions from the parties or anything further that we
3 need to address while we're here today?

4 MR. HILLIS: I take it there is going to be some sort
5 of written order, but --

6 THE COURT: What I anticipate doing is simply an order
7 that says it's denied for the reasons that I've said here
8 today.

9 MR. HILLIS: Okay. Can I order the transcript then
10 now or do I --

11 THE COURT: Now or when, I think you're entitled to a
12 transcript, so we'll see that you get one.

13 MR. HILLIS: I do appreciate it.

14 THE COURT: Anything else?

15 MR. HILLIS: I think we can be can beat the three-week
16 deadline, Your Honor.

17 THE COURT: All right.

18 Anything else? All right.

19 Court's in recess.

20 (Adjourned.)

21

22

23

24

25

1 CERTIFICATE OF OFFICIAL REPORTER
2

3 I, Susan J. Fenimore, Federal Official Realtime Court
4 Reporter, in and for the United States District Court for the
5 Western District of Oklahoma, do hereby certify that pursuant
6 to Section 753, Title 28, United States Code that the foregoing
7 is a true and correct transcript of the stenographically
8 reported proceedings held in the above-entitled matter and that
9 the transcript page format is in conformance with the
10 regulations of the Judicial Conference of the United States.

11 Dated this 29th day of March, 2024
12
13

14 /s/SUSAN J. FENIMORE

15 Susan J. Fenimore, CSR, RPR, FCRR
16 Federal Official Court Reporter
17
18
19
20
21
22
23
24
25

EXHIBIT 5

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

1. STATE OF OKLAHOMA

Plaintiff,

v.

1. UNITED STATES DEPARTMENT
OF HEALTH AND HUMAN
SERVICES;

2. XAVIER BECERRA, in his official
capacity as the Secretary of the U.S.
Department of Health and Human
Services;

3. JESSICA S. MARCELLA, in her
official capacity as Deputy Assistant
Secretary for Population Affairs; and

4. OFFICE OF POPULATION
AFFAIRS

Defendants.

Case No. 23-CV-01052-HE

**PLAINTIFF’S MOTION FOR PRELIMINARY INJUNCTION
AND OPENING BRIEF IN SUPPORT**

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INTRODUCTION

In 1970, Congress enacted Title X to provide federal funding for family planning services. Ever since, the United States has been funneling millions of dollars to states through Title X, including to high quality programs run by Plaintiff, the State of Oklahoma, through the Oklahoma State Department of Health (“Oklahoma,” “Health Department,” “OSDH,” or “State”). These programs have improved the lives of countless Oklahomans.

From the beginning, Title X has expressly prohibited Title X funds from “be[ing] used in programs where abortion is a method of family planning.” 42 U.S.C. § 300a-6 (Title X, § 1008). And beginning in 2004, the Weldon Amendment precluded any state from receiving Title X funds if they discriminate against health care entities who refuse to refer women for abortions. Nevertheless, in 2021, Defendants issued a new final rule that *requires* Title X programs to “[o]ffer pregnant clients the opportunity to be provided information and counseling regarding ... pregnancy termination.” 42 C.F.R. § 59.5(a)(5)(i)(C). Soon after, *Dobbs v. Jackson Women’s Health Organization* restored the authority of the people and their elected state representatives to regulate abortion. Several Oklahoma laws then took effect, making it a crime to advise or procure an abortion for any woman, except to preserve her life, and instructing that no Oklahoma person or health care facility can be required to participate in any abortion unless the mother’s life is at stake.

Defendants have now terminated Oklahoma’s Title X funding solely because Oklahoma will not provide counseling or referrals for abortion. This decision violated Title X, the Weldon Amendment, the Administrative Procedures Act, the Spending Clause, and more. As such, it should be enjoined immediately to protect Oklahoma and Oklahomans.

BACKGROUND

I. Oklahoma Has Successfully Managed Title X Funding for Decades.

Oklahoma has participated in Title X's voluntary family planning projects for over fifty years, offering the State's most vulnerable citizens "a broad range of acceptable and effective family planning methods" that includes natural family planning, infertility, and services for adolescents. At no point since Oklahoma began participation in the federal program in 1971 has Oklahoma's funding received adverse treatment. Declaration of Tina Johnson, attached as Exhibit 1, at ¶ 8. Until now, that is.

The Health Department uses the Title X grant to disperse funds through 68 county health departments ("County Partners"), who provide critical public health services to rural and urban Oklahoma communities. *Id.* at ¶ 12. These County Partners are a part of the front-line of women's health in Oklahoma, and aim to provide comprehensive, connected care to all patients they serve. *Id.* at ¶ 12, 15. The Health Department has also contracted with the Oklahoma City-County Health Department and the Tulsa County Health Department ("City-County Partners") to ensure family planning services are available in Oklahoma's most heavily populated counties. *Id.* at ¶ 13.

The impact of depriving those communities and populations of Title X services cannot be understated. In many instances, particularly in rural Oklahoma communities, the Health Department and County Partners may be one of the only access points for critical preventative services for tens or even hundreds of miles. *Id.* at ¶ 18. Some of these same rural communities may not have a grocery store, let alone the presence of a full-time health

provider or women’s health provider. *Id.* Many patients the Health Department sees already have difficulty accessing the health care they need because of location, work schedules, and/or transportation issues. *Id.* at ¶ 18. Language can also create difficulties in providing services. *Id.* at ¶ 17. Thus, Oklahoma’s Title X program has access to 30+ different translators to assist with barriers to care.

In May 2016, HHS reviewed Oklahoma’s Title X program in person, concluding that it “supports excellent projects and activities.” *Id.* at ¶ 10. Indeed, HHS “applaud[ed]” Oklahoma’s “efforts to increase services and qualities throughout the system,” and its reviewers were “impressed with the dedication and commitment to family planning in both the central office staff as well as in the field.” 2016 Review, attached as Exhibit 2, p. 1. After complying with several recommended changes, Oklahoma’s program was approved, and HHS would not schedule a return visit until 2024. Exh. 1, ¶ 11. In March 2022, HHS awarded Oklahoma a Title X grant (FPHPA 006507), as it had done virtually every grant cycle since 1971. Notice of Award, attached as Exhibit 3.

II. HHS Has Promulgated Contradictory Regulations Throughout the Years.

From the beginning, Title X has expressly prohibited grant funds from “be[ing] used in programs where abortion is a method of family planning.” 42 U.S.C. § 300a-6. Despite this Congressional mandate, HHS has historically implemented contradictory rules and regulations for Title X, depending on the presidential administration. From the mid-1970s to the late-1980s, HHS permitted—and then in 1981 adopted guidelines requiring—Title X recipients to offer pregnant women “nondirective options counseling on pregnancy

termination (abortion) . . . followed by referral for these services if she so requests.” 53 Fed. Reg. 2922, 2923 (Feb. 2, 1988). *Id.*

In 1988, HHS changed course and issued a final rule prohibiting Title X providers from making referrals for or counseling women regarding abortion. *Id.* at 2945. HHS determined that these requirements were “more consistent with” the Title X provision prohibiting abortion funding. *Id.* at 2932. In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Supreme Court upheld HHS’s 1988 regulation. *Rust* held that HHS had permissibly justified its new rule on abortion referrals, which, the federal government had argued, was “more in keeping with the original intent of the statute[.]” 500 U.S. at 186-87.

But in 1993, HHS again reversed course and suspended the 1988 Rule. In 2000, HHS began requiring Title X recipients to make abortion referrals upon request from a patient. 65 Fed. Reg. 41,270. In 2004, however, Congress began including the so-called “Weldon Amendment” as an annual appropriations rider for every HHS appropriations bill. *See, e.g.*, Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, div. H, title V, § 507(d)(1), 136 Stat. 49,496 (Mar. 15, 2022). Per the Weldon Amendment, no HHS funds, which includes Title X funds,

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.

Id.

In 2019, in line with the Weldon Amendment, HHS promulgated *Compliance with Statutory Program Integrity Requirements*, 84 Fed. Reg. 7714 (Mar. 4, 2019) (“2019

Rule”). The 2019 Rule adopted much of the 1988 Rule that was upheld in *Rust*, including the prohibition on Title X grantees “perform[ing], promot[ing], refer[ing] for, or support[ing] abortion as a method of family planning.” *Id.* at 7788-90. HHS concluded that this approach reflects “the best reading of” Section 1008, “which was intended to ensure that Title X funds are also not used to encourage or promote abortion.” *Id.* at 7777. HHS determined that prior regulations “are inconsistent” with section 1008 “insofar as they require referral for abortion as a method of family planning.” *Id.* at 7723.

Finally, in 2021, HHS reversed course yet again, promulgating a regulation that it now claims requires abortion referrals. *See* 86 Fed. Reg. 56,144 (Oct. 7, 2021). Although contrary to Title X’s text and the Weldon Amendment, HHS’s 2021 Rule remains in effect today, and, pursuant to HHS’s interpretation, generally requires grantees like the Health Department to make abortion counseling and referrals available upon patients’ requests.

III. HHS Terminates Oklahoma’s Title X Funding Over Abortion Referrals.

In Oklahoma, advising or procuring an abortion for any woman is punishable as a felony. *See* 21 O.S. § 861. This statute came into effect immediately following the Supreme Court’s decision in *Dobbs*, which reversed *Roe v. Wade* and held that authority to regulate abortion must be returned to the people and their elected representatives. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 302 (2022). Exercising that right, the people’s elected representatives in Oklahoma have prohibited abortion except to preserve a woman’s life, and they have made it illegal to advise a woman to obtain an abortion. *See* 21 O.S. § 861. This law has been upheld by the Oklahoma Supreme Court. *See OCRJ v. Drummond*, 2023 OK 24, 526 P.3d 1123 (Okla. 2023).

Although 42 C.F.R. § 59.5(a)(5) holds that “[e]ach” Title X project should “[n]ot provide abortion as a method of family planning,” the Biden Administration re-added in 2021 that each project must nevertheless “[o]ffer pregnant clients the opportunity to be provided information and counseling regarding ... [p]regnancy termination.” *Id.* § 59.5(a)(5)(i). Then, after *Dobbs*, HHS indicated that it would require compliance with 42 C.F.R. § 59.5(a)(5)’s requirement of abortion referrals, regardless of any state laws that conflict with this requirement.

For its part, the Health Department reasonably concluded that it could not comply with 42 C.F.R. § 59.5(a)(5)(i)(c) if it required abortion referrals, because Oklahoma law makes it a crime for any person to advise or procure an abortion for any woman. Health Department Appeal Letter, attached as Exhibit 6. Nevertheless, the Health Department took several actions to find an agreeable solution that would allow the Health Department to continue receiving Title X funds while complying with Oklahoma law prohibiting abortions. *Id.* On August 29, 2022, the Health Department sought to modify its programmatic procedures to ensure compliance with Oklahoma abortion law, a modification that was denied by HHS on November 9, 2022. *Id.* The Health Department sought reconsideration of this determination on November 22, 2022. *Id.* The Health Department undertook extensive internal processes to determine how to comply with this HHS regulation and Oklahoma law through early 2023, but it was unable to find a solution. Exh. 1, ¶ 21.

On May 25, 2023, HHS sent a letter to the Health Department claiming the Department was in violation of Title X and out of compliance with the terms and conditions

of award FPHPA 006507, the “Oklahoma State Department of Health Family Planning Services Project” (the “Award”). HHS Suspension Letter, attached as Exhibit 4. The Award totals approximately \$4.5 million in funding—money that is relied on by the Health Department to provide critical health care services to Oklahoma citizens. Exh. 1, ¶ 9. Specifically, HHS determined that the Health Department was in violation of Section 59.5(a)(5)(i)(c) because the Health Department would not offer pregnant clients the opportunity to be provided information and counseling about abortion.

During its 2016 review of Oklahoma’s program, HHS specifically noted that “Title X grantees and sub-recipients must be in full compliance with Section 1008 of the Title X statute and 42 C.F.R. § 59.5(a)(5), which prohibit abortion as a method of family planning. Systems must be in place to assure adequate separation of any non-Title X activities from Title X project.” *Id.* HHS determined that this requirement was met by the Health Department’s Title X program. *Id.* HHS further noted that, “Oklahoma State Department of Health Maternal and Child Health policies and procedures, including the sub-recipient contract reviewed contain provisions prohibiting abortion as a method of family planning.” *Id.* at p.20, ¶ 8.2. The Health Department received notice that the Award would be terminated on June 27, 2023. HHS Termination Notice, attached as Exhibit 5. On July 27, 2023, the Health Department appealed that ruling, administratively. Exh. 6.

On or about September 22, 2023, while the Health Department administrative appeal was still pending, HHS announced supplemental funding, supposedly to support the provision of Title X services in Oklahoma. Funds that would previously have been directed to the Health Department were instead apparently reallocated to Community Health

Connection, Inc. and Missouri Family Health Council, Inc., a Missouri entity. Community Health Connection, Inc. was awarded \$216,000 in newly authorized federal funds, while Missouri Family Health Council, Inc. was awarded \$3,250,000 in supplemental funds. [HHS Grant Award Announcements, available at <https://opa.hhs.gov/about/news/grant-award-announcements/hhs-issues-11-million-supplemental-funding-support-provision>, last accessed January 24, 2024]

IV. Oklahoma Brings an As-Applied Challenge to the Title X Termination.

On November 23, 2023, Oklahoma filed this as-applied challenge to HHS's termination of Oklahoma's Title X funding based on HHS's 2021 Rule. *See Scherer v. U.S. Forest Serv.*, 653 F.3d 1241, 1243 (10th Cir. 2011). Oklahoma anticipates that HHS may attempt to rely on the Sixth Circuit's recent decision in *Ohio v. Becerra*, 87 F.4th 759 (6th Cir. 2023), to argue that these issues have already been decided. But *Ohio*, where Oklahoma was a plaintiff, was a *facial* challenge to the 2021 rule that did not consider the facts and circumstances of the decision at issue here. This as-applied challenge raises factual and legal issues that were not present in *Ohio*, such as the effect of *Dobbs*, the Spending Clause, and the Weldon Amendment. *Ohio* does not foreclose relief.

ARGUMENTS AND AUTHORITIES

To obtain a preliminary injunction, Oklahoma must show that: (1) it is likely to succeed on the merits; (2) it will suffer irreparable injury if the injunction is denied; (3) the threatened injury outweighs any injury to the opposing party; and (4) the injunction is not against the public interest. *Awad v. Ziriak*, 670 F.3d 1111, 1125 (10th Cir. 2012). Oklahoma meets all four requirements, and this Court should issue a temporary injunction.

Alternatively, this Court should postpone effectiveness of Defendants' action to terminate Oklahoma's Title X award pursuant to 5 U.S.C. § 705.

I. OKLAHOMA IS LIKELY TO SUCCEED ON THE MERITS.

Defendants' decision to terminate Oklahoma's Title X funding is unlawful. Under the Administrative Procedures Act ("APA"), courts are entitled to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. Courts may compel an agency action "unlawfully withheld" and "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] without observance of procedure required by law." *Id.* Here, Oklahoma seeks to set aside Defendants' termination decision and restore Oklahoma's Title X funding.

A. Defendants' Decision to Terminate Oklahoma's Title X Funding is Reviewable.

Defendants' decision to terminate Oklahoma's Title X funding is a final agency action subject to review by this Court. *Sackett v. EPA*, 566 U.S. 120, 127 (2012). While Oklahoma pursued an agency appeal prior to filing this action, and allowed HHS ample time to resolve that appeal, that appeal was not mandatory. *See Darby v. Cisneros*, 509 U.S. 137, 147 (1993); *State of Mo. v. Bowen*, 813 F.2d 864, 871 (8th Cir. 1987).

B. Defendants’ Decision to Terminate Oklahoma’s Title X Funding Violates the Spending Clause of the U.S. Constitution.

The Spending Clause provides that “Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to . . . provide for the . . . general Welfare of the United States. . . .” U.S. Const. art. I, § 8, cl. 1. The Supreme Court has recognized four restrictions on the ability of Congress to exercise power under the Spending Clause, the second of which is most prominent in this case: if Congress wants to place conditions on a state’s receipt of federal funds, it must do so unambiguously, so that states know the consequences of their decision to participate. *See Arbogast v. Kansas, Dep’t of Lab.*, 789 F.3d 1174, 1186 (10th Cir. 2015) (citing *South Dakota v. Dole*, 483 U.S. 203, 207 (1987)).

“The legitimacy of Spending Clause legislation,” “depends on whether a state voluntarily and knowingly accepts the terms of such programs.” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 522 (2012); *see also Deer Creek Water Corp. v. Oklahoma City*, 82 F.4th 972, 987–88 (10th Cir. 2023). Thus, while Congress may exert influence on states by conditioning funding on certain requirements, Congress must provide *clear notice* of the obligations imposed. *Arlington Cent. School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). “[L]egislation enacted pursuant to the spending power is much in the nature of a contract,” and therefore, to be bound by “federally imposed conditions,” recipients of federal funds must accept them “voluntarily and knowingly.” *Pennhurst State Sch. & Hospital v. Halderman*, 451 U.S. 1, 17 (1981) (emphasis added).

Ambiguity is critical in this context. “[A]gency-imposed grant conditions, even if they themselves are unambiguous, cannot be constitutional under the Spending Clause

unless the statute from which they originate is also unambiguous.” *Colorado v. U.S. Dep’t of Justice*, 455 F. Supp. 3d 1034, 1056 (D. Colo. 2020). And conditions imposed by an agency on grant funding cannot have been unambiguously authorized by Congress when the conditions were never statutorily authorized to begin with. *Id.* at 1056-57; *see also West Virginia ex rel. Morrissey v. U.S. Dep’t of the Treasury*, 59 F.4th 1124, 1147 (11th Cir. 2023) (stating that “the ability to place conditions on federal grants ultimately comes from the Spending Clause, which empowers Congress, not the Executive, to spend for the general welfare”). “Allowing an executive agency to impose a condition that is not otherwise ascertainable in the law Congress enacted ‘would be inconsistent with the Constitution’s meticulous separation of powers.’” *Morrissey*, 59 F. 4th at 1147 (citations omitted). “Therefore, the ‘needed clarity’ under the Spending Clause ‘must come directly from the statute[,]’” not from Defendants’ after-the-fact regulations. *Id.* (citations omitted).

Before terminating Oklahoma’s funding, Defendants placed a condition on Oklahoma’s receipt of Title X funding: the requirement to refer women for abortions. That condition was wholly absent from Congress’s statutory regime. Importantly, the Supreme Court in *Rust* specifically found that the Title X statute is ambiguous on the point of abortion referrals. *Rust*, 500 U.S. at 184 (finding that the statutory language of § 1008 “does not speak directly to the issues of counseling, referral, advocacy, or program integrity” and is therefore ambiguous); *see also Ohio*, 874 F.4th at 771 (reiterating *Rust*’s finding that the statute is ambiguous). And that was before Congress enacted the Weldon Amendment, which, if anything, clarified the Title X ambiguity *in Oklahoma’s favor*. *See infra* I(C).

Thus, Defendants wrongfully imposed their abortion referral requirement as a condition to Oklahoma's receipt of Title X funding.

Indeed, HHS itself has acknowledged that the Title X statute is silent and therefore *at best* ambiguous about abortion counseling and referrals. *See* 86 Fed. Reg. at 56,149. And since the statute is admittedly ambiguous (at most), Defendants' grant conditions cannot be constitutional under the Spending Clause. *See, e.g., Colorado*, 455 F. Supp. 3d at 1056. Without that *clear notice* from Congress itself, Oklahoma could not *voluntarily* and *knowingly* agree to that requirement as a condition to accepting Title X funding.

In sum, binding precedent holds that Title X is at most ambiguous on the issue of abortion referrals, and therefore the Spending Clause prohibits Oklahoma from being punished for not complying with Defendants' regulatory gloss. The Sixth Circuit's recent decision in *Ohio* says nothing to the contrary, since it did not involve a Spending Clause argument. Rather, the Sixth Circuit claimed, as a critical part of its analysis, that Title X is ambiguous on abortion referrals. *Ohio*, 87 F.4th at 765 ("In *Rust v. Sullivan*, the Supreme Court held that § 1008 is ambiguous as to ... referrals for abortion and that *Chevron* deference applies."). The ambiguity that the Sixth Circuit deemed as foreclosing the facial APA argument there counsels directly *toward* a Spending Clause violation here. Because HHS's decision to terminate Oklahoma's grant funding was based on a requirement that was not congressionally mandated and that Oklahoma never knowingly and voluntarily accepted, HHS's decision violates the Spending Clause. An injunction should therefore issue.

Moreover, as courts have recognized, “more is at stake when Congressional spending legislation threatens state sovereign interests” *Commonwealth of Kentucky v. Yellen*, 67 F.4th 322, 327 (6th Cir. 2023); *see also Planned Parenthood of Kansas & Mid-Missouri v. Moser*, 747 F.3d 814, 824 (10th Cir. 2014) (describing the “special nature of Spending Clause legislation” and explaining that “[i]n the federal-grant context, the State is more a partner than a subordinate of the federal government”), *abrogated in part on other grounds as recognized by Safe Streets All. v. Hickenlooper*, 859 F.3d 865, 905 n.16 (10th Cir. 2017). “In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.” *United States v. Bass*, 404 U.S. 336, 349 (1971). In this instance, Oklahoma’s sovereign interests in protecting unborn Oklahoma lives and in controlling criminal activities are directly impacted. First, under Oklahoma law, procuring an abortion for any woman is punishable as a felony. 21 O.S. § 861. This statute came into effect immediately following *Dobbs*, which held that the U.S. Constitution does not provide a right to abortion and that authority to regulate abortion must be returned to the people and their elected representatives. *See* 597 U.S. at 301-02 (holding that “respect for and preservation of prenatal life at all stages of development” is a legitimate state interest).

By terminating Oklahoma’s grant funds on the basis of its abortion laws and refusal to countenance referrals, without clear congressional authorization, Defendants have intruded upon Oklahoma’s sovereignty. Moreover, by awarding Oklahoma’s funds to an entity in Missouri, Defendants have willfully encouraged an entity to disregard Oklahoma

law. By awarding the Missouri Family Health Council funds to provide services in Oklahoma, HHS presumably expects and anticipates that entity will provide services in Oklahoma. HHS will also presumably condition Missouri Family Health Council's receipt of such funds on compliance with all of HHS's regulations, including 42 C.F.R. § 59.5(a)(5)(i)(c). To the extent that Missouri Family Health Council provides services in Oklahoma and provides pregnancy termination referrals, Missouri Family Health Council risks violating Oklahoma law.

Therefore, Oklahoma's sovereign interests are directly in play, and the lack of *clear notice* by *Congress* of any requirement to offer abortion counseling and referrals renders HHS's termination of Oklahoma's Title X funding violative of the Spending Clause.

C. Defendants' Decision to Terminate Oklahoma's Title X Funding Violates Title X and the Weldon Amendment.

HHS's decision to interpret its regulation as requiring the termination of Oklahoma's Title X funding violates federal law—specifically, it violates Title X and the Weldon Amendment. Again, the Weldon Amendment expressly *prohibits* Title X funds from flowing to States that discriminate against a “health care entity” that refuses to refer women for abortions. *See supra* p.4. A “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.” Pub. L. No. 117-103, div. H, title V, § 507(d)(2) (emphasis added).

The Weldon Amendment’s requirements plainly apply to Oklahoma, as a state. The Health Department administers the Title X family planning program in Oklahoma by dispersing funds through 68 county health departments that provide critical public health services to rural and urban Oklahoma communities. Exh. 1, ¶ 12. These County Partners *easily* meet the broad definition of “health care entities” set forth above. The Health Department is also a health care entity because it partners with and funds county health departments. *See* 45 C.F.R. § 88.2 (stating that “[a]s applicable, components of State or local governments may be health care entities under the Weldon Amendment . . .”). Thus, the Weldon Amendment applies here to prohibit Oklahoma from requiring these entities to provide referrals for abortions. Yet, that is exactly what Defendants are trying to coerce Oklahoma to do—require health care entities to refer for abortions, else risk losing millions in Title X funding. This is unlawful, whether it is construed as a violation of the Weldon Amendment itself or a violation of Title X as interpreted in light of the Weldon Amendment.

Incredibly, when enacting the 2021 Rule supposedly requiring abortion referrals, Defendants expressly *declined* to consider the impact of the Weldon Amendment. The relevant rulemaking stated as follows:

While the [conscience] statutes may at times interact with the requirements of Title X, interpreting these laws is beyond the scope of this rule and the HHS Office for Civil Rights (OCR) has been delegated authority to receive complaints under these provisions. . . .

Irrespective of the points made above . . . objecting individuals and grantees will not be required to counsel or refer for abortions in the Title X program in accordance with applicable federal law.

86 Fed. Reg. 56,153 (Oct. 7, 2021) (emphases added). So, despite having declined to analyze the Weldon Amendment, and despite indicating that “grantees will not be required to counsel or refer for abortions in the Title X program,” *id.*, Defendants have now discontinued Oklahoma’s funding because it declines to refer women for abortion. This is unlawful.

Put differently, under Title X Oklahoma must ensure that sub-grantees and recipients comply with all Title X regulations. *See* 86 Fed. Reg. at 56,152. Defendants’ decision to suspend and terminate Oklahoma’s Title X funding is based on Oklahoma’s failure to comply with HHS’s requirements in 42 C.F.R. § 59.5(a)(5). *See* Exh. 5 at 3. HHS contends that this regulation forbids Oklahoma from sub-granting to health care entities that will not refer for abortion. *Id.* at 5. This includes the County and City-County Partners that receive Oklahoma’s Title X funding. But to comply with Defendants’ regulation, Oklahoma is required to “discriminat[e] on the basis that the health care entity does not . . . refer for abortions,” which is directly prohibited by the Weldon Amendment. 136 Stat. 49,496 § 507(d)(2). As such, Defendants’ decision to suspend and terminate Oklahoma’s Title X funding is based on HHS’s requirement that Oklahoma comply with a regulation that violates federal law. Thus, Defendants’ decision should be set aside under the APA for the separate and independent reason that HHS’s action is premised on requiring a violation of federal law.

An alternative way of phrasing all this is to say that through the Weldon Amendment, Congress has made it clear that Title X is *not* ambiguous in regard to whether abortion referrals can be required of grantees. *Rust*, that is, cannot control an analysis of an

issue that did not yet exist when *Rust* was decided. Along these lines, it is important to observe that the Sixth Circuit in *Ohio* did not rule on any argument that the 2021 Rule violates the Weldon Amendment, because it was not raised by the parties in the briefing. *See* 87 F.4th at 774 n.8. The Sixth Circuit correctly observed, however, that “the 2021 Rule would seem to forbid states from subgranting to ‘health care entities’ who will not refer for abortion; that, in turn seems to force the States to ‘discriminat[e] on the basis that the health care entity does not . . . refer for abortions,’ the very thing the Weldon Amendment forbids.” *Id.* The Sixth Circuit hinted, in other words, that the Weldon Amendment could change its precedent-based analysis of *Rust*, *Chevron*, and Title X. Therefore, this Court should find that HHS’s decision to terminate Oklahoma’s Title X funding violates federal law, specifically in light of the Weldon Amendment.

D. DEFENDANTS’ DECISION TO TERMINATE OKLAHOMA’S TITLE X FUNDING EXCEEDS HHS’S STATUTORY AUTHORITY AND IS ARBITRARY AND CAPRICIOUS.

Here, Oklahoma challenges application of the 2021 Rule by HHS to terminate Oklahoma’s Title X funding. Again, this is an as-applied challenge to the 2021 Rule.

1. Defendants’ Termination of Oklahoma’s Title X Funding Overstepped the Agency’s Authority and is Not a Reasonable Interpretation.

Defendants’ decision to terminate Oklahoma’s Title X grant funding as a result of HHS’s regulation purportedly requiring abortion counseling and referrals is not within the bounds of reasonable interpretation and is therefore in excess of the statutory authority granted by Congress. Agencies are required to follow governing statutes and regulations. In reviewing an agency’s legal determinations, federal courts generally apply the analysis

set out in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which consists of a two-step test. *Sinclair Wyo. Ref. Co. v. EPA*, 887 F.3d 986, 990 (10th Cir. 2017). At step one, courts consider “whether Congress has directly spoken to the precise question at issue.” *Id.* (quotation omitted). At step two, if Congress has not directly spoken, courts ask whether an agency’s interpretation is based on a permissible construction of the statute.” *Id.* (citation omitted). The task is not to decide whether the agency’s interpretation is the best interpretation, but whether it represents a reasonable one. *See Chevron*, 467 U.S. at 843-44.

Whether Title X funding provisions “include abortion as a method of family planning” was a point of debate while Congress considered Title X. 116 Cong. Rec. 37,375 (Nov. 16, 1970) (statement of Rep. Dingell). It was later clarified 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. Through this language, “committee members clearly intend[ed] that abortion is not to be *encouraged or promoted in any way* through” Title X. 116 Cong. Rec. 37375 (Nov. 16, 1970) (statement of Rep. Dingell) (emphasis added). “Programs which include abortion as a method of family planning are not eligible for funds allocated through this act.” *Id.*

As described above, in *Rust* the Supreme Court held that HHS could permissibly prohibit abortion referrals, pursuant to a *Chevron* analysis. 500 U.S. at 186-87. The regulation considered by *Rust* was essentially the *opposite* of the regulation HHS has enforced against Oklahoma to strip Oklahoma’s Title X funding here, though. Thus, while *Rust* recognizes that HHS can prohibit counseling and referrals for abortion services under

Title X, or could conceivably be agnostic or neutral with respect to requiring abortion counseling and referrals, HHS’s application of 42 C.F.R. § 59.5(a) here goes too far—especially in light of the Weldon Amendment.

Although *Rust* recognized Title X was ambiguous on abortion referrals (under the first part of the *Chevron* analysis), Defendants may not resolve that ambiguity in the statute by *requiring* Title X grantees to make abortion counseling and referrals. The Weldon Amendment simply cannot be squared with such an approach. Using the current regulation to suspend and terminate Oklahoma’s funding is inconsistent with federal law.¹

Furthermore, Defendants’ decision to terminate Oklahoma’s Title X funding unreasonably interprets its own regulations. HHS’s interpretation contradicts its other regulations requiring grantees to ensure that they will provide “family planning medical services” that are “allowable under *state* law.” 42 C.F.R. § 59.5(b)(6) (emphasis added). HHS describes this as a requirement that must be met by a family planning project. *Id.* As set forth above, abortion counseling and referrals are not allowable under Oklahoma law. HHS cannot interpret its 2021 Rule to require Oklahoma to violate state law and then cancel Oklahoma’s Title X funding when Oklahoma fails to do so.

On top of that, the same regulation requires grantees to:

[p]rovide for coordination and use of referrals and linkages with primary healthcare providers, other providers of healthcare services, local health and

¹ Moreover, HHS’s interpretation of the statute will be entitled to little or no deference if *Chevron* is overruled or significantly narrowed in the two cases currently pending before the Supreme Court where *Chevron*’s overruling is being considered. *See Loper Bright Enterprises, Inc. v. Raimondo*, Case No. 22-451, and *Relentless, Inc. v. Department of Commerce*, Case No. 22-1219. Defendants preserve their ability to argue for *Chevron*’s overruling, or for evaluating this case absent *Chevron* entirely.

welfare departments, hospitals, voluntary agencies, and health services projects supported by other federal programs, *who are in close proximity to the Title X site*, when feasible, in order to promote access to services and provide a seamless continuum of care.

Id. § 59.5(b)(8) (emphasis added). Even if the Health Department could require subgrantees to make abortion referrals out of state under Oklahoma law, to do so would violate the requirement that referrals be given in close proximity to the Title X site. To be sure, the proximity requirement is only a requirement “when feasible.” But it is not feasible to make referrals that are not permitted under Oklahoma law and that completely disregard the physical proximity requirement. Out of state travel is not something that is economically feasible for many recipients of Title X services, and the physical proximity requirement reflects this important reality. Simply disregarding the proximity requirement in all cases is not a viable option. As such, HHS’s interpretation of its 2021 Rule to suspend and terminate Oklahoma’s Title X funding exceeds HHS’s statutory authority and ignores other requirements HHS placed on Oklahoma’s Title X program.

2. *Defendants’ Termination Decision Was Arbitrary and Capricious.*

Defendants’ termination of Oklahoma’s Title X funding was arbitrary and capricious. *See Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560 (10th Cir. 1994). As part of this analysis, courts must “ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made” to determine “whether there [was] a clear error of judgment.” *Id.* (citation omitted) “If the agency relied on factors which Congress has not intended for it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that

runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise” then an agency’s action must be set aside. *Id.* (citation omitted).

Here, for reasons detailed above, Congress clearly intended its Title X funding *not* to go to promoting or performing abortions in any way, so Defendants’ reliance on the lack of abortion referrals to strip Oklahoma of funding was arbitrary and capricious. Further, HHS failed to address important aspects of the problem since HHS did not consider the impact of requiring States where abortion is prohibited to comply with counseling and referral requirements. Defendants cannot point to any material in its administrative record where HHS has grappled with this important issue.

That is to say, HHS’s application of its rule here was arbitrary and capricious because federalism concerns were overlooked. “[I]t is incumbent upon federal courts to be certain of Congress’ intent before finding that a federal law overrides the usual constitutional balance of federal and state powers.” *Bond v. U.S.*, 572 U.S. 844, 858 (2014) (citations omitted). Since the 2021 Rule was introduced, the Supreme Court has determined that abortion is not a constitutionally protected right and that issues concerning abortion must be returned to the people and their elected representatives. *Dobbs*, 597 U.S. at 231. While HHS may have found that there were no federalism implications at the time it implemented the 2021 Rule, *see* 86 Fed. Reg. 56,144, 56,168, there has been a paradigm shift on this issue. HHS’s failure to consider this shift and the resultant federalism concerns at the time HHS suspended and terminated Oklahoma’s Title X grant demonstrates that the decision was arbitrary and capricious. Oklahoma has exercised its sovereign right to ban

abortions and referrals for abortions. HHS either failed to think through these concerns prior to suspending and terminating Oklahoma’s Title X grant, or it did think through them and capriciously decided to punish Oklahoma for its lawful exercise of sovereignty that is perfectly in accord with the language of Title X. *See* Complaint ¶¶ 34-35 (Defendant Becerra: Post-*Dobbs*, HHS will “double down and use every lever we have to protect access to abortion care.”).

Defendants also failed to adequately consider the impact of its termination on patients and Oklahoma’s ability to properly administer the Title X program in this State. HHS has consistently approved Oklahoma’s Title X program. The Health Department’s Title X program was last reviewed by HHS in 2016. At that time, HHS was “[o]verall. . . impressed with the dedication and commitment to family planning in both the central office staff as well as in the field.” Exh. 2. The result of the Health Department’s site visit by HHS was so positive that HHS did not schedule a return visit until January 2024—eight years later. Further, Oklahoma is heavily invested in providing services described in Title X, given Oklahoma’s 40-year track record of administering the Title X program. And Oklahoma’s citizens are heavily invested in receiving those services. *See supra*. HHS did not consider these important aspects before terminating Oklahoma’s Title X funding.

Finally, in contradiction with the 2021 Rule’s note—based on the Weldon Amendment—that “objecting . . . Title X grantees are not required to counsel or refer for abortions,” 86 Fed. Reg. at 56,153, HHS shifted positions to require Oklahoma to refer for abortions and stripped our Title X funding when the Health Department could not do so.

This amounts to HHS “[s]hifting the regulatory goalposts without explanation,” and is prohibited by the APA. *Fontem US, LLC v. FDA*, 82 F.4th 1207, 1222 (D.C. Cir. 2023).

3. *HHS Failed to Follow Proper Procedures.*

In deciding to suspend and terminate Oklahoma’s Title X funding, HHS failed to follow proper procedures. Notice and comment requirements apply to substantive rules, or legislative rules, which are rules issued by agencies pursuant to statutory authority and which implement a statute, create new legal rights, and have the force and effect of law. *Sorenson Commc’n v. F.C.C.*, 567 F.3d 1215, 1222 (10th Cir. 2009); *New Mexico v. McAleenan*, 450 F. Supp. 3d 1130, 1180 (D.N.M. 2020). Thus, HHS’s termination of Oklahoma’s Title X funding amounts to a legislative rule that required notice and comment. HHS’s failure to follow the correct procedural path also requires setting aside HHS’s decision.

II. OKLAHOMA WILL SUFFER IRREPARABLE HARM IF AN INJUNCTION IS DENIED.

Oklahoma will suffer irreparable harm should an injunction not issue. Importantly, the grant funding for this next cycle, as far as Oklahoma is aware, will be sent or decided by April 1, 2024, making an injunction by that date critical.

Once this funding is distributed, Oklahoma will not likely be able to recoup the funds as monetary damages due to sovereign immunity. “An ‘irreparable harm requirement is met if a plaintiff demonstrates a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages.’” *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250 (10thCir. 2003). Further, once

funding is distributed, there is no way for Oklahoma or the federal government to claw back distributions from entities that received funding. *See Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs*, 141 S. Ct. 2485, 2489 (2021) (indicating that risk of significant financial harm with no guarantee of eventual recovery constitutes irreparable harm). This loss of funding jeopardizes Oklahoma's ability to continue offering services through the Health Department and loss of its investment in translation and language services. Additional impacts include Oklahoma's ability to access the federal discount pharmacy program and potential loss to future grant funding that totals \$541.2 million. *See* Exh. 1, ¶¶ 22-29. Each of these concerns favor issuance of a temporary injunction.

III. THE THREATENED INJURY TO OKLAHOMA EXCEEDS ANY POSSIBLE INJURY HHS COULD FACE.

The third element counseling in favor of issuing a temporary injunction is that the threatened injury to Oklahoma greatly exceeds any possible injury that HHS could face. Virtually no cognizable harm to HHS can be imagined, as an injunction would only preserve the status quo in effect before HHS terminated Oklahoma's funding in an arbitrary and capricious attack. And Defendants cannot rely on a lack of referrals for abortion as harm since, again, Title X expressly prohibits funding going to abortion. Further, no harm can result from issuing an injunction since HHS previously found that Oklahoma complied with program requirements and in good standing to receive and administer federal Title X funds during the current grant period. The very real injuries that Oklahoma has and will continue to sustain are greatly disproportionate to any harm that HHS might allege.

IV. THE REQUESTED INJUNCTION IS IN THE PUBLIC INTEREST.

Finally, a temporary injunction is appropriate since the requested injunction is in the public interest. Restoring Oklahoma’s Title X funding *advances* the public interest by allowing the Health Department to continue to offer services as it historically has done. The public interest will also be advanced since, as recognized in *Dobbs*, regulation of “abortion must be returned to the people and their elected representatives.” 597 U.S. at 215, 292. Oklahoma has exercised its right to determine policy on this issue. As such, the public interest will only be undercut by HHS’s decision to suspend and terminate funding based on abortion concerns under a statute that expressly prohibits funding from going to programs promoting abortion.

CONCLUSION

For the foregoing reasons, this Court should grant Oklahoma’s motion for a preliminary injunction and a stay under 5 U.S.C. § 705. Oklahoma respectfully requests this Court’s resolution of the instant motion no later than April 1, 2024, to preserve Oklahoma’s ability to benefit from a favorable decision or else seek appellate intervention prior to HHS’s disbursement of Title X funds for 2024.

Respectfully submitted,

s/ R. Tom Hillis

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January 2024, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrant:

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/s/ R. Tom Hillis

R. Tom Hillis

EXHIBIT 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,

Plaintiff,

v.

Case No: 23-CV-1052-HE

UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES; XAVIER BECERRA, *in
his official capacity as the U.S. Department of Health
and Human Services*; JESSICA S. MARCELLA, *in
her official capacity as the Deputy Assistant Secretary
for Population Affairs*; and OFFICE OF
POPULATION AFFAIRS,

Defendants.

DECLARATION OF TINA JOHNSON, MPH, RN

I, Tina Johnson, pursuant to 28 U.S.C. § 1747 declare and state as follows:

1. I am over the age of eighteen, of sound mind, and am competent to testify to the matters stated herein.

2. I am currently the Assistant Deputy Commissioner for Family Health Services for the Oklahoma State Department of Health (“OSDH”), and I have served in this role since 2016.

3. I have been employed with OSDH for over thirty-five (35) years, and prior to my current position I served in various roles with OSDH including: Director of Nursing Service (2013-2016), Regional County Director for Pottawatomie, Seminole, Hughes, and Okfuskee Counties (2004-2013), Director of Nursing Education Nursing Service (2000-2004), District Nurse Manager for Pottawatomie, Seminole, Hughes, and Okfuskee Counties (1997-2000), and Public Health Nurse for Lincoln and Okfuskee County (1988-1997).

4. Prior to my employment with OSDH, I served as the Director of Nursing Service and as a Hospital RN Floor supervisor for Surgery and ER for the Prague Municipal Hospital in Prague, Oklahoma.

5. I obtained a Bachelor of Science in Nursing from Oklahoma Wesleyan University and a Masters of Public Health Administration and Policy from the University of Oklahoma College of Public Health.

6. I serve on the Board of Directors for the Public Health Institute of Oklahoma and volunteer with the Public Health Accreditation Board as a site visitor for accreditation reviews. I have previously served as the President of the Oklahoma Public Health Association.

7. In my role as Assistant Deputy Commissioner for Family Health Services, I have senior leadership oversight of family planning services as a component of OSDH's broader Family Health Services division, which encompasses Maternal and Child Health Services. The management of Title X grants falls within Maternal and Child Health Services.

8. The State of Oklahoma, through OSDH, has continuously received federal grant funds to provide family planning services across the state through Title X for more than forty years, or since 1971.

9. OSDH's Title X grant was approximately \$4.5 million, annually, in the current grant cycle.

10. The U.S. Department of Health and Human Services ("HHS") conducted a comprehensive review of OSDH's Title X program in 2016, attached as Exhibit 1. That review process was designed to assess OSDH's compliance with federal regulations and guidelines governing Title X, and the quality of services and implementation of key aspects of the Title

X program. That review process included meetings with key personnel, extensive document review, and on-site observational visits.

11. The result of HHS's comprehensive review of OSDH's Title X program was positive. HHS found that the OSDH met the requirements of Title X, and HHS reported that it was overall impressed with OSDH's program. Although HHS's review noted some deficiencies in OSDH's Title X program, none of those deficiencies resulted in the revocation of the Title X grant. Nor did HHS ever mention or threaten revocation of the Title X grant during that review process. In fact, the result of the on-site visits during this review were so positive that HHS did not schedule a return visit until January 2024.

12. Through the Title X program, OSDH provides funding to the State's 68 county health departments ("County Partners"), who provide critical family planning public health services to rural and urban Oklahoma communities. Those critical family planning services include counseling of family planning options and related services, preventative women's health screenings and exams (including mammograms, pap-smears, anemia testing, depression screening, and the like), infectious disease testing, pre-conception care, immunizations, Medicaid applicability, and providing family planning prescriptions or medical devices. Moreover, County Partners provide referrals for mammograms, dysplasia follow-up as a result of an abnormal pap-smear, and follow-ups resulting from abnormal blood pressure, psychological / mental health concerns, and post-partum complications.

13. OSDH also contracts with the Oklahoma City-County Health Department and the Tulsa County Health Department ("City-County Partners"), who provide the same or

similar family planning services previously described, in Oklahoma's most heavily populated counties.

14. Oklahoma's Title X program allows OSDH and its County and City-County Partners (collectively "Partners") to provide confidential services to adolescents, which account for approximately 12% of the patients served. This helps health care providers discuss sensitive or embarrassing topics and provide education, while still encouraging parental involvement and complying with all mandatory reporting laws.

15. The Title X program also allows OSDH and its Partners connect with patients who come in with other ancillary concerns, allowing the State to refer those patients to other health care providers or state resources to better serve a patients' overall health and well-being. For example, this has allowed the State to connect patients with the Oklahoma Women, Infants & Children supplemental food program, immunization programs, and programs providing free infant car seats, including installation and safety checks. It also allows the State to screen for safety issues such as child abuse, domestic violence, or sex trafficking.

16. Because OSDH has continuously administered its Title X program for decades, OSDH and its Partners have built the infrastructure, capacity, personnel, and institutional knowledge to implement its Title X program across the entire state of Oklahoma effectively, efficiently, and with integrity. This has allowed OSDH and its Partners to provide critical health services to the public and those in need for decades. In recent years, over 25,000 patients on average annually have received services through Oklahoma's Title X program.

17. As one specific example of how this infrastructure and institutional knowledge has advanced public health, OSDH and its County Partners have built a network of translation

services available across the state to accommodate the 30+ languages and dialects spoken in the state. Providing these translation services helps eliminate communication barriers that can have serious impact on a patient's care, for example when a patient may otherwise have to rely on an abusive partner or child to translate sensitive health information.

18. In many rural areas in Oklahoma, OSDH and its County Partners may be one of the only access points for critical preventative health services for many miles. Thus, many of the patients served by OSDH and its County Partners face barriers to accessing health care because of distance, work schedules, and transportation issues.

19. A substantial portion of patients served by OSDH and its Partners include lower income or uninsured individuals who cannot afford care elsewhere.

20. OSDH and its Partners have created significant goodwill throughout the state by providing crucial family planning, preventative, and screening services to citizens through its decades of administering the Title X program.

21. OSDH spent months working with HHS, seeking guidance as well as proposing solutions in an effort to remain in compliance with the grant requirements while not potentially running afoul of Oklahoma law. HHS was adamant in its "all or nothing" position that OSDH must include abortion-education resources as part of family planning client counseling. HHS was consistent in its position that OSDH must comply or face consequences despite repeat reminders of current Oklahoma law.

22. The continuing impact of HHS's decision to revoke the Title X grant awarded to OSDH—on OSDH, the County Partners, the City-County Partners, the Oklahomans served by the program, and the State at large—is extremely difficult to measure.

23. Without the Title X grant funds, OSDH required the Oklahoma Legislature to provide an emergency backstop to supplement the federal loss. The Oklahoma Legislature appropriated those funds for the 2023 fiscal year, but there is no guarantee that the Oklahoma Legislature continues to supplement those funds going forward. Without this continued funding, OSDH and its Partners will be unable to continue providing the critical family planning services offered throughout the state, causing incalculable and devastating harm to the public health of the state and its citizens.

24. The revocation of the Title X grant has deprived OSDH of the federal discount pharmacy program for family planning prescriptions and medical devices (“340B”), which covers oral contraceptives, IUDs, and long-acting reversible contraceptives, among other things.

25. In order to ensure continuity of services in the aftermath of HHS’s revocation, and to mitigate against forced disposal of these prescriptions and medical devices, OSDH has been forced to cobble together additional state dollars, approximately \$678,000, to buy-back 340B acquired medications from HHS. This stopgap has also placed significant and unexpected strain on OSDH’s Pharmacist and other personnel.

26. The delays and uncertainty caused by the abrupt deprivation of the 340B federal discount program has impacted rural county health departments as well as City-County Partners, who contract with OSDH to receive these critical prescriptions and medical devices. Meaning, public dollars used to purchase any prescriptions or medical devices do not stretch as far because OSDH and its Partners are forced to purchase at market rates. This impacts the number of services that can be provided, and ultimately reduces the number of Oklahomans

served. It is also impacting the State's inventory and the availability of prescriptions and medical devices, which is crucial to provide real-time access to low income clients with low or no cost prescriptions or medical devices.

27. Without the 340B federal discounts, the cost of relevant prescriptions and medical devices may increase up to six times, leaving OSDH and its Partners unable to continue providing those benefits without significant financial impact, which will inevitably harm other critical health services offered by OSDH and its Partners.

28. In addition, HHS has repeatedly warned and threatened that OSDH's purported non-compliance under the Title X grant may be reported to the Federal Awardee Performance Integrity Information System ("FAPIIS"). In fact, it is likely HHS has already reported OSDH on the FAPIIS based on prior conversations between OSDH and HHS officials, where HHS officials expressed repeat warnings of intent to report OSDH. OSDH has been unable to confirm whether HHS has followed through with this intent. Being reported to the FAPIIS would have significant impact OSDH's ability to obtain or maintain other federal grant funds, including because federal law requires a contracting officer review the FAPIIS before awarding any federal grant over the simplified acquisition threshold. *See* FAR 9.104-6.

29. OSDH currently receives approximately \$541.2 million in funding from over 90 other federal grant programs outside of Title X, ranging from HIV prevention, immunizations and public health infrastructure to workforce development, emergency preparedness, COVID-19 response and recovery (through the American Rescue Plan Act of 2021), and

laboratory quality and readiness. Each of these grants could be jeopardized by HHS reporting OSDH to the FAPIIS.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 26th, 2024.

Dem R Johnson

EXHIBIT 1



DEPARTMENT OF HEALTH AND HUMAN SERVICES
Office of the Assistant Secretary for Health

Regional Health Administrator
Region VI
1301 Young Street
Suite 1124
Dallas, TX 75202



June 28, 2016

Terry L. Cline, Ph.D.
Commissioner of Health
Oklahoma State Department of Health
1000 NE 10th
Oklahoma City, OK 73117

RE: Grant Number FPHPA066194

Dear Dr. Cline:

The Federal Title X program review for the Oklahoma State Department of Health was conducted May 2-5, 2016. Your Title X program supports excellent projects and activities and we applaud your efforts to increase services and quality throughout the system.

The purpose of the review is to provide the Regional Office with an evaluation of the Oklahoma State Department of Health's compliance with the Title X requirements and alignment with the Quality Family Planning (QFP) guidelines as set out in *Providing Quality Family Planning Services: Recommendations of CDC and the U.S. Office of Population Affairs*. This report addresses the administrative, fiscal, and clinical aspects of the Title X program and provides information to continue to strengthen your efforts.

I would like to highlight some of the review's major findings. Overall, the reviewers were impressed with the dedication and commitment to family planning in both the central office staff as well as in the field. Required areas to be addressed include:

- Ensuring client privacy during intake and financial interviews (see page 12)
- Ensuring clients with limited English proficiency are aware of translation services available to them (page 16)
- Ensuring appropriate application of Title X requirements with respect to charges on the sliding fee schedule (page 21)

With respect to quality family planning guidelines, many aspects of OSDH's program are fully developed, but some policies and procedures require modification to be in alignment with QFP recommendations (see pages 30-33).

Please review the report and respond to the findings in writing with a plan of action to address them by August 5, 2016.

On behalf of the site assessment review team, I want to thank you and all of your staff for the cooperation and hospitality extended during the visit. If you or your staff have any questions concerning any items in the report, please contact Dr. Liese Sherwood-Fabre at (214) 767-3060.

Sincerely,



Epi (Epi) Elizondo, Ph.D., PA-C
Regional Health Administrator, Region VI
Rear Admiral, Assistant Surgeon General,
U.S. Public Health Service

Attachment

cc: GrantSolutions

Joyce Marshall, MPH

Jill Nobles-Botkin, APRN-CNM

***PROGRAM REVIEW
TITLE X FAMILY PLANNING PROJECT
OKLAHOMA STATE DEPARTMENT OF HEALTH***

May 2-5, 2016

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BACKGROUND INFORMATION

Grantee Name: Oklahoma State Department of Health

Grantee Number: FPHPA066194

Project Address: 1000 NE 10th Street
Oklahoma City, Oklahoma 73117

Site Visit Dates: May 2- 5, 2016

Program Review Team Members:

Liese Sherwood-Fabre, PhD Administrative/Community Outreach and Education
Review Team Leader

Lawrence Peaco, MPA Financial Services

Cristino Rodriguez, FNP-C Clinical Services

Department of Health and Human Services (DHHS) Region VI Staff:

Liese Sherwood-Fabre, PhD

Department of Health and Human Services (DHHS) Region VI Staff:

May 2, 2016 Briefing

Oklahoma State Department of Health

Nancy Bacon, Nutrition Consultant

Ann Benson, Advanced Practice Coordinator

Joni Bruce, Oklahoma Family Network Executive Director

Dawn Butler, MCH Administrative Support

Peggy Byerly, Early Childhood Coordinator

Jeanette Cline, QI Coordinator

Dana Coles, Perinatal and Reproductive Health Epidemiologist

Mark R. Densett, Community and Family Health Services

Angela Dickson, Public Health Social Work Coordinator

Ira Farley, Health Educator

Tony Fleshmann, Nurse Manager

Shannon Gormley, Executive Assistant, MCH

Audie Hamman, Internal Audit Manager

Neil Hann, Assistant Deputy, CFHS Administration

Mack S. Harris, Financial Services, Grants Reporting

Ashley Hillemeier, Interim Agency Procurement Officer

Jay Holland, Director, Internal Auditor

Ashley Hoobler, MCH-CAH Health Educator

Ayesha Lampkins, PRAMS/Tots Program Manager

Alicia Lincoln, Child and Adolescent Health

Lynette Mackey, Nurse Practitioner

Carolyn Marriott, Contract Monitor
Joyce Marshall, Director, MCH Services
Gunnar McFadden, Administrative Coordinator
Pam Miles, Medical Consultant, Title X
Jill Nobles-Botkin, MCH/PRH Administrative Program Manager
Paul Patrick, MCH Assessment
Edd Rhoades, Medical Director, Community and Family Health
Angela Steinle, Social Work Intern
Amy Terry, MCH/CAH Adolescent Health Coordinator
Sean Tomlinson, Financial Management
Mick Truitt, Assistant CFO
LaBetta Wallenmeyer, NP Consultant
Shirley Ward, Administrative Assistant, PRH

May 3, 2016

Comanche County Health Department

Nancy Bacon, MCH Nutrition Consultant/State Review Team Lead
Marquise Bishop, CCHD-HE
Gail Byber, Business Manager
Patsy Cooper, NP
Sharlet Rena Evans, District Nurse Manager
Tony Fleshman, RN
Lana Fry, Administrative Assistant, Clerical Support
Sarah Lambaria, Health Educator
Ayesha Lampkins, MCH Consultant (PRAMS/ToTs Project Manager)
Joyce Marshall, MCH Director, OSDH
Leah Mays, RN
Nicki McCray, MA
Johnette Miller, APO
LaCresha Mitchel, Front Desk Clerk
Jill Nobles-Botkin, PRH Administrative Program Manager
Brandie O'Connor, Regional Director
Bob Richardson, Internal Auditor II
LaBetta Wallenmeyer, NP Consultant
Sarah Whittington, RN II
Zachery Williams, Internal Auditor II
Melissa Wilson, Records Consultant

May 4, 2016

Oklahoma City-County Health Department (OCCHD)

Tiffany Elmore, OCCHD, Administrator of Clinical Services
Lacey Gann, RN
Karina Hernandez, Front Desk Clerk

Kaitlin Hostetter, Public Health Nurse
Jenny LeGrande, Public Health Nurse, Supervisor
Joyce Marshall, OSDH, MCH Director
Patrick McGough, Deputy Director, OCCHD
Tony Miller, Director of Finance, OCCHD
Jill Nobles-Botkin, OSDH, Perinatal and Reproductive Health
Kerri Stewart, Public Health Nurse, Clinical Supervisor
Joyce Tow, CNP
Diane Wermey, Office Manager

May 5, 2016 Debriefing:
Oklahoma State Department of Health

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Paul Patrick, MCH Assessment
Angela Steinle, Social Work Intern
Amy Terry, MCH/CAH Adolescent Health Coordinator
LaBetta Wallenmeyer, NP Consultant

Materials Supplied Prior to the Visit
FORMS

335 Early Start Consent Form
336 Emergency Contraception Consent Form
393 Family Planning Initial/Annual Visit
395 Pregnancy Screening
637 Emergency Contraception History & Assessment
657 Early Start Depo History & Exam
873 Early Start Oral Contraceptive History & Assessment

875 Family Planning Problem Visit
876 Family Planning Counseling & Education
1010 Etonogestrel Implant/Removal Procedure
Birth Control Guide
ODH 303C Consent for Services (English & Spanish)
303L Screening and Test Results
330 Contraceptive Follow-Up Form
ODH337 Natural Family Planning Fact Sheet
ODH337B Birth Control Fact Sheet
ODH337C IUD Fact Sheet
ODH337D Diaphragm Fact Sheet
ODF337F Spermicide Fact Sheet
ODH337H Male Condom Fact Sheet
ODH337I Patch Fact Sheet
ODH337J Vaginal Ring Fact Sheet
ODH337K Implantable Rod Fact Sheet
ODH337L Sponge Fact Sheet
ODH337M Emergency Contraception Fact Sheet
ODH340 Birth Control Shot Fact Sheet
ODH638 Early Start History & Assessment Combined Hormonal Contraception (Pill, Patch, Ring)
ODH902 Missed Oral Contraceptive Pill Fact Sheet (Bilingual)
ODH903 Missed Vaginal Ring Contraceptive Fact Sheet
904 Missed Transdermal Patch Fact Sheet
ODH1055 Client Visit History & Allergies
ODH1105 Basic Infertility Visit
ODHP348B Osteoporosis
P337 IUC Insertion Procedure
P338 Family Planning Services Risk & Benefit Sheet
P348 Vitamins and Using the Pill

FAMILY PLANNING POLICY AND PROCEDURES MANUAL

QUALITY ASSURANCE/QUALITY IMPROVEMENT

CCPP 2016 –County Community Participation, Education, and Project Promotion Plan Template
CHD (County Health Department) Annual Monitoring Site Visit Tool
Comprehensive Program Review (CPR)
 CPRTeam Evaluation Summaries for 2015 and 2016
 Federal and State Required Posters
 Minutes MCH Comprehensive Program Review Staff Meeting
SV TOOL – Site Visit Tool Family Planning Chart Audit
SV TOOL – List of County Documents to Have Ready
SV TOOL – Administrative Tool
SV TOOL – Financial Tool
SV TOOL – Public Health Enabling Tool

SV TOOL – Clinical Services Tool
Team Evaluations for Comprehensive Program Review
Client Satisfaction Survey (English & Spanish)
Survey Monkey CARS (Community Activity Reporting)
Survey Monkey QI (Quality Improvement Reporting)

TRAINING

Community Participation & QI Training 3/30/15
MCH Training Calendar SFY 2016
Needs Assessment Results 2015-2016

EDUCATIONAL MATERIAL

FP Services Brochure
Men's Health Brochure
Women's Health Assessment

ORIENTATION

MCH Orientation Manual
New Employee Orientation Signature Sheet

Memoranda of agreement with other programs

Documents reviewed at the Clinic Level

Constitution and by-laws of Advisory board, if delegated to site
Annual reports
Financial records, including any audits completed
Certificate/reports: fire inspection, state licensure, sanitation, CLIA, OSHA, ADA
Internal medical audit policies and procedures
Emergency and Disaster plans (medical and non-medical)
Clinic education brochures, public information materials—Site-specific and OSDH-supplied
The schedule of discounts for clients at/below 250% of poverty level for sub-recipients
Client Sterilization records
Abnormal laboratory results and follow-up records
Documentation of community education and outreach
Pharmacy Records, especially of any stock-outs
Client charts: Initial visit, return visit, adolescents, males and pregnancy-test only clients

OVERVIEW OF THE PROJECT

History and Development

The Oklahoma State Department of Health (OSDH) and State Board of Health were created with the passage of the Oklahoma Public Health Code on July 1, 1963. The State Department of Health was to consist of the Commissioner of Health and such divisions, sections, bureaus, office and positions as established by the Board of Health and by law. Currently state health services are organized under a Governor-appointed Secretary for Health. The current Commissioner of Health is also the Secretary of Health.

Description of the Program

The Oklahoma State Department of Health Family Planning Program (OSDH FPP) is administered within the Perinatal and Reproductive Health Division of the Maternal & Child Health Service, a part of the Community & Family Health Services. The OSDH Family Planning (FP) Program is responsible for assuring compliance with Title X policy, procedure, and administration of funds. Day-to-day coordination of Title X project activities is the responsibility of the Administrative Program Manager of PRHD, who reports directly to the Director of MCH, who reports directly to the Deputy Commissioner of the CFHS. The Deputy Commissioner of the CFHS answers directly to the Commissioner of Health.

OSDH has administered the Title X family planning program for more than forty years.

The public health system in Oklahoma includes the OSDH with its statewide county health department system and the two city county health departments in Oklahoma County and in Tulsa County, which are administratively separate from the OSDH system and have their own personnel systems. The county health departments are OSDH administrative units. Altogether, clinical and educational services are provided through 87 county health sites and 8 contract agency sites across the state, located in 70 of the 77 counties. The clinical services are provided through the Community Health Services' County District Administration, Nursing Service, Community Development Service, and Record Evaluation and Support. These entities provide service delivery and assist with program monitoring. The Medical Director is available by contract through OUHSC.

Oklahoma Health Care Authority (OHCA), the state Medicaid agency, changed their family planning services 1115B waiver to a State Plan Amendment (SPA) on September 1, 2011 (now, SoonerPlan). The SPA includes hormonal contraceptive sub-dermal implant and the HPV vaccination, which were previously not included in the family planning waiver. Sterilization is not provided through the Title X FP project, although the SPA covers both male and female sterilizations.

The Title X Program Review Process

At the start of the process, the regional office and OSDH negotiated the dates for the review and the sites to be visited. Following these decisions, the regional office provided a list of documents to be compiled, including policies and protocols, board meeting minutes, and medical charts (at the clinic sites).

The region office staff also provided both review consultants and OSDH with the protocol to be used during the visit. The instrument, developed to coincide with the Title X requirements and Quality Family Planning guidelines issued in April, 2014 (*Providing Quality Family Planning Services: Recommendations of CDC and the U.S. Office of Population Affairs*), reflects current federal regulations and guidelines. The tool guides the review team's assessment of grantee policies and procedures and on-site observations and evaluations of program operations for evidence of compliance with grantee policies and procedures based on these requirements and QFP guidelines.

Title X Program Requirements Assessment

This assessment relates to the grantee's compliance with the statute and regulations. For these requirements, the grantee will receive an assessment of compliance and will receive a rating of "met", "not met", or "N/A" (not applicable). The evidence that minimum criteria have been met will be based on both grantee and sub-recipient records and observation at grantee administrative offices and selected service sites as part of the monitoring process. Evidence may include—but is not limited to—policies, procedures, protocols, documentation of training, direct visual confirmation per consultants and/or regional office staff to ensure that what is contained in written policy or instructions is actually being carried out, and/or any other form of documentation substantiating the project is operating in accordance with the Title X Program Requirements

QFP Quality Assessment

This assessment reflects the extent to which the grantee has implemented key aspects of QFP. Grantees will be assessed using the list of items providing evidence of various aspects of quality services. The number of items identified serves as a means of recognizing grantee achievements as well as identify areas in need of improvement and/or technical assistance.

Assessment Timeline

Before the review, OSDH and the sites selected for visits were requested to compile a series of documents including policies and protocols, board meeting minutes, and medical charts (at the clinic sites); arrange for interviews with central office staff; and schedule a initial and debriefing meeting with Departmental representatives.

At the initial meeting, the team discussed the review process, and OSDH provided an overview of the project. Following meetings at the central office the morning of the first review day, the team visited two different clinic sites.

At the conclusion of the each clinic visit, the team gave an oral report to clinic and accompanying central office staff. At a formal exit conference, the reviewers reported on the findings related to compliance in each area. This written report follows the same format and contains major findings and recommendations as reported by the review team to OSDH at the exit conference on May 5, 2016. In the recommendation statements, a "must" references OSDH non-compliance to federal regulations. Additionally, quality assessment ratings indicate the

extent to a program has achieved various aspects of QFP. In this section, a “should” references strong program suggestions and recommends the program evaluate the information in the interest of continued improvement of program operations.

Title X Program Requirements

Administrative Aspects

8. Project Management and Administration

8.1 Voluntary Participation

8.1.1 Prohibition of Coercion

Title X projects must “provide services without subjecting individuals to any coercion to accept services or to employ or not to employ any particular methods of family planning. (Sections 1001 and 1007, PHS Act; 42 CFR 59.5 (a)(2))

Such requirements are met through institutionalizing administrative procedures (i.e., staff training, clinical protocols, and consent forms) to ensure clients receive services on a voluntary basis.

Observations:

The policies and procedures for the service and contract sites’ responsibilities include the voluntary nature the program. The program also includes a general consent form and a family planning risk and benefit form that indicates the voluntary nature of the services. All family planning staff sign an Annual Title X Reminder that includes this statement.

Finding:

This requirement was MET.

8.1.2 Prohibition of Prerequisite for Other Services

Title X projects must ensure that “acceptance of services must...not be made a prerequisite to eligibility for, or receipt of, any services, assistance from or participation in any other program of the applicant.” (Section 1007, PHS Act; 42 CFR 59.5 (a)(2))

This requirement is met through institutionalizing administrative procedures (e.g., staff training, clinical protocols, and consent forms) to ensure clients’ receipt of family planning services is not used as a prerequisite to receipt of other services from the service site.

Observations:

The policies and procedures for the service and contract sites’ responsibilities include this prohibition. The program also requires clients to sign a family planning risk and benefit form that states this prohibition. All family planning staff sign an Annual Title X Reminder that includes this statement.

Finding:

This requirement was MET.

8.1.3 Prosecution for Coercion

Personnel working within the family planning project must be informed that they may be subject to prosecution if they coerce or try to coerce any person to undergo an abortion or sterilization procedure (Section 205, Public Law 94-63, as set out in 42 CFR 59.5(a)(2) footnote 1).

Evidence that this requirement has been met includes 1) written policies and procedures 2) documentation that staff has been informed at least once during the project period, and 3) documentation exists at the sub-recipient level that staff has been informed.

Observations:

The policies and procedures for the service and contract sites' responsibilities include this statement. All family planning staff sign an Annual Title X Reminder that includes this statement.

Finding:

This requirement was MET.

8.2 Prohibition on Abortion

Title X grantees and sub-recipients must be in full compliance with Section 1008 of the Title X statute and 42 CFR 59.5(a)(5), which prohibit abortion as a method of family planning.

Systems must be in place to assure adequate separation of any non-Title X activities from the Title X project. These include policies and procedures regarding the prohibition as well as for the separation of Title X services.

In addition grantees have documented processes to ensure that they and any sub-recipients are in compliance with Section 1008, including language in any sub-recipient contracts addressing this requirement.

Observations:

The policies and procedures for the service and contract sites' responsibilities include this statement and is also included in the sub-recipient agreement. See also Financial Requirements.

Finding:

This requirement was MET.

8.3 Structure and Management

8.3.1 Written Agreements

The grantee must have a written agreement with each sub-recipient and establish written standards and guidelines for all delegated project activities consistent with the appropriate section(s) of the Title X Program Requirements, as well as other applicable requirements (45 CFR parts 74 and 92).

Observations:

Sub-recipient agreements include references to the Title X requirements and guidelines. In addition, the Family Planning Policy and Procedure Manual contains a section on “Service Site and Contract Agency Responsibilities” that reiterates these requirements.

Finding:

This requirement was MET.

8.3.2 Sub-recipient Contracting of Services

If a sub-recipient wishes to subcontract any of its responsibilities or services, a written agreement that is consistent with Title X Program Requirements and approved by the grantee must be maintained by the sub-recipient (45 CFR parts 74 and 92).

Evidence that this requirement has been met include a signed subcontracting agreement stipulating compliance with Title X requirements, documentation of grantee approval of sub-contracts, and monitoring reports to ensure compliance.

Observations:

OCCHD does not have any sub-recipient agreements, but a clause in the OSDH agreement requires approval from OSDH.

Finding:

This requirement was NOT APPLICABLE

8.3.5 Sub-recipient Participation in Development of Policies and Procedures.

Sub-recipient agencies must be given an opportunity to participate in the establishment of ongoing grantee policies and guidelines (42 CFR 59.5 (a)(10)).

Evidence that this requirement has been met include a mechanism for sub-recipient participation in the policies and procedures and documentation of the sub-recipients’ inclusion.

Observations:

The inclusion of sub-recipients is stated in the program administration manual and sub-recipients review, comment on, and approve all policies and procedures along with OSDH staff.

Finding:

This requirement was MET.

8.5 Project Personnel

8.5.1 Federal and State Personnel Requirements

Grantees and sub-recipients personnel policies must comply with applicable Federal and State requirements, including Title VI of the Civil Rights Act, Section 504 of the Rehabilitation Act of 1973, Title I of the Americans with Disabilities Act, and the annual appropriations language.

Evidence that this requirement has been met includes grantee and sub-recipient personnel policies and procedures create a process to avoid discrimination in personnel administration.

Observations:

The policies and procedures for the service and contract sites' responsibilities include this statement, and it is included as part of the sub-recipient site visit review tool

Finding:

This requirement was MET.

8.5.2 Cultural Competency

Project staff should be broadly representative of all significant elements of the population to be served by the project, and should be sensitive to, and able to deal effectively with, the cultural and other characteristics of the client population (42 CFR 59.5 (b)(10)).

Evidence that this requirement has been met includes grantee and sub-recipient personnel policies and procedures regarding cultural competency that has been implemented through training and client surveys.

Observations:

The policies and procedures for the service and contract sites' responsibilities include this statement and all staff must complete training in the topic and such training is documented.

Finding:

This requirement was MET.

8.5.3 Project Director

Projects must be administered by a qualified project director, and changes in the project director or other key personnel must be approved by the Office of Grants Management. (HHS Grants Policy Statement, 2007 Section II-54.)

Evidence that this requirement has been met includes documentation of OGM approval of personnel changes during the project period.

Observations:

No personnel changes requiring OGM approval occurred during the current grant. Prior approval was sought and granted for the new MCH Director in 2014.

Finding:

This requirement was NOT APPLICABLE

8.6 Staff Training and Project Technical Assistance

8.6.1 Orientation and In-Service Training

Projects must provide for the orientation and in-service training of all project personnel, including the staff of sub-recipient agencies and service sites (42 CFR 59.5(b)(4)).

Evidence that this requirement has been met includes grantee and sub-recipient staff training needs assessment and plan and records of personnel trainings completed.

Observations:

The OSDH program has an orientation program for all new employees, an annual assessment for additional training needs, and a training plan to address these needs.

Finding:

This requirement was MET.

8.6.2 Mandatory Reporting Training

The project's orientation/in-service training includes training on Federal/State requirements for reporting or notification of child abuse, child molestation, sexual abuse, rape, or incest, as well as on human trafficking.

Evidence that this requirement has been met includes grantee and sub-recipient policies and procedures for meeting these training requirements, and training attendance records.

Observations:

The policies and procedures manual includes information on mandatory reporting, records indicate all staff have completed training in this area and records are checked during service site visits.

Finding:

This requirement was MET.

8.7 Planning and Evaluation

Grantees must ensure that the project is competently and efficiently administered (42 CFR 59.5 (b) (6) and (7)).

Evidence that this requirement has been met includes written monitoring plans, documented periodic review of work plan progress, and timely, complete, and accurate submission of FPAR data.

Observations:

The program has a work plan that is updated at least annually, the program has also identified two quality assurance elements that are calculated and reported back to the service sites (the percentage of clients using LARCs and the no-show rate). FPAR submission was completed on-time with only one validation that involved only adding a note regarding local income not including in-kind goods or services.

Finding:

This requirement was MET.

9.1 Low-Income Families

Priority for project services is to persons from low- income families (Section 1006(c)(1), PHS Act; 42 CFR 59.5(a)(6)).

Evidence that this requirement has been met includes more than 50% of clients are at or below 100% FPL as reported on the FPAR and service site locations are accessible to low-income individuals.

Observations:

The 2014 and 2015 OSDH FPAR percentages for those under 100% FPL was 73%. Both clinics visited were on a bus line and OSDH operates at least one clinic in all but seven very rural counties.

Finding:

This requirement was MET.

9.2 Dignity of the Individual

Services must be provided in a manner which protects the dignity of the individual (42 CFR 59.5 (a)(3)).

Evidence that this requirement has been met includes appropriate policies, direct observation of clinic operations that indicate protection of client privacy, and documentation which outlines clients' rights and responsibilities.

Observations:

OSDH policies and procedures includes protecting client privacy, patient rights are posted, and all clients have a documented receipt of the HIPAA notification. In-take and financial interviews in one site visited, however, were open to the waiting room and could be heard by occupants in that area.

Finding:

This requirement was **NOT MET**.

OSDH **must** ensure that client privacy is maintained when collecting personal data.

9.3 Non-Discrimination

Services must be provided without regard to religion, race, color, national origin, disability, age, sex, number of pregnancies, or marital status (42 CFR 59.5 (a)(4)).

Evidence that this requirement has been met includes written policies and procedures stating non-discrimination, documentation that staff have been informed of non-discrimination policies, and documentation of monitoring of sub-recipients for non-discrimination.

Observations:

OSDH has policies and procedures regarding non-discrimination and staff sign a reminder at least once a project period regarding this requirement.

Finding:

This requirement was MET.

9.4 Referral for Related Social Services

Projects must provide for social services related to family planning including counseling, referral to and from other social and medical services agencies, and any ancillary services which may be necessary to facilitate clinic attendance (42 CFR 59.5 (b)(2)).

Evidence that this requirement has been met includes documentation that social service and medical needs of the community has been assessed and relevant services identified, sub-recipients are required to develop and implement plans to address relevant service needs, and current, written agreements with relevant referral agencies exist.

Observations:

OSDH completes a state-wide needs assessment and has developed written agreements with community health centers for cross-referrals between primary care and provision of contraceptives. The county health unit can provide in-house referrals for dietician/nutrition counseling, WIC, and dental. OCCHD has primary care referrals to the primary care clinic co-located with them and have a number of different written MOUs for various services. Additionally, clinics also provide clients with brochures regarding specialized services, such as transportation and social/medical services, but these do not have written agreements.

Finding:

This requirement was MET.

9.5 Referral Arrangements

Projects must provide for coordination and use of referral arrangements with other providers of health care services, local health and welfare departments, hospitals, voluntary agencies, and health services projects supported by other federal programs (42 CFR 59.5 (b)(8)).

Evidence that this requirement has been met includes written policies requiring plans to coordinate with other service providers and current, written agreements with relevant referral agencies exist.

Observations:

OSDH has a policy and procedure regarding referrals and written agreements with community health centers for cross-referrals between primary care and provision of contraceptives exist for some clinical issues, including the two sites visited.

Medical files included referrals for some clinical issues to outside service providers without a written agreement between the OSDH and the service provider. Such referrals do not follow OSDH policies and procedures or Title X requirements for written agreements.

Finding:

This requirement was **NOT MET**.

OSDH **must** ensure referrals meet Title X requirements.

9.9 Residency Requirements

Services must be provided without the imposition of any durational residency requirement or requirement that the client be referred by a physician (42 CFR 59.5(b)(5)).

Evidence that this requirement has been met includes written policies prohibiting imposition of residency requirement at the grantee and sub-recipient level.

Observations:

OSDH policies and procedures include a prohibition of any residency requirement for services and all staff have signed an annual reminder of this requirement.

Finding:

This requirement was MET.

9.12 Legislative Mandates

Title X grantees must comply with applicable legislative mandates set out in the HHS appropriations act. Grantees must have written policies in place that address these legislative mandates:

“None of the funds appropriated in the Act may be made available to any entity under Title X of the Public Health Service Act unless the applicant for the award certifies to the Secretary of Health and Human Services that it encourages family participation in the decision of minors to seek family planning services and that it provides counseling to minors on how to resist attempts to coerce minors into engaging in sexual activities.”

“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.”

Evidence that this requirement has been met includes written policies and procedures informing staff on a periodic basis of these requirements and documentation that staff have been formally informed of this requirement at least once during the project period, medical records document adolescents are encouraged to seek family participation.

Observations:

OSDH covers these requirements in their adolescent counseling policies and procedures (pages 1 and 2). In addition all staff sign an annual reminder of this requirement and these are on-file with the grantee. Medical records document this counseling for all adolescents.

Finding:

This requirement was MET.

10. Confidentiality

Every project must have safeguards to ensure client confidentiality. Information obtained by project staff about an individual receiving services may not be disclosed without the individual's documented consent, except as required by law or as may be necessary to provide services to the individual, with appropriate safeguards for confidentiality. Information may otherwise be disclosed only in summary, statistical, or other form that does not identify the individual (42 CFR 59.11).

Evidence that this requirement has been met includes written policies and procedures requiring safeguarding of client confidentiality, documentation that staff have been formally informed of this requirement at least once during the project period, clinical protocols have statements regarding client confidentiality, record systems adequately ensure privacy and confidentiality, clients are informed of HIPAA privacy forms, consent form or other documentation indicates clients are informed, materials regarding the availability of confidentiality are available to clients, and the physical layout allows for confidentiality and privacy.

Observations:

Systems are in place to ensure bills are not sent to clients requesting confidentiality, and staff note how to contact clients requesting such confidentiality. OSDH policies and procedures include protecting client privacy, patient rights are posted as well as all clients have a documented receipt of the HIPAA notification. In-take and financial interviews in one site visited, however, were open to the waiting room and could be heard by occupants in that area.

Finding:

This requirement was **NOT MET**.

OSDH **must** ensure that client privacy is maintained when collecting personal data.

11. Community Participation, Education, and Project Promotion

11.1 Community Participation

Title X grantees and sub-recipient agencies must provide an opportunity for participation in the development, implementation, and evaluation of the project by persons broadly representative of all significant elements of the population to be served; and by persons in the community knowledgeable about the community's needs for family planning services (42 CFR 59.5(b)(10)).

Evidence that this requirement has been met includes written policies and procedures to ensure participation of individuals broadly representative of the community in the project plan, a community engagement plan, and documentation of the implementation of the community engagement plan.

Observations:

OSDH has policy and procedures in place to ensure community participation. The program has a youth advisory team, the county health departments work with community groups to share program activities and information, and community representatives consult with potential clients to gain a broader perspective. All service sites must develop a community engagement plan and

submit it for review and approval at the state department level and report activities once a quarter.

Finding:

This requirement was MET.

11.2 Community Assessment Programs

Projects must establish and implement planned activities to facilitate community awareness of and access to family planning services (42 CFR 59.5(b)(3)). Each family planning project must provide for community education programs (42 CFR 59.5(b)(3)).

The community education program(s) should be based on an assessment of the needs of the community and should contain an implementation and evaluation strategy.

Evidence that this requirement has been met includes documentation of a periodic community needs assessment, a written community education and service promotion plan, documentation of an evaluation and modification to plan as needed.

Observations:

Service sites conduct client surveys and OSDH conducts a statewide needs assessment every three years. All service sites must develop a community engagement plan and submit it for review and approval at the state department level and report activities once a quarter.

Finding:

This requirement was MET.

11.3 Goals of Community Education

Community education should serve to:

- enhance community understanding of the objectives of the project,
- make known the availability of services to potential clients,
- encourage continued participation by persons to whom family planning may be beneficial (42 CFR 59.5 (b)(3))

Evidence that this requirement has been met includes a plan that:

- (a) states that the purpose is to enhance community understanding of the objectives of the project, make known the availability of services to potential clients, and encourage continued participation by persons to whom family planning may be beneficial
 - (b) promotes the use of family planning among those with unmet need,
 - (c) utilizes an appropriate range of methods to reach the community
 - (d) includes an evaluation strategy.
- and that such a plan has been implemented.

Observations:

OSDH includes these elements as part of their policies and procedures, and all service sites must develop a community engagement plan and submit it for review and approval at the state department level and report activities once a quarter. The program has also developed brochures to share with potential clients

Finding:

This requirement was MET.

12. Information and Education (I&E) Materials Approval

12.1 The Approval Process

Title X grantees and sub-recipient agencies are required to have a review and approval process, by an Advisory Committee, of all informational and educational (I&E) materials developed or made available under the project prior to their distribution (Section 1006 (d)(2), PHS Act; 42 CFR 59.6(a)).

Evidence that this requirement has been met includes written policies and procedures regarding the review of all materials prior to use with clients and documentation that the committee has reviewed and approved them.

Observations:

OSDH has an active I&E Committee that reviews and approves brochures, etc. developed and distributed by the state office. Sites are also provided templates that can be used to develop site-specific information. These materials, however, were not reviewed or approved by the I&E committee. At both sites visited such unapproved materials were being distributed to clients.

Finding:

This requirement was **NOT MET**.

OSDH **must** ensure all I&E materials given to Title X clients have been reviewed and approved by the I&E committee.

12.2 The I&E Committee

The committee must include individuals broadly representative (in terms of demographic factors such as race, color, national origin, handicapped condition, sex and age) of the population or community for which the materials are intended (42 CFR 59.6 (b)(2)).

Evidence that this requirement has been met includes an established board that is broadly representative of the population served, a process in place for sub-recipients, and documentation that the committee meets the representation requirement.

Observations:

The OSDH I&E Committee consists of seven individuals, primarily from the health department, but also some from the community. None are adolescents. One community representative does consult with youth in her project about materials she receives for review and another Youth Advisory Board also has input.

Finding:

This requirement was **NOT MET**.

OSDH **must** ensure the I&E Committee is broadly representative of the population, including youth.

12.3 Composition of the I&E Committee

Each Title X grantee must have an Advisory Committee of five to nine members, except that the size provision may be waived by the Secretary for good cause shown (42 CFR 59.6 (b)(1)). The Advisory Committee must review and approve all informational and educational (I&E) materials developed or made available under the project prior to their distribution to assure that the materials are suitable for the population and community for which they are intended and to assure their consistency with the purposes of Title X (Section 1006(d)(1), PHS Act; 42 CFR 59.6(a)).

Evidence that this requirement has been met includes policies and procedures regarding the committee, a current the roster/list of committee members, and current, written meeting minutes.

Observations:

The OSDH I&E Committee consists of seven individuals and policies and procedures are in place for its operations and meeting minutes exist with their review and decisions.

Finding:

This requirement was MET.

12.5 Delegation of I&E Functions

The grantee may delegate I&E functions for the review and approval of materials to sub-recipient agencies; however, the oversight of the I&E review process rests with the grantee.

Evidence that this requirement has been met includes policies and procedures that cover such delegation, monitoring of sub-recipients, and documentation of such monitoring.

Observations:

The OSDH supports the only I&E committee operating for the project.

Finding:

This requirement was **NOT APPLICABLE**

12.6 I&E Committee Responsibilities

The I&E Advisory Committee(s) must:

- Consider the educational and cultural backgrounds of the individuals to whom the materials are addressed;
- Consider the standards of the population or community to be served with respect to such materials;
- Review the content of the material to assure that the information is factually correct;
- Determine whether the material is suitable for the population or community to which it is to be made available; and
- Establish a written record of its determinations
(Section 1006(d), PHS Act; 42 CFR 59.6(b))

Evidence that this requirement has been met includes policies and procedures addressing these elements and documentation that all components are reviewed.

Observations:

OSDH I&E Committee deliberations include those elements required by federal regulations and records exist concerning their review and approval/disapproval of the materials.

Finding:

This requirement was MET.

13. Additional Administrative Requirements

13.1.1 Limited English Proficiency

Title X clinics must have written policies that are consistent with the HHS Office for Civil Rights policy document, Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons (August 4, 2003) (HHS Grants Policy Statement 2007, II-23).

Evidence that this requirement has been met includes policies regarding the provision of language assistance and documentation that staff are aware of such policies.

Observations:

OSDH has policies and procedures regarding language assistance for those with limited English proficiency. Some staff at most sites are bilingual (usually Spanish), and those with other languages can have a translator by phone. One site posted the availability of translation services at the front desk and a large poster with a variety languages on a waiting room wall. The other site visited (recently relocated) posted the availability of translation services only in English.

Finding:

This requirement was **NOT MET**.

OSDH **must** ensure all clients, especially those with minimal to no ability in English, are aware of the availability of translation services.

13.1.2 Prohibition of Disability Discrimination

Projects may not discriminate on the basis of disability and, when viewed in their entirety, facilities must be readily accessible to people with disabilities (45 CFR 84).

Evidence that this requirement has been met includes policies and procedures that ensure those with a disability can access services, documentation regarding accommodations to disabled clients, and project sites free of any obvious barriers.

Observations:

OSDH has policies and procedures in place and the facilities were accessible to those with disabilities.

Finding:

This requirement was MET.

13.2 Emergencies Management

All grantees, sub-recipients and Title X clinics are required to have a written plan for the management of emergencies (29 CFR 1910, subpart E) and clinical facilities must meet applicable standards established by Federal State and local governments (e.g. local fire, building, and licensing codes).

Evidence that this requirement has been met includes current disaster plans, staff identification of emergency evacuation routes, documentation of staff training, recognizable and barrier-free exits, and documentation that sub-recipients are in compliance.

Observations:

OSDH has policies and procedures in place, staff are trained and a record of drills maintained, emergency exits are marked and maps indicating the exit routes are posted. OSDH monitors site compliance with policies and procedures as part of their regular site visits.

Finding:

This requirement was MET.

13.3 Prohibition of Personal Gain

Projects are required to establish policies to prevent employees, consultants, or members of governing/advisory bodies from using their positions for purposes that are, or give the appearance of being motivated by a desire for private financial gain for themselves or others (HHS Grants Policy Statement 2007, II-7).

Evidence that this requirement has been met includes policies that prohibit personal financial gain and documentation that grantees have assured sub-recipients are in compliance.

Observations:

OSDH policies and procedures cover this prohibition in its administrative policies and sub-recipients are monitored for compliance.

Finding:

This requirement was MET.

13.4 Human Subjects Research

Research conducted within Title X projects may be subject to Department of Health and Human Services regulations regarding the protection of human subjects (45 CFR Part 46). The grantee/sub-recipient should advise their Regional Office in writing of any research projects that involve Title X clients (HHS Grants Policy Statement 2007, II-9).

Evidence that this requirement has been met includes written policies regarding the use of human subjects and documentation that grantees have assured sub-recipients are in compliance.

Observations:

OSDH has policies and procedures in place regarding human subjects research and includes such requirements in the contract for any sub-recipients. Sub-recipients are also monitored for compliance.

Finding:

This requirement was MET.

Title X Program Requirements

Financial Aspects

8.2 Prohibition on Abortion

Title X grantees and sub-recipients must be in full compliance with Section 1008 of the Title X statute and 42 CFR 59.5(a)(5), which prohibit abortion as a method of family planning.

Systems must be in place to assure adequate separation of any non-Title X activities from the Title X project.

Observations:

Oklahoma State Department of Health Maternal and Child Health policies and procedures, including the sub-recipient contract reviewed contain provisions prohibiting abortion as a method of family planning.

Finding:

This requirement was MET.

8.3 Structure and Management

8.3.3 Purchase Authorization

The grantee must ensure that all services purchased for project participants will be authorized by the project director or his designee on the project staff (42 CFR 59.5(b)(7)).

Evidence that this requirement has been met includes policies and procedures providing for a purchase approval process and documentation of purchases following appropriate policies and procedures.

Observations:

Oklahoma State Department of Health procurement policies and procedures provide and allow for the Title X Project Director to review and approve Title X-related purchases.

Finding:

This requirement was MET.

8.3.4 Contracted Services Follow Established Schedule of Fees

The grantee must ensure that services provided through a contract or other similar arrangement are paid for under agreements that include a schedule of rates and payment procedures maintained by the grantee. The grantee must be prepared to substantiate that these rates are reasonable and necessary (42 CFR 59.5(b)(9)).

Evidence that this requirement has been met includes a schedule of payments as part of the contract and the costs for services have a documented basis for rates.

Observations:

The sub-recipient agreement contains a voucher submission process and procedures and the amount of the sub-award.

Finding:

This requirement was MET.

8.3.6 Financial Management System

The grantee and each sub-recipient must maintain a financial management system that meets Federal standards, as applicable, as well as any other requirements imposed by the Notice of Award, and which complies with Federal standards that will support effective control and accountability of funds, as required (45 CFR parts 74.20 and 92.20).

Evidence that this requirement has been met includes financial policies and procedures references to appropriate federal regulations and records and other documentation to indicate practices align with Title X and other federal regulations.

Observations:

A review of recipient and sub-recipient financial policies and procedures reference 45CFR74 remain applicable and have not been updated include 45CFR75 and 2CFR 200 Part D.

Finding:

This requirement was **NOT MET**.

The OSDH NOA dated March 24, 2015 requires compliance with 2 CFR Part 200 and 45 CFR Part 75 which replace 45CFR Part 74 or 92. Accordingly, OSDH **must** update its financial policies and procedures to be consistent with 2 CFR Part 200 and 45 CFR Part 75.

8.4 Charges, Billings, and Collections

8.4.1 Charges to Those Below 100% of Federal Policy Levels and Third-Party Payers

Clients whose documented income is at or below 100% of the Federal Poverty Level (FPL) must not be charged, although projects must bill all third parties authorized or legally obligated to pay for services (Section 1006(c)(2), PHS Act; 42 CFR 59.5(a)(7)).

Evidence that this requirement has been met includes financial policies and procedures regarding collection of clients' income data, including legally accessing income information from another program or clients self-reported income; documentation that those below 100% FPL are not charged; and the income reporting process does not create a barrier to receipt of services.

Observations:

Recipient and sub-recipient billing and collection policies require clients whose documented income is at or below 100% must not be charged while third parties authorized and/or legally obligated to pay for services must be billed. Policies also prohibit denying services to persons with an inability to pay. Additional policies require providing services to clients unable to document their income.

Finding:

This requirement was MET.

8.4.2 Schedule of Discounts

A schedule of discounts, based on ability to pay, is required for individuals with family incomes between 101% and 250% of the Federal Poverty Level (FPL) (42 CFR 59.5(a)(8)).

Evidence that this requirement has been met includes financial policies and procedures regarding development of a schedule of discounts and documentation that these discounts are applied appropriately.

Observations:

Both the recipient and sub-recipient had a schedule of discounts based on ability to pay as determined by the sliding fee scale and applicable to clients with family incomes between 101% and 250% of the current FPL. The recipient's practice management system, Public Health Oklahoma Client Information System (PHOCIS) which the sub-recipient is also required to use, calculates the appropriate discount based on inputted client family size and income data.

While the written policy states that clients with family incomes between 101% and 250% of FPL do not pay more in co-payments or additional fees than they would otherwise pay when the schedule of discounts is applied, discussion with front desk staff and review of patient registration information indicate the sliding fee scale is not applied to insurance co-pays and deductibles.

Finding:

This requirement was **NOT MET**.

OSDH **must** ensure staff follow its policy regarding the application of the Title X sliding fee scale to co-payments or additional fees for clients with family incomes between 101% and 250% of FPL.

8.4.3 Waiving of Fees

Fees must be waived for individuals with family incomes above 100% of the FPL who, as determined by the service site project director, are unable, for good cause, to pay for family planning services (42 CFR 59.2).

Evidence that this requirement has been met includes policies and procedures for waiving fees and documentation that any determination to waive the fee is made by the service site director, is documented and the client is informed of the determination.

Observations:

OSDH has a written policy for the service site administrator to waive fees for those with "good cause." Staff, however, do not appear to distinguish between waiving fees under such circumstances and extending credit for those unable to pay. In addition, OSDH procedures do not indicate how clients are to be made aware of this option or the steps involved for staff to

complete such documentation for the administrator, or MCH for other circumstances, to make that decision. At present, OSDH staff exercises a de facto fee waiver when client account balances are allowed to accrue until they are written off as uncollectible.

Finding:

This requirement was **NOT MET**.

OSDH **must** develop and implement effective procedures to ensure Title X client fees are waived as indicated by policies.

8.4.4 Determining the Cost of Services

For persons from families whose income exceeds 250% of the FPL, charges must be made in accordance with a schedule of fees designed to recover the reasonable cost of providing services. (42 CFR 59.5(a)(8)).

Evidence that this requirement has been met includes policies and procedures for determining the cost of services and documentation that charges are applied appropriately.

Observations:

OSDH has policies and procedures in place regarding the development and approval of both the state and contractor fee schedules. The fee schedule currently in use by one sub-recipient, while approved by OSDH, is below both what the sub-recipient needs to recover its reasonable costs as well as that used by OSDH. No justification for the approval of such a fee schedule in deviation to Title X requirements was provided.

Finding:

This requirement was **NOT MET**.

OSDH **must** ensure approval of contractor Title X fee schedules provide a justification when deviating from Title X requirements.

8.4.5 Charges for Confidential Services

Eligibility for discounts for un-emancipated minors who receive confidential services must be based on the income of the minor (42 CFR 59.2).

Evidence that this requirement has been met includes policies and procedures for determining if the minor is seeking confidential services and charging the minor based on his/her own income and documentation that charges are applied appropriately.

Observations:

OSDH policies and procedures require a minor seeking confidential services be charged based solely on his or her income, and record reviews and front staff interviews confirmed this practice.

Finding:

This requirement was **MET**.

8.4.6 Third Party Payment

Where there is legal obligation or authorization for third party reimbursement, including public or private sources, all reasonable efforts must be made to obtain third party payment without the application of any discounts (42 CFR 59.5(a)(9)).

Family income should be assessed before determining whether copayments or additional fees are charged. With regard to insured clients, clients whose family income is at or below 250% FPL should not pay more (in copayments or additional fees) than what they would otherwise pay when the schedule of discounts is applied.

Evidence that this requirement has been met includes policies and procedures regarding billing third parties and assessing co-pays, contracts with third party payers, and a review of records indicates appropriate assessment and charges.

Observations:

OSDH participates in Medicaid, Medicare and has contracts with three private third-party payers and bills for services. See section 8.4.2 regarding the application of the sliding fee schedule to co-pays and other fees.

Finding:

This requirement was MET.

8.4.6 Title XIX and Title XX Reimbursements

Where reimbursement is available from Title XIX or Title XX of the Social Security Act, a written agreement with the Title XIX or the Title XX state agency at either the grantee level or sub-recipient agency is required (42 CFR 59.5(a)(9)).

Evidence that this requirement has been met includes up-to-date written agreements at both the grantee and/or sub-recipient level.

Observations:

Both OSDH and the sub-recipient visited have policies and procedures regarding participation in both the Medicaid and Medicaid waiver program. Accounts receivable records indicate reimbursements are received from these programs.

Finding:

This requirement was MET.

8.4.8 Fee Collection

Reasonable efforts to collect charges without jeopardizing client confidentiality must be made.

Evidence that this requirement has been met includes policies and procedures providing safeguards that protect client confidentiality, particularly in cases where sending an explanation of benefits could breach client confidentiality, and documentation at service sites demonstrating the sites maintain confidentiality when billing and collecting payments.

Observations:

OSDH and sub-recipient policies and procedures include adequate safeguards to protect client confidentiality, including cases where sending an explanation of benefits could breach client confidentiality. In addition clinic front desk staff were observed implementing the policy.

Finding:

This requirement was MET.

8.4.9 Voluntary Donations

Voluntary donations from clients are permissible; however, clients must not be pressured to make donations, and donations must not be a prerequisite to the provision of services or supplies.

Evidence that this requirement has been met includes policies and procedures that provide for voluntary donations and documentation and observation of requests for donations indicate no pressure for such payments.

Observations:

OSDH policies and procedures allow for voluntary donations and prohibit clinic staff from pressuring clients for donations. Direct observations of clinic processes demonstrated that the policy was being followed.

Finding:

This requirement was MET.

8.5 Project Personnel

8.5.5 Salary Limits

Appropriate salary limits will apply as required by law.

Evidence that this requirement has been met includes budgets and payroll records correspond to the most current family planning services Funding Opportunity Announcement (FOA).

Observations:

OSDH and sub-recipient budgets and staff assurances indicate adherence to appropriate salary limits as required by law and stipulated in the NOA.

Finding:

This requirement was MET.

10. Confidentiality

Every project must have safeguards to ensure client confidentiality. Information obtained by project staff about an individual receiving services may not be disclosed without the individual's documented consent, except as required by law or as may be necessary to provide services to the individual, with appropriate safeguards for confidentiality. Information may otherwise be

disclosed only in summary, statistical, or other form that does not identify the individual (42 CFR 59.11).

Evidence that this requirement has been met includes third-party billing does not breach confidentiality.

Observations:

OSDH policies contain safeguards, including procedural requirements to ensure patient confidentiality on all forms.

Finding:

This requirement was MET.

Title X Requirements

Clinical

8.1.2 Prohibition of Prerequisite for Other Services

Clients are aware that receipt of family planning services is not used as a prerequisite for receipt of other services from the service site.

Medical record review demonstrates that each client has signed a general consent form or other documentation indicating they are aware that receipt of family planning services is not a prerequisite for receipt of any other services offered.

Observations:

Medical records reviewed include the family planning risk and benefit form that includes this notification.

Finding:

This requirement was MET.

8.5 Project Personnel

8.5.4 Medical Director

Projects must provide that family planning medical services will be performed under the direction of a physician with special training or experience in family planning (42 CFR 59.5 (b)(6)).

Evidence that this requirement has been met includes documentation that 1) a physician is involved in medical/clinical services, 2) the Medical Director is involved in program operations, 3) the curriculum vitae indicates training or experience in family planning, and 4) clinical protocols are approved by the Medical Director.

Observations:

The project Medical Director, Dr. Pamela S. Miles, is an OB/GYN practitioner and professor with appropriate credentials who takes an active role in the program.

Finding:

This requirement was MET.

9.4 Referral for Related Social Services

Projects must provide for social services related to family planning including counseling, referral to and from other social and medical services agencies, and any ancillary services which may be necessary to facilitate clinic attendance (42 CFR 59.5 (b)(2)).

Evidence that this requirement has been met includes documentation that referrals were made based on specific conditions/issues.

Observations:

OSDH medical records reviewed indicates a robust referral network available to reproductive health clients with appropriate follow up.

Finding:

This requirement was MET.

9.6 Clinical Protocols

All grantees should assure services provided within their project operate within written clinical protocols that are in accordance with nationally recognized standards of care, approved by the grantee, and signed by the physician responsible for the service site.

Evidence that this requirement has been met includes written clinical policies and procedures that are aligned with nationally recognized standards of care and signed by a responsible physician, grantee monitoring of sub-recipients' policies for alignment with nationally recognized standards of care, and client records indicating services follow protocols.

Observations:

The OSDH Medical Director approved and signed all clinical protocols. Review of the protocols indicates they are based on nationally recognized standards promoted by ACOG and the USPTF.

Finding:

This requirement was MET.

9.7 Provision of Family Planning Related Medical Services

All projects must provide for medical services related to family planning and the effective usage of contraceptive devices and practices (including physician's consultation, examination, prescription, and continuing supervision, laboratory examination, and contraceptive supplies) as well as necessary referrals to other medical facilities when medically indicated (42 CFR 59.5(b)(1)). This includes, but is not limited to, emergencies that require referral.

Evidence that this requirement has been met includes written policies and procedures requiring family planning-related medical services, provision of breast and cervical cancer screening on-site, and written agreements with relevant referral agencies exist.

Observations:

Review of documents and direct observation of interaction of clinic personnel with clients indicate that grantee is providing comprehensive family planning services including breast and cervical cancer screening as well as appropriate referrals.

Finding:

This requirement was MET.

9.8 A Broad Range of Contraceptives

All Title X projects must provide 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).

If an organization offers only a single method of family planning, it may participate as part of a project as long as the entire project offers a broad range of family planning services. (42 CFR 59.5(a)(1)).

Evidence that this requirement has been met includes medical records indicating provision of a broad-range of contraceptives; all services, when viewed as a whole, providing a broad range, with current stocks offering a broad range on-site or by referral; clinical protocols covering contraception, pregnancy testing and counseling, services for achieving pregnancy, STD services and preconception health services; and documentation that the grantee ensures sub-recipients comply with these requirements.

Observations:

All OSDH clinical sites visited during this program review offer a broad range of contraceptive options to the patient population. These include hormonal and non-hormonal options. Related services such as pregnancy testing, counseling, preconception and infertility services are readily available.

The program director, however, reports demand for long-acting reversible contraception (LARCs) exceeds current supplies, and some clinics keep a waiting list for those who desire such a method, but are unable to receive it because of limited availability. The OCCHD is able for referral, but is not convenient for clients with limited transportation options.

Finding:

This requirement was MET.

Recommendation:

OSDH **should** budget additional funds to ensure an adequate supply of LARCs for all clinics.

9.10 Pregnancy Diagnosis and Counseling

Projects must provide pregnancy diagnosis and counseling to all clients in need of these services (42 CFR 59.5(a)(5)).

Evidence that this requirement has been met includes a written policy requiring provision of pregnancy diagnosis and counseling and clinic inventory and client record reviews indicate services were offered to all clients.

Observations:

Pregnancy diagnosis and counseling are available to all OSDH clients requesting this service. Medical records indicate appropriate counseling and follow up are completed for clients.

Finding:

This requirement was MET.

9.11 Pregnancy Options Counseling

Projects must offer 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.

If requested to provide such information and counseling, Title X staff must provide neutral, factual information and nondirective counseling on each of the options, and referral upon request, except with respect to any options(s) about which the pregnant woman indicates she does not wish to receive such information and counseling (42 CFR 59.5(a)(5)).

Evidence that this requirement has been met includes written policies and procedures regarding options counseling that are neutral and factual, referrals provided as requested, and medical records document such counseling and referrals.

Observations:

OSDH policies and procedures guide staff through options counseling. Medical records indicate appropriate counseling and necessary follow up have been documented.

Some of the materials provided clients, however, have **not** been reviewed and approved by the I&E committee (see Administrative finding 12.1)

Finding:

This requirement was MET.

Quality Family Planning Implementation Assessment

This portion of the assessment follows the recommendations detailed in *Providing Quality Family Planning Services: Recommendations of CDC and the U.S. Office of Population Affairs (QFP)*, which focuses on service provision consistent with the best available scientific evidence.

8.1 Voluntary Participation

8.1.1 Client-Centered Services

A core premise of Recommendations for Providing Quality Family Planning Services is that quality services are client-centered.

The key principles of providing quality, client-centered counseling include:

- 1) establish and maintain rapport with the client
- 2) assess the client's needs and personalize discussions accordingly
- 3) work with the client interactively to establish a plan
- 4) provide information that can be understood and retained by the client
- 5) confirm client understanding (See Appendix C of QFP for additional detail.)

Observations:

OSDH policies and procedures support client-centered services and counseling. Observation of interactions of medical staff with clients demonstrated good interaction between client and providers, and clients are encouraged to actively participate in their health care.

Finding:

This Quality Aspect is FULLY DEVELOPED.

8.7 Planning and Evaluation

Grantees should evaluate implementation of quality family planning services following the QFP framework, monitoring performance and improving efforts on an on-going basis. quality improvement (QI) activities should include:

- 1) Monitoring the use of most- or moderately-effective contraceptive methods and long-acting reversible contraceptives
- 2) On-going QI processes related to contraceptive use
- 3) Monitoring contraceptive use at the service-site level
- 4) On-going QI processes at the service site level to respond to contraceptive use findings
- 5) QI efforts at the service site level related to other aspects of quality care
- 6) Use of HIT data to increase QI efforts

Observations:

The OSDH program has encouraged the use of LARCs, creating such a demand that not all requests can be filled immediately. OSDH clients were above the national average for adolescents and women using highly effective and moderately effective contraceptives. The program uses the percentage of women using LARCs at the service as part of their quality assurance process. The program does not have an electronic health record and as such, is limited in the ability to analyze data from the service sites.

Finding:

This Quality Aspect is **PARTIALLY DEVELOPED**.

Recommendation:

OSDH **should** develop its HIT/EHR capabilities to allow for more efficient and accurate QA/QI monitoring.

9.2 Client-Centered Services

Quality services are client-centered, which includes providing services in a respectful and culturally competent manner, and are evidenced by:

- 1) A needs assessment to determine groups needed culturally competent care
- 2) Written policies and procedures requiring training in culturally competent care
- 3) Documentation that staff have received such training
- 4) Observation of a welcoming clinic environment
- 5) Client surveys document respectful treatment

Observations:

OSDH completed a needs assessment and identified priority populations to be served. The program has completed a series of mandatory cultural competence trainings on a variety of different populations and staff completion is documented. Policies and procedures include a waiving of fees for good cause and client surveys indicate the majority of clients view staff as respectful.

Finding:

This Quality Aspect is **FULLY DEVELOPED**.

9.6 Clinical Protocols

Protocols follow QFP and are evidenced by:

- 1) Covering the full scope of QFP-defined family planning services
- 2) Sub-recipient protocols reflect latest QFP recommendations
- 3) Documentation of QFP training
- 4) Client records indicate services per QFP Tables 2 and 3

Observations:

OSDH clinical protocols include the full scope of family planning services indicated by QFP, medical records document that providers follow these protocols and clinicians have been trained on QFP.

Finding:

This Quality Aspect is **FULLY DEVELOPED**.

9.8 Adolescent Services

The special needs of adolescents are addressed by:

- 1) Offering all services listed in the QFP
- 2) No out-stock of routinely offered contraceptives occurred in the past 6 months
- 3) FPAR data indicate services to adolescents close to or above the national average

- 4) FPAR data indicate services to males close to or above the national average
- 5) Medical records indicate adolescents have been counseled about abstinence, condoms and LARCs

Observations:

OSDH supports a full complement of reproductive health services is available to adolescents including a broad range of contraceptive methods. Appropriate counseling is provided. FPAR data indicate OSDH serves more than the national average for adolescents and less than the national average for males. At one site visited, the percentage of teen clients is below both the grantee's and national averages, but staff are aware of the issue and are working to increase the number served.

Finding:

This Quality Aspect is PARTIALLY DEVELOPED.

Recommendation:

OSDH **should** strategies to promote services among adolescents and males.

9.10 Pregnancy Testing and Counseling

Pregnancy testing and counseling services should include:

- 1) Written protocols follow QFP recommendations, including reproductive life planning
- 2) Medical records indicate clients with positive pregnancy tests receive prenatal counseling and social support assessment
- 3) Medical records indicate clients with a negative pregnancy test who wish not to become pregnant are offered same-day contraception
- 4) Staff are trained in QFP pregnancy testing and counseling recommendations
- 5) Medical records and observation indicate pregnancy counseling follows QFP recommendations, including reproductive life planning

Observations:

OSDH policies and procedures comply with QFP recommendations, and medical records indicate that appropriate testing and counseling is taking place at the clinical level. All clients completed a checklist that includes the reproductive life planning elements. Referral systems are in place for pregnant clients

Finding:

This Quality Aspect is FULLY DEVELOPED.

13.1 Limited English Proficiency

Providing services or materials to those with Limited English Proficiency include:

- 1) Materials are clear and easy to understand (e.g. 4th-6th-grade reading level)
- 2) Observation demonstrates that information is presented in a way that emphasizes essential points
- 3) Observation demonstrates that information on risks and benefits of different contraceptives or procedures are communicated in a way that is easily understood
- 4) Information provided during counseling is culturally appropriate

5) Educational materials are tailored to literacy

Observations:

Information is available to clients in English and Spanish, and a significant number of staff is bilingual (English/Spanish). A language line is available for instances in which a translator is not present (See Administrative section 13.1.1 regarding client notification of services). Cultural competency training covers a variety of different aspects throughout the year, and observations indicate clients receive counseling at appropriate levels.

Finding:

This Quality Aspect is FULLY DEVELOPED.

EXHIBIT 2



DEPARTMENT OF HEALTH AND HUMAN SERVICES
Office of the Assistant Secretary for Health

Regional Health Administrator
Region VI
1301 Young Street
Suite 1124
Dallas, TX 75202



June 28, 2016

Terry L. Cline, Ph.D.
Commissioner of Health
Oklahoma State Department of Health
1000 NE 10th
Oklahoma City, OK 73117

RE: Grant Number FPHPA066194

Dear Dr. Cline:

The Federal Title X program review for the Oklahoma State Department of Health was conducted May 2-5, 2016. Your Title X program supports excellent projects and activities and we applaud your efforts to increase services and quality throughout the system.

The purpose of the review is to provide the Regional Office with an evaluation of the Oklahoma State Department of Health's compliance with the Title X requirements and alignment with the Quality Family Planning (QFP) guidelines as set out in *Providing Quality Family Planning Services: Recommendations of CDC and the U.S. Office of Population Affairs*. This report addresses the administrative, fiscal, and clinical aspects of the Title X program and provides information to continue to strengthen your efforts.

I would like to highlight some of the review's major findings. Overall, the reviewers were impressed with the dedication and commitment to family planning in both the central office staff as well as in the field. Required areas to be addressed include:

- Ensuring client privacy during intake and financial interviews (see page 12)
- Ensuring clients with limited English proficiency are aware of translation services available to them (page 16)
- Ensuring appropriate application of Title X requirements with respect to charges on the sliding fee schedule (page 21)

With respect to quality family planning guidelines, many aspects of OSDH's program are fully developed, but some policies and procedures require modification to be in alignment with QFP recommendations (see pages 30-33).

Please review the report and respond to the findings in writing with a plan of action to address them by August 5, 2016.

On behalf of the site assessment review team, I want to thank you and all of your staff for the cooperation and hospitality extended during the visit. If you or your staff have any questions concerning any items in the report, please contact Dr. Liese Sherwood-Fabre at (214) 767-3060.

Sincerely,



Epi (Epi) Elizondo, Ph.D., PA-C
Regional Health Administrator, Region VI
Rear Admiral, Assistant Surgeon General,
U.S. Public Health Service

Attachment

cc: GrantSolutions

Joyce Marshall, MPH

Jill Nobles-Botkin, APRN-CNM

***PROGRAM REVIEW
TITLE X FAMILY PLANNING PROJECT
OKLAHOMA STATE DEPARTMENT OF HEALTH***

May 2-5, 2016

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BACKGROUND INFORMATION

Grantee Name: Oklahoma State Department of Health

Grantee Number: FPHPA066194

Project Address: 1000 NE 10th Street
Oklahoma City, Oklahoma 73117

Site Visit Dates: May 2- 5, 2016

Program Review Team Members:

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Review Team Leader

Lawrence Peaco, MPA Financial Services

Cristino Rodriguez, FNP-C Clinical Services

Department of Health and Human Services (DHHS) Region VI Staff:

Liese Sherwood-Fabre, PhD

Department of Health and Human Services (DHHS) Region VI Staff:

May 2, 2016 Briefing

Oklahoma State Department of Health

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Joni Bruce, Oklahoma Family Network Executive Director

Dawn Butler, MCH Administrative Support

Peggy Byerly, Early Childhood Coordinator

Jeanette Cline, QI Coordinator

Dana Coles, Perinatal and Reproductive Health Epidemiologist

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Pam Miles, Medical Consultant, Title X
Jill Nobles-Botkin, MCH/PRH Administrative Program Manager
Paul Patrick, MCH Assessment
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Sean Tomlinson, Financial Management
Mick Truitt, Assistant CFO
LaBetta Wallenmeyer, NP Consultant
Shirley Ward, Administrative Assistant, PRH

May 3, 2016

Comanche County Health Department

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Marquise Bishop, CCHD-HE
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Sharlet Rena Evans, District Nurse Manager
Tony Fleshman, RN
Lana Fry, Administrative Assistant, Clerical Support
Sarah Lambaria, Health Educator
Ayesha Lampkins, MCH Consultant (PRAMS/ToTs Project Manager)
Joyce Marshall, MCH Director, OSDH
Leah Mays, RN
Nicki McCray, MA
Johnette Miller, APO
LaCresha Mitchel, Front Desk Clerk
Jill Nobles-Botkin, PRH Administrative Program Manager
Brandie O'Connor, Regional Director
Bob Richardson, Internal Auditor II
LaBetta Wallenmeyer, NP Consultant
Sarah Whittington, RN II
Zachery Williams, Internal Auditor II
Melissa Wilson, Records Consultant

May 4, 2016

Oklahoma City-County Health Department (OCCHD)

Tiffany Elmore, OCCHD, Administrator of Clinical Services
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May 5, 2016 Debriefing:
Oklahoma State Department of Health

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Paul Patrick, MCH Assessment
Angela Steinle, Social Work Intern
Amy Terry, MCH/CAH Adolescent Health Coordinator
LaBetta Wallenmeyer, NP Consultant

Materials Supplied Prior to the Visit
FORMS

335 Early Start Consent Form
336 Emergency Contraception Consent Form
393 Family Planning Initial/Annual Visit
395 Pregnancy Screening
637 Emergency Contraception History & Assessment
657 Early Start Depo History & Exam
873 Early Start Oral Contraceptive History & Assessment

875 Family Planning Problem Visit
876 Family Planning Counseling & Education
1010 Etonogestrel Implant/Removal Procedure
Birth Control Guide
ODH 303C Consent for Services (English & Spanish)
303L Screening and Test Results
330 Contraceptive Follow-Up Form
ODH337 Natural Family Planning Fact Sheet
ODH337B Birth Control Fact Sheet
ODH337C IUD Fact Sheet
ODH337D Diaphragm Fact Sheet
ODF337F Spermicide Fact Sheet
ODH337H Male Condom Fact Sheet
ODH337I Patch Fact Sheet
ODH337J Vaginal Ring Fact Sheet
ODH337K Implantable Rod Fact Sheet
ODH337L Sponge Fact Sheet
ODH337M Emergency Contraception Fact Sheet
ODH340 Birth Control Shot Fact Sheet
ODH638 Early Start History & Assessment Combined Hormonal Contraception (Pill, Patch, Ring)
ODH902 Missed Oral Contraceptive Pill Fact Sheet (Bilingual)
ODH903 Missed Vaginal Ring Contraceptive Fact Sheet
904 Missed Transdermal Patch Fact Sheet
ODH1055 Client Visit History & Allergies
ODH1105 Basic Infertility Visit
ODHP348B Osteoporosis
P337 IUC Insertion Procedure
P338 Family Planning Services Risk & Benefit Sheet
P348 Vitamins and Using the Pill

FAMILY PLANNING POLICY AND PROCEDURES MANUAL

QUALITY ASSURANCE/QUALITY IMPROVEMENT

CCPP 2016 –County Community Participation, Education, and Project Promotion Plan Template
CHD (County Health Department) Annual Monitoring Site Visit Tool
Comprehensive Program Review (CPR)
 CPRTeam Evaluation Summaries for 2015 and 2016
 Federal and State Required Posters
 Minutes MCH Comprehensive Program Review Staff Meeting
SV TOOL – Site Visit Tool Family Planning Chart Audit
SV TOOL – List of County Documents to Have Ready
SV TOOL – Administrative Tool
SV TOOL – Financial Tool
SV TOOL – Public Health Enabling Tool

SV TOOL – Clinical Services Tool
Team Evaluations for Comprehensive Program Review
Client Satisfaction Survey (English & Spanish)
Survey Monkey CARS (Community Activity Reporting)
Survey Monkey QI (Quality Improvement Reporting)

TRAINING

Community Participation & QI Training 3/30/15
MCH Training Calendar SFY 2016
Needs Assessment Results 2015-2016

EDUCATIONAL MATERIAL

FP Services Brochure
Men's Health Brochure
Women's Health Assessment

ORIENTATION

MCH Orientation Manual
New Employee Orientation Signature Sheet

Memoranda of agreement with other programs

Documents reviewed at the Clinic Level

Constitution and by-laws of Advisory board, if delegated to site
Annual reports
Financial records, including any audits completed
Certificate/reports: fire inspection, state licensure, sanitation, CLIA, OSHA, ADA
Internal medical audit policies and procedures
Emergency and Disaster plans (medical and non-medical)
Clinic education brochures, public information materials—Site-specific and OSDH-supplied
The schedule of discounts for clients at/below 250% of poverty level for sub-recipients
Client Sterilization records
Abnormal laboratory results and follow-up records
Documentation of community education and outreach
Pharmacy Records, especially of any stock-outs
Client charts: Initial visit, return visit, adolescents, males and pregnancy-test only clients

OVERVIEW OF THE PROJECT

History and Development

The Oklahoma State Department of Health (OSDH) and State Board of Health were created with the passage of the Oklahoma Public Health Code on July 1, 1963. The State Department of Health was to consist of the Commissioner of Health and such divisions, sections, bureaus, office and positions as established by the Board of Health and by law. Currently state health services are organized under a Governor-appointed Secretary for Health. The current Commissioner of Health is also the Secretary of Health.

Description of the Program

The Oklahoma State Department of Health Family Planning Program (OSDH FPP) is administered within the Perinatal and Reproductive Health Division of the Maternal & Child Health Service, a part of the Community & Family Health Services. The OSDH Family Planning (FP) Program is responsible for assuring compliance with Title X policy, procedure, and administration of funds. Day-to-day coordination of Title X project activities is the responsibility of the Administrative Program Manager of PRHD, who reports directly to the Director of MCH, who reports directly to the Deputy Commissioner of the CFHS. The Deputy Commissioner of the CFHS answers directly to the Commissioner of Health.

OSDH has administered the Title X family planning program for more than forty years.

The public health system in Oklahoma includes the OSDH with its statewide county health department system and the two city county health departments in Oklahoma County and in Tulsa County, which are administratively separate from the OSDH system and have their own personnel systems. The county health departments are OSDH administrative units. Altogether, clinical and educational services are provided through 87 county health sites and 8 contract agency sites across the state, located in 70 of the 77 counties. The clinical services are provided through the Community Health Services' County District Administration, Nursing Service, Community Development Service, and Record Evaluation and Support. These entities provide service delivery and assist with program monitoring. The Medical Director is available by contract through OUHSC.

Oklahoma Health Care Authority (OHCA), the state Medicaid agency, changed their family planning services 1115B waiver to a State Plan Amendment (SPA) on September 1, 2011 (now, SoonerPlan). The SPA includes hormonal contraceptive sub-dermal implant and the HPV vaccination, which were previously not included in the family planning waiver. Sterilization is not provided through the Title X FP project, although the SPA covers both male and female sterilizations.

The Title X Program Review Process

At the start of the process, the regional office and OSDH negotiated the dates for the review and the sites to be visited. Following these decisions, the regional office provided a list of documents to be compiled, including policies and protocols, board meeting minutes, and medical charts (at the clinic sites).

The region office staff also provided both review consultants and OSDH with the protocol to be used during the visit. The instrument, developed to coincide with the Title X requirements and Quality Family Planning guidelines issued in April, 2014 (*Providing Quality Family Planning Services: Recommendations of CDC and the U.S. Office of Population Affairs*), reflects current federal regulations and guidelines. The tool guides the review team's assessment of grantee policies and procedures and on-site observations and evaluations of program operations for evidence of compliance with grantee policies and procedures based on these requirements and QFP guidelines.

Title X Program Requirements Assessment

This assessment relates to the grantee's compliance with the statute and regulations. For these requirements, the grantee will receive an assessment of compliance and will receive a rating of "met", "not met", or "N/A" (not applicable). The evidence that minimum criteria have been met will be based on both grantee and sub-recipient records and observation at grantee administrative offices and selected service sites as part of the monitoring process. Evidence may include—but is not limited to—policies, procedures, protocols, documentation of training, direct visual confirmation per consultants and/or regional office staff to ensure that what is contained in written policy or instructions is actually being carried out, and/or any other form of documentation substantiating the project is operating in accordance with the Title X Program Requirements

QFP Quality Assessment

This assessment reflects the extent to which the grantee has implemented key aspects of QFP. Grantees will be assessed using the list of items providing evidence of various aspects of quality services. The number of items identified serves as a means of recognizing grantee achievements as well as identify areas in need of improvement and/or technical assistance.

Assessment Timeline

Before the review, OSDH and the sites selected for visits were requested to compile a series of documents including policies and protocols, board meeting minutes, and medical charts (at the clinic sites); arrange for interviews with central office staff; and schedule a initial and debriefing meeting with Departmental representatives.

At the initial meeting, the team discussed the review process, and OSDH provided an overview of the project. Following meetings at the central office the morning of the first review day, the team visited two different clinic sites.

At the conclusion of the each clinic visit, the team gave an oral report to clinic and accompanying central office staff. At a formal exit conference, the reviewers reported on the findings related to compliance in each area. This written report follows the same format and contains major findings and recommendations as reported by the review team to OSDH at the exit conference on May 5, 2016. In the recommendation statements, a "must" references OSDH non-compliance to federal regulations. Additionally, quality assessment ratings indicate the

extent to a program has achieved various aspects of QFP. In this section, a “should” references strong program suggestions and recommends the program evaluate the information in the interest of continued improvement of program operations.

Title X Program Requirements

Administrative Aspects

8. Project Management and Administration

8.1 Voluntary Participation

8.1.1 Prohibition of Coercion

Title X projects must “provide services without subjecting individuals to any coercion to accept services or to employ or not to employ any particular methods of family planning. (Sections 1001 and 1007, PHS Act; 42 CFR 59.5 (a)(2))

Such requirements are met through institutionalizing administrative procedures (i.e., staff training, clinical protocols, and consent forms) to ensure clients receive services on a voluntary basis.

Observations:

The policies and procedures for the service and contract sites’ responsibilities include the voluntary nature the program. The program also includes a general consent form and a family planning risk and benefit form that indicates the voluntary nature of the services. All family planning staff sign an Annual Title X Reminder that includes this statement.

Finding:

This requirement was MET.

8.1.2 Prohibition of Prerequisite for Other Services

Title X projects must ensure that “acceptance of services must...not be made a prerequisite to eligibility for, or receipt of, any services, assistance from or participation in any other program of the applicant.” (Section 1007, PHS Act; 42 CFR 59.5 (a)(2))

This requirement is met through institutionalizing administrative procedures (e.g., staff training, clinical protocols, and consent forms) to ensure clients’ receipt of family planning services is not used as a prerequisite to receipt of other services from the service site.

Observations:

The policies and procedures for the service and contract sites’ responsibilities include this prohibition. The program also requires clients to sign a family planning risk and benefit form that states this prohibition. All family planning staff sign an Annual Title X Reminder that includes this statement.

Finding:

This requirement was MET.

8.1.3 Prosecution for Coercion

Personnel working within the family planning project must be informed that they may be subject to prosecution if they coerce or try to coerce any person to undergo an abortion or sterilization procedure (Section 205, Public Law 94-63, as set out in 42 CFR 59.5(a)(2) footnote 1).

Evidence that this requirement has been met includes 1) written policies and procedures 2) documentation that staff has been informed at least once during the project period, and 3) documentation exists at the sub-recipient level that staff has been informed.

Observations:

The policies and procedures for the service and contract sites' responsibilities include this statement. All family planning staff sign an Annual Title X Reminder that includes this statement.

Finding:

This requirement was MET.

8.2 Prohibition on Abortion

Title X grantees and sub-recipients must be in full compliance with Section 1008 of the Title X statute and 42 CFR 59.5(a)(5), which prohibit abortion as a method of family planning.

Systems must be in place to assure adequate separation of any non-Title X activities from the Title X project. These include policies and procedures regarding the prohibition as well as for the separation of Title X services.

In addition grantees have documented processes to ensure that they and any sub-recipients are in compliance with Section 1008, including language in any sub-recipient contracts addressing this requirement.

Observations:

The policies and procedures for the service and contract sites' responsibilities include this statement and is also included in the sub-recipient agreement. See also Financial Requirements.

Finding:

This requirement was MET.

8.3 Structure and Management

8.3.1 Written Agreements

The grantee must have a written agreement with each sub-recipient and establish written standards and guidelines for all delegated project activities consistent with the appropriate section(s) of the Title X Program Requirements, as well as other applicable requirements (45 CFR parts 74 and 92).

Observations:

Sub-recipient agreements include references to the Title X requirements and guidelines. In addition, the Family Planning Policy and Procedure Manual contains a section on “Service Site and Contract Agency Responsibilities” that reiterates these requirements.

Finding:

This requirement was MET.

8.3.2 Sub-recipient Contracting of Services

If a sub-recipient wishes to subcontract any of its responsibilities or services, a written agreement that is consistent with Title X Program Requirements and approved by the grantee must be maintained by the sub-recipient (45 CFR parts 74 and 92).

Evidence that this requirement has been met include a signed subcontracting agreement stipulating compliance with Title X requirements, documentation of grantee approval of sub-contracts, and monitoring reports to ensure compliance.

Observations:

OCCHD does not have any sub-recipient agreements, but a clause in the OSDH agreement requires approval from OSDH.

Finding:

This requirement was NOT APPLICABLE

8.3.5 Sub-recipient Participation in Development of Policies and Procedures.

Sub-recipient agencies must be given an opportunity to participate in the establishment of ongoing grantee policies and guidelines (42 CFR 59.5 (a)(10)).

Evidence that this requirement has been met include a mechanism for sub-recipient participation in the policies and procedures and documentation of the sub-recipients’ inclusion.

Observations:

The inclusion of sub-recipients is stated in the program administration manual and sub-recipients review, comment on, and approve all policies and procedures along with OSDH staff.

Finding:

This requirement was MET.

8.5 Project Personnel

8.5.1 Federal and State Personnel Requirements

Grantees and sub-recipients personnel policies must comply with applicable Federal and State requirements, including Title VI of the Civil Rights Act, Section 504 of the Rehabilitation Act of 1973, Title I of the Americans with Disabilities Act, and the annual appropriations language.

Evidence that this requirement has been met includes grantee and sub-recipient personnel policies and procedures create a process to avoid discrimination in personnel administration.

Observations:

The policies and procedures for the service and contract sites' responsibilities include this statement, and it is included as part of the sub-recipient site visit review tool

Finding:

This requirement was MET.

8.5.2 Cultural Competency

Project staff should be broadly representative of all significant elements of the population to be served by the project, and should be sensitive to, and able to deal effectively with, the cultural and other characteristics of the client population (42 CFR 59.5 (b)(10)).

Evidence that this requirement has been met includes grantee and sub-recipient personnel policies and procedures regarding cultural competency that has been implemented through training and client surveys.

Observations:

The policies and procedures for the service and contract sites' responsibilities include this statement and all staff must complete training in the topic and such training is documented.

Finding:

This requirement was MET.

8.5.3 Project Director

Projects must be administered by a qualified project director, and changes in the project director or other key personnel must be approved by the Office of Grants Management. (HHS Grants Policy Statement, 2007 Section II-54.)

Evidence that this requirement has been met includes documentation of OGM approval of personnel changes during the project period.

Observations:

No personnel changes requiring OGM approval occurred during the current grant. Prior approval was sought and granted for the new MCH Director in 2014.

Finding:

This requirement was NOT APPLICABLE

8.6 Staff Training and Project Technical Assistance

8.6.1 Orientation and In-Service Training

Projects must provide for the orientation and in-service training of all project personnel, including the staff of sub-recipient agencies and service sites (42 CFR 59.5(b)(4)).

Evidence that this requirement has been met includes grantee and sub-recipient staff training needs assessment and plan and records of personnel trainings completed.

Observations:

The OSDH program has an orientation program for all new employees, an annual assessment for additional training needs, and a training plan to address these needs.

Finding:

This requirement was MET.

8.6.2 Mandatory Reporting Training

The project's orientation/in-service training includes training on Federal/State requirements for reporting or notification of child abuse, child molestation, sexual abuse, rape, or incest, as well as on human trafficking.

Evidence that this requirement has been met includes grantee and sub-recipient policies and procedures for meeting these training requirements, and training attendance records.

Observations:

The policies and procedures manual includes information on mandatory reporting, records indicate all staff have completed training in this area and records are checked during service site visits.

Finding:

This requirement was MET.

8.7 Planning and Evaluation

Grantees must ensure that the project is competently and efficiently administered (42 CFR 59.5 (b) (6) and (7)).

Evidence that this requirement has been met includes written monitoring plans, documented periodic review of work plan progress, and timely, complete, and accurate submission of FPAR data.

Observations:

The program has a work plan that is updated at least annually, the program has also identified two quality assurance elements that are calculated and reported back to the service sites (the percentage of clients using LARCs and the no-show rate). FPAR submission was completed on-time with only one validation that involved only adding a note regarding local income not including in-kind goods or services.

Finding:

This requirement was MET.

9.1 Low-Income Families

Priority for project services is to persons from low- income families (Section 1006(c)(1), PHS Act; 42 CFR 59.5(a)(6)).

Evidence that this requirement has been met includes more than 50% of clients are at or below 100% FPL as reported on the FPAR and service site locations are accessible to low-income individuals.

Observations:

The 2014 and 2015 OSDH FPAR percentages for those under 100% FPL was 73%. Both clinics visited were on a bus line and OSDH operates at least one clinic in all but seven very rural counties.

Finding:

This requirement was MET.

9.2 Dignity of the Individual

Services must be provided in a manner which protects the dignity of the individual (42 CFR 59.5 (a)(3)).

Evidence that this requirement has been met includes appropriate policies, direct observation of clinic operations that indicate protection of client privacy, and documentation which outlines clients' rights and responsibilities.

Observations:

OSDH policies and procedures includes protecting client privacy, patient rights are posted, and all clients have a documented receipt of the HIPAA notification. In-take and financial interviews in one site visited, however, were open to the waiting room and could be heard by occupants in that area.

Finding:

This requirement was **NOT MET**.

OSDH **must** ensure that client privacy is maintained when collecting personal data.

9.3 Non-Discrimination

Services must be provided without regard to religion, race, color, national origin, disability, age, sex, number of pregnancies, or marital status (42 CFR 59.5 (a)(4)).

Evidence that this requirement has been met includes written policies and procedures stating non-discrimination, documentation that staff have been informed of non-discrimination policies, and documentation of monitoring of sub-recipients for non-discrimination.

Observations:

OSDH has policies and procedures regarding non-discrimination and staff sign a reminder at least once a project period regarding this requirement.

Finding:

This requirement was MET.

9.4 Referral for Related Social Services

Projects must provide for social services related to family planning including counseling, referral to and from other social and medical services agencies, and any ancillary services which may be necessary to facilitate clinic attendance (42 CFR 59.5 (b)(2)).

Evidence that this requirement has been met includes documentation that social service and medical needs of the community has been assessed and relevant services identified, sub-recipients are required to develop and implement plans to address relevant service needs, and current, written agreements with relevant referral agencies exist.

Observations:

OSDH completes a state-wide needs assessment and has developed written agreements with community health centers for cross-referrals between primary care and provision of contraceptives. The county health unit can provide in-house referrals for dietician/nutrition counseling, WIC, and dental. OCCHD has primary care referrals to the primary care clinic co-located with them and have a number of different written MOUs for various services. Additionally, clinics also provide clients with brochures regarding specialized services, such as transportation and social/medical services, but these do not have written agreements.

Finding:

This requirement was MET.

9.5 Referral Arrangements

Projects must provide for coordination and use of referral arrangements with other providers of health care services, local health and welfare departments, hospitals, voluntary agencies, and health services projects supported by other federal programs (42 CFR 59.5 (b)(8)).

Evidence that this requirement has been met includes written policies requiring plans to coordinate with other service providers and current, written agreements with relevant referral agencies exist.

Observations:

OSDH has a policy and procedure regarding referrals and written agreements with community health centers for cross-referrals between primary care and provision of contraceptives exist for some clinical issues, including the two sites visited.

Medical files included referrals for some clinical issues to outside service providers without a written agreement between the OSDH and the service provider. Such referrals do not follow OSDH policies and procedures or Title X requirements for written agreements.

Finding:

This requirement was **NOT MET**.

OSDH **must** ensure referrals meet Title X requirements.

9.9 Residency Requirements

Services must be provided without the imposition of any durational residency requirement or requirement that the client be referred by a physician (42 CFR 59.5(b)(5)).

Evidence that this requirement has been met includes written policies prohibiting imposition of residency requirement at the grantee and sub-recipient level.

Observations:

OSDH policies and procedures include a prohibition of any residency requirement for services and all staff have signed an annual reminder of this requirement.

Finding:

This requirement was MET.

9.12 Legislative Mandates

Title X grantees must comply with applicable legislative mandates set out in the HHS appropriations act. Grantees must have written policies in place that address these legislative mandates:

“None of the funds appropriated in the Act may be made available to any entity under Title X of the Public Health Service Act unless the applicant for the award certifies to the Secretary of Health and Human Services that it encourages family participation in the decision of minors to seek family planning services and that it provides counseling to minors on how to resist attempts to coerce minors into engaging in sexual activities.”

“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.”

Evidence that this requirement has been met includes written policies and procedures informing staff on a periodic basis of these requirements and documentation that staff have been formally informed of this requirement at least once during the project period, medical records document adolescents are encouraged to seek family participation.

Observations:

OSDH covers these requirements in their adolescent counseling policies and procedures (pages 1 and 2). In addition all staff sign an annual reminder of this requirement and these are on-file with the grantee. Medical records document this counseling for all adolescents.

Finding:

This requirement was MET.

10. Confidentiality

Every project must have safeguards to ensure client confidentiality. Information obtained by project staff about an individual receiving services may not be disclosed without the individual's documented consent, except as required by law or as may be necessary to provide services to the individual, with appropriate safeguards for confidentiality. Information may otherwise be disclosed only in summary, statistical, or other form that does not identify the individual (42 CFR 59.11).

Evidence that this requirement has been met includes written policies and procedures requiring safeguarding of client confidentiality, documentation that staff have been formally informed of this requirement at least once during the project period, clinical protocols have statements regarding client confidentiality, record systems adequately ensure privacy and confidentiality, clients are informed of HIPAA privacy forms, consent form or other documentation indicates clients are informed, materials regarding the availability of confidentiality are available to clients, and the physical layout allows for confidentiality and privacy.

Observations:

Systems are in place to ensure bills are not sent to clients requesting confidentiality, and staff note how to contact clients requesting such confidentiality. OSDH policies and procedures include protecting client privacy, patient rights are posted as well as all clients have a documented receipt of the HIPAA notification. In-take and financial interviews in one site visited, however, were open to the waiting room and could be heard by occupants in that area.

Finding:

This requirement was **NOT MET**.

OSDH **must** ensure that client privacy is maintained when collecting personal data.

11. Community Participation, Education, and Project Promotion

11.1 Community Participation

Title X grantees and sub-recipient agencies must provide an opportunity for participation in the development, implementation, and evaluation of the project by persons broadly representative of all significant elements of the population to be served; and by persons in the community knowledgeable about the community's needs for family planning services (42 CFR 59.5(b)(10)).

Evidence that this requirement has been met includes written policies and procedures to ensure participation of individuals broadly representative of the community in the project plan, a community engagement plan, and documentation of the implementation of the community engagement plan.

Observations:

OSDH has policy and procedures in place to ensure community participation. The program has a youth advisory team, the county health departments work with community groups to share program activities and information, and community representatives consult with potential clients to gain a broader perspective. All service sites must develop a community engagement plan and

submit it for review and approval at the state department level and report activities once a quarter.

Finding:

This requirement was MET.

11.2 Community Assessment Programs

Projects must establish and implement planned activities to facilitate community awareness of and access to family planning services (42 CFR 59.5(b)(3)). Each family planning project must provide for community education programs (42 CFR 59.5(b)(3)).

The community education program(s) should be based on an assessment of the needs of the community and should contain an implementation and evaluation strategy.

Evidence that this requirement has been met includes documentation of a periodic community needs assessment, a written community education and service promotion plan, documentation of an evaluation and modification to plan as needed.

Observations:

Service sites conduct client surveys and OSDH conducts a statewide needs assessment every three years. All service sites must develop a community engagement plan and submit it for review and approval at the state department level and report activities once a quarter.

Finding:

This requirement was MET.

11.3 Goals of Community Education

Community education should serve to:

- enhance community understanding of the objectives of the project,
- make known the availability of services to potential clients,
- encourage continued participation by persons to whom family planning may be beneficial (42 CFR 59.5 (b)(3))

Evidence that this requirement has been met includes a plan that:

- (a) states that the purpose is to enhance community understanding of the objectives of the project, make known the availability of services to potential clients, and encourage continued participation by persons to whom family planning may be beneficial
 - (b) promotes the use of family planning among those with unmet need,
 - (c) utilizes an appropriate range of methods to reach the community
 - (d) includes an evaluation strategy.
- and that such a plan has been implemented.

Observations:

OSDH includes these elements as part of their policies and procedures, and all service sites must develop a community engagement plan and submit it for review and approval at the state department level and report activities once a quarter. The program has also developed brochures to share with potential clients

Finding:

This requirement was MET.

12. Information and Education (I&E) Materials Approval

12.1 The Approval Process

Title X grantees and sub-recipient agencies are required to have a review and approval process, by an Advisory Committee, of all informational and educational (I&E) materials developed or made available under the project prior to their distribution (Section 1006 (d)(2), PHS Act; 42 CFR 59.6(a)).

Evidence that this requirement has been met includes written policies and procedures regarding the review of all materials prior to use with clients and documentation that the committee has reviewed and approved them.

Observations:

OSDH has an active I&E Committee that reviews and approves brochures, etc. developed and distributed by the state office. Sites are also provided templates that can be used to develop site-specific information. These materials, however, were not reviewed or approved by the I&E committee. At both sites visited such unapproved materials were being distributed to clients.

Finding:

This requirement was **NOT MET**.

OSDH **must** ensure all I&E materials given to Title X clients have been reviewed and approved by the I&E committee.

12.2 The I&E Committee

The committee must include individuals broadly representative (in terms of demographic factors such as race, color, national origin, handicapped condition, sex and age) of the population or community for which the materials are intended (42 CFR 59.6 (b)(2)).

Evidence that this requirement has been met includes an established board that is broadly representative of the population served, a process in place for sub-recipients, and documentation that the committee meets the representation requirement.

Observations:

The OSDH I&E Committee consists of seven individuals, primarily from the health department, but also some from the community. None are adolescents. One community representative does consult with youth in her project about materials she receives for review and another Youth Advisory Board also has input.

Finding:

This requirement was **NOT MET**.

OSDH **must** ensure the I&E Committee is broadly representative of the population, including youth.

12.3 Composition of the I&E Committee

Each Title X grantee must have an Advisory Committee of five to nine members, except that the size provision may be waived by the Secretary for good cause shown (42 CFR 59.6 (b)(1)). The Advisory Committee must review and approve all informational and educational (I&E) materials developed or made available under the project prior to their distribution to assure that the materials are suitable for the population and community for which they are intended and to assure their consistency with the purposes of Title X (Section 1006(d)(1), PHS Act; 42 CFR 59.6(a)).

Evidence that this requirement has been met includes policies and procedures regarding the committee, a current the roster/list of committee members, and current, written meeting minutes.

Observations:

The OSDH I&E Committee consists of seven individuals and policies and procedures are in place for its operations and meeting minutes exist with their review and decisions.

Finding:

This requirement was MET.

12.5 Delegation of I&E Functions

The grantee may delegate I&E functions for the review and approval of materials to sub-recipient agencies; however, the oversight of the I&E review process rests with the grantee.

Evidence that this requirement has been met includes policies and procedures that cover such delegation, monitoring of sub-recipients, and documentation of such monitoring.

Observations:

The OSDH supports the only I&E committee operating for the project.

Finding:

This requirement was **NOT APPLICABLE**

12.6 I&E Committee Responsibilities

The I&E Advisory Committee(s) must:

- Consider the educational and cultural backgrounds of the individuals to whom the materials are addressed;
- Consider the standards of the population or community to be served with respect to such materials;
- Review the content of the material to assure that the information is factually correct;
- Determine whether the material is suitable for the population or community to which it is to be made available; and
- Establish a written record of its determinations (Section 1006(d), PHS Act; 42 CFR 59.6(b))

Evidence that this requirement has been met includes policies and procedures addressing these elements and documentation that all components are reviewed.

Observations:

OSDH I&E Committee deliberations include those elements required by federal regulations and records exist concerning their review and approval/disapproval of the materials.

Finding:

This requirement was MET.

13. Additional Administrative Requirements

13.1.1 Limited English Proficiency

Title X clinics must have written policies that are consistent with the HHS Office for Civil Rights policy document, Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons (August 4, 2003) (HHS Grants Policy Statement 2007, II-23).

Evidence that this requirement has been met includes policies regarding the provision of language assistance and documentation that staff are aware of such policies.

Observations:

OSDH has policies and procedures regarding language assistance for those with limited English proficiency. Some staff at most sites are bilingual (usually Spanish), and those with other languages can have a translator by phone. One site posted the availability of translation services at the front desk and a large poster with a variety languages on a waiting room wall. The other site visited (recently relocated) posted the availability of translation services only in English.

Finding:

This requirement was **NOT MET**.

OSDH **must** ensure all clients, especially those with minimal to no ability in English, are aware of the availability of translation services.

13.1.2 Prohibition of Disability Discrimination

Projects may not discriminate on the basis of disability and, when viewed in their entirety, facilities must be readily accessible to people with disabilities (45 CFR 84).

Evidence that this requirement has been met includes policies and procedures that ensure those with a disability can access services, documentation regarding accommodations to disabled clients, and project sites free of any obvious barriers.

Observations:

OSDH has policies and procedures in place and the facilities were accessible to those with disabilities.

Finding:

This requirement was MET.

13.2 Emergencies Management

All grantees, sub-recipients and Title X clinics are required to have a written plan for the management of emergencies (29 CFR 1910, subpart E) and clinical facilities must meet applicable standards established by Federal State and local governments (e.g. local fire, building, and licensing codes).

Evidence that this requirement has been met includes current disaster plans, staff identification of emergency evacuation routes, documentation of staff training, recognizable and barrier-free exits, and documentation that sub-recipients are in compliance.

Observations:

OSDH has policies and procedures in place, staff are trained and a record of drills maintained, emergency exits are marked and maps indicating the exit routes are posted. OSDH monitors site compliance with policies and procedures as part of their regular site visits.

Finding:

This requirement was MET.

13.3 Prohibition of Personal Gain

Projects are required to establish policies to prevent employees, consultants, or members of governing/advisory bodies from using their positions for purposes that are, or give the appearance of being motivated by a desire for private financial gain for themselves or others (HHS Grants Policy Statement 2007, II-7).

Evidence that this requirement has been met includes policies that prohibit personal financial gain and documentation that grantees have assured sub-recipients are in compliance.

Observations:

OSDH policies and procedures cover this prohibition in its administrative policies and sub-recipients are monitored for compliance.

Finding:

This requirement was MET.

13.4 Human Subjects Research

Research conducted within Title X projects may be subject to Department of Health and Human Services regulations regarding the protection of human subjects (45 CFR Part 46). The grantee/sub-recipient should advise their Regional Office in writing of any research projects that involve Title X clients (HHS Grants Policy Statement 2007, II-9).

Evidence that this requirement has been met includes written policies regarding the use of human subjects and documentation that grantees have assured sub-recipients are in compliance.

Observations:

OSDH has policies and procedures in place regarding human subjects research and includes such requirements in the contract for any sub-recipients. Sub-recipients are also monitored for compliance.

Finding:

This requirement was MET.

Title X Program Requirements

Financial Aspects

8.2 Prohibition on Abortion

Title X grantees and sub-recipients must be in full compliance with Section 1008 of the Title X statute and 42 CFR 59.5(a)(5), which prohibit abortion as a method of family planning.

Systems must be in place to assure adequate separation of any non-Title X activities from the Title X project.

Observations:

Oklahoma State Department of Health Maternal and Child Health policies and procedures, including the sub-recipient contract reviewed contain provisions prohibiting abortion as a method of family planning.

Finding:

This requirement was MET.

8.3 Structure and Management

8.3.3 Purchase Authorization

The grantee must ensure that all services purchased for project participants will be authorized by the project director or his designee on the project staff (42 CFR 59.5(b)(7)).

Evidence that this requirement has been met includes policies and procedures providing for a purchase approval process and documentation of purchases following appropriate policies and procedures.

Observations:

Oklahoma State Department of Health procurement policies and procedures provide and allow for the Title X Project Director to review and approve Title X-related purchases.

Finding:

This requirement was MET.

8.3.4 Contracted Services Follow Established Schedule of Fees

The grantee must ensure that services provided through a contract or other similar arrangement are paid for under agreements that include a schedule of rates and payment procedures maintained by the grantee. The grantee must be prepared to substantiate that these rates are reasonable and necessary (42 CFR 59.5(b)(9)).

Evidence that this requirement has been met includes a schedule of payments as part of the contract and the costs for services have a documented basis for rates.

Observations:

The sub-recipient agreement contains a voucher submission process and procedures and the amount of the sub-award.

Finding:

This requirement was MET.

8.3.6 Financial Management System

The grantee and each sub-recipient must maintain a financial management system that meets Federal standards, as applicable, as well as any other requirements imposed by the Notice of Award, and which complies with Federal standards that will support effective control and accountability of funds, as required (45 CFR parts 74.20 and 92.20).

Evidence that this requirement has been met includes financial policies and procedures references to appropriate federal regulations and records and other documentation to indicate practices align with Title X and other federal regulations.

Observations:

A review of recipient and sub-recipient financial policies and procedures reference 45CFR74 remain applicable and have not been updated include 45CFR75 and 2CFR 200 Part D.

Finding:

This requirement was **NOT MET**.

The OSDH NOA dated March 24, 2015 requires compliance with 2 CFR Part 200 and 45 CFR Part 75 which replace 45CFR Part 74 or 92. Accordingly, OSDH **must** update its financial policies and procedures to be consistent with 2 CFR Part 200 and 45 CFR Part 75.

8.4 Charges, Billings, and Collections

8.4.1 Charges to Those Below 100% of Federal Policy Levels and Third-Party Payers

Clients whose documented income is at or below 100% of the Federal Poverty Level (FPL) must not be charged, although projects must bill all third parties authorized or legally obligated to pay for services (Section 1006(c)(2), PHS Act; 42 CFR 59.5(a)(7)).

Evidence that this requirement has been met includes financial policies and procedures regarding collection of clients' income data, including legally accessing income information from another program or clients self-reported income; documentation that those below 100% FPL are not charged; and the income reporting process does not create a barrier to receipt of services.

Observations:

Recipient and sub-recipient billing and collection policies require clients whose documented income is at or below 100% must not be charged while third parties authorized and/or legally obligated to pay for services must be billed. Policies also prohibit denying services to persons with an inability to pay. Additional policies require providing services to clients unable to document their income.

Finding:

This requirement was MET.

8.4.2 Schedule of Discounts

A schedule of discounts, based on ability to pay, is required for individuals with family incomes between 101% and 250% of the Federal Poverty Level (FPL) (42 CFR 59.5(a)(8)).

Evidence that this requirement has been met includes financial policies and procedures regarding development of a schedule of discounts and documentation that these discounts are applied appropriately.

Observations:

Both the recipient and sub-recipient had a schedule of discounts based on ability to pay as determined by the sliding fee scale and applicable to clients with family incomes between 101% and 250% of the current FPL. The recipient's practice management system, Public Health Oklahoma Client Information System (PHOCIS) which the sub-recipient is also required to use, calculates the appropriate discount based on inputted client family size and income data.

While the written policy states that clients with family incomes between 101% and 250% of FPL do not pay more in co-payments or additional fees than they would otherwise pay when the schedule of discounts is applied, discussion with front desk staff and review of patient registration information indicate the sliding fee scale is not applied to insurance co-pays and deductibles.

Finding:

This requirement was **NOT MET**.

OSDH **must** ensure staff follow its policy regarding the application of the Title X sliding fee scale to co-payments or additional fees for clients with family incomes between 101% and 250% of FPL.

8.4.3 Waiving of Fees

Fees must be waived for individuals with family incomes above 100% of the FPL who, as determined by the service site project director, are unable, for good cause, to pay for family planning services (42 CFR 59.2).

Evidence that this requirement has been met includes policies and procedures for waiving fees and documentation that any determination to waive the fee is made by the service site director, is documented and the client is informed of the determination.

Observations:

OSDH has a written policy for the service site administrator to waive fees for those with "good cause." Staff, however, do not appear to distinguish between waiving fees under such circumstances and extending credit for those unable to pay. In addition, OSDH procedures do not indicate how clients are to be made aware of this option or the steps involved for staff to

complete such documentation for the administrator, or MCH for other circumstances, to make that decision. At present, OSDH staff exercises a de facto fee waiver when client account balances are allowed to accrue until they are written off as uncollectible.

Finding:

This requirement was **NOT MET**.

OSDH **must** develop and implement effective procedures to ensure Title X client fees are waived as indicated by policies.

8.4.4 Determining the Cost of Services

For persons from families whose income exceeds 250% of the FPL, charges must be made in accordance with a schedule of fees designed to recover the reasonable cost of providing services. (42 CFR 59.5(a)(8)).

Evidence that this requirement has been met includes policies and procedures for determining the cost of services and documentation that charges are applied appropriately.

Observations:

OSDH has policies and procedures in place regarding the development and approval of both the state and contractor fee schedules. The fee schedule currently in use by one sub-recipient, while approved by OSDH, is below both what the sub-recipient needs to recover its reasonable costs as well as that used by OSDH. No justification for the approval of such a fee schedule in deviation to Title X requirements was provided.

Finding:

This requirement was **NOT MET**.

OSDH **must** ensure approval of contractor Title X fee schedules provide a justification when deviating from Title X requirements.

8.4.5 Charges for Confidential Services

Eligibility for discounts for un-emancipated minors who receive confidential services must be based on the income of the minor (42 CFR 59.2).

Evidence that this requirement has been met includes policies and procedures for determining if the minor is seeking confidential services and charging the minor based on his/her own income and documentation that charges are applied appropriately.

Observations:

OSDH policies and procedures require a minor seeking confidential services be charged based solely on his or her income, and record reviews and front staff interviews confirmed this practice.

Finding:

This requirement was MET.

8.4.6 Third Party Payment

Where there is legal obligation or authorization for third party reimbursement, including public or private sources, all reasonable efforts must be made to obtain third party payment without the application of any discounts (42 CFR 59.5(a)(9)).

Family income should be assessed before determining whether copayments or additional fees are charged. With regard to insured clients, clients whose family income is at or below 250% FPL should not pay more (in copayments or additional fees) than what they would otherwise pay when the schedule of discounts is applied.

Evidence that this requirement has been met includes policies and procedures regarding billing third parties and assessing co-pays, contracts with third party payers, and a review of records indicates appropriate assessment and charges.

Observations:

OSDH participates in Medicaid, Medicare and has contracts with three private third-party payers and bills for services. See section 8.4.2 regarding the application of the sliding fee schedule to co-pays and other fees.

Finding:

This requirement was MET.

8.4.6 Title XIX and Title XX Reimbursements

Where reimbursement is available from Title XIX or Title XX of the Social Security Act, a written agreement with the Title XIX or the Title XX state agency at either the grantee level or sub-recipient agency is required (42 CFR 59.5(a)(9)).

Evidence that this requirement has been met includes up-to-date written agreements at both the grantee and/or sub-recipient level.

Observations:

Both OSDH and the sub-recipient visited have policies and procedures regarding participation in both the Medicaid and Medicaid waiver program. Accounts receivable records indicate reimbursements are received from these programs.

Finding:

This requirement was MET.

8.4.8 Fee Collection

Reasonable efforts to collect charges without jeopardizing client confidentiality must be made.

Evidence that this requirement has been met includes policies and procedures providing safeguards that protect client confidentiality, particularly in cases where sending an explanation of benefits could breach client confidentiality, and documentation at service sites demonstrating the sites maintain confidentiality when billing and collecting payments.

Observations:

OSDH and sub-recipient policies and procedures include adequate safeguards to protect client confidentiality, including cases where sending an explanation of benefits could breach client confidentiality. In addition clinic front desk staff were observed implementing the policy.

Finding:

This requirement was MET.

8.4.9 Voluntary Donations

Voluntary donations from clients are permissible; however, clients must not be pressured to make donations, and donations must not be a prerequisite to the provision of services or supplies.

Evidence that this requirement has been met includes policies and procedures that provide for voluntary donations and documentation and observation of requests for donations indicate no pressure for such payments.

Observations:

OSDH policies and procedures allow for voluntary donations and prohibit clinic staff from pressuring clients for donations. Direct observations of clinic processes demonstrated that the policy was being followed.

Finding:

This requirement was MET.

8.5 Project Personnel

8.5.5 Salary Limits

Appropriate salary limits will apply as required by law.

Evidence that this requirement has been met includes budgets and payroll records correspond to the most current family planning services Funding Opportunity Announcement (FOA).

Observations:

OSDH and sub-recipient budgets and staff assurances indicate adherence to appropriate salary limits as required by law and stipulated in the NOA.

Finding:

This requirement was MET.

10. Confidentiality

Every project must have safeguards to ensure client confidentiality. Information obtained by project staff about an individual receiving services may not be disclosed without the individual's documented consent, except as required by law or as may be necessary to provide services to the individual, with appropriate safeguards for confidentiality. Information may otherwise be

disclosed only in summary, statistical, or other form that does not identify the individual (42 CFR 59.11).

Evidence that this requirement has been met includes third-party billing does not breach confidentiality.

Observations:

OSDH policies contain safeguards, including procedural requirements to ensure patient confidentiality on all forms.

Finding:

This requirement was MET.

Title X Requirements

Clinical

8.1.2 Prohibition of Prerequisite for Other Services

Clients are aware that receipt of family planning services is not used as a prerequisite for receipt of other services from the service site.

Medical record review demonstrates that each client has signed a general consent form or other documentation indicating they are aware that receipt of family planning services is not a prerequisite for receipt of any other services offered.

Observations:

Medical records reviewed include the family planning risk and benefit form that includes this notification.

Finding:

This requirement was MET.

8.5 Project Personnel

8.5.4 Medical Director

Projects must provide that family planning medical services will be performed under the direction of a physician with special training or experience in family planning (42 CFR 59.5 (b)(6)).

Evidence that this requirement has been met includes documentation that 1) a physician is involved in medical/clinical services, 2) the Medical Director is involved in program operations, 3) the curriculum vitae indicates training or experience in family planning, and 4) clinical protocols are approved by the Medical Director.

Observations:

The project Medical Director, Dr. Pamela S. Miles, is an OB/GYN practitioner and professor with appropriate credentials who takes an active role in the program.

Finding:

This requirement was MET.

9.4 Referral for Related Social Services

Projects must provide for social services related to family planning including counseling, referral to and from other social and medical services agencies, and any ancillary services which may be necessary to facilitate clinic attendance (42 CFR 59.5 (b)(2)).

Evidence that this requirement has been met includes documentation that referrals were made based on specific conditions/issues.

Observations:

OSDH medical records reviewed indicates a robust referral network available to reproductive health clients with appropriate follow up.

Finding:

This requirement was MET.

9.6 Clinical Protocols

All grantees should assure services provided within their project operate within written clinical protocols that are in accordance with nationally recognized standards of care, approved by the grantee, and signed by the physician responsible for the service site.

Evidence that this requirement has been met includes written clinical policies and procedures that are aligned with nationally recognized standards of care and signed by a responsible physician, grantee monitoring of sub-recipients' policies for alignment with nationally recognized standards of care, and client records indicating services follow protocols.

Observations:

The OSDH Medical Director approved and signed all clinical protocols. Review of the protocols indicates they are based on nationally recognized standards promoted by ACOG and the USPTF.

Finding:

This requirement was MET.

9.7 Provision of Family Planning Related Medical Services

All projects must provide for medical services related to family planning and the effective usage of contraceptive devices and practices (including physician's consultation, examination, prescription, and continuing supervision, laboratory examination, and contraceptive supplies) as well as necessary referrals to other medical facilities when medically indicated (42 CFR 59.5(b)(1)). This includes, but is not limited to, emergencies that require referral.

Evidence that this requirement has been met includes written policies and procedures requiring family planning-related medical services, provision of breast and cervical cancer screening on-site, and written agreements with relevant referral agencies exist.

Observations:

Review of documents and direct observation of interaction of clinic personnel with clients indicate that grantee is providing comprehensive family planning services including breast and cervical cancer screening as well as appropriate referrals.

Finding:

This requirement was MET.

9.8 A Broad Range of Contraceptives

All Title X projects must provide 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).

If an organization offers only a single method of family planning, it may participate as part of a project as long as the entire project offers a broad range of family planning services. (42 CFR 59.5(a)(1)).

Evidence that this requirement has been met includes medical records indicating provision of a broad-range of contraceptives; all services, when viewed as a whole, providing a broad range, with current stocks offering a broad range on-site or by referral; clinical protocols covering contraception, pregnancy testing and counseling, services for achieving pregnancy, STD services and preconception health services; and documentation that the grantee ensures sub-recipients comply with these requirements.

Observations:

All OSDH clinical sites visited during this program review offer a broad range of contraceptive options to the patient population. These include hormonal and non-hormonal options. Related services such as pregnancy testing, counseling, preconception and infertility services are readily available.

The program director, however, reports demand for long-acting reversible contraception (LARCs) exceeds current supplies, and some clinics keep a waiting list for those who desire such a method, but are unable to receive it because of limited availability. The OCCHD is able for referral, but is not convenient for clients with limited transportation options.

Finding:

This requirement was MET.

Recommendation:

OSDH **should** budget additional funds to ensure an adequate supply of LARCs for all clinics.

9.10 Pregnancy Diagnosis and Counseling

Projects must provide pregnancy diagnosis and counseling to all clients in need of these services (42 CFR 59.5(a)(5)).

Evidence that this requirement has been met includes a written policy requiring provision of pregnancy diagnosis and counseling and clinic inventory and client record reviews indicate services were offered to all clients.

Observations:

Pregnancy diagnosis and counseling are available to all OSDH clients requesting this service. Medical records indicate appropriate counseling and follow up are completed for clients.

Finding:

This requirement was MET.

9.11 Pregnancy Options Counseling

Projects must offer 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.

If requested to provide such information and counseling, Title X staff must provide neutral, factual information and nondirective counseling on each of the options, and referral upon request, except with respect to any options(s) about which the pregnant woman indicates she does not wish to receive such information and counseling (42 CFR 59.5(a)(5)).

Evidence that this requirement has been met includes written policies and procedures regarding options counseling that are neutral and factual, referrals provided as requested, and medical records document such counseling and referrals.

Observations:

OSDH policies and procedures guide staff through options counseling. Medical records indicate appropriate counseling and necessary follow up have been documented.

Some of the materials provided clients, however, have **not** been reviewed and approved by the I&E committee (see Administrative finding 12.1)

Finding:

This requirement was MET.

Quality Family Planning Implementation Assessment

This portion of the assessment follows the recommendations detailed in *Providing Quality Family Planning Services: Recommendations of CDC and the U.S. Office of Population Affairs (QFP)*, which focuses on service provision consistent with the best available scientific evidence.

8.1 Voluntary Participation

8.1.1 Client-Centered Services

A core premise of Recommendations for Providing Quality Family Planning Services is that quality services are client-centered.

The key principles of providing quality, client-centered counseling include:

- 1) establish and maintain rapport with the client
- 2) assess the client's needs and personalize discussions accordingly
- 3) work with the client interactively to establish a plan
- 4) provide information that can be understood and retained by the client
- 5) confirm client understanding (See Appendix C of QFP for additional detail.)

Observations:

OSDH policies and procedures support client-centered services and counseling. Observation of interactions of medical staff with clients demonstrated good interaction between client and providers, and clients are encouraged to actively participate in their health care.

Finding:

This Quality Aspect is FULLY DEVELOPED.

8.7 Planning and Evaluation

Grantees should evaluate implementation of quality family planning services following the QFP framework, monitoring performance and improving efforts on an on-going basis. quality improvement (QI) activities should include:

- 1) Monitoring the use of most- or moderately-effective contraceptive methods and long-acting reversible contraceptives
- 2) On-going QI processes related to contraceptive use
- 3) Monitoring contraceptive use at the service-site level
- 4) On-going QI processes at the service site level to respond to contraceptive use findings
- 5) QI efforts at the service site level related to other aspects of quality care
- 6) Use of HIT data to increase QI efforts

Observations:

The OSDH program has encouraged the use of LARCs, creating such a demand that not all requests can be filled immediately. OSDH clients were above the national average for adolescents and women using highly effective and moderately effective contraceptives. The program uses the percentage of women using LARCs at the service as part of their quality assurance process. The program does not have an electronic health record and as such, is limited in the ability to analyze data from the service sites.

Finding:

This Quality Aspect is **PARTIALLY DEVELOPED**.

Recommendation:

OSDH **should** develop its HIT/EHR capabilities to allow for more efficient and accurate QA/QI monitoring.

9.2 Client-Centered Services

Quality services are client-centered, which includes providing services in a respectful and culturally competent manner, and are evidenced by:

- 1) A needs assessment to determine groups needed culturally competent care
- 2) Written policies and procedures requiring training in culturally competent care
- 3) Documentation that staff have received such training
- 4) Observation of a welcoming clinic environment
- 5) Client surveys document respectful treatment

Observations:

OSDH completed a needs assessment and identified priority populations to be served. The program has completed a series of mandatory cultural competence trainings on a variety of different populations and staff completion is documented. Policies and procedures include a waiving of fees for good cause and client surveys indicate the majority of clients view staff as respectful.

Finding:

This Quality Aspect is **FULLY DEVELOPED**.

9.6 Clinical Protocols

Protocols follow QFP and are evidenced by:

- 1) Covering the full scope of QFP-defined family planning services
- 2) Sub-recipient protocols reflect latest QFP recommendations
- 3) Documentation of QFP training
- 4) Client records indicate services per QFP Tables 2 and 3

Observations:

OSDH clinical protocols include the full scope of family planning services indicated by QFP, medical records document that providers follow these protocols and clinicians have been trained on QFP.

Finding:

This Quality Aspect is **FULLY DEVELOPED**.

9.8 Adolescent Services

The special needs of adolescents are addressed by:

- 1) Offering all services listed in the QFP
- 2) No out-stock of routinely offered contraceptives occurred in the past 6 months
- 3) FPAR data indicate services to adolescents close to or above the national average

- 4) FPAR data indicate services to males close to or above the national average
- 5) Medical records indicate adolescents have been counseled about abstinence, condoms and LARCs

Observations:

OSDH supports a full complement of reproductive health services is available to adolescents including a broad range of contraceptive methods. Appropriate counseling is provided. FPAR data indicate OSDH serves more than the national average for adolescents and less than the national average for males. At one site visited, the percentage of teen clients is below both the grantee's and national averages, but staff are aware of the issue and are working to increase the number served.

Finding:

This Quality Aspect is PARTIALLY DEVELOPED.

Recommendation:

OSDH **should** strategies to promote services among adolescents and males.

9.10 Pregnancy Testing and Counseling

Pregnancy testing and counseling services should include:

- 1) Written protocols follow QFP recommendations, including reproductive life planning
- 2) Medical records indicate clients with positive pregnancy tests receive prenatal counseling and social support assessment
- 3) Medical records indicate clients with a negative pregnancy test who wish not to become pregnant are offered same-day contraception
- 4) Staff are trained in QFP pregnancy testing and counseling recommendations
- 5) Medical records and observation indicate pregnancy counseling follows QFP recommendations, including reproductive life planning

Observations:

OSDH policies and procedures comply with QFP recommendations, and medical records indicate that appropriate testing and counseling is taking place at the clinical level. All clients completed a checklist that includes the reproductive life planning elements. Referral systems are in place for pregnant clients

Finding:

This Quality Aspect is FULLY DEVELOPED.

13.1 Limited English Proficiency

Providing services or materials to those with Limited English Proficiency include:

- 1) Materials are clear and easy to understand (e.g. 4th-6th-grade reading level)
- 2) Observation demonstrates that information is presented in a way that emphasizes essential points
- 3) Observation demonstrates that information on risks and benefits of different contraceptives or procedures are communicated in a way that is easily understood
- 4) Information provided during counseling is culturally appropriate

5) Educational materials are tailored to literacy

Observations:

Information is available to clients in English and Spanish, and a significant number of staff is bilingual (English/Spanish). A language line is available for instances in which a translator is not present (See Administrative section 13.1.1 regarding client notification of services). Cultural competency training covers a variety of different aspects throughout the year, and observations indicate clients receive counseling at appropriate levels.

Finding:

This Quality Aspect is FULLY DEVELOPED.



Office of the Secretary

Award# 1 FPHPA006507-01-00

FAIN# FPHPA006507

Federal Award Date: 03/23/2022

Recipient Information

1. Recipient Name

Health Department, Oklahoma State
123 Robert S Kerr Ave
0308
Oklahoma State Department of Health
Oklahoma City, OK 73102-6406

2. Congressional District of Recipient

05

3. Payment System Identifier (ID)

1736017987C4

4. Employer Identification Number (EIN)

736017987

5. Data Universal Numbering System (DUNS)

143673015

6. Recipient's Unique Entity Identifier

7. Project Director or Principal Investigator

JILL NOBLES-BOTKIN
jill@health.ok.gov
405-271-4476

8. Authorized Official

Ms. Bethany J Ledel
Grants Reporting Officer
bethanyl@health.ok.gov
405-271-4042

Federal Agency Information

OASH Grants and Acquisitions Management Division

9. Awarding Agency Contact Information

Mrs. Jessica Hall-Shields
Grants Specialist
Jessica.Shields@hhs.gov
240-453-8839

10. Program Official Contact Information

Cynda Hall
Public Health Advisor
cynda.hall@hhs.gov
2404532850

Federal Award Information

11. Award Number

1 FPHPA006507-01-00

12. Unique Federal Award Identification Number (FAIN)

FPHPA006507

13. Statutory Authority

Title X of the Public Health Service Act, Section 1001 (42 U.S.C. § 300)

14. Federal Award Project Title

Oklahoma State Department of Health Family Planning Services Project

15. Assistance Listing Number

93.217

16. Assistance Listing Program Title

Family Planning Services

17. Award Action Type

New

18. Is the Award R&D?

No

Summary Federal Award Financial Information

19. Budget Period Start Date	04/01/2022	- End Date	03/31/2023
20. Total Amount of Federal Funds Obligated by this Action	\$4,500,000.00		
20a. Direct Cost Amount	\$8,813,049.00		
20b. Indirect Cost Amount	\$264,921.00		
21. Authorized Carryover	\$0.00		
22. Offset	\$0.00		
23. Total Amount of Federal Funds Obligated this budget period	\$0.00		
24. Total Approved Cost Sharing or Matching, where applicable	\$4,577,970.00		
25. Total Federal and Non-Federal Approved this Budget Period	\$9,077,970.00		
26. Project Period Start Date	04/01/2022	- End Date	03/31/2027
27. Total Amount of the Federal Award including Approved Cost Sharing or Matching this Project Period	Not Available		

28. Authorized Treatment of Program Income

OTHER (See REMARKS)

29. Grants Management Officer – Signature

Dr. Scott Moore
OASH Grants Management Officer

30. Remarks

See Remarks (continuation)



DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice of Award

Office of the Secretary

Award# 1 FPHPA006507-01-00

FAIN# FPHPA006507

Federal Award Date: 03/23/2022

Recipient Information
<p>Recipient Name Health Department, Oklahoma State 123 Robert S Kerr Ave 0308 Oklahoma State Department of Health Oklahoma City, OK 73102-6406</p> <p>Congressional District of Recipient 05</p> <p>Payment Account Number and Type 1736017987C4</p> <p>Employer Identification Number (EIN) 736017987</p> <p>Data Universal Numbering System (DUNS) 143673015</p> <p>Recipient's Unique Entity Identifier</p>
<p>31. Assistance Type Project Grant</p> <p>32. Type of Award Service</p>

33. Approved Budget (Excludes Direct Assistance)	
I. Financial Assistance from the Federal Awarding Agency Only	
II. Total project costs including grant funds and all other financial participation	
a. Salaries and Wages	\$4,041,510.00
b. Fringe Benefits	\$1,970,211.00
c. Total Personnel Costs	\$6,011,721.00
d. Equipment	\$0.00
e. Supplies	\$1,465,816.00
f. Travel	\$30,183.00
g. Construction	\$0.00
h. Other	\$319,914.00
i. Contractual	\$985,415.00
j. TOTAL DIRECT COSTS	\$8,813,049.00
k. INDIRECT COSTS	\$264,921.00
l. TOTAL APPROVED BUDGET	\$9,077,970.00
m. Federal Share	\$4,500,000.00
n. Non-Federal Share	\$4,577,970.00

34. Accounting Classification Codes					
FY-ACCOUNT NO.	DOCUMENT NO.	ADMINISTRATIVE CODE	OBJECT CLASS	AMT ACTION FINANCIAL ASSISTANCE	APPROPRIATION
2-3984521	FPHPA6507A	FPH70	41.51	\$4,500,000.00	75-22-0359

EXHIBIT 4



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary
Office of the Assistant Secretary for Health
Grants & Acquisitions Management
Rockville, MD 20852

May 25, 2023

TO: Jill Nobles-Botkin (jill@health.ok.gov)
Project Director/Principle Investigator

Ms. Bethany J Ledel (bethanyl@health.ok.gov)
Authorized Official

Oklahoma State Health Department
123 Robert S Kerr Ave 0308
Oklahoma City, OK 73102-6406

RE: Suspension of Award FPHPA006507 "Oklahoma State Department of Health
Family Planning Services Project"

The Office of Population Affairs (OPA) has provided notice in the attached letter that your award FPHPA006507 "Oklahoma State Department of Health Family Planning Services Project" is out of compliance with the Title X regulation (42 CFR Part 59, Subpart A) as of May 24, 2023.

As a condition of accepting the award (Notice of Award, Special Terms and Requirements 2), Oklahoma State Department of Health (OSDH) stipulated "that the award and any activities thereunder are subject to all provisions of 42 CFR Part 59, Subpart A." OSDH accepted the award per Standard Term 1 of the Notice of Award, "By drawing or otherwise obtaining funds for the award from the grant payment system or office, you accept the terms and conditions of the award and agree to perform in accordance with the requirements of the award."

OSDH accepted the award on May 24, 2022, by drawing down funds from the HHS Payment Management System (PMS). In doing so, OSDH agreed to comply with the Title X regulation as a condition of the award.

Therefore, I conclude that because OSDH is out of compliance with the Title X regulation, OSDH is also out of compliance with the terms and conditions of award FPHPA006507. As of April 27, 2023 (i.e., the effective date of the non-compliant OSDH policy), all costs are unallowable.

Consequently, I am suspending award FPHPA006507 and all activities supported by it effective with the date of this letter. I will review this action in 30 days to reassess OSDH's compliance with the award terms and conditions. The suspension may be extended for an appropriate time or the award may be terminated pursuant to 45 CFR § 75.372(a)(1) for material noncompliance or unsatisfactory performance with the terms and conditions of the award. A termination under this section must be reported to the Office of Management and Budget-designated integrity and

performance system, currently the Federal Awardee Performance and Integrity Information System (FAPIIS). See 45 CFR § 75.372(b). Inclusion in FAPIIS may affect your ability to obtain future Federal funding.

As an alternative, you have the opportunity to voluntarily relinquish your grant and may do so by contacting the assigned Grants Management Specialist (Jessica Shields, Jessica.shields@hhs.gov), who can provide your additional information on the process. Note that as compared to termination, a decision to relinquish your award is not reported to FAPIIS.

Respectfully,



Scott J. Moore -S
2023.05.25 11:09:13 -04'00'

Scott J. Moore, Ph.D., J.D.
Director / Chief Grants Management Officer
OASH Grants & Acquisitions Management

cc: Jessica Shields, Grants Management Specialist
Cynda Hall, OPA Project Officer
Duane Barlow, OASH Grants Branch chief
Amy Margolis, OPA Deputy Director
Jessica Marcella, Deputy Assistant Secretary for Population Affairs



DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Office of the Assistant Secretary for Health
Office of Population Affairs
Washington, D.C. 20201

May 24, 2023

Jill Nobles-Botkin, APRN-CNM, MSN
Administrative Programs Manager
Perinatal and Reproductive Health Division
Maternal & Child Health Services
Oklahoma State Department of Health
123 Robert S. Kerr Avenue 0308
Oklahoma City, OK 73102-6406

Dear Ms. Nobles-Botkin,

As you know, the Office of Population Affairs (OPA) has been corresponding with the Oklahoma State Department of Health (OSDH) since last summer with respect to its policy and procedure for providing nondirective options counseling and referral within its Title X project (FPHPA006507), in accordance with the 2021 Title X implementing regulations at 42 CFR § 59.5(a)(5). As a brief recap, on August 29, 2022, because of recent changes in Oklahoma state laws, OSDH submitted a proposal to change its policy and procedure for providing nondirective options counseling by providing clients seeking counseling on pregnancy termination with a link to the HHS OPA website. On November 9, 2022, OPA informed OSDH that this proposal did not comply with the Title X regulatory requirements set out in 42 CFR § 59.5(a)(5)(ii) and, therefore, could not be approved. On November 22, 2022, OSDH submitted to OPA a request for reconsideration of OPA's November 9, 2022 decision. On January 25, 2023, OPA posted a letter to OSDH on GrantSolutions. That letter reiterated that the proposal to provide clients seeking counseling on pregnancy termination with a link to the HHS OPA website does not comply with the 2021 Title X implementing regulations at 42 CFR § 59.5(a)(5)(ii). The letter also informed OSDH that it could submit an alternate compliance proposal that included providing clients with a referral to another entity, such as the All-Options Talkline. OSDH informed OPA that it became aware of this letter on February 7, 2023, when contacted by email.

On February 16, 2023, OSDH responded to OPA's January 25, 2023, letter by submitting an alternative proposal for compliance, which included providing nondirective counseling on all pregnancy options by OSDH staff or through the All-Options Talk Line. On March 14, 2023, OSDH submitted a "Pregnancy Diagnosis and Counseling" policy (revised March 2023), which indicated that the protocol for counseling clients with a positive pregnancy test includes:

- b. Provide neutral, factual information and nondirective counseling on all pregnancy options by OSDH staff or through the All-Options Talk Line (1-888-493-0092) and website, <https://www.all-options.org/find-support/talkline/> (except for options the client indicated she does not want more information on).

In addition, as a corollary to the counseling protocol, OSDH's "Pregnancy Diagnosis and Counseling" policy (revised March 2023) indicated that one of the options for referral was to the "All-Options Talk Line (1-888-493-0092)." As part of its March 14 submission, OSDH also sent a Pregnancy Choices brochure (dated March 2023), listing the All-Options Talk Line as one of the Oklahoma Family Planning Resources.

On March 21, 2023, OSDH submitted a written assurance of compliance with the options counseling and referral requirements in the 2021 Title X Final Rule. On March 23, 2023, OPA posted two documents on GrantSolutions (a letter dated March 1, 2023, and a printout of a Technical Review, Exported On: 03/20/2023). Those documents informed OSDH that OPA had determined that OSDH's policy complied with the Title X regulations.

Most recently, however, on May 5, 2023, OSDH notified OPA by email that it "had a change required in our family planning program policy effective late afternoon of 4/27/23." As documentation, OSDH submitted the same exact "Pregnancy Diagnosis and Counseling" policy (revised March 2023) as it originally submitted on March 14, 2023, but the new version no longer includes counseling through and referral to the All-Options Talk Line. Specifically, the policy submitted on May 5, 2023, replaced part b. quoted above with the following:

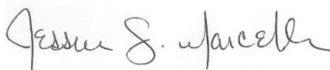
b. Provide neutral, factual information and nondirective counseling on pregnancy options in Oklahoma by OSDH staff (except for options the client indicated she does not want more information on).

In addition, the updated OSDH "Pregnancy Diagnosis and Counseling" policy (revised March 2023) no longer includes the All-Options Talk Line as an entity to which clients may be referred. And, as part of its May 5, 2023, submission, OSDH also included an updated Pregnancy Choices brochure, which no longer lists the All-Options Talk Line as a resource.

OSDH's reference to counseling on "pregnancy options in Oklahoma" in the "Pregnancy Diagnosis and Counseling" policy, rather than counseling on all pregnancy options, and the deletion of referral to the All-Options Talk Line in this policy without any other provision for abortion referrals, are not acceptable revisions, as Title X recipients must still follow all Federal regulatory requirements. The changes to OSDH's family planning program policy do not suffice or meet Federal requirements because Oklahoma law does not extend to all pregnancy options (*See* Okla. Stat. tit. 21, § 861), and we understand that, pursuant to OSDH's revised policy, information, counseling and referral will not be available for all alternative courses of action, but only for those options available under Oklahoma state law. This is inconsistent with Title X regulations at 42 CFR § 59.5(a)(5), which require Title X projects to provide information and nondirective counseling on a range of options, including prenatal care and delivery; infant care, foster care, or adoption; and pregnancy termination. Additionally, projects are required to provide referrals upon client request, including referrals for abortion. In some circumstances, those referrals will need to be made out of state.

Thus, based upon the documentation provided, OPA has determined that OSDH's policy for providing nondirective options counseling and referral within your Title X project does not comply with the Title X regulatory requirements and, therefore, the terms and conditions of your grant. Given OSDH's failure to adhere to the Title X regulatory requirements for nondirective options counseling and referral, I have referred this matter to the HHS Office of the Assistant Secretary for Health's Grants and Acquisitions Management (GAM) Division as a violation of the terms and conditions of your grant. I have copied the Director of OASH GAM on this correspondence as notification of the compliance violation and will be in touch with a response.

Thanks,



Jessica Swafford Marcella
Deputy Assistant Secretary for Population Affairs
U.S. Department of Health and Human Services
Office of the Assistant Secretary for Health, Office of Population Affairs

cc: Scott Moore
Director/Chief Grants Management Officer
U.S. Department of Health and Human Services
Office of the Assistant Secretary for Health, Grants and Acquisitions Management

EXHIBIT 5



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Office of the Assistant Secretary for Health
Grants & Acquisitions Management
Rockville, MD 20852

DATE June 27, 2023

To: Jill Nobles-Botkin (jill@health.ok.gov)
Project Director/Principal Investigator

Ms. Bethany J Ledel (bethanyl@health.ok.gov)
Authorized Official

Oklahoma State Health Department
123 Robert S Kerr Ave 0308
Oklahoma City, OK 73102-6406

Re: Termination Notice for award FPHPA006507 “Oklahoma State Department of Health Family Planning Services Project”

This letter provides notice of my decision to terminate the above identified award under 45 C.F.R. § 75.372. Termination is not final until a Notice of Award has been issued with a revised project period end date indicating the effective date of the termination. You must submit complete close out documentation within 120 days of the new project period end date. Additional guidance is attached (Tab A). Failure to provide a timely and acceptable closeout package may result in a unilateral closeout and report to the Federal Awardee Performance and Integrity Information System (FAPIIS) as a material failure to comply with the terms and conditions of the award.

This termination is based on a failure to comply with the terms and conditions of the award as described below. The termination decision will be reported to the OMB-designated integrity and performance system accessible through SAM (currently FAPIIS). The information will be available in the OMB-designated integrity and performance system for a period of five years from the date of the termination, then archived. Agencies that consider making a Federal award to your organization during that five-year period must consider that information in judging whether organization is qualified to receive the Federal award, when the Federal share of the Federal award is expected to exceed the simplified acquisition threshold over the period of performance.

Your organization may comment on any information the OMB-designated integrity and performance system contains about the non-Federal entity for future consideration by awarding agencies. You may submit comments to the awardee integrity and performance portal accessible

through SAM (currently CPARS). Awarding agencies will consider your comments when determining whether your organization is qualified for a future Federal award.

Appeal Procedure

You have an opportunity to object and provide information and documentation challenging the termination action, in accordance with [42 CFR part 50, subpart D](#). To receive a review of your challenge, you must submit a request for such review to the Assistant Secretary for Health (ASH) no later than 30 days after the written notification of the determination is received. An extension of time may be considered upon a demonstration of good cause for the extension. A request for review must identify the issue(s) in dispute. It must also contain a full statement of your position with respect to such issue(s) and the pertinent facts and reasons in support of your position. In addition to the required written statement, you must provide copies of any documents supporting your claim.

Upon receipt of your request, the ASH will follow the process set forth in [42 CFR part 50, subpart D](#). Any review committee appointed under [§ 50.405](#) will be provided with copies of all relevant background materials (including applications(s), award(s), summary statement(s), and correspondence) and any additional pertinent information available. You will be given an opportunity to provide the review committee with additional statements and documentation not provided in the request for review. This additional submission must be tabbed and organized chronologically and accompanied by an indexed list identifying each document. The additional submission should provide only material that is relevant to the review committee's deliberation of the issues raised. You may be asked by the committee, at its discretion, to discuss the pertinent issues with the committee and to submit such additional information as the committee deems appropriate.

Based on its review, the review committee will prepare a written decision to be signed by the chairperson and each of the other committee members. The review committee will then send the written decision with a transmittal letter to you. If the decision is adverse to your position, you will be advised as to your right to appeal to the Departmental Appeals Board under 45 CFR part 16.

Compliance Findings

Our findings with respect to non-compliance with the award terms and conditions.

1. By accepting the award (Tab A—Notice of Award (NOA), Special Terms and Requirements 2), Oklahoma State Department of Health (OSDH) stipulated “that the award and any activities thereunder are subject to all provisions of [42 CFR Part 59, Subpart A](#).” OSDH accepted the award “By drawing or otherwise obtaining funds for the award from the grant payment system or office, you accept the terms and conditions of the award and agree

to perform in accordance with the requirements of the award.” (Tab A—NOA Standard Term 1).

2. OSDH accepted the award on May 24, 2022, by drawing down funds from the HHS Payment Management System (PMS). In doing so, OSDH agreed to comply with the [42 CFR Part 59, Subpart A](#) as a condition of the award.
3. The Notice of Funding Opportunity (NOFO) [PA-FPH-22-001](#) for the competition ultimately leading to the issuance of FPHPA006507 to OSDH stated the requirement that recipients must comply with the final rule issued on October 4, 2021 (NOFO, Section B.2.a.2).
4. In the application submitted under [PA-FPH-22-001](#), OSDH certified SF-424B “Assurance-Non-Construction Programs” which includes assurance “18. Will comply with all applicable requirements of all other Federal laws, executive orders, regulations, and policies governing this program.” (Tab D)

OPA Determination of Non-Compliance with [42 CFR Part 59, Subpart A](#)

5. On August 29, 2022, because of recent changes in Oklahoma state laws, OSDH submitted a proposal to change its policy and procedure for providing nondirective options counseling by providing clients seeking counseling on pregnancy termination with a link to the HHS OPA website.
6. On November 9, 2022, OPA informed OSDH that this proposal did not comply with the Title X regulatory requirements set out in [42 CFR § 59.5\(a\)\(5\)\(ii\)](#) and, therefore, could not be approved.
7. On November 22, 2022, OSDH submitted to OPA a request for reconsideration of OPA’s November 9, 2022 decision.
8. On January 25, 2023, OPA posted a letter to OSDH on GrantSolutions. That letter reiterated that the proposal to provide clients seeking counseling on pregnancy termination with a link to the HHS OPA website does not comply with the 2021 Title X implementing regulations at 42 CFR § 59.5(a)(5)(ii). The letter also informed OSDH that it could submit an alternate compliance proposal that included providing clients with a referral to another entity, such as the All-Options Talkline.
9. OSDH informed OPA that it became aware of this letter on February 7, 2023, when contacted by email.

10. On February 16, 2023, OSDH responded to OPA's January 25, 2023, letter by submitting an alternative proposal for compliance, which included providing nondirective counseling on all pregnancy options by OSDH staff or through the All-Options Talk Line.
11. On March 14, 2023, OSDH submitted a "Pregnancy Diagnosis and Counseling" policy (revised March 2023), which indicated that the protocol for counseling clients with a positive pregnancy test includes:
 - b. Provide neutral, factual information and nondirective counseling on all pregnancy options by OSDH staff or through the All-Options Talk Line (1-888-493-0092) and website, <https://www.all-options.org/find-support/talkline/> (except for options the client indicated she does not want more information on).
12. In addition, as a corollary to the counseling protocol, OSDH's "Pregnancy Diagnosis and Counseling" policy (revised March 2023) indicated that one of the options for referral was to the "All-Options Talk Line (1-888-493-0092)." As part of its March 14 submission, OSDH also sent a Pregnancy Choices brochure (dated March 2023), listing the All-Options Talk Line as one of the Oklahoma Family Planning Resources.
13. On March 21, 2023, OSDH submitted a written assurance of compliance with the options counseling and referral requirements in the 2021 Title X Final Rule. On March 23, 2023, OPA posted two documents on GrantSolutions (a letter dated March 1, 2023, and a printout of a Technical Review, Exported On: 03/20/2023). Those documents informed OSDH that OPA had determined that OSDH's policy complied with the Title X regulations.
14. On May 5, 2023, OSDH notified OPA by email that it "had a change required in our family planning program policy effective late afternoon of 4/27/23." As documentation, OSDH submitted the same exact "Pregnancy Diagnosis and Counseling" policy (revised March 2023) as it originally submitted on March 14, 2023, but the new version no longer includes counseling through and referral to the All-Options Talk Line. Specifically, the policy submitted on May 5, 2023, replaced part b. with the following:
 - b. Provide neutral, factual information and nondirective counseling on pregnancy options in Oklahoma by OSDH staff (except for options the client indicated she does not want more information on).
15. In addition, the updated OSDH "Pregnancy Diagnosis and Counseling" policy (revised March 2023) no longer includes the All-Options Talk Line as an entity to which clients may be referred. And, as part of its May 5, 2023, submission, OSDH also included an updated Pregnancy Choices brochure, which no longer lists the All-Options Talk Line as a resource.
16. OSDH's reference to counseling on "pregnancy options in Oklahoma" in the "Pregnancy Diagnosis and Counseling" policy, rather than counseling on all pregnancy options, and the deletion of referral to the All-Options Talk Line in this policy without any other provision for abortion referrals, are not acceptable revisions, as Title X recipients must still follow all

Federal regulatory requirements. The changes to OSDH's family planning program policy do not suffice or meet Federal requirements because Oklahoma law does not extend to all pregnancy options (See Okla. Stat. tit. 21, § 861), and we understand that, pursuant to OSDH's revised policy, information, counseling and referral will not be available for all alternative courses of action, but only for those options available under Oklahoma state law. This is inconsistent with Title X regulations at [42 CFR § 59.5\(a\)\(5\)](#), which require Title X projects to provide information and nondirective counseling on a range of options, including prenatal care and delivery; infant care, foster care, or adoption; and pregnancy termination. Additionally, projects are required to provide referrals upon client request, including referrals for abortion. In some circumstances, those referrals will need to be made out of state.

17. Thus, based upon the documentation provided, OPA determined that OSDH's policy for providing nondirective options counseling and referral the Title X project does not comply with the Title X regulatory requirements.
18. OPA communicated this determination of non-compliance to OSDH and the OASH Chief Grants Management Officer (CGMO) by letter dated May 24, 2023 (Tab C).

Determination of Non-Compliance with Award Terms and Award Suspension

19. On May 25, 2023, the CGMO concluded that because OSDH is out of compliance with the Title X regulation, OSDH is also out of compliance with the terms and conditions of award FPHPA006507. The CGMO provided notice of the suspension on that day to OSDH and informed OSDH that as of April 27, 2023 (i.e., the effective date of the non-compliant OSDH policy), all costs are unallowable (Tab B).
20. On June 22, 2023, during a call to assess the status of OSDH's efforts to come into compliance during the first 30 days of the suspension period, OSDH indicated that it would not be able to comply with the Title X regulation citing state law. OSDH stated it did not intend to relinquish the award.

Conclusion

After consideration of the above, I conclude that OSDH remains out of compliance with the Title X regulation. OSDH had ample notification of what is required to maintain compliance with the Title X regulation. OSDH took steps to achieve compliance in order to receive a continuation award and subsequently revised its policy to a non-complaint version.

Furthermore, I conclude that OSDH is unlikely to achieve compliance with the terms and conditions of the award during the current budget period. OSDH's material non-compliance with terms and conditions of the award place the federal interest at risk and it is in the best interest of

the government to terminate award FPHPA006507 “Oklahoma State Department of Health Family Planning Services Project”.

This decision to terminate will be final and effective with the project period end date on the NOA when it is issued.

Respectfully,



Scott J. Moore -S
2023.06.27 13:44:38 -04'00'

Scott J. Moore, Ph.D., J.D., C.F.E.
Director and Chief Grants Management Officer

CC Jessica Shields, Grants Management Specialist
Cynda Hall, OPA Project Officer
Duane Barlow, OASH Grants Branch Chief
Amy Margolis, OPA Deputy Director
Jessica Marcella, Deputy Assistant Secretary for Population Affairs

Attachments

- A. Award Closeout Guidance
- B. Notice(s) of Award (initial and all amendments)
- C. OPA Determination of Non-Compliance with Title X Regulation [42 CFR Part 59, Subpart A](#)
- D. Award Suspension Letter
- E. SF-424B Assurances - Non-Construction Programs



June 27, 2023

Dear: Ms. Jill Nobles-Botkin

FPHPA006507

Our records indicate that your award is scheduled to end on 06/28/2023. In order to complete closeout procedures for this project in accordance with the Uniform Administrative Requirements regulations, the following information and reports must be submitted to the Office of Grants Management, as indicated below: In accordance with the terms and conditions of your award and 45 CFR §75.381, final reports are due ninety (120) days after the Project Period End date.

When your award expires, you may only use remaining grant funds to liquidate expenses incurred during the performance period. You must liquidate all obligations within 90 days of your award expiration date and withdraw the corresponding cash from the HHS Payment Management System (PMS). If you need to liquidate additional funds after the 90-day liquidation period, you must request an extension from the Grants & Acquisitions Management (GAM). Unless an extension has been approved by GAM, you will be unable to withdraw additional funds from PMS.

As part of the closeout of your award, you are responsible for the timely closeout of any subaward(s) and or contract(s) under the award and the financial settlement of any claims with those entities. You should establish a receipt date for your subrecipients/contractors to submit closeout data, final reports, and final claims that allows you to meet the requirement for submission of final reports.

1. SF-425 – Final Federal Financial Report (FFR) and Federal Cash Transactions Report (FCTR)– You must submit your final FFR via the FFR Reporting Module in PMS. You may find [a paper copy of the form and instructions at https://www.grants.gov/web/grants/forms/post-award-reporting-forms.html](https://www.grants.gov/web/grants/forms/post-award-reporting-forms.html). In order for your final FFR to be approved, the final, cumulative FFR must:
 - Have no un-liquidated obligations,
 - Indicate the exact balance of unobligated funds as reported to the Payment Management System (PMS),
 - Reflect the proper amount of indirect costs applicable to the period based on current rates available at the time of preparation, and

Your disbursements reported in PMS must match your reported obligations on the FFR. You must withdraw all cash needed for disbursements or return unneeded cash. Failure to reconcile your disbursements and cash drawdowns will delay the closeout of your award

Also, if your Notice of Award includes a cost-sharing or matching commitment, your final, cumulative FFR must show that you have met that requirement. If you have not met that commitment, you must notify us immediately with a justification and request for budget revision.

2. SF-428 and SF-428-B Tangible Personal Property report and/or Disposition report – A report regarding equipment acquired with project funds with an acquisition cost of \$5,000 or more per

unit or residual unused supplies with an aggregate fair market value exceeding \$5,000. A **negative report is required**. If there are items to report, the inventory must name items, date of purchase, and cost of each item. Indicate your request for disposition of this equipment in accordance with Subpart D - Post Federal Award Requirements, Property Standards, Equipment, 45 CFR part. 75.320. If disposition by transfer or sale is requested include fair market value; you must provide a final Tangible Personal Property Report on the SF 428-B. Access to form SF-428, with instructions for completing the forms, can be found on the Web at <https://www.grants.gov/web/grants/forms/post-award-reporting-forms.html>. Submit this report as an attachment in Grant Notes in GrantSolutions.

3. Final Program Progress Report – Your reports must address content required by 45 CFR § 75.342(b)(2). Submit your report as an attachment in Grant Notes in GrantSolutions.

Your annual audit must meet the audit requirements for close out of this project. An audit is required for all entities which expend \$750,000 or more of Federal funds in each fiscal year. The audits are due within 30 days of receipt from the auditor or within 9 months of the end of the fiscal year, whichever occurs first. The audit report when completed must be submitted online to the Federal Audit Clearinghouse at <http://harvester.census.gov/fac/collect/ddeindex.html>.

If any inventions were conceived or first actually reduced to practice under this award, they must be listed on the HHS-568 - Procedures for Submission of Final Invention Statement <http://www.hhs.gov/forms/publicuse.html>. This form should be submitted as an attachment in Grant Notes in GrantSolutions

If your award is subject to reimbursement payment, you must submit an SF 270, Request for Advance or Reimbursement, for any amounts for which you have not previously requested payment. Submit this form as an attachment in Grant Notes in GrantSolutions

The specified reports must be sent as indicated above. Submission in any other manner or to any other office or official will result in your reports being considered delinquent.

Following receipt of your reports, we will review them and advise you of their acceptability or any need for revision.

Financial records, supporting documents, statistical records, and all records pertinent to this grant shall be retained for a period of three years. The records shall be retained beyond the three-year period if an audit is in process or if any audit findings have not been resolved.

Receipt and acceptance of the requested materials will complete the closeout process, subject to final audit. If you have any questions or require assistance, please contact your assigned Grants Management Specialist (GMS) Jessica Shields at Jessica.Shields@hhs.gov, 240-453-8839 or your Project Officer (PO) Cynda Hall at Cynda.Hall@hhs.gov, 240-453-2850. When emailing, it is best to copy both your GMS and PO.

Sincerely,

Jessica Shields
Grants Management Specialist

cc: Cynda Hall Project Officer



Recipient Information

1. Recipient Name
 Health Department, Oklahoma State
 123 Robert S Kerr Ave
 0308
 Oklahoma State Department of Health
 Oklahoma City, OK 73102-6406

2. Congressional District of Recipient
 05

3. Payment System Identifier (ID)
 1736017987C4

4. Employer Identification Number (EIN)
 736017987

5. Data Universal Numbering System (DUNS)
 143673015

6. Recipient's Unique Entity Identifier

7. Project Director or Principal Investigator
 JILL NOBLES-BOTKIN
 jill@health.ok.gov
 405-271-4476

8. Authorized Official
 Ms. Bethany J Ledel
 Grants Reporting Officer
 bethanyl@health.ok.gov
 405-271-4042

Federal Agency Information

OASH Grants and Acquisitions Management Division

9. Awarding Agency Contact Information
 Mrs. Jessica Hall-Shields
 Grants Specialist
 Jessica.Shields@hhs.gov
 240-453-8839

10. Program Official Contact Information
 Cynda Hall
 Public Health Advisor
 cynda.hall@hhs.gov
 2404532850

Federal Award Information

11. Award Number
 1 FPHPA006507-01-00

12. Unique Federal Award Identification Number (FAIN)
 FPHPA006507

13. Statutory Authority
 Title X of the Public Health Service Act, Section 1001 (42 U.S.C. § 300)

14. Federal Award Project Title
 Oklahoma State Department of Health Family Planning Services Project

15. Assistance Listing Number
 93.217

16. Assistance Listing Program Title
 Family Planning Services

17. Award Action Type
 New

18. Is the Award R&D?
 No

Summary Federal Award Financial Information

19. Budget Period Start Date	04/01/2022	- End Date	03/31/2023
20. Total Amount of Federal Funds Obligated by this Action	S4,500,000.00		
20a. Direct Cost Amount	S8,813,049.00		
20b. Indirect Cost Amount	S264,921.00		
21. Authorized Carryover	S0.00		
22. Offset	S0.00		
23. Total Amount of Federal Funds Obligated this budget period	S0.00		
24. Total Approved Cost Sharing or Matching, where applicable	S4,577,970.00		
25. Total Federal and Non-Federal Approved this Budget Period	S9,077,970.00		
26. Project Period Start Date	04/01/2022	- End Date	03/31/2027
27. Total Amount of the Federal Award including Approved Cost Sharing or Matching this Project Period	Not Available		

28. Authorized Treatment of Program Income
 OTHER (See REMARKS)

29. Grants Management Officer – Signature
 Dr. Scott Moore
 OASH Grants Management Officer

30. Remarks

See Remarks (continuation)



DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice of Award

Office of the Secretary

Award# 1 FPHPA006507-01-00

FAIN# FPHPA006507

Federal Award Date: 03/23/2022

Recipient Information
<p>Recipient Name Health Department, Oklahoma State 123 Robert S Kerr Ave 0308 Oklahoma State Department of Health Oklahoma City, OK 73102-6406</p> <p>Congressional District of Recipient 05</p> <p>Payment Account Number and Type 1736017987C4</p> <p>Employer Identification Number (EIN) 736017987</p> <p>Data Universal Numbering System (DUNS) 143673015</p> <p>Recipient's Unique Entity Identifier</p>
<p>31. Assistance Type Project Grant</p> <p>32. Type of Award Service</p>

33. Approved Budget (Excludes Direct Assistance)	
I. Financial Assistance from the Federal Awarding Agency Only	
II. Total project costs including grant funds and all other financial participation	
a. Salaries and Wages	\$4,041,510.00
b. Fringe Benefits	\$1,970,211.00
c. Total Personnel Costs	\$6,011,721.00
d. Equipment	\$0.00
e. Supplies	\$1,465,816.00
f. Travel	\$30,183.00
g. Construction	\$0.00
h. Other	\$319,914.00
i. Contractual	\$985,415.00
j. TOTAL DIRECT COSTS	\$8,813,049.00
k. INDIRECT COSTS	\$264,921.00
l. TOTAL APPROVED BUDGET	\$9,077,970.00
m. Federal Share	\$4,500,000.00
n. Non-Federal Share	\$4,577,970.00

34. Accounting Classification Codes					
FY-ACCOUNT NO.	DOCUMENT NO.	ADMINISTRATIVE CODE	OBJECT CLASS	AMT ACTION FINANCIAL ASSISTANCE	APPROPRIATION
2-3984521	FPHPA6507A	FPH70	41.51	\$4,500,000.00	75-22-0359



DEPARTMENT OF HEALTH AND HUMAN SERVICES Notice of Award

Office of the Secretary

Award# 1 FPHPA006507-01-00

FAIN# FPHPA006507

Federal Award Date: 03/23/2022

Remarks (Continuation)

This Notice of Award provides funding below the total amount requested in the application for the budget period. OASH is not obligated to make additional Federal Funds available. All award decisions, including the level of funding, are final and you may not appeal. You should re-submit an SF 424A and Budget Narrative justification which includes the total cumulative cost for each cost for the budget reimbursement period based on Personnel, Fringe, Travel, Supplies, Contractual, Other and Indirect cost by object class categories. The budget should be resubmitted for the total awarded amount within 30 days of the start of the budget period on this Notice of Award. Prior approval of the revised budget by the Grants Management Officer is required. Changes in scope proposed as part of the budget revision should be clearly noted and also require Grants Management Officer prior approval.



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Office of the Secretary

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35. Terms And Conditions

SPECIAL TERMS AND REQUIREMENTS

1. **Program Income Use.** Program income (fees, premiums, third-party reimbursements which the project may reasonably expect to receive), as well as State, local and other operational funding, will be used to finance the non-federal share of the scope of project as defined in the approved grant application and reflected in the approved budget. Program income and the level projected in the approved budget will be used to further program objectives. Box 28 on this Notice of Award (NoA) indicates **Other**. Program Income may be used to meet the cost sharing or matching requirement of the Federal award. The amount of the Federal award stays the same. Program Income in excess of any amounts specified must be added to the Federal funds awarded. They must be used for the purposes and conditions of this award for the duration of the Project period. 45 C.F.R. § 75.307 (e).

2. **Program Specific Regulation.** In accepting this award, the grantee stipulates that the award and any activities thereunder are subject to all provisions of 42 CFR Part 59, Subpart A.

3. **OPA Program Priorities.** All recipients must comply with the requirements regarding the provision of family planning services that can be found in the statute (Title X of the Public Health Service Act, 42 U.S.C. § 300 et seq.) and the implementing regulations (42 C.F.R. Part 59, Subpart A), and any legislative mandates. In addition, sterilization of clients as part of the Title X program must be consistent with 42 C.F.R. Part 50, Subpart B (“Sterilization of Persons in Federally Assisted Family Planning Projects”).

In addition to the statute, regulations, legislative mandates, and additional program guidance that apply to Title X, OPA establishes program priorities that represent overarching goals for the Title X program. OPA expects recipients to develop and implement plans to address program priorities. The current priorities are: 1) advance health equity through the delivery of Title X services; 2) improve and expand access to Title X services; and 3) deliver Title X services of the highest quality.

4. **Notice of Change in Service Sites.** In order to maintain an accurate record of current Title X service sites, grantees must provide notice to the Office of Population Affairs (OPA) of any deletions, additions, or changes to the name, location, street address and email, services provided on-site, and contact information for Title X grantees and service sites. This database will also be used to verify eligibility for 340B program registration and recertification. You must enter your changes to the Title X database within 30 days from the official approval of the change at <https://opa-fpclinicdb.hhs.gov/>. This does not replace the prior approval requirement under HHS grants policy for changes in project scope, including clinic closures.

5. **304B Program Participation.** If you or your sub-recipient(s) enrolls in the 340B Program, you must comply with all 340B Program requirements. You may be subject to audit at any time regarding 340B Program compliance. 340B Program requirements are available at <https://www.hrsa.gov/opa/program-requirements/index.html>.

6. **FPAR reporting.** For each calendar year covered by the project period, you will be required to submit a Family Planning Annual Report (FPAR). The information collection (reporting requirements) and format for this report have been approved by the Office of Management and Budget (OMB) and assigned OMB No. 0990-0479 (Expires 9/30/2024). The FPAR data elements, instrument, and instructions are found on the OPA Web site at <http://opa.hhs.gov>. You are expected to use the FPAR data to inform your QI/QA activities.

7. **Evaluation Cooperation.** The grantee is expected to participate in OPA research and evaluation activities, if selected, and must agree to follow all evaluation protocols established by OPA or its designee.

8. **Grantee Meetings.** The grantee is encouraged to actively participate in all OPA-supported Title X grantee meetings and grantee conferences. In addition to training and technical assistance available from the Reproductive Health National Training Center and the National Clinical Training Center for Family Planning, OPA is planning to conduct two Title X grantee trainings in 2022 and a Title X grantee conference in 2023.



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Office of the Secretary

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9. **Institutional Review Board (IRB).** Institutional Review Board (IRB) approvals, when required, must be submitted via Grant Solutions Grant Notes within 5 business days of receipt from the IRB. No activities that require IRB approval may take place prior to your receipt of the IRB approval.
10. **Maximizing Access.** In furtherance of maximizing access and best serving individuals in need in the service areas, recipients should make reasonable efforts to avoid duplication of effort in the provision of services across the Title X network. For example, Title X recipients' coverage areas may overlap geographically, but duplication of subrecipient sites could be minimized or avoided to create more opportunities for services.
11. **Prior Approval for Vehicle Purchases.** No mobile health unit(s) or other vehicle(s), even if proposed in the application for this award, may be purchased with award funds without prior written approval from the grant management officer. Requests for approval of such purchases must include a justification with a cost-benefit analysis comparing both purchase and lease options. Such requests must be submitted as a Budget Revision Amendment in Grant Solutions.

STANDARD TERMS

1. **Compliance with Terms and Conditions.** You must comply with all terms and conditions outlined in the grant award, including grant policy terms and conditions contained in applicable Department of Health and Human Services (HHS) Grant Policy Statements (GPS), (note any references in the GPS to 45 C.F.R. Part 74 or 92 are now replaced by 45 C.F.R. Part 75, and the SF-269 is now the SF-425), and requirements imposed by program statutes and regulations, Executive Orders, and HHS grant administration regulations, as applicable; as well as any requirements or limitations in any applicable appropriations acts. By drawing or otherwise obtaining funds for the award from the grant payment system or office, you accept the terms and conditions of the award and agree to perform in accordance with the requirements of the award. The HHS Grants Policy Statement is available at: <http://www.hhs.gov/sites/default/files/grants/grants/policies-regulations/hhseps107.pdf> Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS awards are at 45 C.F.R. Part 75.
2. **Grants Management Officer Prior Approval Requirements.** Certain changes to your project or personnel require prior approval from the Grants Management Officer (GMO). (See Part II, HHS Grants Policy Statement (GPS), any references in the GPS to 45 C.F.R. Part 74 or 92 are now replaced by 45 C.F.R. Part 75). All amendment requests requiring prior approval must be signed by the grantee authorizing official and or PI/PD and submitted through the GrantSolutions Amendment Module. Only responses signed by the GMO are considered valid. If you take action on the basis of responses from other officials or individuals, you do so at your own risk. Such responses will not be considered binding by or upon any OASH Office or HHS component. Any other correspondence not relating to a prior approval item should be uploaded to Grant Notes within the GrantSolutions system. Include the Federal grant number and signature of the authorized business official and the project director on all such correspondence.
3. **Salary Limitation (Further Consolidated Appropriations Act, 2022, Div. H, Title II, sec. 202).** "None of the funds appropriated in this title shall be used to pay the salary of an individual, through a grant or other extramural mechanism, at a rate in excess of Executive Level II."

The Salary Limitation is based upon the Executive Level II of the Federal Executive Pay Scale. Effective January 2022, the Executive Level II salary is \$203,700. For the purposes of the salary limitation, the direct salary is exclusive of fringe benefits and indirect costs. An individual's direct salary is not constrained by the legislative provision for a limitation of salary. The rate limitation simply limits the amount that may be awarded and charged to the grant or cooperative agreement. A recipient may pay an individual's salary amount in excess of the salary cap with non-federal funds.

4. **Reporting Subawards and Executive Compensation.**



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Office of the Secretary

Award# 1 FPHPA006507-01-00

FAIN# FPHPA006507

Federal Award Date: 03/23/2022

A. Reporting of first-tier subawards.

1) Applicability.

Unless you are exempt as provided in paragraph D. of this award term, you must report each action that obligates \$30,000 or more in Federal funds that does not include Recovery Act funds (as defined in section 1512(a)(2) of the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5) for a subaward to an entity (see definitions in paragraph e. of this award term).

2) Where and when to report.

You must report each obligating action described in paragraph A.1. of this award term to the Federal Funding Accountability and Transparency Act Subaward Reporting System (FFRS). For subaward information, report no later than the end of the month following the month in which the obligation was made. (For example, if the obligation was made on November 7, 2010, the obligation must be reported by no later than December 31, 2010.)

3) What to report.

You must report the information about each obligating action as specified in the submission instructions posted at <http://www.fsrs.gov>.

B. Reporting Total Compensation of Recipient Executives.

1) Applicability and what to report.

You must report total compensation for each of your five most highly compensated executives for the preceding completed fiscal year, if—

a) The total Federal funding authorized to date under this award is \$30,000 or more;

b) In the preceding fiscal year, you received—

(1) 80 percent or more of your annual gross revenues from Federal procurement contracts (and subcontracts) and Federal financial assistance subject to the Transparency Act, as defined at 2 C.F.R. §170.320 (and subawards); and

(2) \$25,000,000 or more in annual gross revenues from Federal procurement contracts (and subcontracts) and Federal financial assistance subject to the Transparency Act, as defined at 2 C.F.R. §170.320 (and subawards); and

c) The public does not have access to information about the compensation of the executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986. (To determine if the public has access to the compensation information, see the U.S. Security and Exchange Commission total compensation filings at the Executive Compensation page of the SEC website.)

2) Where and when to report.

You must report executive total compensation described in paragraph B.1. of this award term:



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- a) As part of your registration profile in the System for Award Management (SAM),
- b) By the end of the month following the month in which this award is made, and annually thereafter.

C. Reporting of Total Compensation of Subrecipient Executives.

- 1) Applicability and what to report.

Unless you are exempt as provided in paragraph D of this award term, for each first-tier subrecipient under this award, you shall report the names and total compensation of each of the subrecipient's five most highly compensated executives for the subrecipient's preceding completed fiscal year, if—

- a) In the subrecipient's preceding fiscal year, the subrecipient received—

- (1) 80 percent or more of its annual gross revenues from Federal procurement contracts (and subcontracts) and Federal financial assistance subject to the Transparency Act, as defined at 2 C.F.R. § 170.320 (and subawards); and

- (2) \$25,000,000 or more in annual gross revenues from Federal procurement contracts (and subcontracts), and Federal financial assistance subject to the Transparency Act (and subawards); and

- b) The public does not have access to information about the compensation of the executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986. (To determine if the public has access to the compensation information, see the U.S. Security and Exchange Commission total compensation filings at the Executive Compensation page of the SEC website.)

- 2) Where and when to report.

You must report subrecipient executive total compensation described in paragraph C.1. of this award term:

- a) To the recipient.
- b) By the end of the month following the month during which you make the subaward. For example, if a subaward is obligated on any date during the month of October of a given year (i.e., between October 1 and 31), you must report any required compensation information of the subrecipient by November 30 of that year.

D. Exemptions.

If, in the previous tax year, you had gross income, from all sources, under \$300,000, you are exempt from the requirements to report:

- 1) Subawards, and
- 2) The total compensation of the five most highly compensated executives of any subrecipient.

E. Definitions.



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Federal Award Date: 03/23/2022

For purposes of this award term:

1) "Entity"

This term means all of the following, as defined in 2 C.F.R. Part 25:

- a) A Governmental organization, which is a State, local government, or Indian tribe;
- b) A foreign public entity;
- c) A domestic or foreign nonprofit organization;
- d) A domestic or foreign for-profit organization;
- e) A Federal agency, but only as a subrecipient under an award or subaward to a non-Federal entity.

2) "Executive"

This term means officers, managing partners, or any other employees in management positions.

3) "Subaward":

- a) This term means a legal instrument to provide support for the performance of any portion of the substantive project or program for which you received this award and that you as the recipient award to an eligible subrecipient.
- b) The term does not include your procurement of property and services needed to carry out the project or program (for further explanation, see Sec. II .210 of the attachment to OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations").
- c) A subaward may be provided through any legal agreement, including an agreement that you or a subrecipient considers a contract.

4) "Subrecipient"

This term means an entity that:

- a) Receives a subaward from you (the recipient) under this award; and
- b) Is accountable to you for the use of the Federal funds provided by the subaward.

5) "Total compensation"

This term means the cash and noncash dollar value earned by the executive during the recipient's or subrecipient's preceding fiscal year and includes the following (for more information see 17 C.F.R. § 229.402(e)(2)):

- a) Salary and bonus.



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- b) Awards of stock, stock options, and stock appreciation rights. Use the dollar amount recognized for financial statement reporting purposes with respect to the fiscal year in accordance with the Statement of Financial Accounting Standards No. 123 (Revised 2004) (FAS 123R), Shared Based Payments.
- c) Earnings for services under non-equity incentive plans. This does not include group life, health, hospitalization or medical reimbursement plans that do not discriminate in favor of executives, and are available generally to all salaried employees.
- d) Change in pension value. This is the change in present value of defined benefit and actuarial pension plans.
- e) Above-market earnings on deferred compensation which is not tax-qualified.
- f) Other compensation, if the aggregate value of all such other compensation (e.g. severance, termination payments, value of life insurance paid on behalf of the employee, perquisites or property) for the executive exceeds \$10,000.

5. Intellectual Property and Data Rights.

- A. Data. The federal government has the right to: 1) Obtain, reproduce, publish, or otherwise use the data produced under this award; and 2) Authorize others to receive, reproduce, publish, or otherwise use such data for federal purposes.
- B. Copyright. The awardee may copyright any work that is subject to copyright and was developed, or for which ownership was acquired, under a federal award. The federal government reserves a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so.
- C. Patents and Inventions. The awardee is subject to applicable regulations governing patents and inventions, including government- wide regulations issued by the Department of Commerce at 37 CFR part 401.

6. Acknowledgement of Federal Grant Support. When issuing statements, press releases, publications, requests for proposal, bid solicitations and other documents --such as tool-kits, resource guides, websites, and presentations (hereafter "statements")-- describing the projects or programs funded in whole or in part with U.S. Department of Health and Human Services (HHS) federal funds, the recipient must clearly state:

- 1) the percentage and dollar amount of the total costs of the program or project funded with federal money; and,
- 2) the percentage and dollar amount of the total costs of the project or program funded by non-governmental sources.

When issuing statements resulting from activities supported by HHS financial assistance, the recipient entity must include an acknowledgement of federal assistance using one of the following or a similar statement.

If the HHS Grant or Cooperative Agreement is NOT funded with other non-governmental sources:

This [project/publication/program/website, etc.] [is/was] supported by the [full name of the PROGRAM OFFICE] of the U.S. Department of Health and Human Services (HHS) as part of a financial assistance award totaling SXX with 100 percent funded by [PROGRAM OFFICE]/OASH/HHS. The contents are those of the author(s) and do not necessarily represent the official views of, nor an endorsement, by [PROGRAM OFFICE]/OASH/HHS, or the U.S. Government. For more information, please visit [PROGRAM OFFICE website, if available].

The HHS Grant or Cooperative Agreement IS partially funded with other nongovernmental sources:



Office of the Secretary

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FAIN# FPHPA006507
Federal Award Date: 03/23/2022

This [project/publication/program/website, etc.] [is/was] supported by the [full name of the PROGRAM OFFICE] of the U.S. Department of Health and Human Services (HHS) as part of a financial assistance award totaling \$XX with XX percentage funded by [PROGRAM OFFICE]/OASH/HHS and \$XX amount and XX percentage funded by non-government source(s). The contents are those of the author (s) and do not necessarily represent the official views of, nor an endorsement, by [PROGRAM OFFICE]/OASH/HHS, or the U.S. Government. For more information, please visit [PROGRAM OFFICE website, if available].

The federal award total must reflect total costs (direct and indirect) for all authorized funds (including supplements and carryover) for the total competitive segment up to the time of the public statement.

Any amendments by the recipient to the acknowledgement statement must be coordinated with the OASH federal project officer and the OASH grants management officer.

If the recipient plans to issue a press release concerning the outcome of activities supported by this financial assistance, it should notify the OASH federal project officer and the OASH grants management officer in advance to allow for coordination.

7. **Whistleblower Protections.** You are hereby given notice that the 48 C.F.R. § 3.908 (related to the enhancement of contractor employee whistleblower protections), implementing 41 U.S.C. § 4712, as amended (entitled “Enhancement of contractor protection from reprisal for disclosure of certain information”) applies to this award.

8. **Reporting of Matters Related to Recipient Integrity and Performance.**

A. General Reporting Requirement

If the total value of your currently active grants, cooperative agreements, and procurement contracts from all Federal awarding agencies exceeds \$10,000,000 for any period of time during the period of performance of this Federal award, then you as the recipient during that period of time must maintain the currency of information reported to the System for Award Management (SAM) that is made available in the designated integrity and performance system (currently the Federal Awardee Performance and Integrity Information System (FAPIS)) about civil, criminal, or administrative proceedings described in paragraph 2 of this award term and condition. This is a statutory requirement under section 872 of Public Law 110-417, as amended (41 U.S.C. § 2313). As required by section 3010 of Public Law 111-212, all information posted in the designated integrity and performance system on or after April 15, 2011, except past performance reviews required for Federal procurement contracts, will be publicly available.

B. Proceedings About Which You Must Report

Submit the information required about each proceeding that:

- 1) Is in connection with the award or performance of a grant, cooperative agreement, or procurement contract from the Federal Government;
- 2) Reached its final disposition during the most recent five-year period; and
- 3) If one of the following:
 - a) A criminal proceeding that resulted in a conviction, as defined in paragraph 5 of this award term and condition;
 - b) A civil proceeding that resulted in a finding of fault and liability and payment of a monetary fine, penalty, reimbursement, restitution, or damages of \$5,000 or more;



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c) An administrative proceeding, as defined in paragraph 5 of this award term and condition, that resulted in a finding of fault and liability and your payment of either a monetary fine or penalty of \$5,000 or more or reimbursement, restitution, or damages in excess of \$100,000; or

d) Any other criminal, civil, or administrative proceeding if:

(1) It could have led to an outcome described in paragraph 2.c.(1), (2), or (3) of this award term and condition;

(2) It had a different disposition arrived at by consent or compromise with an acknowledgement of fault on your part; and

(3) The requirement in this award term and condition to disclose information about the proceeding does not conflict with applicable laws and regulations.

C. Reporting Procedures

Enter in the SAM Entity Management area the information that SAM requires about each proceeding described in paragraph B of this award term and condition. You do not need to submit the information a second time under assistance awards that you received if you already provided the information through SAM because you were required to do so under Federal procurement contracts that you were awarded.

D. Reporting Frequency

During any period of time when you are subject to this requirement in paragraph A of this award term and condition, you must report proceedings information through SAM for the most recent five year period, either to report new information about any proceeding(s) that you have not reported previously or affirm that there is no new information to report. Recipients that have Federal contract, grant, and cooperative agreement awards with a cumulative total value greater than \$10,000,000 must disclose semiannually any information about the criminal, civil, and administrative proceedings.

E. Definitions

For purposes of this award term and condition:

1) Administrative proceeding means a non-judicial process that is adjudicatory in nature in order to make a determination of fault or liability (e.g., Securities and Exchange Commission Administrative proceedings, Civilian Board of Contract Appeals proceedings, and Armed Services Board of Contract Appeals proceedings). This includes proceedings at the Federal and State level but only in connection with performance of a Federal contract or grant. It does not include audits, site visits, corrective plans, or inspection of deliverables.

2) Conviction, for purposes of this award term and condition, means a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, and includes a conviction entered upon a plea of nolo contendere.

3) Total value of currently active grants, cooperative agreements, and procurement contracts includes—

a) Only the Federal share of the funding under any Federal award with a recipient cost share or match; and



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b) The value of all expected funding increments under a Federal award and options, even if not yet exercised.

F. Disclosure Requirements.

Consistent with 45 C.F.R. § 75.113, applicants and recipients must disclose, in a timely manner, in writing to the HHS Awarding Agency, with a copy to the HHS Office of the Inspector General, all information related to violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award. Subrecipients must disclose, in a timely manner, in writing to the prime recipient (pass through entity) and the HHS Office of the Inspector General all information related to violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award. Disclosures must be sent in writing to the awarding agency and to the HHS OIG at the following addresses:

*HHS OASH Grants and Acquisitions Management
1101 Wootton Parkway, Plaza Level
Rockville, MD 20852*

AND

*US Department of Health and Human Services Office of Inspector General
ATTN: OIG HOTLINE OPERATIONS—MANDATORY GRANT DISCLOSURES
PO Box 23489
Washington, DC 20026*

URL: <http://oig.hhs.gov/fraud/report-fraud/index.asp>

(Include "Mandatory Grant Disclosures" in subject line)

Fax: 1-800-223-8164 (Include "Mandatory Grant Disclosures" in subject line)

Failure to make required disclosures can result in any of the remedies described in 45 C.F.R. § 75.371 ("Remedies for noncompliance"), including suspension or debarment (See also 2 C.F.R. Parts 180 & 376 and 31 U.S.C. § 3321).

The recipient must include this mandatory disclosure requirement in all subawards and contracts under this award.

9. Advancing Racial Equity and Support for Underserved Communities Through the Federal Government. You must administer your project in compliance with federal civil rights laws that prohibit discrimination on the basis of race, color, national origin, disability, age and, in some circumstances, religion, conscience, and sex (including gender identity, sexual orientation, and pregnancy). This includes taking reasonable steps to provide meaningful access to persons with limited English proficiency and providing programs that are accessible to and usable by persons with disabilities. The HHS Office for Civil Rights provides guidance on complying with civil rights laws enforced by HHS. See <https://www.hhs.gov/civil-rights/for-providers/provider-obligations/index.html> and <https://www.hhs.gov/civil-rights/for-individuals/nondiscrimination/index.html>.

-- You must take reasonable steps to ensure that your project provides meaningful access to persons with limited English proficiency. For guidance on meeting your legal obligation to take reasonable steps to ensure meaningful access to your programs or activities by limited English proficient individuals, see <https://www.hhs.gov/civil-rights/for-individuals/special-topics/limited-english-proficiency/fact-sheet-guidance/index.html> and <https://www.lep.gov>.

-- For information on your specific legal obligations for serving qualified individuals with disabilities, including providing program access, reasonable modifications, and taking appropriate steps to provide effective communication, see <http://www.hhs.gov/ocr/civilrights/understanding/disability/index.html>.

-- HHS funded health and education programs must be administered in an environment free of sexual harassment, see



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<https://www.hhs.gov/civil-rights/for-individuals/sex-discrimination/index.html>.

-- For guidance on administering your project in compliance with applicable federal religious nondiscrimination laws and applicable federal conscience protection and associated anti-discrimination laws, *see* <https://www.hhs.gov/conscience/conscience-protections/index.html> and <https://www.hhs.gov/conscience/religious-freedom/index.html>.

10. **Trafficking in Persons.** This award is subject to the requirements of Section 106 (g) of the Trafficking Victims Protection Act of 2000, as amended (22 U.S.C. § 7104)

A. Provisions applicable to a recipient that is a private entity.

- 1) You as the recipient, your employees, subrecipients under this award, and subrecipients' employees may not
 - a) Engage in severe forms of trafficking in persons during the period of time that the award is in effect;
 - b) Procure a commercial sex act during the period of time that the award is in effect; or
 - c) Use forced labor in the performance of the award or subawards under the award.
- 2) We as the Federal awarding agency may unilaterally terminate this award, without penalty, if you or a subrecipient that is a private entity –
 - a) Is determined to have violated a prohibition in paragraph A.1 of this award term; or
 - b) Has an employee who is determined by the agency official authorized to terminate the award to have violated a prohibition in paragraph A.1 of this award term through conduct that is either-
 - (1) Associated with performance under this award; or
 - (2) Imputed to you or the subrecipient using the standards and due process for imputing the conduct of an individual to an organization that are provided in 2 C.F.R. Part 180, "OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement)," as implemented by our agency at 2 C.F.R. Part 376.

B. Provision applicable to a recipient other than a private entity.

We as the Federal awarding agency may unilaterally terminate this award, without penalty, if a subrecipient that is a private entity-

- 1) Is determined to have violated an applicable prohibition in paragraph a.1 of this award term; or
- 2) Has an employee who is determined by the agency official authorized to terminate the award to have violated an applicable prohibition in paragraph a.1 of this award term through conduct that is either
 - a) Associated with performance under this award; or
 - b) Imputed to the subrecipient using the standards and due process for imputing the conduct of an individual to an



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organization that are provided in 2 C.F.R. Part 180, "OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement)," as implemented by our agency at 2 C.F.R. Part 376.

C. Provisions applicable to any recipient.

- 1) You must inform us immediately of any information you receive from any source alleging a violation of a prohibition in paragraph A.1 of this award term
- 2) Our right to terminate unilaterally that is described in paragraph A.2 or B of this section:
 - a) Implements section 106(g) of the Trafficking Victims Protection Act of 2000 (TVPA), as amended (22 U.S.C. § 7104(g)), and
 - b) Is in addition to all other remedies for noncompliance that are available to us under this award.
- 3) You must include the requirements of paragraph A.1 of this award term in any subaward you make to a private entity.

D. Definitions. For purposes of this award term:

- 1) "Employee" means either:
 - a) An individual employed by you or a subrecipient who is engaged in the performance of the project or program under this award; or
 - b) Another person engaged in the performance of the project or program under this award and not compensated by you including, but not limited to, a volunteer or individual whose services are contributed by a third party as an in-kind contribution toward cost sharing or matching requirements.

2) "Forced labor" means:

Labor obtained by any of the following methods: the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

3) "Private entity":

- a) Means any entity other than a State, local government, Indian tribe, or foreign public entity, as those terms are defined in 2 C.F.R. § 175.25.
- b) Includes:
 - (1) A nonprofit organization, including any nonprofit institution of higher education, hospital, or tribal organization other than one included in the definition of Indian tribe at 2 C.F.R. § 175.25(b).
 - (2) A for-profit organization.



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- 4) "Severe forms of trafficking in persons," "commercial sex act," and "coercion"

These terms have the meanings given at section 103 of the TVPA, as amended (22 U.S.C. § 7102)

11. Prohibition on certain telecommunications and video surveillance services or equipment.

A. As described in CFR 200.216, recipients and subrecipients are prohibited to obligate or spend grant funds (to include direct and indirect expenditures as well as cost share and program) to:

- 1) Procure or obtain,
- 2) Extend or renew a contract to procure or obtain; or
- 3) Enter into contract (or extend or renew contract) to procure or obtain equipment, services, or systems that use covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. As described in Pub. L. 115-232, section 889, covered telecommunications equipment is telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities).
 - a) For the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities).
 - b) Telecommunications or video surveillance services provided by such entities or using such equipment.
 - c) Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of the National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise, connected to the government of a covered foreign country.

REPORTING REQUIREMENTS

1. **Financial Reporting Requirement—Federal Financial Report (FFR) SF 425.** Effective October 1, 2020, you must submit your SF-425 to OASH using the Department of Health and Human Services (HHS) Payment Management System for any OASH awards with a project period ending October 1, 2020 or later. Failure to submit the FFR in the correct system by the due date may delay processing of any pending requests or applications.

OASH and the Program Support Center are collaborating in the submission of the SF-425 to reduce the burden on grantees and assist with the reconciliation of expenditures and disbursements, and to allow for timely closeout of grants. Your submission must be through the HHS Payment Management System. SF-425 submissions through Grant Solutions will no longer be accepted for OASH awards.

You must use the SF-425 Federal Financial Report (FFR) for expenditure reporting. To assist in your preparation for submission you may find the SF-425 and instructions for completing the form on the Web at:

<http://apply07.grants.gov/apply/forms/sample/SF425-V1.0.pdf>. You must complete **all** sections of the FFR.



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A. Quarterly FFR Due Date.

Your FFR is due 30 days after the end of each Quarter in the federal fiscal year. That is for the:

Quarter ending September 30, your FFR is due October 30

Quarter ending December 31, your FFR is due January 30

Quarter ending March 30, your FFR is due April 30

Quarter ending June 30, your FFR is due July 30.

B. Final FFR Due Date.

Your final FFR covering the entire project is due 90 days after the end date for your project period.

C. Past due reports.

If you have not submitted by the due date, you will receive a message indicating the report is **Past Due**. Please ensure your Payment Management System account and contact information are up to date so you receive notifications.

D. Electronic Submission.

Electronic Submissions are accepted only via the HHS Payment Management System – No other submission methods will be accepted without prior written approval from the GMO. You must be assigned to the grant with authorized access to the FFR reporting Module when submitting. If you encounter any difficulties, contact the HHS Payment Management System Help Desk or your assigned Grants Management Specialist. Please reference the CONTACTS section of NoA Terms and Conditions to locate the name of your assigned Grants Management Specialist.

- 2. Annual Progress Report Requirements.** You must submit annual progress reports 90 days after the end of each performance reporting period unless otherwise required under the Special Terms and Requirements for this award. Your progress reports must address content required by 45 CFR § 75.342(b)(2). Additional progress reporting may be requirement under Special Terms and Requirements as required by statute, regulation, or specific circumstances warranting additional monitoring. Additional guidance may be provided by the Program Office. Reports must be submitted electronically via upload to Grant Notes in GrantSolutions.
- 3. Audit Requirements.** The Single Audit Act Amendments of 1996 (31 U.S.C. §§ 7501-7507) combined the audit requirements for all entities under one Act. An audit is required for all non-Federal entities expending Federal awards, and must be consistent with the standards set out at 45 CFR Part 75, Subpart F (“Audit Requirements”). The audits are due within 30 days of receipt from the auditor or within 9 months of the end of the fiscal year, whichever occurs first. The audit report when completed should be submitted online to the Federal Audit Clearinghouse at <https://harvester.census.gov/facides/Account/Login.aspx>.

CONTACTS

- 1. Fraud, Waste, and Abuse.** The HHS Inspector General accepts tips and complaints from all sources about potential fraud, waste, abuse, and mismanagement in Department of Health and Human Services' programs. Your information will be reviewed promptly by a professional staff member. Due to the high volume of information that they receive, they are unable to reply to submissions. You may reach the OIG through various channels.



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Internet: <https://forms.oig.hhs.gov/hotlineoperations/index.aspx>

Phone: 1-800-HHS-TIPS (1-800-447-8477)

Mail: US Department of Health and Human Services

Office of Inspector General

ATTN: OIG HOTLINE OPERATIONS

PO Box 23489

Washington, DC 20026

For additional information visit <https://oig.hhs.gov/fraud/report-fraud/index.asp>

- 2. Payment Procedures.** Payments for grants awarded by OASH Program Offices are made through Payment Management Services (previously known as the Division of Payment Management) <https://pms.psc.gov/home.html> PMS is administered by the Program Support Center (PSC), HHS. NOTE: Please contact the Payment Management Services to establish an account if you do not have one.

Inquiries regarding payments should be directed to <https://pms.psc.gov/home.html>; or

Payment Management Services, P.O. Box 6021, Rockville, MD 20852;

or 1-877-614-5533.

- 3. Use of Grant Solutions.** GrantSolutions is our web-based system that will be used to manage your grant throughout its life cycle. Please contact GrantSolutions User Support to establish an account if you do not have one. Your Grants Management Specialist has the ability to create a GrantSolutions account for the Grantee Authorized Official and Principle Investigator/Program Director roles. Financial Officer accounts may only be established by GrantSolutions staff. All account requests must be signed by the prospective user and their supervisor or other authorized organization official.

For assistance on GrantSolutions issues please contact: GrantSolutions User Support at 202-401-5282 or 866-577-0771, email help@grantsolutions.gov, Monday – Friday, 8 a.m. – 6 p.m. ET. Frequently Asked Questions and answers are available at <https://grantsolutions.secure.force.com/>.

- 4. Grants Administration Assistance.** For assistance on **grants administration** issues please contact: Jessica Shields, Grants Management Specialist, at (240) 453-8839, or e-mail jessica.shields@hhs.gov or mail:

OASH Grants and Acquisitions Management Division

Department of Health and Human Services

Office of the Secretary

Office of the Assistant Secretary for Health

1101 Wootton Parkway, Rockville, MD 20852.



Office of the Secretary

Award# 6 FPHPA006507-01-01
 FAIN# FPHPA006507
 Federal Award Date: 06/07/2022

Recipient Information	Federal Award Information																																												
<p>1. Recipient Name Health Department, Oklahoma State 123 Robert S Kerr Ave 0308 Oklahoma State Department of Health Oklahoma City, OK 73102-6406</p> <p>2. Congressional District of Recipient 05</p> <p>3. Payment System Identifier (ID) 1736017987C4</p> <p>4. Employer Identification Number (EIN) 736017987</p> <p>5. Data Universal Numbering System (DUNS) 143673015</p> <p>6. Recipient's Unique Entity Identifier (UEI) LFU8Z8MPLTG3</p> <p>7. Project Director or Principal Investigator JILL NOBLES-BOTKIN jill@health.ok.gov 405-271-4476</p> <p>8. Authorized Official Ms. Bethany J Ledel Grants Reporting Officer bethanyl@health.ok.gov 405-271-4042</p>	<p>11. Award Number 6 FPHPA006507-01-01</p> <p>12. Unique Federal Award Identification Number (FAIN) FPHPA006507</p> <p>13. Statutory Authority Title X of the Public Health Service Act, Section 1001 (42 U.S.C. § 300)</p> <p>14. Federal Award Project Title Oklahoma State Department of Health Family Planning Services Project</p> <p>15. Assistance Listing Number 93.217</p> <p>16. Assistance Listing Program Title Family Planning Services</p> <p>17. Award Action Type Budget Revision</p> <p>18. Is the Award R&D? No</p>																																												
<p>Federal Agency Information OASH Grants and Acquisitions Management Division</p> <p>9. Awarding Agency Contact Information Mrs. Jessica Hall-Shields Grants Specialist Jessica.Shields@hhs.gov 240-453-8839</p> <p>10. Program Official Contact Information Cynda Hall Public Health Advisor cynda.hall@hhs.gov 2404532850</p>	<p style="text-align: center;">Summary Federal Award Financial Information</p> <table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 60%;">19. Budget Period Start Date</td> <td style="width: 20%;">04/01/2022</td> <td style="width: 20%;">- End Date</td> <td>03/31/2023</td> </tr> <tr> <td>20. Total Amount of Federal Funds Obligated by this Action</td> <td colspan="3" style="text-align: right;">\$0.00</td> </tr> <tr> <td> 20a. Direct Cost Amount</td> <td colspan="3" style="text-align: right;">(\$2,210.00)</td> </tr> <tr> <td> 20b. Indirect Cost Amount</td> <td colspan="3" style="text-align: right;">\$2,210.00</td> </tr> <tr> <td>21. Authorized Carryover</td> <td colspan="3" style="text-align: right;">\$0.00</td> </tr> <tr> <td>22. Offset</td> <td colspan="3" style="text-align: right;">\$0.00</td> </tr> <tr> <td>23. Total Amount of Federal Funds Obligated this budget period</td> <td colspan="3" style="text-align: right;">\$4,500,000.00</td> </tr> <tr> <td>24. Total Approved Cost Sharing or Matching, where applicable</td> <td colspan="3" style="text-align: right;">\$4,577,970.00</td> </tr> <tr> <td>25. Total Federal and Non-Federal Approved this Budget Period</td> <td colspan="3" style="text-align: right;">\$9,077,970.00</td> </tr> <tr> <td>26. Period of Performance Start Date</td> <td>04/01/2022</td> <td>- End Date</td> <td>03/31/2027</td> </tr> <tr> <td>27. Total Amount of the Federal Award including Approved Cost Sharing or Matching this Period of Performance</td> <td colspan="3" style="text-align: right;">Not Available</td> </tr> </table>	19. Budget Period Start Date	04/01/2022	- End Date	03/31/2023	20. Total Amount of Federal Funds Obligated by this Action	\$0.00			20a. Direct Cost Amount	(\$2,210.00)			20b. Indirect Cost Amount	\$2,210.00			21. Authorized Carryover	\$0.00			22. Offset	\$0.00			23. Total Amount of Federal Funds Obligated this budget period	\$4,500,000.00			24. Total Approved Cost Sharing or Matching, where applicable	\$4,577,970.00			25. Total Federal and Non-Federal Approved this Budget Period	\$9,077,970.00			26. Period of Performance Start Date	04/01/2022	- End Date	03/31/2027	27. Total Amount of the Federal Award including Approved Cost Sharing or Matching this Period of Performance	Not Available		
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<p>30. Remarks</p>	<p>28. Authorized Treatment of Program Income OTHER (See REMARKS)</p> <p>29. Grants Management Officer – Signature Dr. Scott Moore OASH Grants Management Officer</p>																																												

This action approves the budget revision, please see revised line items. All prior terms and conditions remain in effect unless specifically removed.



DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice of Award

Office of the Secretary

Award# 6 FPHPA006507-01-01

FAIN# FPHPA006507

Federal Award Date: 06/07/2022

Recipient Information
Recipient Name Health Department, Oklahoma State 123 Robert S Kerr Ave 0308 Oklahoma State Department of Health Oklahoma City, OK 73102-6406
Congressional District of Recipient 05
Payment Account Number and Type 1736017987C4
Employer Identification Number (EIN) Data 736017987
Universal Numbering System (DUNS) 143673015
Recipient's Unique Entity Identifier (UEI) LFU8Z8MPLTG3
31. Assistance Type Project Grant
32. Type of Award Service

33. Approved Budget (Excludes Direct Assistance)	
I. Financial Assistance from the Federal Awarding Agency Only	
II. Total project costs including grant funds and all other financial participation	
a. Salaries and Wages	\$3,761,973.00
b. Fringe Benefits	\$1,970,211.00
c. Total Personnel Costs	\$5,732,184.00
d. Equipment	\$0.00
e. Supplies	\$1,301,994.00
f. Travel	\$30,183.00
g. Construction	\$0.00
h. Other	\$301,823.00
i. Contractual	\$1,444,655.00
j. TOTAL DIRECT COSTS	\$8,810,839.00
k. INDIRECT COSTS	\$267,131.00
l. TOTAL APPROVED BUDGET	\$9,077,970.00
m. Federal Share	\$4,500,000.00
n. Non-Federal Share	\$4,577,970.00

34. Accounting Classification Codes						
FY-ACCOUNT NO.	DOCUMENT NO.	ADMINISTRATIVE CODE	OBJECT CLASS	CFDA NO.	AMT ACTION FINANCIAL ASSISTANCE	APPROPRIATION
2-3984521	FPHPA6507A	FPH70	41.51	93.217	\$0.00	75-22-0359



Office of the Secretary

Award# 5 FPHPA006507-02-00
 FAIN# FPHPA006507
 Federal Award Date: 03/30/2023

Recipient Information	Federal Award Information																																												
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<p>30. Remarks</p> <p>This action authorizes a total approved budget of \$9,077,970.00 for a continuation award that includes \$4,500,000.00 in FY2023 funding, an offset of \$0, and a carryover of \$0.</p>																																													



DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice of Award

Office of the Secretary

Award# 5 FHPA006507-02-00

FAIN# FHPA006507

Federal Award Date: 03/30/2023

Recipient Information
<p>Recipient Name Health Department, Oklahoma State 123 Robert S Kerr Ave 0308 Oklahoma State Department of Health Oklahoma City, OK 73102-6406 405 426-8099</p> <p>Congressional District of Recipient 05</p> <p>Payment Account Number and Type 1736017987C4</p> <p>Employer Identification Number (EIN) Data 736017987</p> <p>Universal Numbering System (DUNS) 143673015</p> <p>Recipient's Unique Entity Identifier (UEI) LFU8Z8MPLTG3</p>
<p>31. Assistance Type Project Grant</p> <p>32. Type of Award Service</p>

33. Approved Budget (Excludes Direct Assistance)	
I. Financial Assistance from the Federal Awarding Agency Only	
II. Total project costs including grant funds and all other financial participation	
a. Salaries and Wages	\$3,631,462.00
b. Fringe Benefits	\$1,997,305.00
c. Total Personnel Costs	\$5,628,767.00
d. Equipment	\$0.00
e. Supplies	\$1,302,726.00
f. Travel	\$66,000.00
g. Construction	\$0.00
h. Other	\$269,683.00
i. Contractual	\$1,526,674.00
j. TOTAL DIRECT COSTS	\$8,793,850.00
k. INDIRECT COSTS	\$284,120.00
l. TOTAL APPROVED BUDGET	\$9,077,970.00
m. Federal Share	\$4,500,000.00
n. Non-Federal Share	\$4,577,970.00

34. Accounting Classification Codes						
FY-ACCOUNT NO.	DOCUMENT NO.	ADMINISTRATIVE CODE	OBJECT CLASS	CFDA NO.	AMT ACTION FINANCIAL ASSISTANCE	APPROPRIATION
3-3980663	FHPA6507A	FPH70	41.51	93.217	\$4,500,000.00	75-23-0359



DEPARTMENT OF HEALTH AND HUMAN SERVICES Notice of Award

Office of the Secretary

Award# 5 FPHPA006507-02-00

FAIN# FPHPA006507

Federal Award Date: 03/30/2023

35. Terms And Conditions

SPECIAL TERMS AND REQUIREMENTS

1. **Prior Terms, Conditions, and Requirements.** Unless specifically removed, all prior terms, conditions, and requirements under this award remain in effect.



Office of the Secretary

Award# 6 FPHPA006507-02-01
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 Federal Award Date: 04/20/2023

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<p>30. Remarks</p> <p>This action approves the change in scope due to the closing of brick and mortar location due to current building being in need of repair. All prior terms and conditions remain in effect unless specifically removed.</p>																																													



DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice of Award

Office of the Secretary

Award# 6 FHPA006507-02-01

FAIN# FHPA006507

Federal Award Date: 04/20/2023

Recipient Information	
Recipient Name	Health Department, Oklahoma State 123 Robert S Kerr Ave 0308 Oklahoma State Department of Health Oklahoma City, OK 73102-6406 405 426-8099
Congressional District of Recipient	05
Payment Account Number and Type	1736017987C4
Employer Identification Number (EIN) Data	736017987
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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Office of the Assistant Secretary for Health
Office of Population Affairs
Washington, D.C.
20201

May 24, 2023

Jill Nobles-Botkin, APRN-CNM, MSN
Administrative Programs Manager
Perinatal and Reproductive Health Division
Maternal & Child Health Services
Oklahoma State Department of Health
123 Robert S. Kerr Avenue 0308
Oklahoma City, OK 73102-6406

Dear Ms. Nobles-Botkin,

As you know, the Office of Population Affairs (OPA) has been corresponding with the Oklahoma State Department of Health (OSDH) since last summer with respect to its policy and procedure for providing nondirective options counseling and referral within its Title X project (FHPA006507), in accordance with the 2021 Title X implementing regulations at 42 CFR § 59.5(a)(5). As a brief recap, on August 29, 2022, because of recent changes in Oklahoma state laws, OSDH submitted a proposal to change its policy and procedure for providing nondirective options counseling by providing clients seeking counseling on pregnancy termination with a link to the HHS OPA website. On November 9, 2022, OPA informed OSDH that this proposal did not comply with the Title X regulatory requirements set out in 42 CFR § 59.5(a)(5)(ii) and, therefore, could not be approved. On November 22, 2022, OSDH submitted to OPA a request for reconsideration of OPA's November 9, 2022 decision. On January 25, 2023, OPA posted a letter to OSDH on GrantSolutions. That letter reiterated that the proposal to provide clients seeking counseling on pregnancy termination with a link to the HHS OPA website does not comply with the 2021 Title X implementing regulations at 42 CFR § 59.5(a)(5)(ii). The letter also informed OSDH that it could submit an alternate compliance proposal that included providing clients with a referral to another entity, such as the All-Options Talkline. OSDH informed OPA that it became aware of this letter on February 7, 2023, when contacted by email.

On February 16, 2023, OSDH responded to OPA's January 25, 2023, letter by submitting an alternative proposal for compliance, which included providing nondirective counseling on all pregnancy options by OSDH staff or through the All-Options Talk Line. On March 14, 2023, OSDH submitted a "Pregnancy Diagnosis and Counseling" policy (revised March 2023), which indicated that the protocol for counseling clients with a positive pregnancy test includes:

- b. Provide neutral, factual information and nondirective counseling on all pregnancy options by OSDH staff or through the All-Options Talk Line (1-888-493-0092) and website, <https://www.all-options.org/find-support/talkline/> (except for options the client indicated she does not want more information on).

In addition, as a corollary to the counseling protocol, OSDH's "Pregnancy Diagnosis and Counseling" policy (revised March 2023) indicated that one of the options for referral was to the "All-Options Talk Line (1-888-493-0092)." As part of its March 14 submission, OSDH also sent a Pregnancy Choices brochure (dated March 2023), listing the All-Options Talk Line as one of the Oklahoma Family Planning Resources.

On March 21, 2023, OSDH submitted a written assurance of compliance with the options counseling and referral requirements in the 2021 Title X Final Rule. On March 23, 2023, OPA posted two documents on GrantSolutions (a letter dated March 1, 2023, and a printout of a Technical Review, Exported On: 03/20/2023). Those documents informed OSDH that OPA had determined that OSDH's policy complied with the Title X regulations.

Most recently, however, on May 5, 2023, OSDH notified OPA by email that it "had a change required in our family planning program policy effective late afternoon of 4/27/23." As documentation, OSDH submitted the same exact "Pregnancy Diagnosis and Counseling" policy (revised March 2023) as it originally submitted on March 14, 2023, but the new version no longer includes counseling through and referral to the All-Options Talk Line. Specifically, the policy submitted on May 5, 2023, replaced part b. quoted above with the following:

b. Provide neutral, factual information and nondirective counseling on pregnancy options in Oklahoma by OSDH staff (except for options the client indicated she does not want more information on).

In addition, the updated OSDH "Pregnancy Diagnosis and Counseling" policy (revised March 2023) no longer includes the All-Options Talk Line as an entity to which clients may be referred. And, as part of its May 5, 2023, submission, OSDH also included an updated Pregnancy Choices brochure, which no longer lists the All-Options Talk Line as a resource.

OSDH's reference to counseling on "pregnancy options in Oklahoma" in the "Pregnancy Diagnosis and Counseling" policy, rather than counseling on all pregnancy options, and the deletion of referral to the All-Options Talk Line in this policy without any other provision for abortion referrals, are not acceptable revisions, as Title X recipients must still follow all Federal regulatory requirements. The changes to OSDH's family planning program policy do not suffice or meet Federal requirements because Oklahoma law does not extend to all pregnancy options (*See Okla. Stat. tit. 21, § 861*), and we understand that, pursuant to OSDH's revised policy, information, counseling and referral will not be available for all alternative courses of action, but only for those options available under Oklahoma state law. This is inconsistent with Title X regulations at 42 CFR § 59.5(a)(5), which require Title X projects to provide information and nondirective counseling on a range of options, including prenatal care and delivery; infant care, foster care, or adoption; and pregnancy termination. Additionally, projects are required to provide referrals upon client request, including referrals for abortion. In some circumstances, those referrals will need to be made out of state.

Thus, based upon the documentation provided, OPA has determined that OSDH's policy for providing nondirective options counseling and referral within your Title X project does not comply with the Title X regulatory requirements and, therefore, the terms and conditions of your grant. Given OSDH's failure to adhere to the Title X regulatory requirements for nondirective options counseling and referral, I have referred this matter to the HHS Office of the Assistant Secretary for Health's Grants and Acquisitions Management (GAM) Division as a violation of the terms and conditions of your grant. I have copied the Director of OASH GAM on this correspondence as notification of the compliance violation and will be in touch with a response.

Thanks,



Jessica Swafford Marcella
Deputy Assistant Secretary for Population Affairs
U.S. Department of Health and Human Services
Office of the Assistant Secretary for Health, Office of Population Affairs

cc: Scott Moore
Director/Chief Grants Management Officer
U.S. Department of Health and Human Services
Office of the Assistant Secretary for Health, Grants and Acquisitions Management



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary
Office of the Assistant Secretary for Health
Grants & Acquisitions Management
Rockville, MD 20852

May 25, 2023

TO: Jill Nobles-Botkin (jill@health.ok.gov)
Project Director/Principle Investigator

Ms. Bethany J Ledel (bethanyl@health.ok.gov)
Authorized Official

Oklahoma State Health Department
123 Robert S Kerr Ave 0308
Oklahoma City, OK 73102-6406

RE: Suspension of Award FPHPA006507 "Oklahoma State Department of Health
Family Planning Services Project"

The Office of Population Affairs (OPA) has provided notice in the attached letter that your award FPHPA006507 "Oklahoma State Department of Health Family Planning Services Project" is out of compliance with the Title X regulation (42 CFR Part 59, Subpart A) as of May 24, 2023.

As a condition of accepting the award (Notice of Award, Special Terms and Requirements 2), Oklahoma State Department of Health (OSDH) stipulated "that the award and any activities thereunder are subject to all provisions of 42 CFR Part 59, Subpart A." OSDH accepted the award per Standard Term 1 of the Notice of Award, "By drawing or otherwise obtaining funds for the award from the grant payment system or office, you accept the terms and conditions of the award and agree to perform in accordance with the requirements of the award."

OSDH accepted the award on May 24, 2022, by drawing down funds from the HHS Payment Management System (PMS). In doing so, OSDH agreed to comply with the Title X regulation as a condition of the award.

Therefore, I conclude that because OSDH is out of compliance with the Title X regulation, OSDH is also out of compliance with the terms and conditions of award FPHPA006507. As of April 27, 2023 (i.e., the effective date of the non-compliant OSDH policy), all costs are unallowable.

Consequently, I am suspending award FPHPA006507 and all activities supported by it effective with the date of this letter. I will review this action in 30 days to reassess OSDH's compliance with the award terms and conditions. The suspension may be extended for an appropriate time or the award may be terminated pursuant to 45 CFR § 75.372(a)(1) for material noncompliance or unsatisfactory performance with the terms and conditions of the award. A termination under this section must be reported to the Office of Management and Budget-designated integrity and

performance system, currently the Federal Awardee Performance and Integrity Information System (FAPIS). See 45 CFR § 75.372(b). Inclusion in FAPIS may affect your ability to obtain future Federal funding.

As an alternative, you have the opportunity to voluntarily relinquish your grant and may do so by contacting the assigned Grants Management Specialist (Jessica Shields, Jessica.shields@hhs.gov), who can provide your additional information on the process. Note that as compared to termination, a decision to relinquish your award is not reported to FAPIS.

Respectfully,



Scott J. Moore -S
2023.05.25 11:09:13 -04'00'

Scott J. Moore, Ph.D., J.D.
Director / Chief Grants Management Officer
OASH Grants & Acquisitions Management

cc: Jessica Shields, Grants Management Specialist
Cynda Hall, OPA Project Officer
Duane Barlow, OASH Grants Branch chief
Amy Margolis, OPA Deputy Director
Jessica Marcella, Deputy Assistant Secretary for Population Affairs

Grants Certifications Report

Certification for: OKLAHOMA STATE DEPARTMENT OF HEALTH

Unique Entity ID: LFU8Z8MPLTG3

Certification Validity From: Tue Jun 13 15:08:04 EDT 2023

Certification Validity To: Wed Jun 12 15:08:04 EDT 2024

Financial Assistance General Certifications and Representations

As the duly authorized representative of the **OKLAHOMA STATE DEPARTMENT OF HEALTH**, I certify that **OKLAHOMA STATE DEPARTMENT OF HEALTH**:

- (1) Has the legal authority to apply for Federal assistance and the institutional, managerial and financial capability to ensure proper planning, management and completion of any financial assistance project covered by this Certifications and Representations document (See 2 C.F.R. § 200.113 Mandatory disclosures, 2 C.F.R. § 200.214 Suspension and debarment, OMB Guidance A- 129, "Policies for Federal Credit Programs and Non-Tax Receivables");
- (2) Will give the awarding agency, the Comptroller General of the United States and, if appropriate, the State, through any authorized representative, access to and the right to examine all records, books, papers, or documents related to the award; and will establish a proper accounting system in accordance with generally accepted accounting standards or agency directives (See 2 C.F.R. § 200.302 Financial Management and 2 C.F.R. § 200.303 Internal controls);
- (3) Will disclose in writing any potential conflict of interest to the Federal awarding agency or pass through entity in accordance with applicable Federal awarding agency policy (See 2 C.F.R. § 200.112 Conflict of interest);
- (4) Will comply with all limitations imposed by annual appropriations acts;
- (5) Will comply with the U.S. Constitution, all Federal laws, and relevant Executive guidance in promoting the freedom of speech and religious liberty in the administration of federally-funded programs (See 2 C.F.R. § 200.300 Statutory and national policy requirements and 2 C.F.R. § 200.303 Internal controls);
- (6) Will comply with all applicable requirements of all other Federal laws, executive orders, regulations, and public policies governing financial assistance awards and any Federal financial assistance project covered by this certification document, including but not limited to:
 - (a) Trafficking Victims Protection Act (TVPA) of 2000, as amended, 22 U.S.C. § 7104(g);
 - (b) Drug Free Workplace, 41 U.S.C. § 8103;
 - (c) Protection from Reprisal of Disclosure of Certain Information, 41 U.S.C. § 4712;
 - (d) National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4321 et seq.;
 - (e) Universal Identifier and System for Award Management, 2 C.F.R part 25;
 - (f) Reporting Subaward and Executive Compensation Information, 2 C.F.R. part 170;
 - (g) OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Non-procurement), 2 C.F.R. part 180;
 - (h) Civil Actions for False Claims Act, 31 U.S.C. § 3730;
 - (i) False Claims Act, 31 U.S.C. § 3729, 18 U.S.C. §§ 287 and 1001;
 - (j) Program Fraud and Civil Remedies Act, 31 U.S.C. § 3801 et seq.;
 - (k) Lobbying Disclosure Act of 1995, 2 U.S.C. § 1601 et seq.;
 - (l) Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq.;
 - (m) Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 et seq.;
 - (n) Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. § 1681 et seq.;
 - (o) Section 504 of the Rehabilitation Act of 1973, as amended, 42 U.S.C. § 794; and.
 - (p) Age Discrimination Act of 1975, as amended, 42 U.S.C. § 6101 et seq.

✓ I have read each of the certifications and representations presented on this page. By submitting this certification, I, **Bethany Ledel**, am attesting to the accuracy of the certifications and representations contained herein. I understand that I may be subject to criminal prosecution under Section 1001, Title 18 of the United States Code or civil liability under the False Claims Act if I misrepresent **OKLAHOMA STATE DEPARTMENT OF HEALTH** by providing false, fictitious, or fraudulent information to the U.S. Government.

EXHIBIT 6



July 27, 2023

Via U.S. Mail and Email: ASH@hhs.gov

Rachel L. Levine, M.D.
Office of the Assistant Secretary for Health
200 Independence Avenue, SW
Room 716G
Washington, D.C. 20201

Re: Appeal of Termination of Award FPHPA006507 “Oklahoma State Department of Health Family Planning Services Project”

APPEAL OF TERMINATION OF AWARD FPHPA006507

Adverse Determination

On May 25, 2023, HHS sent a letter to the Oklahoma State Department of Health (OSDH) explaining HHS’s position that OSDH was in violation of Title X and out of compliance with the terms and conditions of award FPHPA006507 “Oklahoma State Department of Health Family Planning Services Project” (“Award”). HHS explained OSDH was in violation of 42 C.F.R. §59.5(a)(5)(i)(c)—specifically, by no longer offering pregnant clients the opportunity to be provided information and counseling about pregnancy termination.

The Award was suspended as of the May 25, 2023, with a provision stating the action would be reviewed in thirty (30) days to “reassess OSDH’s compliance with the award terms and conditions.” Subsequently, on June 27, 2023, OSDH received notice the Award would be terminated. (See Exhibit A, Notice of Termination).

Governing Law

This appeal from HHS’s termination of award is governed by 42 C.F.R. §§50.401-50.406. The appeal provisions apply to the Office of Public Health and Science, which the OPA is a part



of.¹ Termination of a grant for purported failure of grantee to operate in accordance with applicable law is specifically enumerated as a dispute covered by these procedures.² A complaint must be initiated within thirty (30) days of receipt of the written notification of the determination.³ The request for review must: include a copy of the adverse determination; identify the issue in dispute; and contain a full statement of the grantee's position.⁴

STATEMENT OF THE ISSUES

Since 1971, the Oklahoma State Department of Health (hereinafter "OSDH") has continuously received federal grant funds to provide family planning services across the State of Oklahoma. Through those funds as well as access to 340B priced pharmaceuticals and medical devices, OSDH has provided family planning services in 68 counties, while also contracting with Oklahoma City-County Health Department and Tulsa County Health Department, both independent of OSDH, to ensure family planning services are available in Oklahoma's two most populous counties. Because of both OSDH's statewide presence and receipt of the at-issue grant funds, OSDH has been able to provide safe and local access to family planning services for tens of thousands of Oklahomans. This is important to note, because the actions and conclusions of late are not exclusively ideological or political in nature, but carry life-altering consequences by limiting that historically successful and available access.

On June 24, 2022, the United States Supreme Court overruled *Roe v. Wade*, 410 U.S. 113, 93, S.Ct. 705 and *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, (1992), holding that the Constitution does not confer a right to abortion. *Dobbs v. Jackson*

¹ 42 C.F.R. §50.402

² 42 C.F.R. §50.404(a)(1)

³ 42 C.F.R. §50.406(a)

⁴ 42 C.F.R. §50.406(b)



*Women's Health Organization Et. Al.*⁵ Up until that decision, 21 O.S. § 861 was unconstitutional only because of the United States Supreme Court decisions in *Roe* and *Casey*. On April 29, 2022, S.B. 1555 was signed into law by Oklahoma Governor, Kevin Stitt, allowing the Oklahoma Attorney General to certify that *Roe* and *Casey* have been overruled so that Oklahoma may enforce 21 O.S. § 861 and other legislation prohibiting abortion. The Oklahoma Attorney general “appropriately” made this certification the same day as the *Dobbs* opinion- June 24, 2022. *Oklahoma Call For Reproductive Justice v. Drummond*, 2023 OK 24, P 14, 526 P.3d 1123. Title 21 O.S. 861 is currently good law in Oklahoma and provides:

Every person who administers to any woman, or who prescribes for any woman, **or advises** or procures any woman to take any medicine, drug or substance, or uses or employs any instrument, or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life shall be guilty of a felony punishable by imprisonment in the State Penitentiary for not less than two (2) years nor more than five (5) years.

OSDH was found to be in noncompliance with 42 C.F.R. §59.5(a)(5)(i)(c), which states a project must:

- (i) Offer pregnant clients the opportunity to be provided information and counseling regarding each of the following options:
 - (A) Prenatal care and delivery;
 - (B) Infant care, foster care, or adoption; and
 - (C) Pregnancy termination.

The definition of counseling is “to give advice to someone.”⁶ As such, this rule is directly in conflict with the Oklahoma criminal statute 12 O.S. § 861 and prohibits OSDH from being in

⁵ *Dobbs v. Jackson Women's Health Org.*, 213 L. Ed. 2d 545, 142 S. Ct. 2228 (2022)

⁶ *Merriam-Webster*. Available at: <https://www.merriam-webster.com/dictionary/counsel> (Accessed: 27 July 2023).



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compliance with the arbitrary HHS rule without risking criminal conduct.

Title 12 O.S. § 861 is not an unconstitutional law under guidance from the U.S. Supreme Court and a recent holding by the Oklahoma Supreme Court⁷. Therefore, Oklahoma and its citizens are being deprived of Title X funds for family planning service because of the condition HHS has placed into rule requiring counseling and/or advising on abortion.

Simply, this result was not the intent of 42 U.S.C. § 300 *et seq.*, and the condition requiring recipients to counsel on abortion services is contrary to law and exceeds statutory authority. Congress has passed specific legislation intended to prevent the denial or termination of awards based on the very type of conduct HHS is requiring Oklahoma to promote and engage in. The rule requiring counseling on termination of pregnancy has changed three (3) times in the last five (5) years in a manner that appears based on the political party in power; providing more evidence this requirement is more politically relevant than aimed at meeting the purpose of the enabling law. Finally, terminating a grantee's Title X funding solely on the failure to counsel on abortion is a condition that is in violation of U.S. Supreme Court case law.

LEGAL ARGUMENT

It is "axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). When it comes to spending, Congress alone is given the "power of the purse," and the executive branch does not have unilateral authority to impose conditions on federal funding or to "decline to follow a statutory mandate or prohibition simply because of policy objections."

⁷ In *Oklahoma Call For Reproductive Justice v. Drummond*, the Oklahoma Supreme Court held that 21 O.S. § 861 does not violate the Oklahoma Constitution as it allows the termination of a pregnancy in order to preserve the life of the pregnant woman. 2023 OK 24, P 14, 526 P.3d 1123



City & Cnty. of San Francisco v. Trump, 897 F.3d 1225, 1232 (9th Cir. 2018). Further, it is “well settled that an agency may only act within the authority granted to it by statute.” *Nat. Res. Def. Council v. Nat’l Highway Traffic Safety Admin.*, 894 F.3d 95, 108 (2d Cir. 2018). *See, Gundy v. United States*, 139 S.Ct. 2116, 2121 (2019) (“The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government.”) Further, under the APA, agencies cannot make rules that are “arbitrary, capricious, an abuse of discretion, **or otherwise not in accordance with law**” and “in excess of statutory jurisdiction, authority, or limitation, or short of statutory right.” *Id.*; See also 5 U.S.C. § 706(2).

Not only does the requirement at issue exceed statutory authority and violate the APA, but it also is an unlawful condition in violation of the U.S. Constitution and the limitations espoused by the United State Supreme Court in *South Dakota v. Dole*, 483 U.S. 203, 107 S. Ct. 2793 (1987). In *Dole*, the Court outlined the limitations on what conditions Congress may attach to the receipt of federal funds: (1) “the exercise of spending must be in pursuit of ‘the general welfare;” (2) if Congress wishes to condition the States’ receipt of federal funds, it must do so unambiguously allowing “States to exercise their choice knowingly, cognizant of the consequence of their participation;” (3) conditions must be related “to the federal interest in particular national projects or programs;” (4) conditions must not violate other provisions of the Constitution, such as the First Amendment or the Due Process or Takings Clauses of the Fifth Amendment. Finally, the *Dole* court expressed a fifth limitation, stating the condition cannot cross the line from enticement to impermissible coercion, such that states have no real choice but to accept the funding and enact or administer a federal regulatory program. *Dole*, 483 U.S. at 207-208, 107 S. Ct. at 2796.



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A. HHS' determination to terminate funding based on rule 42 C.F.R. §59.5(a)(5)(i)(c) exceeds statutory authority and is not related to the federal interest expressed in 42 U.S.C. §§ 300 et seq.

In 1970, Congress enacted Title X of the Public Health Service Act, codified in 42 U.S.C. §§ 300-300a-6A. Under 42 U.S.C. § 300, the Secretary is authorized to make grants and enter into contracts with public or non-profit 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). Further, the statute lists factors the Secretary shall take into account in making grants and contracts: “number of patients to be served, the extent to which family planning services are needed locally, the relative need of the applicant, and its capacity to make rapid and effective use of such assistance.” 42 U.S.C. § 300(b). None of the factors require counseling on abortion services. In fact, Title X’s governing statute, 42 U.S.C. §§300-300a-6, mentions “abortion” only once. “None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.” The legislative history as to why this language was added is clear. The Conference report stated that section was specifically adopted into the Act “to ensure that Title X funds would ‘be used only to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities.” H.R. Conf. Rep. No. 91-1667, 8 (Dec. 3, 1970), 42 U.S.C. 300a-6 (emphasis added).

Further, the author of Title X, Rep. John Dingell (D-MI) clarified the intent of the abortion prohibition:

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. Programs which include abortion as a method of family planning are not eligible for funds allocated through this act. 116 Cong. Rec. 37375 (Nov. 16, 1970) (emphasis added). The governing regulation rightly acknowledges the statutory provision stating “[e]ach project supported under this part must...[n]ot provide abortion as a method of family planning.”⁸ Yet, in the same subpart, the regulation promulgated by HHS goes on to state “a project must [o]ffer pregnant clients the opportunity to be provided information and counseling regarding...pregnancy termination.”⁹ This inclusion is contrary to the expressed intent and spirit of the statute, evidenced by congressional disavowal of abortion as a means of family planning within the meaning of Title X, and is without statutory basis. The purpose of Title X is to provide funding for preventive family planning services, not abortion. Conditioning an award of Title X funding on counseling for abortion is outside of the scope and purpose of Title X.

In *Rust v. Sullivan*, the Court analyzed a challenge to HHS regulations prohibiting recipients of Title X funding from “counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.” *Rust v. Sullivan*, 500 U.S. 173, 193–96 (1991). The Court upheld the prohibition because “[t]he Title X program is designed not for prenatal care, but to encourage family planning.... This is not a case of the government ‘suppressing a dangerous idea,’ but of a prohibition on a project grantee or its employees from engaging in activities *outside of the project’s scope*.” *Rust v. Sullivan*, 500 U.S. 173, 193-194 (1991) (**emphasis added**). In other words, counseling on abortion is outside the scope of Title X. The Court understood Title X’s primary intent was pre-pregnancy preventive services, stating “Indeed, if one thing is clear from the legislative history, it is that **Congress**

⁸ 42 C.F.R. §59.5(a)(5)

⁹ 42 C.F.R. §59.5(a)(5)(i)(c)



intended that Title X funds be kept separate and distinct from abortion-related activities. It is undisputed that Title X was intended to provide primarily pre-pregnancy preventive services.” *Id.* at 190 (emphasis added).

However, the condition in rule now is a complete reversal to those requirements analyzed and upheld in *Rust*, as well as the requirements put in place in February 2019 by HHS. Nothing in statute has changed relating to the purpose of the project’s scope. The current rule no longer defines the limits of the programs, as they relate to the abortion prohibition in 42 U.S.C. § 300a-6, nor seeks to keep abortion and related activities separated from family planning services. Instead, the rule as applied by HHS now seeks to force recipients to counsel on abortion or lose their funding. The current condition is not related to Title X’s expressed purpose and clear legislative history. Further, the condition clearly exceeds statutory authority because Title X’s purpose is to provide family planning services. Abortion is unambiguously excluded from the scope of family planning services by 42 U.S.C. § 300a-6, stating no funds “shall be used in programs where abortion is a method of family planning.” Such a condition requiring specific counseling as a form of family planning that is specifically excluded by statute, is both arbitrary and unreasonable.

Further, 42 C.F.R. §59.5(a)(5)(i)(c) not only exceeds HHS’s statutory authority, but it is also in violation of the Weldon Amendment; further supporting that the requirement to counsel on abortion is wholly unrelated and antithetical to the expressed federal interest. The Weldon Amendment states:

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 an institutional or individual health care entity to



discrimination on the basis that the health care entity does not provide, pay for, or provide coverage of, or *refer* for abortions.¹⁰

This amendment sets forth clear Congressional intent, in plain language, that states healthcare entities are not penalized for refusing to, *inter alia*, refer for abortions. When Congress's intent is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). Here, the unambiguous intent of Congress is to protect healthcare entities, including State entities such as OSDH, from having their funding denied or terminated for not referring patients for abortions. Referral is defined as "The act or an instance of sending or **directing to another for information, service, consideration, or decision.**" Black's Law Dictionary 9th ed. (**emphasis added**).

HHS's termination of Award was due to OSDH's refusal to refer and/or counsel for abortions. This is clearly contrary to the terms of the Weldon Amendment. OSDH is a healthcare entity. The Weldon Amendment defines "health care entity" as "includ[ing] 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." 45 C.F.R. § 88.2 The rule specifically recognizes State agencies, such as OSDH, may be health care entities: "As applicable, components of State or local governments may be health care entities under the Weldon Amendment and Patient Protection and Affordable Care Act section 1553." 45 C.F.R. § 88.2. OSDH operates sixty-eight (68) county health departments that provide direct patient care to Oklahomans, including providing family planning services

¹⁰ Consolidated Appropriations Act, 2023, Public Law 117-328, Div. H, sec. 507(d) (**emphasis added**)



specifically intended under Title X. By its own terms the grant given recognizes OSDH is a healthcare entity.

See, 42 C.F.R. §59.1 (“The regulations of this subpart are applicable to the award of grants under section 1001 of the Public Health Service Act (42 U.S.C. 300) to assist in the establishment and operation of voluntary family planning projects. These projects shall consist of the educational, comprehensive medical, and social services necessary to aid individuals to determine freely the number and spacing of children.”) “Comprehensive medical services” by definition stem from “health care facility, organization, or plan.”

In addition to being prohibited by statute, HHS’s action is in violation of the APA because the condition is “arbitrary, capricious, an abuse of discretion, **or otherwise not in accordance with law**” and “in excess of statutory jurisdiction, authority, or limitation, or short of statutory right.”¹¹ As previously mentioned, the agency action is “otherwise” contrary to law and expressly prohibited by federal conscience protection statutes. 42 C.F.R. §59.5(a)(5)(i)(c), upon which the HHS based its action, is an unlawful regulation in that it is directly contrary to Title X’s expressed purpose and the Weldon Amendment—where the Rule purports to require referral for pregnancy termination (i.e., abortion), the Weldon Amendment seeks to protect entities who do not, *inter alia*, refer for abortions. Additionally, abortion is not a proper form of family planning methods under Title X. This is an irreconcilable conflict between administrative regulation and applicable statutory provisions. A “regulation that contravenes a statute is invalid.” *United States v. Kahn*, 5 F4th 167, 175 (2d Cir. 2021). This conflict is obliquely recognized in the regulation itself, a

¹¹ *Id.* (emphasis added)



footnote to the prohibition of providing abortion as a method of family planning states “[p]roviders may separately be covered by federal statutes protecting conscience and/or civil rights.”¹²

It is clear Congress has not delegated power to supersede statutes to HHS, or any administrative agency for that matter. HHS acted in excess of its statutory jurisdiction by seeking to render a statute void. In fact, such a purported delegation would itself be unconstitutional. *See, Gundy v. United States*, 139 S.Ct. 2116, 2121 (2019) (“The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government.”).

When an agency administers a statute, as HHS administers Title X, it is subjected to a two-level inquiry. First, the question is “whether Congress has directly spoken to the precise question at issue.” *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Second, and only if Congress has been “silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843-844. Further, when an “agency’s interpretation involves an issue of ‘deep ‘economic and political significance,’ it may not be entitled to deference. *City & Cnty. of San Francisco v. Trump*, 897 F.3d 1225, 1242 (9th Cir. 2018) (citing *King v. Burwell*, 135 S.Ct. 2480, 2489, 192 L.Ed.2d 483 (2015)). Under the *Chevron* two-part inquiry, the rule in question fails both parts of the test. First, Congress has spoken directly on the subject clearly and extensively.¹³ Abortion is not a valid form of family planning under Title X and, irrespective of that, providers are not to be penalized for not referring patients for abortions. As discussed, the legislative history on this is also clear. Thus, any possible ambiguity on Congress’s intent

¹² 42 C.F.R. §59.5(a)(5) fn. 2

¹³ *See e.g.*, Weldon Amendment and 42 U.S.C. §300a-6



regarding Title X and referring for abortion is belied by the legislative history—Title X was not intended to “encourage or promote” abortion in any way. It cannot seriously be contended that requiring referral for abortion services is not a way of promoting or encouraging abortion.

However, even if the record from Congress were to be found to be ambiguous, HHS’s construction is not a reasonable one. Title X provides HHS may “make grants to public or nonprofit private entities and to enter into contracts with public or private entities and individuals **to assist in developing and making available family planning and population growth information** (including educational materials) to all persons desiring such information (or materials).”¹⁴ HHS is only empowered to promulgate regulations under Title X to implement making grants (or contracts) for this express purpose.¹⁵ Thus the only reasonable scope of implementation is rules and regulations aimed at implementing family planning (from which abortion is statutorily prohibited), and population growth (which abortion is, by definition, excluded from). A rule requiring referral for abortion is therefore not a logical outgrowth, or reasonable interpretation, of Title X.

In practice, the arbitrary nature of this requirement becomes even more apparent. OSDH through community health departments provides family planning services, and the funds received under Title X were almost entirely expended in furtherance of those services. These funds have been and were intended, up to HHS’s termination, to provide those family planning services to communities. The funds cannot be used for abortion related services even under the Act. None of the funds are intended to go to abortion, but the entire grant reward can be terminated for not counseling on abortion, subsequently depriving communities of the very funding and access

¹⁴ 42 U.S.C. §300a-3(a)

¹⁵ *See*, 42 U.S.C. §300a-4



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needed to family planning services the Act is designed to ensure. Simply, terminating grant funds for failing to counsel on a service the recipient cannot provide by or be associated with by the Act is arbitrary and contrary to the purpose of the Act, depriving communities of funding for the very services the Act seeks to promote.

A. The condition to counsel for abortion is an unconstitutional condition.

Courts have reasoned that a condition may be unconstitutional when the condition goes beyond just defining the limits of a program, and instead, forces recipients to adopt “the Government’s view on an issue of public concern...” *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 220, 133 S. Ct. 2321, 2332, 186 L. Ed. 2d 398 (2013). This limitation is based on the following principle:

For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to ‘produce a result which (it) could not command directly.’ Such interference with constitutional rights is impermissible.

Perry v. Sindermann, 408 U.S. 593, 597, 92 S. Ct. 2694, 2697, 33 L. Ed. 2d 570 (1972) (citing *Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460). As argued above, the condition requiring counseling on abortion does exceed the limits of the Title X program. This rule usurps the entire intent of Title X by forcing recipients to counsel on abortion, which is a method of encouraging and promoting abortion¹⁶. In light of the *Dobbs* decision, the condition poses a significant problem, especially for recipients in the State of Oklahoma. Abortion, and advising on abortion, is now illegal in Oklahoma. The condition seeks to require recipients to

¹⁶ 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 (Nov. 16, 1970) (emphasis added).



“pledge allegiance” to HHS’s policy of promoting abortion even if it means potential criminal liability for such conduct, which is a condition in violation of the Constitution, including the First Amendment. *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 220, 133 S. Ct. 2321, 2332, 186 L. Ed. 2d 398 (2013).

The current requirement is not defining the limits of the programs or preventing conduct that undermines the program. In *Rust*, the Court upheld the HHS rule prohibiting a recipient from counseling on abortion because, in part, counseling on abortion was “*outside of the project’s scope.*” *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). A requirement for recipients to now counsel on abortion is still outside Title X’s scope and terminating a recipient’s funds for not conducting activities outside the scope of a project is contrary to law.

Requiring recipients to counsel on abortion is an attempt to expand the purpose of the Title X program to include abortion as a family planning method in contradiction to the very terms of Title X. “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 220–21, 133 S. Ct. 2321, 2332, 186 L. Ed. 2d 398 (2013) (quoting *Barnette*, 319 U.S., at 642, 63 S.Ct. 1178). Simply, a recipient should not be required to potentially violate criminal law to receive federal funding, especially for an issue outside the scope and purpose of Title X and within the State’s lawful authority.

B. Congress has not unambiguously imposed the condition that recipients must counsel on abortion to receive Title X funds.

“If Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.” *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 101 S. Ct. 1531,



1540, 67 L. Ed. 2d 694 (1981). In enacting Title X, Congress specifically enumerated factors HHS should look at in awarding Title X funds: “number of patients to be served, the extent to which family planning services are needed locally, the relative need of the applicant, and its capacity to make rapid and effective use of such assistance.” 42 U.S.C. § 300(b). There is no condition requiring recipients to counsel on abortion services provided in statute. In fact, the only condition related to abortion in statute is that a recipient must not use funds in a program where abortion is used as a family planning method. See 42 U.S.C. § 300a-6.

As argued above, the statutory language specifically prohibits the use of Title X funds for abortion service, and the legislative history reveals the Title X grant funds are intend to go towards pre-pregnancy services, not anything related to abortion. Such a requirement runs afoul of constitutional case law and is not unambiguously expressed by the statute. HHS has acted unilaterally outside the enabling law in promulgating this condition into rule, as well as implementing this condition to terminate Title X funding. The rule requiring counseling on termination of pregnancy has changed three (3) times in the last five years based on the political party in office. Further, as in discussed in *Rust*, there use to be a prohibition against counseling on abortion services. Therefore, it cannot be stated that Congress has unambiguously imposed such a condition on Title X funds because the condition is solely imposed by HHS in excess of its authority and direct opposition of the expressed intent of Congress.

C. The condition to counsel on termination of pregnancy does not promote the general welfare

Title 42 U.S.C. §§ 300-300a-6 as codified does promote the general welfare by providing family planning services to citizens; however, the specific condition promulgated into rule by HHS, resulting in OSDH’s grant to be terminated, does not promote the general welfare. In



evaluating this limitation, the U.S. Supreme Court has stated “[t]he discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation. What is critical or urgent changes with the times.” *Helvering v. Davis*, 301 U.S. 619, 641, 57 S. Ct. 904, 908–09, 81 L. Ed. 1307 (1937). Congress in its discretion chose to specifically prohibit Title X funds being used in any program that utilizes abortion as a family planning service. Requiring a recipient to counsel on abortion is not in the general welfare and exceeds the statutory authority and intent under which it is derived.

Conclusion

The action taken by HHS in terminating the Award to OSDH is contrary to law and in violation of federal conscience protection statutes. Conditioning Title X funds on abortion counseling is outside the scope and expressed intent of Title X. Abortion is excluded as a family planning method under Title X, and Congress was clear the funds were never intended to be used to encourage or support abortion. The rule requires exactly what was prohibited by Title X- the promotion, encouragement and support of abortion. After *Dobbs*, abortion is now illegal in Oklahoma, and recipients should not be required to counsel on something not within the scope of the Title X program, especially if there is a potential for criminal conduct. Simply, the action taken exceeds the authority provided under Title X and violates constitutional protections put into place that prohibit the very type of condition required under 42 C.F.R. §59.5(a)(5)(i)(c). The determination must be set aside, and the grant Award be reinstated.



OKLAHOMA
State Department
of Health

OKLAHOMA STATE DEPARTMENT OF HEALTH:

Lisa Martinez-Leeper

Lisa Martinez-Leeper
CHIEF ADMINISTRATIVE OFFICER

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Signature: Lisa Martinez-Leeper
Lisa Martinez-Leeper (Jul 27, 2023 15:06 CDT)

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DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary
Office of the Assistant Secretary for Health
Grants & Acquisitions Management
Rockville, MD 20852

DATE June 27, 2023

To: Jill Nobles-Botkin (jill@health.ok.gov)
Project Director/Principal Investigator

Ms. Bethany J Ledel (bethanyl@health.ok.gov)
Authorized Official

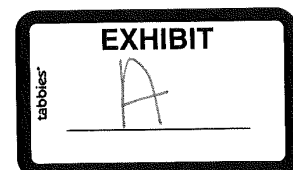
Oklahoma State Health Department
123 Robert S Kerr Ave 0308
Oklahoma City, OK 73102-6406

Re: Termination Notice for award FPHPA006507 "Oklahoma State Department of Health Family Planning Services Project"

This letter provides notice of my decision to terminate the above identified award under 45 C.F.R. § 75.372. Termination is not final until a Notice of Award has been issued with a revised project period end date indicating the effective date of the termination. You must submit complete close out documentation within 120 days of the new project period end date. Additional guidance is attached (Tab A). Failure to provide a timely and acceptable closeout package may result in a unilateral closeout and report to the Federal Awardee Performance and Integrity Information System (FAPIIS) as a material failure to comply with the terms and conditions of the award.

This termination is based on a failure to comply with the terms and conditions of the award as described below. The termination decision will be reported to the OMB-designated integrity and performance system accessible through SAM (currently FAPIIS). The information will be available in the OMB-designated integrity and performance system for a period of five years from the date of the termination, then archived. Agencies that consider making a Federal award to your organization during that five-year period must consider that information in judging whether organization is qualified to receive the Federal award, when the Federal share of the Federal award is expected to exceed the simplified acquisition threshold over the period of performance.

Your organization may comment on any information the OMB-designated integrity and performance system contains about the non-Federal entity for future consideration by awarding agencies. You may submit comments to the awardee integrity and performance portal accessible



through SAM (currently CPARS). Awarding agencies will consider your comments when determining whether your organization is qualified for a future Federal award.

Appeal Procedure

You have an opportunity to object and provide information and documentation challenging the termination action, in accordance with 42 CFR part 50, subpart D. To receive a review of your challenge, you must submit a request for such review to the Assistant Secretary for Health (ASH) no later than 30 days after the written notification of the determination is received. An extension of time may be considered upon a demonstration of good cause for the extension. A request for review must identify the issue(s) in dispute. It must also contain a full statement of your position with respect to such issue(s) and the pertinent facts and reasons in support of your position. In addition to the required written statement, you must provide copies of any documents supporting your claim.

Upon receipt of your request, the ASH will follow the process set forth in 42 CFR part 50, subpart D. Any review committee appointed under § 50.405 will be provided with copies of all relevant background materials (including applications(s), award(s), summary statement(s), and correspondence) and any additional pertinent information available. You will be given an opportunity to provide the review committee with additional statements and documentation not provided in the request for review. This additional submission must be tabbed and organized chronologically and accompanied by an indexed list identifying each document. The additional submission should provide only material that is relevant to the review committee's deliberation of the issues raised. You may be asked by the committee, at its discretion, to discuss the pertinent issues with the committee and to submit such additional information as the committee deems appropriate.

Based on its review, the review committee will prepare a written decision to be signed by the chairperson and each of the other committee members. The review committee will then send the written decision with a transmittal letter to you. If the decision is adverse to your position, you will be advised as to your right to appeal to the Departmental Appeals Board under 45 CFR part 16.

Compliance Findings

Our findings with respect to non-compliance with the award terms and conditions.

1. By accepting the award (Tab A—Notice of Award (NOA), Special Terms and Requirements 2), Oklahoma State Department of Health (OSDH) stipulated “that the award and any activities thereunder are subject to all provisions of 42 CFR Part 59, Subpart A.” OSDH accepted the award “By drawing or otherwise obtaining funds for the award from the grant payment system or office, you accept the terms and conditions of the award and agree

to perform in accordance with the requirements of the award.” (Tab A—NOA Standard Term 1).

2. OSDH accepted the award on May 24, 2022, by drawing down funds from the HHS Payment Management System (PMS). In doing so, OSDH agreed to comply with the 42 CFR Part 59, Subpart A as a condition of the award.
3. The Notice of Funding Opportunity (NOFO) PA-FPH-22-001 for the competition ultimately leading to the issuance of FPHPA006507 to OSDH stated the requirement that recipients must comply with the final rule issued on October 4, 2021 (NOFO, Section B.2.a.2).
4. In the application submitted under PA-FPH-22-001, OSDH certified SF-424B “Assurance-Non-Construction Programs” which includes assurance “18. Will comply with all applicable requirements of all other Federal laws, executive orders, regulations, and policies governing this program.” (Tab D)

OPA Determination of Non-Compliance with 42 CFR Part 59, Subpart A

5. On August 29, 2022, because of recent changes in Oklahoma state laws, OSDH submitted a proposal to change its policy and procedure for providing nondirective options counseling by providing clients seeking counseling on pregnancy termination with a link to the HHS OPA website.
6. On November 9, 2022, OPA informed OSDH that this proposal did not comply with the Title X regulatory requirements set out in 42 CFR § 59.5(a)(5)(ii) and, therefore, could not be approved.
7. On November 22, 2022, OSDH submitted to OPA a request for reconsideration of OPA’s November 9, 2022 decision.
8. On January 25, 2023, OPA posted a letter to OSDH on GrantSolutions. That letter reiterated that the proposal to provide clients seeking counseling on pregnancy termination with a link to the HHS OPA website does not comply with the 2021 Title X implementing regulations at 42 CFR § 59.5(a)(5)(ii). The letter also informed OSDH that it could submit an alternate compliance proposal that included providing clients with a referral to another entity, such as the All-Options Talkline.
9. OSDH informed OPA that it became aware of this letter on February 7, 2023, when contacted by email.

10. On February 16, 2023, OSDH responded to OPA's January 25, 2023, letter by submitting an alternative proposal for compliance, which included providing nondirective counseling on all pregnancy options by OSDH staff or through the All-Options Talk Line.
11. On March 14, 2023, OSDH submitted a "Pregnancy Diagnosis and Counseling" policy (revised March 2023), which indicated that the protocol for counseling clients with a positive pregnancy test includes:
 - b. Provide neutral, factual information and nondirective counseling on all pregnancy options by OSDH staff or through the All-Options Talk Line (1-888-493-0092) and website, <https://www.all-options.org/find-support/talkline/> (except for options the client indicated she does not want more information on).
12. In addition, as a corollary to the counseling protocol, OSDH's "Pregnancy Diagnosis and Counseling" policy (revised March 2023) indicated that one of the options for referral was to the "All-Options Talk Line (1-888-493-0092)." As part of its March 14 submission, OSDH also sent a Pregnancy Choices brochure (dated March 2023), listing the All-Options Talk Line as one of the Oklahoma Family Planning Resources.
13. On March 21, 2023, OSDH submitted a written assurance of compliance with the options counseling and referral requirements in the 2021 Title X Final Rule. On March 23, 2023, OPA posted two documents on GrantSolutions (a letter dated March 1, 2023, and a printout of a Technical Review, Exported On: 03/20/2023). Those documents informed OSDH that OPA had determined that OSDH's policy complied with the Title X regulations.
14. On May 5, 2023, OSDH notified OPA by email that it "had a change required in our family planning program policy effective late afternoon of 4/27/23." As documentation, OSDH submitted the same exact "Pregnancy Diagnosis and Counseling" policy (revised March 2023) as it originally submitted on March 14, 2023, but the new version no longer includes counseling through and referral to the All-Options Talk Line. Specifically, the policy submitted on May 5, 2023, replaced part b. with the following:
 - b. Provide neutral, factual information and nondirective counseling on pregnancy options in Oklahoma by OSDH staff (except for options the client indicated she does not want more information on).
15. In addition, the updated OSDH "Pregnancy Diagnosis and Counseling" policy (revised March 2023) no longer includes the All-Options Talk Line as an entity to which clients may be referred. And, as part of its May 5, 2023, submission, OSDH also included an updated Pregnancy Choices brochure, which no longer lists the All-Options Talk Line as a resource.
16. OSDH's reference to counseling on "pregnancy options in Oklahoma" in the "Pregnancy Diagnosis and Counseling" policy, rather than counseling on all pregnancy options, and the deletion of referral to the All-Options Talk Line in this policy without any other provision for abortion referrals, are not acceptable revisions, as Title X recipients must still follow all

Federal regulatory requirements. The changes to OSDH's family planning program policy do not suffice or meet Federal requirements because Oklahoma law does not extend to all pregnancy options (See Okla. Stat. tit. 21, § 861), and we understand that, pursuant to OSDH's revised policy, information, counseling and referral will not be available for all alternative courses of action, but only for those options available under Oklahoma state law. This is inconsistent with Title X regulations at 42 CFR § 59.5(a)(5), which require Title X projects to provide information and nondirective counseling on a range of options, including prenatal care and delivery; infant care, foster care, or adoption; and pregnancy termination. Additionally, projects are required to provide referrals upon client request, including referrals for abortion. In some circumstances, those referrals will need to be made out of state.

17. Thus, based upon the documentation provided, OPA determined that OSDH's policy for providing nondirective options counseling and referral the Title X project does not comply with the Title X regulatory requirements.
18. OPA communicated this determination of non-compliance to OSDH and the OASH Chief Grants Management Officer (CGMO) by letter dated May 24, 2023 (Tab C).

Determination of Non-Compliance with Award Terms and Award Suspension

19. On May 25, 2023, the CGMO concluded that because OSDH is out of compliance with the Title X regulation, OSDH is also out of compliance with the terms and conditions of award FPHPA006507. The CGMO provided notice of the suspension on that day to OSDH and informed OSDH that as of April 27, 2023 (i.e., the effective date of the non-compliant OSDH policy), all costs are unallowable (Tab B).
20. On June 22, 2023, during a call to assess the status of OSDH's efforts to come into compliance during the first 30 days of the suspension period, OSDH indicated that it would not be able to comply with the Title X regulation citing state law. OSDH stated it did not intend to relinquish the award.

Conclusion

After consideration of the above, I conclude that OSDH remains out of compliance with the Title X regulation. OSDH had ample notification of what is required to maintain compliance with the Title X regulation. OSDH took steps to achieve compliance in order to receive a continuation award and subsequently revised its policy to a non-complaint version.

Furthermore, I conclude that OSDH is unlikely to achieve compliance with the terms and conditions of the award during the current budget period. OSDH's material non-compliance with terms and conditions of the award place the federal interest at risk and it is in the best interest of

the government to terminate award FPHPA006507 "Oklahoma State Department of Health Family Planning Services Project".

This decision to terminate will be final and effective with the project period end date on the NOA when it is issued.

Respectfully,



Scott J. Moore -S

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Scott J. Moore, Ph.D., J.D., C.F.E.

Director and Chief Grants Management Officer

CC Jessica Shields, Grants Management Specialist
Cynda Hall, OPA Project Officer
Duane Barlow, OASH Grants Branch Chief
Amy Margolis, OPA Deputy Director
Jessica Marcella, Deputy Assistant Secretary for Population Affairs

Attachments

- A. Award Closeout Guidance
- B. Notice(s) of Award (initial and all amendments)
- C. OPA Determination of Non-Compliance with Title X Regulation 42 CFR Part 59, Subpart A
- D. Award Suspension Letter
- E. SF-424B Assurances - Non-Construction Programs



DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Office of the Assistant Secretary for Health
Grants and Acquisitions Management Division
Rockville, MD 20852

June 27, 2023

Dear: Ms. Jill Nobles-Botkin

FPHPA006507

Our records indicate that your award is scheduled to end on 06/28/2023. In order to complete closeout procedures for this project in accordance with the Uniform Administrative Requirements regulations, the following information and reports must be submitted to the Office of Grants Management, as indicated below: In accordance with the terms and conditions of your award and 45 CFR §75.381, final reports are due ninety (120) days after the Project Period End date.

When your award expires, you may only use remaining grant funds to liquidate expenses incurred during the performance period. You must liquidate all obligations within 90 days of your award expiration date and withdraw the corresponding cash from the HHS Payment Management System (PMS). If you need to liquidate additional funds after the 90-day liquidation period, you must request an extension from the Grants & Acquisitions Management (GAM). Unless an extension has been approved by GAM, you will be unable to withdraw additional funds from PMS.

As part of the closeout of your award, you are responsible for the timely closeout of any subaward(s) and or contract(s) under the award and the financial settlement of any claims with those entities. You should establish a receipt date for your subrecipients/contractors to submit closeout data, final reports, and final claims that allows you to meet the requirement for submission of final reports.

1. SF-425 – Final Federal Financial Report (FFR) and Federal Cash Transactions Report (FCTR)– You must submit your final FFR via the FFR Reporting Module in PMS. You may find a paper copy of the form and instructions at <https://www.grants.gov/web/grants/forms/post-award-reporting-forms.html>. In order for your final FFR to be approved, the final, cumulative FFR must:
 - Have no un-liquidated obligations,
 - Indicate the exact balance of unobligated funds as reported to the Payment Management System (PMS),
 - Reflect the proper amount of indirect costs applicable to the period based on current rates available at the time of preparation, and

Your disbursements reported in PMS must match your reported obligations on the FFR. You must withdraw all cash needed for disbursements or return unneeded cash. Failure to reconcile your disbursements and cash drawdowns will delay the closeout of your award

Also, if your Notice of Award includes a cost-sharing or matching commitment, your final, cumulative FFR must show that you have met that requirement. If you have not met that commitment, you must notify us immediately with a justification and request for budget revision.

2. SF-428 and SF-428-B Tangible Personal Property report and/or Disposition report– A report regarding equipment acquired with project funds with an acquisition cost of \$5,000 or more per

unit or residual unused supplies with an aggregate fair market value exceeding \$5,000. A **negative report is required**. If there are items to report, the inventory must name items, date of purchase, and cost of each item. Indicate your request for disposition of this equipment in accordance with Subpart D - Post Federal Award Requirements, Property Standards, Equipment, 45 CFR part. 75.320. If disposition by transfer or sale is requested include fair market value; you must provide a final Tangible Personal Property Report on the SF 428-B. Access to form SF-428, with instructions for completing the forms, can be found on the Web at <https://www.grants.gov/web/grants/forms/post-award-reporting-forms.html>. Submit this report as an attachment in Grant Notes in GrantSolutions.

3. Final Program Progress Report – Your reports must address content required by 45 CFR § 75.342(b)(2). Submit your report as an attachment in Grant Notes in GrantSolutions.

Your annual audit must meet the audit requirements for close out of this project. An audit is required for all entities which expend \$750,000 or more of Federal funds in each fiscal year. The audits are due within 30 days of receipt from the auditor or within 9 months of the end of the fiscal year, whichever occurs first. The audit report when completed must be submitted online to the Federal Audit Clearinghouse at <http://harvester.census.gov/fac/collect/ddeindex.html>.

If any inventions were conceived or first actually reduced to practice under this award, they must be listed on the HHS-568 - Procedures for Submission of Final Invention Statement <http://www.hhs.gov/forms/publicuse.html>. This form should be submitted as an attachment in Grant Notes in GrantSolutions

If your award is subject to reimbursement payment, you must submit an SF 270, Request for Advance or Reimbursement, for any amounts for which you have not previously requested payment. Submit this form as an attachment in Grant Notes in GrantSolutions

The specified reports must be sent as indicated above. Submission in any other manner or to any other office or official will result in your reports being considered delinquent.

Following receipt of your reports, we will review them and advise you of their acceptability or any need for revision.

Financial records, supporting documents, statistical records, and all records pertinent to this grant shall be retained for a period of three years. The records shall be retained beyond the three-year period if an audit is in process or if any audit findings have not been resolved.

Receipt and acceptance of the requested materials will complete the closeout process, subject to final audit. If you have any questions or require assistance, please contact your assigned Grants Management Specialist (GMS) Jessica Shields at Jessica.Shields@hhs.gov, 240-453-8839 or your Project Officer (PO) Cynda Hall at Cynda.Hall@hhs.gov, 240-453-2850. When emailing, it is best to copy both your GMS and PO.

Sincerely,

Jessica Shields
Grants Management Specialist

cc: Cynda Hall Project Officer



DEPARTMENT OF HEALTH AND HUMAN SERVICES
Office of the Secretary

Notice of Award

Award# 1 FPHPA006507-01-00
FAIN# FPHPA006507
Federal Award Date: 03/23/2022

<p>Recipient Information</p> <p>1. Recipient Name Health Department, Oklahoma State 123 Robert S Kerr Ave 0308 Oklahoma State Department of Health Oklahoma City, OK 73102-6406</p> <p>2. Congressional District of Recipient 05</p> <p>3. Payment System Identifier (ID) 1736017987C4</p> <p>4. Employer Identification Number (EIN) 736017987</p> <p>5. Data Universal Numbering System (DUNS) 143673015</p> <p>6. Recipient's Unique Entity Identifier</p> <p>7. Project Director or Principal Investigator JILL NOBLES-BOTKIN jill@health.ok.gov 405-271-4476</p> <p>8. Authorized Official Ms. Bethany J Ledel Grants Reporting Officer bethanyl@health.ok.gov 405-271-4042</p> <p>Federal Agency Information OASH Grants and Acquisitions Management Division</p> <p>9. Awarding Agency Contact Information Mrs. Jessica Hall-Shields Grants Specialist Jessica.Shields@hhs.gov 240-453-8839</p> <p>10. Program Official Contact Information Cynda Hall Public Health Advisor cynda.hall@hhs.gov 2404532850</p>

<p>Federal Award Information</p> <p>11. Award Number 1 FPHPA006507-01-00</p> <p>12. Unique Federal Award Identification Number (FAIN) FPHPA006507</p> <p>13. Statutory Authority Title X of the Public Health Service Act, Section 1001 (42 U.S.C. § 300)</p> <p>14. Federal Award Project Title Oklahoma State Department of Health Family Planning Services Project</p> <p>15. Assistance Listing Number 93.217</p> <p>16. Assistance Listing Program Title Family Planning Services</p> <p>17. Award Action Type New</p> <p>18. Is the Award R&D? No</p> <p>Summary Federal Award Financial Information</p> <p>19. Budget Period Start Date 04/01/2022 - End Date 03/31/2023</p> <p>20. Total Amount of Federal Funds Obligated by this Action \$4,500,000.00</p> <p>20a. Direct Cost Amount \$8,813,049.00</p> <p>20b. Indirect Cost Amount \$264,921.00</p> <p>21. Authorized Carryover \$0.00</p> <p>22. Offset \$0.00</p> <p>23. Total Amount of Federal Funds Obligated this budget period \$0.00</p> <p>24. Total Approved Cost Sharing or Matching, where applicable \$4,577,970.00</p> <p>25. Total Federal and Non-Federal Approved this Budget Period \$9,077,970.00</p> <p>26. Project Period Start Date 04/01/2022 - End Date 03/31/2027</p> <p>27. Total Amount of the Federal Award including Approved Cost Sharing or Matching this Project Period Not Available</p> <p>28. Authorized Treatment of Program Income OTHER (See REMARKS)</p> <p>29. Grants Management Officer - Signature Dr. Scott Moore OASH Grants Management Officer</p>

30. Remarks

See Remarks (continuation)



DEPARTMENT OF HEALTH AND HUMAN SERVICES
Office of the Secretary

Notice of Award

Award# 1 FPHPA006507-01-00
FAIN# FPHPA006507
Federal Award Date: 03/23/2022

<p>Recipient Information</p> <p>Recipient Name Health Department, Oklahoma State 123 Robert S Kerr Ave 0308 Oklahoma State Department of Health Oklahoma City, OK 73102-6406</p> <p>Congressional District of Recipient 05</p> <p>Payment Account Number and Type 1736017987C4</p> <p>Employer Identification Number (EIN) 736017987</p> <p>Data Universal Numbering System (DUNS) 143673015</p> <p>Recipient's Unique Entity Identifier</p>
<p>31. Assistance Type Project Grant</p> <p>32. Type of Award Service</p>

33. Approved Budget (Excludes Direct Assistance)	
i. Financial Assistance from the Federal Awarding Agency Only	
ii. Total project costs including grant funds and all other financial participation	
a. Salaries and Wages	\$4,041,510.00
b. Fringe Benefits	\$1,970,211.00
c. Total Personnel Costs	\$6,011,721.00
d. Equipment	\$0.00
e. Supplies	\$1,465,816.00
f. Travel	\$30,183.00
g. Construction	\$0.00
h. Other	\$319,914.00
i. Contractual	\$985,415.00
j. TOTAL DIRECT COSTS	\$8,813,049.00
k. INDIRECT COSTS	\$264,921.00
l. TOTAL APPROVED BUDGET	\$9,077,970.00
m. Federal Share	\$4,500,000.00
n. Non-Federal Share	\$4,577,970.00

34. Accounting Classification Codes						
FY-ACCOUNT NO.	DOCUMENT NO.	ADMINISTRATIVE CODE	OBJECT CLASS	AMT ACTION FINANCIAL ASSISTANCE	APPROPRIATION	
2-3984521	FPHPA6507A	FPH70	41.51	\$4,500,000.00	75-22-0359	



DEPARTMENT OF HEALTH AND HUMAN SERVICES Notice of Award

Office of the Secretary

Award# 1 FPHPA006507-01-00

FAIN# FPHPA006507

Federal Award Date: 03/23/2022

Remarks (Continuation)

This Notice of Award provides funding below the total amount requested in the application for the budget period. OASH is not obligated to make additional Federal Funds available. All award decisions, including the level of funding, are final and you may not appeal. You should re-submit an SF 424A and Budget Narrative justification which includes the total cumulative cost for each cost for the budget reimbursement period based on Personnel, Fringe, Travel, Supplies, Contractual, Other and Indirect cost by object class categories. The budget should be resubmitted for the total awarded amount within 30 days of the start of the budget period on this Notice of Award. Prior approval of the revised budget by the Grants Management Officer is required. Changes in scope proposed as part of the budget revision should be clearly noted and also require Grants Management Officer prior approval.



DEPARTMENT OF HEALTH AND HUMAN SERVICES Notice of Award

Office of the Secretary

Award# 1 FPHPA006507-01-00

FAIN# FPHPA006507

Federal Award Date: 03/23/2022

35. Terms And Conditions

SPECIAL TERMS AND REQUIREMENTS

- 1. Program Income Use.** Program income (fees, premiums, third-party reimbursements which the project may reasonably expect to receive), as well as State, local and other operational funding, will be used to finance the non-federal share of the scope of project as defined in the approved grant application and reflected in the approved budget. Program income and the level projected in the approved budget will be used to further program objectives. Box 28 on this Notice of Award (NoA) indicates **Other**. Program Income may be used to meet the cost sharing or matching requirement of the Federal award. The amount of the Federal award stays the same. Program Income in excess of any amounts specified must be added to the Federal funds awarded. They must be used for the purposes and conditions of this award for the duration of the Project period. 45 C.F.R. § 75.307 (e).
- 2. Program Specific Regulation.** In accepting this award, the grantee stipulates that the award and any activities thereunder are subject to all provisions of 42 CFR Part 59, Subpart A.
- 3. OPA Program Priorities.** All recipients must comply with the requirements regarding the provision of family planning services that can be found in the statute (Title X of the Public Health Service Act, 42 U.S.C. § 300 et seq.) and the implementing regulations (42 C.F.R. Part 59, Subpart A), and any legislative mandates. In addition, sterilization of clients as part of the Title X program must be consistent with 42 C.F.R. Part 50, Subpart B (“Sterilization of Persons in Federally Assisted Family Planning Projects”).

In addition to the statute, regulations, legislative mandates, and additional program guidance that apply to Title X, OPA establishes program priorities that represent overarching goals for the Title X program. OPA expects recipients to develop and implement plans to address program priorities. The current priorities are: 1) advance health equity through the delivery of Title X services; 2) improve and expand access to Title X services; and 3) deliver Title X services of the highest quality.

- 4. Notice of Change in Service Sites.** In order to maintain an accurate record of current Title X service sites, grantees must provide notice to the Office of Population Affairs (OPA) of any deletions, additions, or changes to the name, location, street address and email, services provided on-site, and contact information for Title X grantees and service sites. This database will also be used to verify eligibility for 340B program registration and recertification. You must enter your changes to the Title X database within 30 days from the official approval of the change at <https://opa-fpclinicdb.hhs.gov/> This does not replace the prior approval requirement under HHS grants policy for changes in project scope, including clinic closures.
- 5. 304B Program Participation.** If you or your sub-recipient(s) enrolls in the 340B Program, you must comply with all 340B Program requirements. You may be subject to audit at any time regarding 340B Program compliance. 340B Program requirements are available at <https://www.hrsa.gov/opa/program-requirements/index.html>.
- 6. FPAR reporting.** For each calendar year covered by the project period, you will be required to submit a Family Planning Annual Report (FPAR). The information collection (reporting requirements) and format for this report have been approved by the Office of Management and Budget (OMB) and assigned OMB No. 0990-0479 (Expires 9/30/2024). The FPAR data elements, instrument, and instructions are found on the OPA Web site at <http://opa.hhs.gov>. You are expected to use the FPAR data to inform your QI/QA activities.
- 7. Evaluation Cooperation.** The grantee is expected to participate in OPA research and evaluation activities, if selected, and must agree to follow all evaluation protocols established by OPA or its designee.
- 8. Grantee Meetings.** The grantee is encouraged to actively participate in all OPA-supported Title X grantee meetings and grantee conferences. In addition to training and technical assistance available from the Reproductive Health National Training Center and the National Clinical Training Center for Family Planning, OPA is planning to conduct two Title X grantee trainings in 2022 and a Title X grantee conference in 2023.



DEPARTMENT OF HEALTH AND HUMAN SERVICES Notice of Award

Office of the Secretary

Award# 1 FPHPA006507-01-00

FAIN# FPHPA006507

Federal Award Date: 03/23/2022

9. **Institutional Review Board (IRB).** Institutional Review Board (IRB) approvals, when required, must be submitted via Grant Solutions Grant Notes within 5 business days of receipt from the IRB. No activities that require IRB approval may take place prior to your receipt of the IRB approval.
10. **Maximizing Access.** In furtherance of maximizing access and best serving individuals in need in the service areas, recipients should make reasonable efforts to avoid duplication of effort in the provision of services across the Title X network. For example, Title X recipients' coverage areas may overlap geographically, but duplication of subrecipient sites could be minimized or avoided to create more opportunities for services.
11. **Prior Approval for Vehicle Purchases.** No mobile health unit(s) or other vehicle(s), even if proposed in the application for this award, may be purchased with award funds without prior written approval from the grant management officer. Requests for approval of such purchases must include a justification with a cost-benefit analysis comparing both purchase and lease options. Such requests must be submitted as a Budget Revision Amendment in Grant Solutions.

STANDARD TERMS

1. **Compliance with Terms and Conditions.** You must comply with all terms and conditions outlined in the grant award, including grant policy terms and conditions contained in applicable Department of Health and Human Services (HHS) Grant Policy Statements (GPS), (note any references in the GPS to 45 C.F.R. Part 74 or 92 are now replaced by 45 C.F.R. Part 75, and the SF-269 is now the SF-425), and requirements imposed by program statutes and regulations, Executive Orders, and HHS grant administration regulations, as applicable; as well as any requirements or limitations in any applicable appropriations acts. By drawing or otherwise obtaining funds for the award from the grant payment system or office, you accept the terms and conditions of the award and agree to perform in accordance with the requirements of the award. The HHS Grants Policy Statement is available at: <http://www.hhs.gov/sites/default/files/grants/grants/policies-regulations/hhseps107.pdf> Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS awards are at 45 C.F.R. Part 75.
2. **Grants Management Officer Prior Approval Requirements.** Certain changes to your project or personnel require prior approval from the Grants Management Officer (GMO). (See Part II, HHS Grants Policy Statement (GPS), any references in the GPS to 45 C.F.R. Part 74 or 92 are now replaced by 45 C.F.R. Part 75). All amendment requests requiring prior approval must be signed by the grantee authorizing official and or PI/PPD and submitted through the GrantSolutions Amendment Module. Only responses signed by the GMO are considered valid. If you take action on the basis of responses from other officials or individuals, you do so at your own risk. Such responses will not be considered binding by or upon any OASH Office or HHS component. Any other correspondence not relating to a prior approval item should be uploaded to Grant Notes within the GrantSolutions system. Include the Federal grant number and signature of the authorized business official and the project director on all such correspondence.
3. **Salary Limitation (Further Consolidated Appropriations Act, 2022, Div. H, Title II, sec. 202).** "None of the funds appropriated in this title shall be used to pay the salary of an individual, through a grant or other extramural mechanism, at a rate in excess of Executive Level II."

The Salary Limitation is based upon the Executive Level II of the Federal Executive Pay Scale. Effective January 2022, the Executive Level II salary is \$203,700. For the purposes of the salary limitation, the direct salary is exclusive of fringe benefits and indirect costs. An individual's direct salary is not constrained by the legislative provision for a limitation of salary. The rate limitation simply limits the amount that may be awarded and charged to the grant or cooperative agreement. A recipient may pay an individual's salary amount in excess of the salary cap with non-federal funds.
4. **Reporting Subawards and Executive Compensation.**



DEPARTMENT OF HEALTH AND HUMAN SERVICES Notice of Award

Office of the Secretary

Award# 1 FPHPA006507-01-00

FAIN# FPHPA006507

Federal Award Date: 03/23/2022

A. Reporting of first-tier subawards.

1) Applicability.

Unless you are exempt as provided in paragraph D. of this award term, you must report each action that obligates \$30,000 or more in Federal funds that does not include Recovery Act funds (as defined in section 1512(a)(2) of the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5) for a subaward to an entity (see definitions in paragraph e. of this award term).

2) Where and when to report.

You must report each obligating action described in paragraph A.1. of this award term to the Federal Funding Accountability and Transparency Act Subaward Reporting System (FFRS). For subaward information, report no later than the end of the month following the month in which the obligation was made. (For example, if the obligation was made on November 7, 2010, the obligation must be reported by no later than December 31, 2010.)

3) What to report.

You must report the information about each obligating action as specified in the submission instructions posted at <http://www.fhrs.gov>.

B. Reporting Total Compensation of Recipient Executives.

1) Applicability and what to report.

You must report total compensation for each of your five most highly compensated executives for the preceding completed fiscal year, if—

a) The total Federal funding authorized to date under this award is \$30,000 or more;

b) In the preceding fiscal year, you received—

(1) 80 percent or more of your annual gross revenues from Federal procurement contracts (and subcontracts) and Federal financial assistance subject to the Transparency Act, as defined at 2 C.F.R. §170.320 (and subawards); and

(2) \$25,000,000 or more in annual gross revenues from Federal procurement contracts (and subcontracts) and Federal financial assistance subject to the Transparency Act, as defined at 2 C.F.R. §170.320 (and subawards); and

c) The public does not have access to information about the compensation of the executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986. (To determine if the public has access to the compensation information, see the U.S. Security and Exchange Commission total compensation filings at the Executive Compensation page of the SEC website.)

2) Where and when to report.

You must report executive total compensation described in paragraph B.1. of this award term:



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- a) As part of your registration profile in the System for Award Management (SAM).
- b) By the end of the month following the month in which this award is made, and annually thereafter.

C. Reporting of Total Compensation of Subrecipient Executives.

- 1) Applicability and what to report.

Unless you are exempt as provided in paragraph D of this award term, for each first-tier subrecipient under this award, you shall report the names and total compensation of each of the subrecipient's five most highly compensated executives for the subrecipient's preceding completed fiscal year, if—

- a) In the subrecipient's preceding fiscal year, the subrecipient received—
 - (1) 80 percent or more of its annual gross revenues from Federal procurement contracts (and subcontracts) and Federal financial assistance subject to the Transparency Act, as defined at 2 C.F.R. § 170.320 (and subawards); and
 - (2) \$25,000,000 or more in annual gross revenues from Federal procurement contracts (and subcontracts), and Federal financial assistance subject to the Transparency Act (and subawards); and
- b) The public does not have access to information about the compensation of the executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986. (To determine if the public has access to the compensation information, see the U.S. Security and Exchange Commission total compensation filings at the Executive Compensation page of the SEC website.)

- 2) Where and when to report.

You must report subrecipient executive total compensation described in paragraph C.1. of this award term:

- a) To the recipient.
- b) By the end of the month following the month during which you make the subaward. For example, if a subaward is obligated on any date during the month of October of a given year (i.e., between October 1 and 31), you must report any required compensation information of the subrecipient by November 30 of that year.

D. Exemptions.

If, in the previous tax year, you had gross income, from all sources, under \$300,000, you are exempt from the requirements to report:

- 1) Subawards, and
- 2) The total compensation of the five most highly compensated executives of any subrecipient.

E. Definitions.



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For purposes of this award term:

1) "Entity"

This term means all of the following, as defined in 2 C.F.R. Part 25:

- a) A Governmental organization, which is a State, local government, or Indian tribe;
- b) A foreign public entity;
- c) A domestic or foreign nonprofit organization;
- d) A domestic or foreign for-profit organization;
- e) A Federal agency, but only as a subrecipient under an award or subaward to a non-Federal entity.

2) "Executive"

This term means officers, managing partners, or any other employees in management positions.

3) "Subaward":

- a) This term means a legal instrument to provide support for the performance of any portion of the substantive project or program for which you received this award and that you as the recipient award to an eligible subrecipient.
- b) The term does not include your procurement of property and services needed to carry out the project or program (for further explanation, see Sec. II .210 of the attachment to OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations").
- c) A subaward may be provided through any legal agreement, including an agreement that you or a subrecipient considers a contract.

4) "Subrecipient"

This term means an entity that:

- a) Receives a subaward from you (the recipient) under this award; and
- b) Is accountable to you for the use of the Federal funds provided by the subaward.

5) "Total compensation"

This term means the cash and noncash dollar value earned by the executive during the recipient's or subrecipient's preceding fiscal year and includes the following (for more information see 17 C.F.R. § 229.402(c)(2)):

- a) Salary and bonus.



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- b) Awards of stock, stock options, and stock appreciation rights. Use the dollar amount recognized for financial statement reporting purposes with respect to the fiscal year in accordance with the Statement of Financial Accounting Standards No. 123 (Revised 2004) (FAS 123R), Shared Based Payments.
- c) Earnings for services under non-equity incentive plans. This does not include group life, health, hospitalization or medical reimbursement plans that do not discriminate in favor of executives, and are available generally to all salaried employees.
- d) Change in pension value. This is the change in present value of defined benefit and actuarial pension plans.
- e) Above-market earnings on deferred compensation which is not tax-qualified.
- f) Other compensation, if the aggregate value of all such other compensation (e.g. severance, termination payments, value of life insurance paid on behalf of the employee, perquisites or property) for the executive exceeds \$10,000.

5. Intellectual Property and Data Rights.

- A. Data. The federal government has the right to: 1) Obtain, reproduce, publish, or otherwise use the data produced under this award; and 2) Authorize others to receive, reproduce, publish, or otherwise use such data for federal purposes.
- B. Copyright. The awardee may copyright any work that is subject to copyright and was developed, or for which ownership was acquired, under a federal award. The federal government reserves a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so.
- C. Patents and Inventions. The awardee is subject to applicable regulations governing patents and inventions, including government-wide regulations issued by the Department of Commerce at 37 CFR part 401.

6. Acknowledgement of Federal Grant Support. When issuing statements, press releases, publications, requests for proposal, bid solicitations and other documents --such as tool-kits, resource guides, websites, and presentations (hereafter "statements")-- describing the projects or programs funded in whole or in part with U.S. Department of Health and Human Services (HHS) federal funds, the recipient must clearly state:

- 1) the percentage and dollar amount of the total costs of the program or project funded with federal money; and,
- 2) the percentage and dollar amount of the total costs of the project or program funded by non-governmental sources.

When issuing statements resulting from activities supported by HHS financial assistance, the recipient entity must include an acknowledgement of federal assistance using one of the following or a similar statement.

If the HHS Grant or Cooperative Agreement is NOT funded with other non-governmental sources:

This [project/publication/program/website, etc.] [is/was] supported by the [full name of the PROGRAM OFFICE] of the U.S. Department of Health and Human Services (HHS) as part of a financial assistance award totaling \$XX with 100 percent funded by [PROGRAM OFFICE]/OASH/HHS. The contents are those of the author(s) and do not necessarily represent the official views of, nor an endorsement, by [PROGRAM OFFICE]/OASH/HHS, or the U.S. Government. For more information, please visit [PROGRAM OFFICE website, if available].

The HHS Grant or Cooperative Agreement IS partially funded with other nongovernmental sources:



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This [project/publication/program/website, etc.] [is/was] supported by the [full name of the PROGRAM OFFICE] of the U.S. Department of Health and Human Services (HHS) as part of a financial assistance award totaling \$XX with XX percentage funded by [PROGRAM OFFICE]/OASH/HHS and \$XX amount and XX percentage funded by non-government source(s). The contents are those of the author (s) and do not necessarily represent the official views of, nor an endorsement, by [PROGRAM OFFICE]/OASH/HHS, or the U.S. Government. For more information, please visit [PROGRAM OFFICE] website, if available].

The federal award total must reflect total costs (direct and indirect) for all authorized funds (including supplements and carryover) for the total competitive segment up to the time of the public statement.

Any amendments by the recipient to the acknowledgement statement must be coordinated with the OASH federal project officer and the OASH grants management officer.

If the recipient plans to issue a press release concerning the outcome of activities supported by this financial assistance, it should notify the OASH federal project officer and the OASH grants management officer in advance to allow for coordination.

7. Whistleblower Protections. You are hereby given notice that the 48 C.F.R. § 3.908 (related to the enhancement of contractor employee whistleblower protections), implementing 41 U.S.C. § 4712, as amended (entitled "Enhancement of contractor protection from reprisal for disclosure of certain information") applies to this award.

8. Reporting of Matters Related to Recipient Integrity and Performance.

A. General Reporting Requirement

If the total value of your currently active grants, cooperative agreements, and procurement contracts from all Federal awarding agencies exceeds \$10,000,000 for any period of time during the period of performance of this Federal award, then you as the recipient during that period of time must maintain the currency of information reported to the System for Award Management (SAM) that is made available in the designated integrity and performance system (currently the Federal Awardee Performance and Integrity Information System (FAPIIS)) about civil, criminal, or administrative proceedings described in paragraph 2 of this award term and condition. This is a statutory requirement under section 872 of Public Law 110-417, as amended (41 U.S.C. § 2313). As required by section 3010 of Public Law 111-212, all information posted in the designated integrity and performance system on or after April 15, 2011, except past performance reviews required for Federal procurement contracts, will be publicly available.

B. Proceedings About Which You Must Report

Submit the information required about each proceeding that:

- 1) Is in connection with the award or performance of a grant, cooperative agreement, or procurement contract from the Federal Government;
- 2) Reached its final disposition during the most recent five-year period; and
- 3) If one of the following:
 - a) A criminal proceeding that resulted in a conviction, as defined in paragraph 5 of this award term and condition;
 - b) A civil proceeding that resulted in a finding of fault and liability and payment of a monetary fine, penalty, reimbursement, restitution, or damages of \$5,000 or more;



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c) An administrative proceeding, as defined in paragraph 5 of this award term and condition, that resulted in a finding of fault and liability and your payment of either a monetary fine or penalty of \$5,000 or more or reimbursement, restitution, or damages in excess of \$100,000; or

d) Any other criminal, civil, or administrative proceeding if:

(1) It could have led to an outcome described in paragraph 2.c.(1), (2), or (3) of this award term and condition;

(2) It had a different disposition arrived at by consent or compromise with an acknowledgement of fault on your part; and

(3) The requirement in this award term and condition to disclose information about the proceeding does not conflict with applicable laws and regulations.

C. Reporting Procedures

Enter in the SAM Entity Management area the information that SAM requires about each proceeding described in paragraph B of this award term and condition. You do not need to submit the information a second time under assistance awards that you received if you already provided the information through SAM because you were required to do so under Federal procurement contracts that you were awarded.

D. Reporting Frequency

During any period of time when you are subject to this requirement in paragraph A of this award term and condition, you must report proceedings information through SAM for the most recent five year period, either to report new information about any proceeding(s) that you have not reported previously or affirm that there is no new information to report. Recipients that have Federal contract, grant, and cooperative agreement awards with a cumulative total value greater than \$10,000,000 must disclose semiannually any information about the criminal, civil, and administrative proceedings.

E. Definitions

For purposes of this award term and condition:

1) Administrative proceeding means a non-judicial process that is adjudicatory in nature in order to make a determination of fault or liability (e.g., Securities and Exchange Commission Administrative proceedings, Civilian Board of Contract Appeals proceedings, and Armed Services Board of Contract Appeals proceedings). This includes proceedings at the Federal and State level but only in connection with performance of a Federal contract or grant. It does not include audits, site visits, corrective plans, or inspection of deliverables.

2) Conviction, for purposes of this award term and condition, means a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, and includes a conviction entered upon a plea of nolo contendere.

3) Total value of currently active grants, cooperative agreements, and procurement contracts includes—

a) Only the Federal share of the funding under any Federal award with a recipient cost share or match; and



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b) The value of all expected funding increments under a Federal award and options, even if not yet exercised.

F. Disclosure Requirements.

Consistent with 45 C.F.R. § 75.113, applicants and recipients must disclose, in a timely manner, in writing to the HHS Awarding Agency, with a copy to the HHS Office of the Inspector General, all information related to violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award. Subrecipients must disclose, in a timely manner, in writing to the prime recipient (pass through entity) and the HHS Office of the Inspector General all information related to violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award. Disclosures must be sent in writing to the awarding agency and to the HHS OIG at the following addresses:

*HHS OASH Grants and Acquisitions Management
1101 Wootton Parkway, Plaza Level
Rockville, MD 20852*

AND

*US Department of Health and Human Services Office of Inspector General
ATTN: OIG HOTLINE OPERATIONS—MANDATORY GRANT DISCLOSURES
PO Box 23489
Washington, DC 20026*

URL: <http://oig.hhs.gov/fraud/report-fraud/index.asp>

(Include "Mandatory Grant Disclosures" in subject line)

Fax: 1-800-223-8164 (Include "Mandatory Grant Disclosures" in subject line)

Failure to make required disclosures can result in any of the remedies described in 45 C.F.R. § 75.371 ("Remedies for noncompliance"), including suspension or debarment (See also 2 C.F.R. Parts 180 & 376 and 31 U.S.C. § 3321).

The recipient must include this mandatory disclosure requirement in all subawards and contracts under this award.

9. Advancing Racial Equity and Support for Underserved Communities Through the Federal Government. You must administer your project in compliance with federal civil rights laws that prohibit discrimination on the basis of race, color, national origin, disability, age and, in some circumstances, religion, conscience, and sex (including gender identity, sexual orientation, and pregnancy). This includes taking reasonable steps to provide meaningful access to persons with limited English proficiency and providing programs that are accessible to and usable by persons with disabilities. The HHS Office for Civil Rights provides guidance on complying with civil rights laws enforced by HHS. See <https://www.hhs.gov/civil-rights/for-providers/provider-obligations/index.html> and <https://www.hhs.gov/civil-rights/for-individuals/nondiscrimination/index.html>.

-- You must take reasonable steps to ensure that your project provides meaningful access to persons with limited English proficiency. For guidance on meeting your legal obligation to take reasonable steps to ensure meaningful access to your programs or activities by limited English proficient individuals, see <https://www.hhs.gov/civil-rights/for-individuals/special-topics/limited-english-proficiency/fact-sheet-guidance/index.html> and <https://www.lep.gov>.

-- For information on your specific legal obligations for serving qualified individuals with disabilities, including providing program access, reasonable modifications, and taking appropriate steps to provide effective communication, see <http://www.hhs.gov/ocr/civilrights/understanding/disability/index.html>.

-- HHS funded health and education programs must be administered in an environment free of sexual harassment, see



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<https://www.hhs.gov/civil-rights/for-individuals/sex-discrimination/index.html>.

-- For guidance on administering your project in compliance with applicable federal religious nondiscrimination laws and applicable federal conscience protection and associated anti-discrimination laws, *see* <https://www.hhs.gov/conscience/conscience-protections/index.html> and <https://www.hhs.gov/conscience/religious-freedom/index.html>.

10. **Trafficking in Persons.** This award is subject to the requirements of Section 106 (g) of the Trafficking Victims Protection Act of 2000, as amended (22 U.S.C. § 7104)

A. Provisions applicable to a recipient that is a private entity.

- 1) You as the recipient, your employees, subrecipients under this award, and subrecipients' employees may not
 - a) Engage in severe forms of trafficking in persons during the period of time that the award is in effect;
 - b) Procure a commercial sex act during the period of time that the award is in effect; or
 - c) Use forced labor in the performance of the award or subawards under the award.
- 2) We as the Federal awarding agency may unilaterally terminate this award, without penalty, if you or a subrecipient that is a private entity –
 - a) Is determined to have violated a prohibition in paragraph A.1 of this award term; or
 - b) Has an employee who is determined by the agency official authorized to terminate the award to have violated a prohibition in paragraph A.1 of this award term through conduct that is either-
 - (1) Associated with performance under this award; or
 - (2) Imputed to you or the subrecipient using the standards and due process for imputing the conduct of an individual to an organization that are provided in 2 C.F.R. Part 180, "OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement)," as implemented by our agency at 2 C.F.R. Part 376.

B. Provision applicable to a recipient other than a private entity.

We as the Federal awarding agency may unilaterally terminate this award, without penalty, if a subrecipient that is a private entity-

- 1) Is determined to have violated an applicable prohibition in paragraph a.1 of this award term; or
- 2) Has an employee who is determined by the agency official authorized to terminate the award to have violated an applicable prohibition in paragraph a.1 of this award term through conduct that is either
 - a) Associated with performance under this award; or
 - b) Imputed to the subrecipient using the standards and due process for imputing the conduct of an individual to an



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organization that are provided in 2 C.F.R. Part 180, "OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement)," as implemented by our agency at 2 C.F.R. Part 376.

C. Provisions applicable to any recipient.

- 1) You must inform us immediately of any information you receive from any source alleging a violation of a prohibition in paragraph A.1 of this award term
- 2) Our right to terminate unilaterally that is described in paragraph A.2 or B of this section:
 - a) Implements section 106(g) of the Trafficking Victims Protection Act of 2000 (TVPA), as amended (22 U.S.C. § 7104(g)), and
 - b) Is in addition to all other remedies for noncompliance that are available to us under this award.
- 3) You must include the requirements of paragraph A.1 of this award term in any subaward you make to a private entity.

D. Definitions. For purposes of this award term:

- 1) "Employee" means either:
 - a) An individual employed by you or a subrecipient who is engaged in the performance of the project or program under this award; or
 - b) Another person engaged in the performance of the project or program under this award and not compensated by you including, but not limited to, a volunteer or individual whose services are contributed by a third party as an in-kind contribution toward cost sharing or matching requirements.

2) "Forced labor" means:

Labor obtained by any of the following methods: the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

3) "Private entity":

a) Means any entity other than a State, local government, Indian tribe, or foreign public entity, as those terms are defined in 2 C.F.R. § 175.25.

b) Includes:

(1) A nonprofit organization, including any nonprofit institution of higher education, hospital, or tribal organization other than one included in the definition of Indian tribe at 2 C.F.R. § 175.25(b).

(2) A for-profit organization.



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- 4) "Severe forms of trafficking in persons," "commercial sex act," and "coercion"

These terms have the meanings given at section 103 of the TVPA, as amended (22 U.S.C. § 7102)

11. Prohibition on certain telecommunications and video surveillance services or equipment.

A. As described in CFR 200.216, recipients and subrecipients are prohibited to obligate or spend grant funds (to include direct and indirect expenditures as well as cost share and program) to:

- 1) Procure or obtain,
- 2) Extend or renew a contract to procure or obtain; or
- 3) Enter into contract (or extend or renew contract) to procure or obtain equipment, services, or systems that use covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. As described in Pub. L. 115-232, section 889, covered telecommunications equipment is telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities).
 - a) For the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities).
 - b) Telecommunications or video surveillance services provided by such entities or using such equipment.
 - c) Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of the National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise, connected to the government of a covered foreign country.

REPORTING REQUIREMENTS

1. **Financial Reporting Requirement—Federal Financial Report (FFR) SF 425.** Effective October 1, 2020, you must submit your SF-425 to OASH using the Department of Health and Human Services (HHS) Payment Management System for any OASH awards with a project period ending October 1, 2020 or later. Failure to submit the FFR in the correct system by the due date may delay processing of any pending requests or applications.

OASH and the Program Support Center are collaborating in the submission of the SF-425 to reduce the burden on grantees and assist with the reconciliation of expenditures and disbursements, and to allow for timely closeout of grants. Your submission must be through the HHS Payment Management System. SF-425 submissions through Grant Solutions will no longer be accepted for OASH awards.

You must use the SF-425 Federal Financial Report (FFR) for expenditure reporting. To assist in your preparation for submission you may find the SF-425 and instructions for completing the form on the Web at: <http://apply07.grants.gov/apply/forms/sample/SF425-V1.0.pdf>. You must complete all sections of the FFR.



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A. Quarterly FFR Due Date.

Your FFR is due 30 days after the end of each Quarter in the federal fiscal year. That is for the:

Quarter ending September 30, your FFR is due October 30

Quarter ending December 31, your FFR is due January 30

Quarter ending March 30, your FFR is due April 30

Quarter ending June 30, your FFR is due July 30.

B. Final FFR Due Date.

Your final FFR covering the entire project is due 90 days after the end date for your project period.

C. Past due reports.

If you have not submitted by the due date, you will receive a message indicating the report is **Past Due**. Please ensure your Payment Management System account and contact information are up to date so you receive notifications.

D. Electronic Submission.

Electronic Submissions are accepted only via the HHS Payment Management System – No other submission methods will be accepted without prior written approval from the GMO. You must be assigned to the grant with authorized access to the FFR reporting Module when submitting. If you encounter any difficulties, contact the HHS Payment Management System Help Desk or your assigned Grants Management Specialist. Please reference the CONTACTS section of NoA Terms and Conditions to locate the name of your assigned Grants Management Specialist.

2. **Annual Progress Report Requirements.** You must submit annual progress reports 90 days after the end of each performance reporting period unless otherwise required under the Special Terms and Requirements for this award. Your progress reports must address content required by 45 CFR § 75.342(b)(2). Additional progress reporting may be required under Special Terms and Requirements as required by statute, regulation, or specific circumstances warranting additional monitoring. Additional guidance may be provided by the Program Office. Reports must be submitted electronically via upload to Grant Notes in GrantSolutions.
3. **Audit Requirements.** The Single Audit Act Amendments of 1996 (31 U.S.C. §§ 7501-7507) combined the audit requirements for all entities under one Act. An audit is required for all non-Federal entities expending Federal awards, and must be consistent with the standards set out at 45 CFR Part 75, Subpart F (“Audit Requirements”). The audits are due within 30 days of receipt from the auditor or within 9 months of the end of the fiscal year, whichever occurs first. The audit report when completed should be submitted online to the Federal Audit Clearinghouse at <https://harvester.census.gov/facides/Account/Login.aspx>.

CONTACTS

1. **Fraud, Waste, and Abuse.** The HHS Inspector General accepts tips and complaints from all sources about potential fraud, waste, abuse, and mismanagement in Department of Health and Human Services' programs. Your information will be reviewed promptly by a professional staff member. Due to the high volume of information that they receive, they are unable to reply to submissions. You may reach the OIG through various channels.



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Internet: <https://forms.oig.hhs.gov/hotlineoperations/index.aspx>

Phone: 1-800-HHS-TIPS (1-800-447-8477)

Mail: US Department of Health and Human Services

Office of Inspector General

ATTN: OIG HOTLINE OPERATIONS

PO Box 23489

Washington, DC 20026

For additional information visit <https://oig.hhs.gov/fraud/report-fraud/index.asp>

- 2. Payment Procedures.** Payments for grants awarded by OASH Program Offices are made through Payment Management Services (previously known as the Division of Payment Management) <https://pms.psc.gov/home.html> PMS is administered by the Program Support Center (PSC), HHS. NOTE: Please contact the Payment Management Services to establish an account if you do not have one.

Inquiries regarding payments should be directed to <https://pms.psc.gov/home.html>; or

Payment Management Services, P.O. Box 6021, Rockville, MD 20852;

or 1-877-614-5533.

- 3. Use of Grant Solutions.** GrantSolutions is our web-based system that will be used to manage your grant throughout its life cycle. Please contact GrantSolutions User Support to establish an account if you do not have one. Your Grants Management Specialist has the ability to create a GrantSolutions account for the Grantee Authorized Official and Principle Investigator/Program Director roles. Financial Officer accounts may only be established by GrantSolutions staff. All account requests must be signed by the prospective user and their supervisor or other authorized organization official.

For assistance on GrantSolutions issues please contact: GrantSolutions User Support at 202-401-5282 or 866-577-0771, email help@grantsolutions.gov, Monday – Friday, 8 a.m. – 6 p.m. ET. Frequently Asked Questions and answers are available at <https://grantsolutions.secure.force.com/>.

- 4. Grants Administration Assistance.** For assistance on grants administration issues please contact: Jessica Shields, Grants Management Specialist, at (240) 453-8839, or e-mail jessica.shields@hhs.gov or mail:

OASH Grants and Acquisitions Management Division

Department of Health and Human Services

Office of the Secretary

Office of the Assistant Secretary for Health

1101 Wootton Parkway, Rockville, MD 20852.



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Recipient Information	
1. Recipient Name	Health Department, Oklahoma State 123 Robert S Kerr Ave 0308 Oklahoma State Department of Health Oklahoma City, OK 73102-6406
2. Congressional District of Recipient	05
3. Payment System Identifier (ID)	1736017987C4
4. Employer Identification Number (EIN)	736017987
5. Data Universal Numbering System (DUNS)	143673015
6. Recipient's Unique Entity Identifier (UEI)	LFU8Z8MPLTG3
7. Project Director or Principal Investigator	JILL NOBLES-BOTKIN jill@health.ok.gov 405-271-4476
8. Authorized Official	Ms. Bethany J Ledel Grants Reporting Officer bethanyl@health.ok.gov 405-271-4042
Federal Agency Information OASH Grants and Acquisitions Management Division	
9. Awarding Agency Contact Information	Mrs. Jessica Hall-Shields Grants Specialist Jessica.Shields@hhs.gov 240-453-8839
10. Program Official Contact Information	Cynda Hall Public Health Advisor cynda.hall@hhs.gov 2404532850

Federal Award Information	
11. Award Number	6 FPHPA006507-01-01
12. Unique Federal Award Identification Number (FAIN)	FPHPA006507
13. Statutory Authority	Title X of the Public Health Service Act, Section 1001 (42 U.S.C. § 300)
14. Federal Award Project Title	Oklahoma State Department of Health Family Planning Services Project
15. Assistance Listing Number	93.217
16. Assistance Listing Program Title	Family Planning Services
17. Award Action Type	Budget Revision
18. Is the Award R&D?	No

Summary Federal Award Financial Information		
19. Budget Period Start Date	04/01/2022	- End Date 03/31/2023
20. Total Amount of Federal Funds Obligated by this Action		\$0.00
20a. Direct Cost Amount		(\$2,210.00)
20b. Indirect Cost Amount		\$2,210.00
21. Authorized Carryover		\$0.00
22. Offset		\$0.00
23. Total Amount of Federal Funds Obligated this budget period		\$4,500,000.00
24. Total Approved Cost Sharing or Matching, where applicable		\$4,577,970.00
25. Total Federal and Non-Federal Approved this Budget Period		\$9,077,970.00
26. Period of Performance Start Date	04/01/2022	- End Date 03/31/2027
27. Total Amount of the Federal Award including Approved Cost Sharing or Matching this Period of Performance		Not Available

28. Authorized Treatment of Program Income	OTHER (See REMARKS)
29. Grants Management Officer - Signature	Dr. Scott Moore OASH Grants Management Officer

30. Remarks

This action approves the budget revision, please see revised line items. All prior terms and conditions remain in effect unless specifically removed.



DEPARTMENT OF HEALTH AND HUMAN SERVICES
Office of the Secretary

Notice of Award

Award# 6 FPHPA006507-01-01
FAIN# FPHPA006507
Federal Award Date: 06/07/2022

Recipient Information	
Recipient Name Health Department, Oklahoma State 123 Robert S Kerr Ave 0308 Oklahoma State Department of Health Oklahoma City, OK 73102-6406	
Congressional District of Recipient 05	
Payment Account Number and Type 1736017987C4	
Employer Identification Number (EIN) Data 736017987	
Universal Numbering System (DUNS) 143673015	
Recipient's Unique Entity Identifier (UEI) LFU8Z8MPLTG3	
31. Assistance Type Project Grant	
32. Type of Award Service	

33. Approved Budget (Excludes Direct Assistance)	
I. Financial Assistance from the Federal Awarding Agency Only	
II. Total project costs including grant funds and all other financial participation	
a. Salaries and Wages	\$3,761,973.00
b. Fringe Benefits	\$1,970,211.00
c. Total Personnel Costs	\$5,732,184.00
d. Equipment	\$0.00
e. Supplies	\$1,301,994.00
f. Travel	\$30,183.00
g. Construction	\$0.00
h. Other	\$301,823.00
i. Contractual	\$1,444,655.00
j. TOTAL DIRECT COSTS	\$8,810,839.00
k. INDIRECT COSTS	\$267,131.00
l. TOTAL APPROVED BUDGET	\$9,077,970.00
m. Federal Share	\$4,500,000.00
n. Non-Federal Share	\$4,577,970.00

34. Accounting Classification Codes						
FY-ACCOUNT NO.	DOCUMENT NO.	ADMINISTRATIVE CODE	OBJECT CLASS	CFDA NO.	AMT ACTION FINANCIAL ASSISTANCE	APPROPRIATION
2-398452I	FPHPA6507A	FPH70	41.51	93.217	\$0.00	75-22-0359



DEPARTMENT OF HEALTH AND HUMAN SERVICES
Office of the Secretary

Notice of Award

Award# 5 FPHPA006507-02-00
FAIN# FPHPA006507
Federal Award Date: 03/30/2023

Recipient Information
<p>1. Recipient Name Health Department, Oklahoma State 123 Robert S Kerr Ave 0308 Oklahoma State Department of Health Oklahoma City, OK 73102-6406 405 426-8099</p> <p>2. Congressional District of Recipient 05</p> <p>3. Payment System Identifier (ID) 1736017987C4</p> <p>4. Employer Identification Number (EIN) 736017987</p> <p>5. Data Universal Numbering System (DUNS) 143673015</p> <p>6. Recipient's Unique Entity Identifier (UEI) LFU8Z8MPLTG3</p> <p>7. Project Director or Principal Investigator JILL NOBLES-BOTKIN jill@health.ok.gov 405-271-4476</p> <p>8. Authorized Official Ms. Bethany J Ledel Grants Reporting Officer bethanyl@health.ok.gov 405-271-4042</p>
<p>Federal Agency Information OASH Grants and Acquisitions Management Division</p> <p>9. Awarding Agency Contact Information Mrs. Jessica Hall-Shields Grants Specialist Jessica.Shields@hhs.gov 240-453-8839</p> <p>10. Program Official Contact Information Cynda Hall Public Health Advisor cynda.hall@hhs.gov 2404532850</p>

Federal Award Information
<p>11. Award Number 5 FPHPA006507-02-00</p> <p>12. Unique Federal Award Identification Number (FAIN) FPHPA006507</p> <p>13. Statutory Authority Title X of the Public Health Service Act, Section 1001 (42 U.S.C. § 300)</p> <p>14. Federal Award Project Title Oklahoma State Department of Health Family Planning Services Project</p> <p>15. Assistance Listing Number 93.217</p> <p>16. Assistance Listing Program Title Family Planning Services</p> <p>17. Award Action Type Non-Competing Continuation</p> <p>18. Is the Award R&D? No</p>

Summary Federal Award Financial Information	
19. Budget Period Start Date	04/01/2023 - End Date 03/31/2024
20. Total Amount of Federal Funds Obligated by this Action	\$4,500,000.00
20a. Direct Cost Amount	\$8,793,850.00
20b. Indirect Cost Amount	\$284,120.00
21. Authorized Carryover	\$0.00
22. Offset	\$0.00
23. Total Amount of Federal Funds Obligated this budget period	\$0.00
24. Total Approved Cost Sharing or Matching, where applicable	\$4,577,970.00
25. Total Federal and Non-Federal Approved this Budget Period	\$9,077,970.00
26. Period of Performance Start Date	04/01/2022 - End Date 03/31/2027
27. Total Amount of the Federal Award including Approved Cost Sharing or Matching this Period of Performance	\$18,155,940.00

<p>28. Authorized Treatment of Program Income OTHER (See REMARKS)</p> <p>29. Grants Management Officer – Signature Dr. Scott Moore OASH Grants Management Officer</p>
--

30. Remarks

This action authorizes a total approved budget of \$9,077,970.00 for a continuation award that includes \$4,500,000.00 in FY2023 funding, an offset of \$0, and a carryover of \$0.



DEPARTMENT OF HEALTH AND HUMAN SERVICES
Office of the Secretary

Notice of Award

Award# 5 FPHPA006507-02-00
FAIN# FPHPA006507
Federal Award Date: 03/30/2023

Recipient Information
<p>Recipient Name Health Department, Oklahoma State 123 Robert S Kerr Ave 0308 Oklahoma State Department of Health Oklahoma City, OK 73102-6406 405 426-8099 Congressional District of Recipient 05 Payment Account Number and Type 1736017987C4 Employer Identification Number (EIN) Data 736017987 Universal Numbering System (DUNS) 143673015 Recipient's Unique Entity Identifier (UEI) LFU8Z8MPLTG3</p>
<p>31. Assistance Type Project Grant 32. Type of Award Service</p>

33. Approved Budget (Excludes Direct Assistance)	
i. Financial Assistance from the Federal Awarding Agency Only	
ii. Total project costs including grant funds and all other financial participation	
a. Salaries and Wages	\$3,631,462.00
b. Fringe Benefits	\$1,997,305.00
c. Total Personnel Costs	\$5,628,767.00
d. Equipment	\$0.00
e. Supplies	\$1,302,726.00
f. Travel	\$66,000.00
g. Construction	\$0.00
h. Other	\$269,683.00
i. Contractual	\$1,526,674.00
j. TOTAL DIRECT COSTS	\$8,793,850.00
k. INDIRECT COSTS	\$284,120.00
l. TOTAL APPROVED BUDGET	\$9,077,970.00
m. Federal Share	\$4,500,000.00
n. Non-Federal Share	\$4,577,970.00

34. Accounting Classification Codes						
FY-ACCOUNT NO.	DOCUMENT NO.	ADMINISTRATIVE CODE	OBJECT CLASS	CFDA NO.	AMT ACTION FINANCIAL ASSISTANCE	APPROPRIATION
3-3980663	FPHPA6507A	FPH70	41.51	93.217	\$4,500,000.00	75-23-0359



DEPARTMENT OF HEALTH AND HUMAN SERVICES Notice of Award

Office of the Secretary

Award# 5 FPHPA006507-02-00

FAIN# FPHPA006507

Federal Award Date: 03/30/2023

35. Terms And Conditions

SPECIAL TERMS AND REQUIREMENTS

1. **Prior Terms, Conditions, and Requirements.** Unless specifically removed, all prior terms, conditions, and requirements under this award remain in effect.



DEPARTMENT OF HEALTH AND HUMAN SERVICES
Office of the Secretary

Notice of Award

Award# 6 FPHPA006507-02-01
FAIN# FPHPA006507
Federal Award Date: 04/20/2023

Recipient Information
<p>1. Recipient Name Health Department, Oklahoma State 123 Robert S Kerr Ave 0308 Oklahoma State Department of Health Oklahoma City, OK 73102-6406 405 426-8099</p> <p>2. Congressional District of Recipient 05</p> <p>3. Payment System Identifier (ID) 1736017987C4</p> <p>4. Employer Identification Number (EIN) 736017987</p> <p>5. Data Universal Numbering System (DUNS) 143673015</p> <p>6. Recipient's Unique Entity Identifier (UEI) LFU8Z8MPLTG3</p> <p>7. Project Director or Principal Investigator JILL NOBLES-BOTKIN jill@health.ok.gov 405-271-4476</p> <p>8. Authorized Official Ms. Bethany J Ledel Grants Reporting Officer bethanyl@health.ok.gov 405-271-4042</p>
<p>Federal Agency Information OASH Grants and Acquisitions Management Division</p> <p>9. Awarding Agency Contact Information Mrs. Jessica Hall-Shields Grants Specialist Jessica.Shields@hhs.gov 240-453-8839</p> <p>10. Program Official Contact Information Cynda Hall Public Health Advisor cynda.hall@hhs.gov 2404532850</p>

Federal Award Information
<p>11. Award Number 6 FPHPA006507-02-01</p> <p>12. Unique Federal Award Identification Number (FAIN) FPHPA006507</p> <p>13. Statutory Authority Title X of the Public Health Service Act, Section 1001 (42 U.S.C. § 300)</p> <p>14. Federal Award Project Title Oklahoma State Department of Health Family Planning Services Project</p> <p>15. Assistance Listing Number 93.217</p> <p>16. Assistance Listing Program Title Family Planning Services</p> <p>17. Award Action Type Change in Scope with or without Budget Revision</p> <p>18. Is the Award R&D? No</p>

Summary Federal Award Financial Information	
19. Budget Period Start Date	04/01/2023 - End Date 03/31/2024
20. Total Amount of Federal Funds Obligated by this Action	\$0.00
20a. Direct Cost Amount	\$0.00
20b. Indirect Cost Amount	\$0.00
21. Authorized Carryover	\$0.00
22. Offset	\$0.00
23. Total Amount of Federal Funds Obligated this budget period	\$4,500,000.00
24. Total Approved Cost Sharing or Matching, where applicable	\$4,577,970.00
25. Total Federal and Non-Federal Approved this Budget Period	\$9,077,970.00
26. Period of Performance Start Date	04/01/2022 - End Date 03/31/2027
27. Total Amount of the Federal Award including Approved Cost Sharing or Matching this Period of Performance	\$18,155,940.00

<p>28. Authorized Treatment of Program Income OTHER (See REMARKS)</p> <p>29. Grants Management Officer - Signature Dr. Scott Moore OASH Grants Management Officer</p>
--

30. Remarks

This action approves the change in scope due to the closing of brick and mortar location due to current building being in need of repair. All prior terms and conditions remain in effect unless specifically removed.



DEPARTMENT OF HEALTH AND HUMAN SERVICES
Office of the Secretary

Notice of Award

Award# 6 FPHPA006507-02-01
FAIN# FPHPA006507
Federal Award Date: 04/20/2023

<p>Recipient Information</p> <p>Recipient Name Health Department, Oklahoma State 123 Robert S Kerr Ave 0308 Oklahoma State Department of Health Oklahoma City, OK 73102-6406 405 426-8099 Congressional District of Recipient 05 Payment Account Number and Type 1736017987C4 Employer Identification Number (EIN) Data 736017987 Universal Numbering System (DUNS) 143673015 Recipient's Unique Entity Identifier (UEI) LFU8Z8MPLTG3</p>
<p>31. Assistance Type Project Grant</p> <p>32. Type of Award Service</p>

<p>33. Approved Budget (Excludes Direct Assistance)</p>	
<p>I. Financial Assistance from the Federal Awarding Agency Only</p>	
<p>II. Total project costs including grant funds and all other financial participation</p>	
a. Salaries and Wages	\$3,631,462.00
b. Fringe Benefits	\$1,997,305.00
c. Total Personnel Costs	\$5,628,767.00
d. Equipment	\$0.00
e. Supplies	\$1,302,726.00
f. Travel	\$66,000.00
g. Construction	\$0.00
h. Other	\$269,683.00
i. Contractual	\$1,526,674.00
j. TOTAL DIRECT COSTS	\$8,793,850.00
k. INDIRECT COSTS	\$284,120.00
l. TOTAL APPROVED BUDGET	\$9,077,970.00
m. Federal Share	\$4,500,000.00
n. Non-Federal Share	\$4,577,970.00

34. Accounting Classification Codes						
FY-ACCOUNT NO.	DOCUMENT NO.	ADMINISTRATIVE CODE	OBJECT CLASS	CFDA NO.	AMT ACTION FINANCIAL ASSISTANCE	APPROPRIATION
3-3980663	FPHPA6507A	FPH70	41.51	93.217	\$0.00	75-23-0359



DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Office of the Assistant Secretary for Health
Office of Population Affairs
Washington, D.C.
20201

May 24, 2023

Jill Nobles-Botkin, APRN-CNM, MSN
Administrative Programs Manager
Perinatal and Reproductive Health Division
Maternal & Child Health Services
Oklahoma State Department of Health
123 Robert S. Kerr Avenue 0308
Oklahoma City, OK 73102-6406

Dear Ms. Nobles-Botkin,

As you know, the Office of Population Affairs (OPA) has been corresponding with the Oklahoma State Department of Health (OSDH) since last summer with respect to its policy and procedure for providing nondirective options counseling and referral within its Title X project (FHPA006507), in accordance with the 2021 Title X implementing regulations at 42 CFR § 59.5(a)(5). As a brief recap, on August 29, 2022, because of recent changes in Oklahoma state laws, OSDH submitted a proposal to change its policy and procedure for providing nondirective options counseling by providing clients seeking counseling on pregnancy termination with a link to the HHS OPA website. On November 9, 2022, OPA informed OSDH that this proposal did not comply with the Title X regulatory requirements set out in 42 CFR § 59.5(a)(5)(ii) and, therefore, could not be approved. On November 22, 2022, OSDH submitted to OPA a request for reconsideration of OPA's November 9, 2022 decision. On January 25, 2023, OPA posted a letter to OSDH on GrantSolutions. That letter reiterated that the proposal to provide clients seeking counseling on pregnancy termination with a link to the HHS OPA website does not comply with the 2021 Title X implementing regulations at 42 CFR § 59.5(a)(5)(ii). The letter also informed OSDH that it could submit an alternate compliance proposal that included providing clients with a referral to another entity, such as the All-Options Talkline. OSDH informed OPA that it became aware of this letter on February 7, 2023, when contacted by email.

On February 16, 2023, OSDH responded to OPA's January 25, 2023, letter by submitting an alternative proposal for compliance, which included providing nondirective counseling on all pregnancy options by OSDH staff or through the All-Options Talk Line. On March 14, 2023, OSDH submitted a "Pregnancy Diagnosis and Counseling" policy (revised March 2023), which indicated that the protocol for counseling clients with a positive pregnancy test includes:

- b. Provide neutral, factual information and nondirective counseling on all pregnancy options by OSDH staff or through the All-Options Talk Line (1-888-493-0092) and website, <https://www.all-options.org/find-support/talkline/> (except for options the client indicated she does not want more information on).

In addition, as a corollary to the counseling protocol, OSDH's "Pregnancy Diagnosis and Counseling" policy (revised March 2023) indicated that one of the options for referral was to the "All-Options Talk Line (1-888-493-0092)." As part of its March 14 submission, OSDH also sent a Pregnancy Choices brochure (dated March 2023), listing the All-Options Talk Line as one of the Oklahoma Family Planning Resources.

On March 21, 2023, OSDH submitted a written assurance of compliance with the options counseling and referral requirements in the 2021 Title X Final Rule. On March 23, 2023, OPA posted two documents on GrantSolutions (a letter dated March 1, 2023, and a printout of a Technical Review, Exported On: 03/20/2023). Those documents informed OSDH that OPA had determined that OSDH's policy complied with the Title X regulations.

Most recently, however, on May 5, 2023, OSDH notified OPA by email that it "had a change required in our family planning program policy effective late afternoon of 4/27/23." As documentation, OSDH submitted the same exact "Pregnancy Diagnosis and Counseling" policy (revised March 2023) as it originally submitted on March 14, 2023, but the new version no longer includes counseling through and referral to the All-Options Talk Line. Specifically, the policy submitted on May 5, 2023, replaced part b. quoted above with the following:

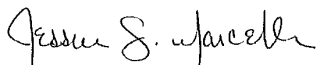
b. Provide neutral, factual information and nondirective counseling on pregnancy options in Oklahoma by OSDH staff (except for options the client indicated she does not want more information on).

In addition, the updated OSDH "Pregnancy Diagnosis and Counseling" policy (revised March 2023) no longer includes the All-Options Talk Line as an entity to which clients may be referred. And, as part of its May 5, 2023, submission, OSDH also included an updated Pregnancy Choices brochure, which no longer lists the All-Options Talk Line as a resource.

OSDH's reference to counseling on "pregnancy options in Oklahoma" in the "Pregnancy Diagnosis and Counseling" policy, rather than counseling on all pregnancy options, and the deletion of referral to the All-Options Talk Line in this policy without any other provision for abortion referrals, are not acceptable revisions, as Title X recipients must still follow all Federal regulatory requirements. The changes to OSDH's family planning program policy do not suffice or meet Federal requirements because Oklahoma law does not extend to all pregnancy options (*See* Okla. Stat. tit. 21, § 861), and we understand that, pursuant to OSDH's revised policy, information, counseling and referral will not be available for all alternative courses of action, but only for those options available under Oklahoma state law. This is inconsistent with Title X regulations at 42 CFR § 59.5(a)(5), which require Title X projects to provide information and nondirective counseling on a range of options, including prenatal care and delivery; infant care, foster care, or adoption; and pregnancy termination. Additionally, projects are required to provide referrals upon client request, including referrals for abortion. In some circumstances, those referrals will need to be made out of state.

Thus, based upon the documentation provided, OPA has determined that OSDH's policy for providing nondirective options counseling and referral within your Title X project does not comply with the Title X regulatory requirements and, therefore, the terms and conditions of your grant. Given OSDH's failure to adhere to the Title X regulatory requirements for nondirective options counseling and referral, I have referred this matter to the HHS Office of the Assistant Secretary for Health's Grants and Acquisitions Management (GAM) Division as a violation of the terms and conditions of your grant. I have copied the Director of OASH GAM on this correspondence as notification of the compliance violation and will be in touch with a response.

Thanks,



Jessica Swafford Marcella
Deputy Assistant Secretary for Population Affairs
U.S. Department of Health and Human Services
Office of the Assistant Secretary for Health, Office of Population Affairs

cc: Scott Moore
Director/Chief Grants Management Officer
U.S. Department of Health and Human Services
Office of the Assistant Secretary for Health, Grants and Acquisitions Management



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary
Office of the Assistant Secretary for Health
Grants & Acquisitions Management
Rockville, MD 20852

May 25, 2023

TO: Jill Nobles-Botkin (jill@health.ok.gov)
Project Director/Principle Investigator

Ms. Bethany J Ledel (bethanyl@health.ok.gov)
Authorized Official

Oklahoma State Health Department
123 Robert S Kerr Ave 0308
Oklahoma City, OK 73102-6406

RE: Suspension of Award FPHPA006507 "Oklahoma State Department of Health
Family Planning Services Project"

The Office of Population Affairs (OPA) has provided notice in the attached letter that your award FPHPA006507 "Oklahoma State Department of Health Family Planning Services Project" is out of compliance with the Title X regulation (42 CFR Part 59, Subpart A) as of May 24, 2023.

As a condition of accepting the award (Notice of Award, Special Terms and Requirements 2), Oklahoma State Department of Health (OSDH) stipulated "that the award and any activities thereunder are subject to all provisions of 42 CFR Part 59, Subpart A." OSDH accepted the award per Standard Term 1 of the Notice of Award, "By drawing or otherwise obtaining funds for the award from the grant payment system or office, you accept the terms and conditions of the award and agree to perform in accordance with the requirements of the award."

OSDH accepted the award on May 24, 2022, by drawing down funds from the HHS Payment Management System (PMS). In doing so, OSDH agreed to comply with the Title X regulation as a condition of the award.

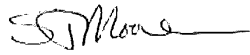
Therefore, I conclude that because OSDH is out of compliance with the Title X regulation, OSDH is also out of compliance with the terms and conditions of award FPHPA006507. As of April 27, 2023 (i.e., the effective date of the non-compliant OSDH policy), all costs are unallowable.

Consequently, I am suspending award FPHPA006507 and all activities supported by it effective with the date of this letter. I will review this action in 30 days to reassess OSDH's compliance with the award terms and conditions. The suspension may be extended for an appropriate time or the award may be terminated pursuant to 45 CFR § 75.372(a)(1) for material noncompliance or unsatisfactory performance with the terms and conditions of the award. A termination under this section must be reported to the Office of Management and Budget-designated integrity and

performance system, currently the Federal Awardee Performance and Integrity Information System (FAPIS). See 45 CFR § 75.372(b). Inclusion in FAPIS may affect your ability to obtain future Federal funding.

As an alternative, you have the opportunity to voluntarily relinquish your grant and may do so by contacting the assigned Grants Management Specialist (Jessica Shields, Jessica.shields@hhs.gov), who can provide your additional information on the process. Note that as compared to termination, a decision to relinquish your award is not reported to FAPIS.

Respectfully,



Scott J. Moore -S
2023.05.25 11:09:13 -04'00'

Scott J. Moore, Ph.D., J.D.
Director / Chief Grants Management Officer
OASH Grants & Acquisitions Management

cc: Jessica Shields, Grants Management Specialist
Cynda Hall, OPA Project Officer
Duane Barlow, OASH Grants Branch chief
Amy Margolis, OPA Deputy Director
Jessica Marcella, Deputy Assistant Secretary for Population Affairs



Grants Certifications Report

Certification for: OKLAHOMA STATE DEPARTMENT OF HEALTH
Unique Entity ID: LFU8Z8MPLTG3
Certification Validity From: Tue Jun 13 15:08:04 EDT 2023
Certification Validity To: Wed Jun 12 15:08:04 EDT 2024

Financial Assistance General Certifications and Representations

As the duly authorized representative of the **OKLAHOMA STATE DEPARTMENT OF HEALTH**, I certify that **OKLAHOMA STATE DEPARTMENT OF HEALTH**:

- (1) Has the legal authority to apply for Federal assistance and the institutional, managerial and financial capability to ensure proper planning, management and completion of any financial assistance project covered by this Certifications and Representations document (See 2 C.F.R. § 200.113 Mandatory disclosures, 2 C.F.R. § 200.214 Suspension and debarment, OMB Guidance A- 129, "Policies for Federal Credit Programs and Non-Tax Receivables");
- (2) Will give the awarding agency, the Comptroller General of the United States and, if appropriate, the State, through any authorized representative, access to and the right to examine all records, books, papers, or documents related to the award; and will establish a proper accounting system in accordance with generally accepted accounting standards or agency directives (See 2 C.F.R. § 200.302 Financial Management and 2 C.F.R. § 200.303 Internal controls);
- (3) Will disclose in writing any potential conflict of interest to the Federal awarding agency or pass through entity in accordance with applicable Federal awarding agency policy (See 2 C.F.R. § 200.112 Conflict of interest);
- (4) Will comply with all limitations imposed by annual appropriations acts;
- (5) Will comply with the U.S. Constitution, all Federal laws, and relevant Executive guidance in promoting the freedom of speech and religious liberty in the administration of federally-funded programs (See 2 C.F.R. § 200.300 Statutory and national policy requirements and 2 C.F.R. § 200.303 Internal controls);
- (6) Will comply with all applicable requirements of all other Federal laws, executive orders, regulations, and public policies governing financial assistance awards and any Federal financial assistance project covered by this certification document, including but not limited to:
 - (a) Trafficking Victims Protection Act (TVPA) of 2000, as amended, 22 U.S.C. § 7104(g);
 - (b) Drug Free Workplace, 41 U.S.C. § 8103;
 - (c) Protection from Reprisal of Disclosure of Certain Information, 41 U.S.C. § 4712;
 - (d) National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4321 et seq.;
 - (e) Universal Identifier and System for Award Management, 2 C.F.R part 25;
 - (f) Reporting Subaward and Executive Compensation Information, 2 C.F.R. part 170;
 - (g) OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Non-procurement), 2 C.F.R. part 180;
 - (h) Civil Actions for False Claims Act, 31 U.S.C. § 3730;
 - (i) False Claims Act, 31 U.S.C. § 3729, 18 U.S.C. §§ 287 and 1001;
 - (j) Program Fraud and Civil Remedies Act, 31 U.S.C. § 3801 et seq.;
 - (k) Lobbying Disclosure Act of 1995, 2 U.S.C. § 1601 et seq.;
 - (l) Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq.;
 - (m) Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 et seq.;
 - (n) Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. § 1681 et seq.;
 - (o) Section 504 of the Rehabilitation Act of 1973, as amended, 42 U.S.C. § 794; and.
 - (p) Age Discrimination Act of 1975, as amended, 42 U.S.C. § 6101 et seq.

✓ I have read each of the certifications and representations presented on this page. By submitting this certification, I, **Bethany Ledel**, am attesting to the accuracy of the certifications and representations contained herein. I understand that I may be subject to criminal prosecution under Section 1001, Title 18 of the United States Code or civil liability under the False Claims Act if I misrepresent **OKLAHOMA STATE DEPARTMENT OF HEALTH** by providing false, fictitious, or fraudulent information to the U.S. Government.

EXHIBIT 6

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, *et*
al.,

Defendants.

No. 5:23-cv-01052-HE

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION
FOR PRELIMINARY INJUNCTION**

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INTRODUCTION

Through Title X of the Public Health Service Act (PHSA), Congress authorized the Department of Health and Human Services (HHS) to award discretionary grants to fund family planning services and to issue regulations defining the terms and conditions of such grants. In 2021, HHS issued a new rule (the 2021 Rule) that largely reinstated regulatory requirements that had been effective for much of the statutory program's history and that were in place without issue or legal challenge between 1993 and 2019. Thereafter, the Oklahoma State Department of Health (OSDH) accepted a Title X grant, which (like all Title X grants) was made expressly contingent on OSDH's compliance with applicable statutory and regulatory requirements, including the 2021 Rule's requirement that grantees provide nondirective options counseling to pregnant clients and a referral for any option chosen by the client, including for an abortion. When OSDH later refused to certify its compliance with these requirements and the terms of its Title X grant, HHS exercised its discretion and decided to terminate OSDH's Title X funding. This lawsuit contends that HHS's decision was unlawful, largely reflecting Oklahoma's belief that it need not follow the 2021 Rule's abortion referral provision. The Sixth Circuit, in a case brought by Oklahoma and other states, recently confirmed the permissibility of that requirement based on binding Supreme Court precedent. *See Ohio v. Becerra*, 87 F.4th 759 (6th Cir. 2023). This Court should follow the *Ohio* court's decision and deny Oklahoma's motion for preliminary injunctive relief.

Oklahoma's claims are unlikely to succeed on the merits. HHS's decision is fully consistent with Title X and its implementing regulations as well as the Weldon Amendment, and Oklahoma's contrary arguments are largely foreclosed for the reasons relied on by the court in *Ohio*. Oklahoma's arbitrary-and-capricious claims fail because HHS provided a reasoned explanation for terminating OSDH's funding. And HHS's funding decision does

not pose any issue under the Spending Clause. Finally, Oklahoma cannot demonstrate that it will suffer irreparable harm in the absence of emergency relief, and the public interest weighs against the imposition of such a drastic remedy.

BACKGROUND

I. Title X

Title X authorizes the HHS Secretary “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.” 42 U.S.C. § 300(a). The statute further requires that “[g]rants and contracts made under this subchapter shall be made in accordance with such regulations as the Secretary may promulgate.” *Id.* § 300a-4(a). HHS’s implementing regulations afford it broad discretion to allocate congressionally-appropriated grant funds amongst competing applicants. *See generally* 42 C.F.R. §§ 59.7, 59.8. Each notice of grant award must specify “how long HHS intends to support the project without requiring the project to recompute for funds,” *id.* § 59.8(a), but in general grants are initially awarded for a one-year period, *id.* § 59.8(b). HHS also issues “continuation awards” which, while funded one year at a time, allow the recipient to receive continued support beyond the initial one-year period (typically for three to five years) without having to reenter the competitive funding process. *See id.* § 59.8(a), (b).

Title X funds shall “be expended solely for the purpose for which the funds were granted in accordance with the approved application and budget” and generally applicable grant regulations. 42 C.F.R. § 59.9 (citing 45 C.F.R. part 75). Those regulations, in turn, require grantees to document and report on their receipt and use of federal funds and authorize HHS to conduct audits to ensure compliance. *See, e.g.*, 45 C.F.R. § 75.300(b) (providing that recipients are “responsible for complying with all requirements of the Federal

award”); 45 C.F.R. subpart D (setting forth post-award requirements, including controls for ensuring compliance and reporting on performance); 45 C.F.R. subpart F (setting forth audit requirements). If a recipient fails to comply with the terms and conditions of a grant—including any incorporated statutory or regulatory requirements—HHS can impose appropriate remedies, including termination. *See id.* §§ 75.371, 75.372.

II. Regulatory History and the 2021 Title X Rule

In accordance with its statutory mandate, *see* 42 U.S.C. § 300a-4(a), HHS has issued regulations defining requirements applicable to Title X grants. These regulations have at times offered differing interpretations of Section 1008 of the PHSA, which requires that “[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.” *Id.* § 300a-6. But for much of the Title X program’s history, the agency has required (as it does now) the provision of nondirective options counseling to pregnant clients (to include counseling on abortion if requested) and referral for abortion upon request.

The agency briefly changed course in 1988 and issued a rule that strictly “prohibited the discussion of or referral for abortion.” 86 Fed. Reg. 19,812, 19,813 (Apr. 15, 2021). But while that interpretation was ultimately upheld by the Supreme Court as a permissible construction of § 1008, *Rust v. Sullivan*, 500 U.S. 173 (1991), the rule was “never implemented on a nationwide basis,” 65 Fed. Reg. 41,270, 41,271 (July 3, 2000). In 1993, HHS suspended the 1988 Rule and imposed interim standards that reinstated the pre-1988 status quo. *See* 58 Fed. Reg. 7462 (Feb. 5, 1993) (“Under these compliance standards, Title X projects would be required, in the event of an unplanned pregnancy and where the patient requests such action, to provide nondirective counseling to the patient on options relating to her pregnancy, including abortion, and to refer her for abortion, if that is the option she selects.”). HHS also

proposed new permanent regulations, which would ultimately be finalized in 2000. *See* 65 Fed. Reg. 41,270. The 2000 Rule adopted the 1993 interim standards that had been “used by the program for virtually its entire history.” *Id.* at 41,271.

The regulatory requirements set forth in the 2000 Rule—which required nondirective pregnancy options counseling and counseling on and referral for abortion upon request—remained in effect without incident until 2019, when HHS issued a new rule similar to the 1988 version. *See* 84 Fed. Reg. 7714 (Mar. 4, 2019). The 2019 Rule significantly restricted the ability of Title X projects to provide pregnancy options counseling and prohibited Title X projects from referring for abortion. *Id.* In 2021, HHS revoked the 2019 Rule and replaced it with a new rule readopting, in substantial part, the 2000 Rule. *See* 86 Fed. Reg. 56,144 (Oct. 7, 2021). That rule again requires that Title X projects offer pregnant clients the opportunity to be provided information and counseling about available options, including “prenatal care and delivery; infant care, foster care, or adoption; and pregnancy termination.” 42 C.F.R. § 59.5(a)(5). The project must provide neutral, factual information and nondirective counseling on each option and “referral upon request.” *Id.*; *see also* 86 Fed. Reg. at 56,150 (explaining that an abortion referral may include “the name, address, telephone number, and other relevant factual information . . . about an abortion provider,” and a Title X project cannot take “further affirmative action . . . to secure abortion services for the patient”). The Sixth Circuit, in a case brought by Oklahoma and eleven other states, recently found that the 2021 Rule’s abortion referral requirement is a permissible interpretation of Title X and declined to award preliminary injunctive relief on that basis. *Ohio*, 87 F.4th at 772 (“it must be permissible for an administration to treat referrals either as falling inside or outside § 1008’s prohibition”).¹ The *Ohio* court determined that the Supreme Court’s decision in *Rust*

¹ The *Ohio* litigation also involved another provision of the 2021 Rule not at issue here;

controlled and permitted the agency to adopt the abortion referral requirement. *See id.* at 770 (“*Rust* remains binding precedent and controls here.”).

In June 2022, the Supreme Court issued a decision in *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215 (2022), which overturned prior precedent recognizing a constitutional right to abortion. In the wake of that decision, HHS clarified that the abortion counseling and referral provisions of the 2021 Rule remained in effect, and that nondirective pregnancy options counseling (to include counseling on the option of abortion if requested), as well as abortion referrals upon request, were still required. *See* OPA Q&A, Ex. A; June 29 OPA Letter, Ex. B.

III. Oklahoma’s Title X Funding & HHS’s Termination Decision

On March 23, 2022, HHS awarded a Title X project grant to the Oklahoma State Department of Health. 2022 Notice of Award (PI. Br., Ex. 5 at 9, ECF No. 23-5). As the award explained, funding is provided one year at a time based on an annual application, the grantee’s continued compliance with the grant’s terms and conditions, and available appropriations. *See generally id.* at 1–17. The award made clear that HHS is “not obligated to make additional Federal Funds available,” *id.* at 3, and that Oklahoma “must comply with all terms and conditions outlined in the grant award,” including requirements imposed by “program statutes and regulations, Executive Orders, and HHS grant administration regulations,” *id.* at 4-5. It also reiterated the requirement that Oklahoma provide quarterly financial and annual progress reports and submit to an annual audit. *Id.* at 16.

A few months later, HHS’s Office of Population Affairs (OPA) and OSDH began corresponding about OSDH’s policy and procedure for providing nondirective options counseling and referral within its Title X project. *See* May 24 OPA Letter at 1 (PI Br., Ex. 5

with respect to that provision, the Sixth Circuit determined that “the preliminary injunction factors weigh in favor of granting relief.” *Ohio*, 87 F.4th at 784.

at 33-34, ECF No. 23-5). Specifically, on August 29, 2022, OSDH submitted a proposal to change its policy and procedure for providing nondirective options counseling and referral. *Id.* On November 9, 2022, OPA informed OSDH that this proposal did not comply with the 2021 Rule, and therefore could not be approved. *Id.* OSDH submitted a request for reconsideration. *Id.* On January 25, 2023, OPA denied that request, but “informed OSDH that it could submit an alternate compliance proposal that included providing clients with referral to another entity, such as the All-Options Talkline.” *Id.*; Jan. 25 OPA Letter to OSDH, Ex C.; Jan. 25 OPA Letter to Grantees, Ex. D; *see* All-Options Talkline, <https://www.all-options.org/find-support/talkline/>. Shortly thereafter, OSDH submitted an alternative proposal for compliance, which included providing nondirective counseling on all pregnancy options by OSDH staff or through the All-Options Talk Line; OSDH submitted a revised policy in March 2023 reflecting this change. May 24 OPA Letter at 1. OSDH also submitted a written assurance of compliance with the options counseling and referral requirements in the 2021 Rule. *Id.* at 24. Based on this documentation, OPA determined that OSDH’s policy complied with the Title X regulations. Accordingly, on March 30, 2023, OPA approved a continuation award for Oklahoma for an additional \$4.5 million in Title X funding. *See* 2023 Notice of Award at 1 (PI Br., Ex. 5 at 26-32, ECF No. 23-5).

However, on May 5, 2023, OSDH notified OPA by email that it “had a change required in our family planning program policy effective late afternoon of 4/27/2023.” May 24 OPA Letter at 2. OSDH shared its changed policy, which no longer provided for counseling through and referral to the All-Options Talk Line, and provided that OSDH staff would “[p]rovide neutral, factual information and nondirective counseling on pregnancy options *in Oklahoma*” (rather than “on all pregnancy options,” as stated in the prior iteration of the policy). *Id.* at 1-2. OPA determined that this new policy “d[id] not comply with the Title X

regulatory requirements and, therefore, the terms and conditions of [OSDH's] grant.” *Id.* at 2. OPA referred the matter to the HHS Office of the Assistant Secretary for Health’s Grants and Acquisitions (“GAM”) division. *Id.*

On May 25, 2023, GAM notified OSDH that it was suspending OSDH’s Title X award effective that day. *See* May 25 GAM Letter (PI Br., Ex. 5 at 36–37, ECF No. 23-5). On June 27, 2023, GAM notified OSDH that its Title X funding was terminated. *See* June 27 GAM Letter (PI Br., Ex. 5 at 1-8, ECF No. 23-5). OSDH appealed that determination administratively on July 27, 2023, *see* PI Br., Ex. 6, ECF No. 23-6, and the appeal remains pending.

IV. This Lawsuit

Oklahoma filed its complaint on November 17, 2023, asserting four claims under the Administrative Procedure Act (“APA”) and one claim pursuant to the Declaratory Judgment Act (“DJA”). ECF No. 1. Oklahoma moved for a preliminary injunction on January 26, 2024 and seeks a ruling on that motion no later than April 1, 2024. *See* Pls.’ Mot. for Preliminary Injunction & Opening Brief in Support, ECF No. 23 (PI Br.).

LEGAL STANDARD

A preliminary injunction is an “extraordinary remedy,” and therefore may only be awarded where the right to relief is “clear and unequivocal.” *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1261 (10th Cir. 2004). A plaintiff “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. NRDC*, 555 U.S. 7, 20 (2008). This standard also applies to a request for a court to “postpone the effective date of an agency action” under 5 U.S.C. § 705. *Colorado v. EPA*, 989 F.3d 874, 883 (10th Cir. 2021) (collecting cases); *see* PI Br. 9 (requesting,

in the alternative, that the Court “postpone effectiveness of Defendants’ action to terminate Oklahoma’s Title X award pursuant to 5 U.S.C. § 705”).²

ARGUMENT

I. Oklahoma Is Not Likely to Succeed on the Merits.

A. HHS’s Decision Is Authorized by Title X.

OPA’s decision to terminate OSDH’s Title X funding was based on the interpretation of § 1008 set forth in the 2021 Rule—*i.e.*, that Title X programs must provide, if requested, counseling on and referral for abortion. Oklahoma contends that OPA’s decision “violates Title X,” PI Br. 14, because HHS’s regulation “requiring abortion counseling and referrals is not within the bounds of reasonable interpretation” of § 1008 “and is therefore in excess of statutory authority granted by Congress,” *id.* at 17; *see id.* at 18. From a statutory perspective, the only relevant consideration is whether the interpretation set forth in the 2021 Rule is permissible. And *Rust* establishes that it is, as recently explained by the Sixth Circuit in a case in which Oklahoma was a plaintiff.³

In *Ohio*, the Sixth Circuit held that *Rust* is controlling authority that § 1008 authorizes HHS to either forbid, permit, or require Title X programs to provide nondirective options counseling and, upon request, abortion counseling and referrals. *Rust* rejected arguments that “providing counseling and referral for abortion is either necessarily treating, or not treating, ‘abortion as a method of family planning,’” and thus, the *Ohio* court held, it “must be

² In any event, Oklahoma’s request for relief in the form of postponement is moot because the termination decision is already effective, and Oklahoma alleges that, as of September 2023, “[f]unds that would previously have been directed to [OSDH] were instead apparently reallocated to” other Title X grantees. Compl. ¶ 26.

³ The distinction between facial and as-applied challenges makes no difference in this situation. *See Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 228 (2d Cir. 2006) (“Facial and as-applied challenges differ in *the extent to which* the invalidity of a statute need be demonstrated (facial, in all applications; as-applied, in a personal application). Invariant, however, is the *substantive rule of law* to be used.” (emphasis in original)).

permissible for an administration to treat referrals” for abortion—and, necessarily, nondirective options counseling about abortion—“either as falling inside or outside § 1008’s prohibition.” *Ohio*, 87 F.4th at 771-72. Accordingly, the Sixth Circuit concluded that “*Rust*’s holding requires us to reject the States’ [including Oklahoma’s] argument that the 2021 Rule’s referral requirement is contrary to law.” *Id.* at 771. Oklahoma does not provide any reason for this Court to reach a different conclusion regarding the legality of the counseling and referral requirement.

Oklahoma suggests that the statutory interpretation question should be analyzed anew to OPA’s application of the 2021 Rule to OSDH because Oklahoma now generally prohibits “advising or procuring an abortion.” PI Br. 5; *see id.* 21–22. But whatever restrictions Oklahoma law might now impose on abortion access, the statutory analysis is the same. The 2021 Rule broadly and unequivocally requires that Title X providers “[o]ffer pregnant clients the opportunity to be provided information and counseling regarding each” of their options—including “[p]regnancy termination”—and, if requested, to “provide neutral, factual information and nondirective counseling on each of the options, and referral upon request.” 42 C.F.R. § 59.5(a)(5). It does not refer to or incorporate state law.⁴ Nor does it limit the required counseling and referrals to procedures available within a particular state. Thus, OPA simply applied the 2021 Rule’s plain text to OSDH, determining that its policy of only providing pregnant clients with information and non-directive counseling on options “in Oklahoma” placed OSDH out of compliance. *See* ECF No. 23-4, at 4. This case does not

⁴ Even before *Dobbs*, states could, and did, adopt abortion policies inconsistent with Title X regulations’ broad counseling and referral provisions. *See, e.g., Valley Family Planning v. North Dakota*, 661 F.2d 99, 102 (8th Cir. 1981) (finding state law prohibiting Title X grantees from making abortion referrals was preempted by the Supremacy Clause). These federal regulatory provisions were in effect for nearly the entire history of the Title X program, and yet Defendants are not aware of any example of a state entity seeking an exception from the plain text of the governing regulation on the basis of conflicting state law.

involve OPA applying any new interpretation of Title X or its regulation to OSDH; it involves OSDH adopting a contrary interpretation and attempting to force it on the agency. *Cf., e.g., Planned Parenthood Fed’n of Am., Inc. v. Heckler*, 712 F.2d 650, 663-64 (D.C. Cir. 1983) (“It is elementary that under the Supremacy Clause . . . states are not permitted to establish eligibility standards for federal assistance programs that conflict with the existing federal statutory or regulatory scheme.”); *Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324, 337 (5th Cir. 2005) (“[A] state eligibility standard that altogether excludes entities that might otherwise be eligible for federal funds is invalid under the Supremacy Clause.”). Under *Rust* and *Ohio*, it is the agency’s interpretation which controls,⁵ not OSDH’s.

Title X establishes a competitive grant program that subjects all grantees to program requirements set forth in agency regulations. *Rust* and *Ohio* establish the permissibility of the abortion counseling and referral provisions relied upon by OPA in the decision challenged here. State entities that wish to receive federal Title X funds can either choose to follow those provisions or they can choose to decline the funds. *Cf. Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l Inc.*, 570 U.S. 205, 214 (2013) (“As a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds.”). But Congress wrote no exceptions into Title X based on state abortion laws—even at a time when most states prohibited abortions.

⁵ Those cases also plainly establish that HHS’s interpretation is entitled to *Chevron* deference. *See Ohio*, 87 F.4th at 770-72 (discussing *Chevron* analysis under *Rust*). HHS’s application of the 2021 Rule’s counseling and referral provisions to OSDH is entitled to the same *Chevron* deference. *See, e.g., City of Arlington, Tex. v. FCC*, 569 U.S. 290, 306 (2013) (*Chevron* deference applies where Congress vests the agency with “general authority to administer the [statute] through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority” (emphasis added)); *Montford and Co. v. SEC*, 793 F.3d 76, 82 (D.C. Cir. 2015).

B. HHS’s Decision Does Not Violate the Weldon Amendment.

Oklahoma also argues that the 2021 Rule, or OPA’s application of it to OSDH, violates the Weldon Amendment. The Weldon Amendment is a statute meant to protect health care entities who object to *providing* abortion services or related referrals. It states that no Appropriations Act funds can be provided 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 abortion.” *E.g.* Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, div. H, title V, § 507(d)(1), 136 Stat. 49,496 (Mar. 15, 2022) (the Weldon Amendment is a rider for every HHS Appropriations Act). Oklahoma argues that the 2021 Rule requires states to discriminate against objecting providers in violation of the Weldon Amendment. PI Br. 16. This argument is meritless.

As an initial matter, nothing in Oklahoma’s Complaint discusses or even mentions the Weldon Amendment. The Court cannot entertain a motion for preliminary injunction on a claim not raised in the Complaint. *See Clay v. Okla. Dep’t of Corr.*, No. CIV-12-1106-C, 2013 WL 3058122, at *2 (W.D. Okla. June 17, 2013) (“When the movant seeks intermediate relief beyond the claims in the complaint, the court is powerless to enter a preliminary injunction.”); *see also Castellano v. Choinski*, No. 3:07-cv-772, 2008 WL 749857, at *2 (D. Conn. Mar. 19, 2008) (citing *De Beers Consol. Mines Ltd. v. United States*, 325 U.S. 212, 220 (1945)).

In any event, Oklahoma’s argument misunderstands the Weldon Amendment’s application to Title X. Under Title X, the requirement to refer for abortions upon request is on the “project,” not on subrecipients. *See* 42 C.F.R. § 59.5(a)(5)(ii) (“Each *project* supported under this part must . . . [n]ot provide abortion as a method of family planning. A *project* must . . . [i]f requested to provide such information and counseling, . . . referral upon request

[for pregnancy termination].” (emphasis added) (footnote omitted)). For example, just as not every service site must offer all methods of family planning as long as the “project” does, not every subrecipient must offer referral for abortions as long as the project does. *See id.* § 59.5(a)(1) (“If an organization offers only a single method of family planning, it may participate as part of a project as long as the entire project offers a broad range of acceptable and effective medically approved family planning methods and services.”); *see also* 2021 Rule, 86 Fed. Reg. at 56,153 (“[O]bjecting providers or Title X grantees are not required to counsel or refer for abortions.”); 42 C.F.R. § 59.5(a)(5) n.2 (“Providers may separately be covered by federal statutes protecting conscience and/or civil rights.”); *Ohio*, 87 F.4th at 774. Because the 2021 Rule’s referral requirement is not imposed on individual providers or subrecipients, who may claim objector status, but on the “project” (here, OSDH), OSDH can still comply with the referral requirement without discriminating against objecting providers.⁶ *Contra* PI Br. 16 (incorrectly asserting that the 2021 Rule “forbids Oklahoma from sub-granting to health care entities that will not refer for abortion”).

Oklahoma also claims that OSDH qualifies as a “health care entity,” PI Br. 15 (citing 45 C.F.R. § 88.2), seemingly suggesting that it can be considered an objector under the Weldon Amendment. But this argument cannot be squared with the text of the Weldon Amendment. For purposes of the Weldon Amendment, 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.” *E.g.* Consolidated Appropriations Act, 2022, Pub. L.

⁶ The 2000 Rule, which also required abortion referrals upon request, contained a similar protection based on other conscience statutes prior to Congress adopting the Weldon Amendment in 2004. *See* 65 Fed. Reg. at 41,274 (“[G]rantees may not require individual employees who have such [conscience] objections to provide such counseling. However, in such cases the grantees must make other arrangements to ensure that the service is available to Title X clients who desire it.”).

No. 117-103, div. H, title V, § 507(d)(2), 136 Stat. 49,496 (Mar. 15, 2022). OSDH is a department of state government, not a “health care facility, organization, or plan” or any of the other entities listed in the statute.⁷

C. HHS’s Decision Is Consistent with Agency Regulations.

Next, Oklahoma contends that HHS’s decision to terminate OSDH’s funding “unreasonably interprets its own regulations,” citing other provisions that the decision allegedly contradicts. PI Br. at 19. But an agency’s interpretation of its own regulations is “controlling unless plainly erroneous or inconsistent with the regulation,” *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *see also Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), and Oklahoma has identified no such deficiency here.

First, Oklahoma misunderstands 42 C.F.R. § 59.5(b)(6), which requires that each Title X project affirm that “family planning medical services will be performed under the direction of a clinical services provider, with services offered within their scope of practice and allowable under state law, and with special training or experience in family planning.” By its terms, that regulatory provision does not limit the scope of pregnancy options counseling, or accompanying referrals, that must be provided pursuant to subsection 59.5(a). Rather, the language on which Oklahoma focuses was added to the 2021 Rule in response to comments advocating to expand the individuals permitted to direct Title X projects from physicians to

⁷ Oklahoma’s attempt to rely on the definition of “health care entity” in 45 C.F.R. § 88.2, PI Br. 15, fails. That regulation, and the broader rule of which it was a part, have been vacated by multiple courts. *See New York v. HHS*, 414 F. Supp. 3d 475, 524–25 (2019) (citing Congressional remarks of Representative Weldon and holding: “The Rule’s definition of this term[, health care entity,]—which appears in the Coats-Snowe and Weldon Amendments and the ACA—extends beyond what the face of these statutes disclose.”); *see also, Washington v. Azar*, 426 F. Supp. 3d 704 (E.D. Wash. 2019) (vacating rule); *City & Cnty. of San Francisco v. Azar*, 411 F. Supp. 3d 1001 (N.D. Cal. 2019) (same). HHS has also rescinded the regulation. *See Safeguarding the Rights of Conscience as Protected by Federal Statutes*, 89 Fed. Reg. 2,078 (Jan. 11, 2024).

“a broader range of healthcare providers.” 86 Fed. Reg. at 56,163. The reference to state law merely incorporated state definitions of the authority of physician assistants and other similar providers to direct family planning programs. *See id.* at 56,164 (explaining that HHS was adopting a definition of “clinical services provider” that includes “physicians, physician assistants, nurse practitioners, certified nurse midwives, and registered nurses with an expanded scope of practice who are trained and *permitted by state-specific regulations to perform*” Title X services (emphasis added)). It did not give state law veto power over all other Title X regulatory requirements.

Oklahoma’s second argument similarly misreads the plain language of the Title X regulation. HHS requires that each project affirm that it will “[p]rovide for coordination and use of referrals and linkages” with various health care providers. 42 C.F.R. § 59.5(b)(8). These “referrals and linkages” should be with providers “who are in close physical proximity to the Title X site, when feasible, in order to promote access to services and provide a seamless continuum of care.” *Id.* The regulation simply provides that Title X projects should attempt, *where feasible*, to make referrals to nearby healthcare providers. Where such close-in-proximity referrals are not feasible, providers are not prevented from making referrals to more distant entities. There is no conflict between this regulatory provision and the challenged HHS decision, which is based on subsection 59.5(a)(5)’s broad requirement that projects provide nondirective options counseling and appropriate referrals upon request. HHS recognized that this might require projects in states with restrictive abortion laws to refer out of state, but left it to the projects to ensure compliance, including by using telehealth and hotline options. But because subsection 59.5(b)(8) does not impose any limitation on a project’s ability to provide referrals to providers that are not in close proximity to the site, Oklahoma has identified no conflict between the challenged decision and HHS’s broader Title X regulations.

D. HHS’s Decision Is Neither Arbitrary Nor Capricious.

Oklahoma’s arbitrary-and-capricious claims fare no better. Agency action must be upheld in the face of an arbitrary-and-capricious challenge so long as the agency “articulate[s] a satisfactory explanation for the action including a rational connection between the facts found and the choice made.” *Little Sisters of Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020) (citation omitted). A court’s review is “narrow” and it “is not to substitute its judgment for that of the agency.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Under this “deferential” standard, a court “simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision.” *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). Oklahoma raises several arguments that OPA’s termination decision was arbitrary and capricious. PI Br. 20–23. None of these arguments succeed.

Oklahoma first argues that the termination decision is arbitrary and capricious because “Congress clearly intended its Title X funding *not* to go to promoting or performing abortions in any way.” *Id.* at 21. This argument is duplicative of Oklahoma’s statutory arguments. *See supra* Part I.A–B. The abortion referral requirement of the 2021 Rule does not violate any statute, so OPA’s termination decision relying on that rule is not arbitrary and capricious.

Oklahoma next argues that OPA discontinued OSDH’s grant without considering “the impact of requiring States where abortion is prohibited to comply with counseling and referral requirements.” PI Br. 21; *see also id.* (arguing that “federalism concerns were overlooked”). Oklahoma is incorrect. As an initial matter, OPA’s decision is a straightforward application of the valid requirements of the 2021 Rule. *See supra* Part I.A; *Ohio*, 87 F.4th at 772 (applying *Rust*). Because that rule requires grantees to provide abortion referrals upon request, OPA

declined to continue funding OSDH's grant when OSDH would not certify that it would do so. An agency does not act in an arbitrary and capricious manner merely by applying a valid regulation. Oklahoma's argument is really a backdoor attempt at challenging the referral requirement of the 2021 Rule—a challenge that was already rejected in the *Ohio* case, to which Oklahoma was a party.

In any event, the agency has provided a valid explanation for its decision that takes into account the fact that certain states have limited access to abortion. In June 2022, HHS issued guidance that clarified the requirements of the Title X program post-*Dobbs*, including in states that limited access to abortion in the immediate wake of the *Dobbs* decision. *See* OPA Q&A, Ex. A. This document states that the abortion counseling and referral provisions of the 2021 Rule remain in effect, and that nondirective pregnancy options counseling (to include counseling on the option of abortion if requested), as well as abortion referrals upon request, is still required. *Id.* at 4–5. The document also notes that “[t]here are no geographic limits for Title X recipients making referrals for their clients,” and that “Title X recipients have flexibility to refer clients for services across state lines if necessary.” *Id.* at 5. HHS also clarified that counseling and referrals may be made in person or via telehealth. *Id.* In deciding to terminate OSDH's funding, OPA further confirmed that Title X projects are required to “provide information and nondirective counseling on a range of options, including . . . referrals upon client request, including referrals for abortion,” and that “in some circumstances, those referrals will need to be made out of state.” ECF No. 23-4, at 4; *see also* May 24 OPA Letter at 1 (PI Br., Ex. 5 at 33-34, ECF No. 23-5) (noting that OPA “informed OSDH that it could submit an alternate compliance proposal that included providing clients with referral to another entity, such as the All-Options Talkline”). This explanation demonstrates that HHS considered the issue of state-law limitations on abortion access and nonetheless decided that

the still-in-force referral requirements of the 2021 Rule should be applied as written. “As long as the agency’s explanation is clear enough that its path may reasonably be discerned, we must respect its policy choice.” *Ohio*, 87 F.4th at 775 (citations omitted).

Oklahoma raises several specific points that it says OPA should have considered and did not address in its decision, although notably Oklahoma does not say whether it raised any of these issues with the agency prior to this lawsuit.⁸ See *Teufel v. Dep’t of the Army*, 608 F. App’x 705, 706 n.2 (10th Cir. 2015) (“Ordinarily, appellate courts refuse to consider issues not raised before an administrative agency.” (quoting *Wallace v. Dep’t of Air Force*, 879 F.2d 829, 832 (Fed. Cir. 1989))). First, pointing to OPA’s 2016 program review of OSDH, Oklahoma argues that family planning services in the state will be reduced if OSDH does not have a Title X grant. PI Br. 22. But OSDH is not the only Title X grantee or the only project capable of providing family planning services in the state. See HHS, Fiscal Year 2023 Title X Service Grant Awards, <https://opa.hhs.gov/grant-programs/title-x-service-grants/current-title-x-service-grantees/fy2023-title-X-service-grant-awards> (noting three Title X grantees, not including OSDH, operating in the State of Oklahoma). Moreover, some of Title X’s 2023 funds have been redistributed to other grantees to serve Oklahoma now that OSDH has refused to comply with HHS regulations. See Compl. ¶ 26 (alleging that OPA has already reallocated some funds). In any event, the Court should not second-guess OPA’s decision to terminate an award to a grantee that fails to comply with applicable regulations. *Ohio*, 87 F.4th at 775 (“[I]t is not the role of the court to ‘second guess the analysis and policy judgments that undergird the agency’s regulations.’” (citation omitted)).

Oklahoma also says that it is “heavily invested in providing services described in

⁸ Oklahoma also did not raise any of these concerns during the notice-and-comment period for the 2021 Rule. To the extent Oklahoma attempts to challenge the 2021 Rule—which OPA’s decision merely applies—such arguments are waived. See *Mich. Dep’t of Emvtl. Quality v. Browner*, 230 F.3d 181, 183 n.1 (6th Cir. 2000).

Title X, given Oklahoma’s 40-year track record of administering the Title X program,” and that “Oklahoma’s citizens are heavily invested in receiving those services.” PI Br. 22. But Oklahoma has no legally cognizable interest in the continued receipt of Title X funding. Title X grants only obligate HHS to provide funds to the grantee for one year (while sometimes providing HHS with the option of issuing noncompetitive continuation grants for additional years), 42 C.F.R. § 59.8(b), and HHS’s Title X regulations provide that “[n]either the approval of any application nor the award of any grant commits or obligates the United States in any way to make any additional, supplemental, continuation, or other award with respect to any approved application or portion of an approved application,” *id.* § 59.8(c). The termination decision here concerns only discretionary funding. *Cf. Janus v. Am. Fed’n of State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2484 (2018) (discounting asserted reliance interests because the relevant “contract provisions . . . will expire on their own in a few years’ time”). Moreover, the referral requirement has been in effect since at least 2021, and for decades prior to the 2019 Rule, and Oklahoma abided by that requirement in accepting grants prior to 2023. Oklahoma thus cannot claim that it now has a reliance interest in receiving grants without needing to comply with the referral requirement.

Finally, Oklahoma contends that OPA unlawfully “shifted positions” by terminating OSDH’s Title X grant. PI Br. 22–23. This argument misses the mark because the referral requirement has been in force since the 2021 Rule was issued and the agency has never changed its position on what the Rule requires. Instead, HHS has consistently applied that requirement. *See generally* OPA Q&A at 3, 5. The referral requirement is an outgrowth of the nondirective counseling requirement, *see* 86 Fed. Reg. at 56,149–50, and is consistent with medical ethics dictating that a pregnant client be provided with information about all options available to her; that need for neutral, accurate information does not change merely because

some states have limited access to certain services. Oklahoma argues that OPA's decision contradicts the 2021 Rule's provision that "objecting providers or Title X grantees are not required to counsel or refer for abortions." 86 Fed. Reg. at 56,153; *see* PI Br. 22. That exception is an application of conscience and religious freedom statutes. *See* 86 Fed. Reg. at 56,153. A state agency cannot claim to be an objector under those statutes.⁹ HHS has not been inconsistent on this point.

E. Notice-and-Comment Procedures Were Not Required.

Oklahoma also briefly argues that HHS's termination decision violated the APA's procedural requirements because "HHS's termination of Oklahoma's Title X funding amounts to a legislative rule that required notice and comment." PI Br. at 23. But this argument provides no independent basis for invalidating the decision because, as explained above, *supra* Part I.A, that decision merely applies the plain language of the 2021 Rule to Oklahoma. *See, e.g., Otsuka Pharm. Co. v. Burnwell*, 302 F. Supp. 3d 375, 409 (D.D.C. 2016) (rejecting similar argument and holding that notice-and-comment procedures are not required so long as challenged agency adjudication is a "clarification or interpretation of the existing rules" rather than a "'de facto' amendment of a duly promulgated regulation") (citation omitted); *see also Blanca Tel. Co. v. FCC*, 743 F.3d 860, 867 (D.C. Cir. 2014) (holding that "adjudicatory decisions are not subject to the APA's notice-and-comment requirements"); *Sorenson Commc'ns, Inc. v. FCC*, 567 F.3d 1215, 1223 (10th Cir. 2009) (holding that the challenged agency action was "an interpretative rule, and the [agency] was not required to comply with notice and comment procedures").

⁹ Providers who work for state grantees may, in some instances, qualify for objector status. *See* 42 C.F.R. § 59.5(a)(5) n.2 ("Providers may separately be covered by federal statutes protecting conscience and/or civil rights." (emphasis added)).

F. HHS’s Decision Does Not Implicate the Spending Clause.

“Congress has broad power under the Spending Clause of the Constitution to set the terms on which it disburses federal funds.” *Cummings v. Premier Rehab Keller, PLLC*, 596 U.S. 212, 216 (2022); *see also Arlington Cent. School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). Oklahoma argues that OPA’s decision to terminate its Title X funding violates the Spending Clause because, in Oklahoma’s view, that decision “was based on a requirement that was not congressionally mandated and that Oklahoma never knowingly and voluntarily accepted.” PI Br. 12. But Oklahoma’s argument incorrectly frames the issue and erroneously relies on *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981), and the Sixth and Eleventh Circuit’s recent *Pennhurst* decisions (*Kentucky v. Yellen*, 54 F.4th 325 (6th Cir. 2022), and *W. Va. ex rel. Morrissey v. U.S. Dep’t of Treasury*, 59 F.4th 1124, 1140 (11th Cir. 2023)), none of which involved the type of challenge contemplated here.

Pennhurst and its progeny reflect the basic proposition that “legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.” *Pennhurst*, 451 U.S. at 17. Just as with actual contractual obligations, a state must “voluntarily and knowingly accept[] the terms” attached to federal funding for those terms to be enforceable. *Id.* For that reason, “if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.” *Id.* Congress cannot “surpris[e] participating States with post acceptance or ‘retroactive’ conditions.” *Id.* at 25; *see also Nat’l Fed. of Indep. Business v. Sebelius*, 567 U.S. 584 (2012).

Courts have applied the *Pennhurst* rule by relieving states of the obligation to comply with statutory conditions on federal funding that were not sufficiently apparent at the time of acceptance. In *Pennhurst* itself, for example, the question was whether the “bill of rights” provision of a federal statute stated an enforceable condition at all, or whether it was merely

“hortatory.” 451 U.S. at 15-27. Construing the statute, the Court found it “clear that the provision[]” was “intended to be hortatory, not mandatory,” *id.* at 24, and thus foreclosed the plaintiffs’ effort to enforce it against the state defendant. In *West Virginia* and *Kentucky*, likewise, the question was whether the plaintiff states could “ascertain” a condition that a federal statute placed on their expenditure of federal grant funds. *West Virginia*, 59 F.4th at 1140; *see Kentucky*, 54 F.4th at 348.

This case differs in significant respects from *Pennburst* and its progeny. First, *Pennburst*, *Kentucky*, and *West Virginia* all dealt with allegedly ambiguous *statutory* funding conditions. None of those cases involved the situation here—*i.e.*, where a statute creates a federal grant program and unambiguously makes such grants subject to conditions set forth in agency regulations. Oklahoma is not challenging any aspect of Title X itself but is instead challenging HHS’s application of the unequivocal counseling and referral provisions in the 2021 Rule, which were just upheld by the Sixth Circuit. *See* PI Br. 11 (arguing that the referral requirement “was wholly absent from Congress’s statutory regime”). None of the cases cited by Oklahoma supports the notion that the Spending Clause can be used to challenge an agency’s application of such a regulation to terminate a discretionary grant.

Even if *Pennburst* did apply, it would present no obstacle to the decision at issue in this case. Most importantly, *Pennburst*’s notice requirement—*i.e.*, that a statute authorizing the provision of federal funds must “provid[e] clear notice to the States that they, by accepting funds under the Act, would indeed be obligated to comply with [the conditions],” *Pennburst*, 451 U.S. at 24-25—is met here. Title X is clear that “[g]rants and contracts . . . shall be made in accordance with such regulations as the Secretary may promulgate,” 42 U.S.C. § 300a-4(a), and “shall be . . . subject to such conditions as the Secretary may determine to be appropriate to assure that such grants will be effectively utilized for the purposes for which made,” *id.*

§ 300a-4(b). Thus, states—as all other Title X recipients—are aware that, once they accept Title X funding, they must comply with the requirements set forth by the Secretary. Those requirements include the 2021 Rule, which requires Title X grantees to provide non-directive counseling and referrals for abortion. Oklahoma’s contention that it “never knowingly and voluntarily accepted” this condition of funding, PI Br. 12, cannot be squared with the fact that the 2021 Rule was promulgated months prior to Oklahoma receiving its Title X grant in 2022, *see* 86 Fed. Reg. at 56,144. Indeed, Oklahoma both submitted a comment on the proposed rule in May 2021, *see* States’ Comment Letter at 15, and filed a lawsuit challenging the 2021 Rule in October 2021, *see* Compl., *Ohio v. Becerra*, No. 1:21-cv-675 (N.D. Ohio Oct. 25, 2021), ECF No. 1, and yet still applied for and accepted Title X funding with full knowledge that the 2021 Rule was in force. Oklahoma’s claim that it lacked sufficient notice of these conditions is particularly unpersuasive given that the Title X program has required non-directive counseling on all options, including abortion, for most of the program’s existence, *see supra* pp. 3–4, and Oklahoma has nevertheless accepted such funding “[f]or nearly half a century,” Compl. ¶ 1.¹⁰

Oklahoma contends that the statute’s silence with respect to abortion counseling, referral, or advocacy prohibits the Secretary from imposing any conditions related to such activity, notwithstanding Congress’s express assertion that Title X grants shall be “subject to such conditions as the Secretary may determine to be appropriate.” PI Br. 11–12. Presumably, then, Oklahoma would argue that *any* conditions imposed by the Secretary that are not expressly addressed in detail in a statute are invalid and unenforceable. But it is not unusual

¹⁰ *Cf. Gruver v. La. Bd. of Supervisors*, 959 F.3d 178, 184 (5th Cir. 2020) (rejecting Spending Clause claim when the challenged provision “has been on the books for over thirty years, all the while LSU has continued to accept federal funding”); *Miss. Comm’n on Env’tl. Quality v. E.P.A.*, 790 F.3d 138, 179 (D.C. Cir. 2015) (noting that a state’s prior acceptance of federal funding despite the challenged condition “may be an additional relevant factor . . . for assessing the constitutionality of Spending Clause legislation.”).

or impermissible for Congress to authorize an agency to promulgate requirements on federal funding. The Supreme Court has long established that, once Congress makes clear that a condition on the use of federal funds is mandatory and enforceable, it may leave the particulars of implementing the condition to the agency charged with administering the spending program. In *Bennett v. Kentucky Department of Education*, 470 U.S. 656 (1985), for example, the Court held that the Department of Education should evaluate a state’s compliance with conditions on federal funds by looking to “the statutory provisions, regulations, and other guidelines provided by the Department at that time.” *Id.* at 670. And in *Biden v. Missouri*, 595 U.S. 87 (2022) (per curiam), the Supreme Court considered whether a statute delegating broad authority for the HHS Secretary “to promulgate, as a condition of a facility’s participation in the [Medicare and Medicaid] programs, such ‘requirements as [he] finds necessary in the interest of health and safety of individuals who are furnished services in the institution,’” *id.* at 90 (quoting 42 U.S.C. § 1395x(e)(9)), allowed the Secretary to require Medicare and Medicaid providers to mandate COVID-19 vaccinations for their employees. The Court found that it did, recognizing the wide array of conditions and requirements imposed on Medicare and Medicaid facilities under that authority.¹¹ *Id.* at 92-96.

Here, as in *Missouri*, the condition articulated in the statute is perfectly clear: Title X recipients must follow conditions prescribed by the agency. As the Supreme Court has historically recognized, when operating a grant program, “the Federal Government simply [cannot] prospectively resolve every possible ambiguity concerning particular applications of the requirements of’ the underlying statute. *Bennett*, 470 U.S. at 669; *see also Mayweathers v.*

¹¹ In *Missouri*, the states argued that they could not be subjected to the COVID-19 vaccination requirement because it was not articulated in the statute. *See* Resp. to Application for a Stay Pending Appeal, *Becerra v. Louisiana*, Nos. 21A240, 21A241, 2021 WL 8939385, at *26-27 (U.S. Dec. 30, 2021) (citing *Pennhurst*, 451 U.S. at 17); Resp. to Application for a Stay, *Biden v. Missouri*, No. 21A240, 2021 WL 8946189, at *23-24 (U.S. Dec. 30, 2021) (citing *Arlington Cent.*, 548 U.S. at 296).

Newland, 314 F.3d 1062, 1067 (9th Cir. 2002) (“Congress is not required to list every factual instance in which a state will fail to comply with a condition. Such specificity would prove too onerous, and perhaps, impossible”). This is particularly true where, as here, “grant recipients had an opportunity to seek clarification of the program requirements” from the agency. *Bennett*, 470 U.S. at 669. As explained above, the 2021 Rule clearly sets out conditions that recipients must follow to receive Title X funding. And those conditions were plainly ascertainable when Oklahoma applied for its initial grant in 2022 and when HHS terminated its funding in 2023.

Oklahoma cites to an Eleventh Circuit case, *West Virginia*, to support its argument that an agency cannot impose a condition that is not set forth unambiguously in a statute. *See* PI Br. 11. But even the *West Virginia* court recognized that “when a state accepts federal funds, the state necessarily agrees ‘to comply with, and its liability determined by, the legal requirements in place when the grants were made,’” and that “[t]hese ‘legal requirements’ include existing regulations.” *W. Virginia*, 59 F.4th at 1148 (quoting *Bennett*, 470 U.S. at 670); *see also id.* (“To be clear, we do not question an agency’s authority to fill in gaps that may exist in a spending condition.”).

As noted above, this case does not present the type of Spending Clause issue addressed in *West Virginia*. And, in any case, the *West Virginia* case is clearly distinguishable from this one. In *West Virginia*, states challenged a provision in the American Rescue Plan Act (“ARPA”), which set aside \$195.3 billion in stimulus funds to be distributed to states and the District of Columbia to combat the economic challenges posed by the COVID-19 pandemic, but conditioned receipt of those funds on states certifying that they would comply with ARPA’s “offset provision.” 59 F.4th at 1132-3. The offset provision provided that states could not use ARPA funds to “directly or indirectly offset a reduction in [their] net tax

revenue” resulting from “a change in law that ‘reduces any tax.’” *Id.* at 1132 (quoting 42 U.S.C. § 802(c)(2)(A)).

ARPA and the offset provision differ in several important respects from Title X and the referral requirement at issue here. *First*, Title X directly authorizes the Secretary to impose conditions on Title X grant funding, whereas ARPA contained no such language. *Compare* 42 U.S.C. § 300a-4(b) (providing that grants shall be “subject to such conditions as the Secretary may determine to be appropriate to assure that such grants will be effectively utilized for the purposes for which made”), *with* 42 U.S.C. § 802(f) (providing that “[t]he Secretary shall have the authority to issue such regulations as may be necessary or appropriate to carry out this section”). Accordingly, Title X expressly put states on notice that grants would be subject to conditions set by the Secretary, including the conditions set forth in the 2021 Rule.¹²

Second, the Eleventh Circuit’s decision in *West Virginia* turned at least in part on ARPA’s “novelty and scope,” *W. Virginia*, 59 F.4th at 1145–46, neither of which are issues here. There is no “lack of historical precedent” here, where the Title X program has required nondirective counseling and referrals for approximately four decades (with two short-lived exceptions). And while ARPA “aimed [a] novel restriction at each state’s *entire* budget and every single one of its taxes,” the amount of funding at issue here—approximately \$4.5 million, *see* 2023 Notice of Award at 1—is a much more modest sum, affecting only one specific state program.

Oklahoma’s repeated references to state sovereignty cannot save its Spending Clause claim. Oklahoma’s brief seems to suggest that there is some heightened version of the Spending Clause that applies where unspecified “sovereign interests” are at stake, but that is

¹² Oklahoma’s reliance on *Colorado v. United States Department of Justice*, 455 F. Supp. 3d 1034 (D. Colo. 2020), is inapposite for the same reason. That case involved a formula grant program, “meaning that Congress has already ‘determine[d] who the grant recipients are and how much money each shall receive.’” *Id.* at 1047 (citation omitted). The statute in question authorized the Attorney General to “issue rules to carry out this part,” *see* 34 U.S.C. § 10155, which is more limited than the grant of power in Title X.

not what the Sixth Circuit meant when it said that “[a]s *Pennhurst* and other precedents recognize, more is at stake when Congressional spending legislation threatens state sovereign interests *than is at issue in a run-of-the-mill private contract dispute.*” *Kentucky v. Yellen*, 67 F.4th 322, 327 (6th Cir. 2023) (emphasis added). In other words, the Sixth Circuit was merely pointing out that cases implicating the Spending Clause may also implicate state sovereign interests. But as explained above, HHS’s decision does not violate the Spending Clause. Thus, it makes no difference which sovereign interests Oklahoma believes are implicated here.

Separately, Oklahoma suggests that HHS terminated the state’s Title X funding “on the basis of its abortion laws,” but that is simply not accurate. HHS terminated the state’s Title X funding—after several attempts to reach a viable compromise—due to its noncompliance with the Title X regulations at 42 C.F.R. § 59.5(a)(5). *See* May 24 OPA Letter at 1–2.¹³ Requiring Oklahoma to follow the regulations that it agreed to follow in exchange for discretionary funding is not an intrusion of state sovereignty. As the Supreme Court has explained, “if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds.” *Agency for Int’l Dev.*, 570 U.S. at 214. Oklahoma also tries to attack HHS’s decision to award supplemental funds to another entity, the Missouri Family Health Council, but that is of no moment here. The Spending Clause does not authorize a state to challenge the federal government’s decision to grant discretionary funds to a nonprofit organization.

II. Oklahoma Has Not Demonstrated Irreparable Harm.

“A preliminary injunction is an extraordinary remedy never awarded as of right.” *Winter*, 555 U.S. at 24. Among other things, a movant must show that it is “likely to suffer irreparable harm in the absence of preliminary relief.” *Id.* at 20, 22. Oklahoma fails to

¹³ HHS has not terminated grants to other states whose laws severely restrict access to abortion, where those states continue to comply with Title X regulations. *See* https://opa.hhs.gov/sites/default/files/202402/Title_X_Directory_January_2024_508.pdf.

demonstrate an injury that is “both certain and great,” and not “merely serious or substantial.” See also *Port City Props. v. Union Pac. R.R. Co.*, 518 F.3d 1186, 1190 (10th Cir. 2008) (citation omitted); see also *Prairie Band of Potawami Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001). In examining the preliminary injunction factors, “courts have consistently noted that “[b]ecause a showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction, the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered.”” *Dominion Video Satellite, Inc.*, 356 F.3d at 1260–61 (alteration in original) (quoting *Reuters Ltd. v. United Press Int’l, Inc.*, 903 F.2d 904, 907 (2d Cir. 1990)).

Oklahoma dedicates only one short paragraph to irreparable harm, and none of its arguments are persuasive. First, Oklahoma claims that it will be irreparably harmed by not receiving Title X funding for fiscal year 2024, which it describes as a “loss of funding.” PI Br. 24. “[E]conomic loss does not, in and of itself, constitute irreparable harm.” *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); see also *State of Ohio ex rel. Celebrezge v. Nuclear Regul. Comm’n*, 812 F.2d 288, 290 (6th Cir. 1987). And while “[t]he federal government’s sovereign immunity typically makes monetary losses . . . irreparable,” *Commonwealth v. Biden*, 57 F.4th 545, 556 (6th Cir. Jan. 12, 2023), courts have recognized that “a party asserting such a loss is not relieved of its obligation to demonstrate that its harm will be ‘great,’” *Ohio v. Becerra*, 577 F. Supp. 3d 678, 699 (S.D. Ohio 2021), *aff’d in part, rev’d in part and remanded*, 87 F.4th 759 (6th Cir. 2023) (quoting *N. Air Cargo v. U.S. Postal Serv.*, 756 F. Supp. 2d 116, 125 n.6 (D.D.C. 2010)); see also, e.g., *Allina Health Servs. v. Sebelius*, 756 F. Supp. 2d 61, 67–68 (D.D.C. 2010) (collecting cases); *Otsuka Pharm. Co. v. Burwell*, No. GJH-15-852, 2015 WL 1962240, at *11 (D. Md. Apr. 29, 2015) (similar). “Otherwise, a litigant seeking injunctive relief against the

government would always satisfy the irreparable injury prong, nullifying that requirement in such cases.” *CoverDyn v. Moniz*, 68 F. Supp. 3d 34, 49 (D.D.C. 2014).

Although Oklahoma does not provide financial information in its brief, the annual amount OSDH receives through Title X funding likely represents a tiny fraction of the state’s total annual budget. As such, Oklahoma has not met its burden of showing that even the loss of a year’s funding would be so great as to constitute irreparable harm.

Oklahoma contends that not receiving Title X funding will “jeopardize[] Oklahoma’s ability to continue offering services through the Health Department” and will cause the state to lose “its investment in translation and language services.” PI Br. 24. Oklahoma’s brief contains no other reference to or explanation of “translation and language services.” *But see* Compl. ¶ 55. In any event, and as explained above, *see supra* Part I.D, Oklahoma has no legally cognizable interest in the continued receipt of Title X funding. Title X grants only obligate HHS to provide funds to the grantee for one year (while sometimes providing HHS with the option of issuing noncompetitive continuation grants for additional years), 42 C.F.R. § 59.8(b), and HHS’s Title X regulations provide that “[n]either the approval of any application nor the award of any grant commits or obligates the United States in any way to make any additional, supplemental, continuation, or other award with respect to any approved application or portion of an approved application,” *id.* § 59.8(c). Additionally, Oklahoma’s argument that OSDH will not be able to continue offering family planning services depends on the assumption that the Oklahoma Legislature will not step in to fill the funding gap.

Next, Oklahoma cursorily cites its “potential loss [of] future grant funding that totals \$541.2 million.” PI Br. 24. But Oklahoma’s argument ignores that it requests *preliminary* relief, and so the question is whether Oklahoma will be irreparably harmed during the pendency of litigation—not over the course of several years. As such, Oklahoma’s focus on the funding

that it anticipated over its original project period (i.e., until 2027) is mistaken. Moreover, Oklahoma provides no evidence supporting its \$541.2 million estimate; the declaration to which Oklahoma's brief cites says that "OSDH currently receives approximately \$541.2 million from over 90 other federal grant programs *outside of Title X*." ECF No. 23-1, ¶ 29 (emphasis added).

Finally, Oklahoma cursorily states that "[a]dditional impacts include Oklahoma's ability to access the federal discount pharmacy program," PI Br. 24. Oklahoma provides no explanation of this anywhere in their brief, or in the Complaint, so Defendants have no real opportunity to respond to this point. Oklahoma's argument should be deemed waived for lack of development.

III. The Public Interest Weighs Against a Preliminary Injunction.

The balance of hardships and the public interest weigh against issuing an injunction here. When the government is a party, these two inquiries merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Oklahoma insists that an injunction would not harm HHS because "an injunction would only preserve the status quo in effect before HHS terminated Oklahoma's funding," PI Br. 24, but that argument ignores that "[t]here is inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest to direct that agency to develop," *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008); *see Seaside Civic League, Inc. v. U.S. Dep't of Housing & Urb. Dev.*, No. 14-1823-RMW, 2014 WL 2192052, at *3 (N.D. Cal. May 23, 2014). HHS had the authority to issue the 2021 Rule, *Ohio*, 87 F.4th at 772, and the agency determined that its counseling and referral provisions were in the public interest. An injunction frustrating the enforcement of the 2021 Rule would therefore harm the agency and the public interest. Moreover, an injunction would change the status quo with an impact on patients because OSDH was providing abortion referrals upon request prior to the

state's policy change that promptly led to the grant termination. And despite Oklahoma's suggestion otherwise, *see* PI Br. 25, other Title X grantees are capable of providing family planning services within the state and filling any gaps left by the discontinuation of Oklahoma's grant, *see* <https://opa.hhs.gov/grant-programs/title-x-service-grants/current-title-x-service-grantees/fy2023-title-X-service-grant-awards> (noting three Title X grantees, not including OSDH, operating in the State of Oklahoma). Presumably whatever relief Oklahoma wants from HHS would require funding OSDH at the expense of funding another grantee, so a preliminary injunction would go beyond merely preserving the status quo.

CONCLUSION

For the foregoing reasons, the Court should deny Oklahoma's preliminary injunction motion.

DATED: February 23, 2024

Respectfully submitted,

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Exhibit A

The questions and answers included below aim to provide guidance and clarification from OPA for Title X recipients regarding the impact of the U.S. Supreme Court decision in *Dobbs v. Jackson Women's Health Organization* on the Title X Program.

General Questions

- 1. If a Title X recipient begins to see an influx of clients following the Supreme Court decision in *Dobbs, et al. v. Jackson Women's Health Organization*, is the Title X recipient allowed to reallocate funds to account for the change in client volume?**

Title X recipients can submit a request for a budget revision via Grant Solutions at any time if a need arises to reallocate more than 10% of the total budget across approved budget categories. The request should contain documentation explaining the need for the budget revision along with a revised budget (SF-424A) and revised budget narrative. This should be submitted through the GrantSolutions amendment module to begin the review and approval process. The process may take up to 30 days. If approved the grants management officer will issue a notice of award with the budget revision. Guidance on how to submit a budget revision amendment in GrantSolutions can be found on [MAX.gov](https://www.max.gov). Recipients should discuss any potential reallocation of funds with their respective project officer and grants management specialist.

- 2. Will OPA be providing Title X recipients with additional funding to address the potential influx in clients that may result from Supreme Court decision in *Dobbs v. Jackson Women's Health Organization*?**

OPA is working to secure additional funding, but unfortunately does not have additional funding available at this time to provide to Title X recipients who may experience an influx in clients following the *Dobbs* Supreme Court decision. If additional funds were to become available at any point, OPA will share the information with all Title X recipients.

- 3. Can Title X recipients expand services to a new community or a new state if the need for services changes?**

The Title X program is not a state-based formula grant program, therefore individual Title X project service areas are not limited to individual states. Title X recipients interested in expanding their service area to include new communities, either within or across states, would need to request approval from OPA and GAM for a change in scope of their projects. Requests must be submitted via a change in scope amendment which may take up to 30 days for review. Approval is communicated via a notice of award issued by the grants management officer. Costs may be disallowed if a recipient begins implementing a change in scope prior to its approval.

A change in scope occurs when the recipient proposes changes to project's objectives, aims, or purposes identified in the approved application, such as changing the service area; applying a new technology; adding or eliminating a service delivery site; or making budget changes that cause a project to change substantially from what was originally approved. The [Title X Family Planning Change in Scope Worksheet](#) helps identify elements for clinic closures, new clinics, or other programmatic changes which may require a request for a change in scope to the current

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Title X family planning project. Recipients are not required to use the worksheet, but can include the completed worksheet with their amendment submission in Grant Solutions.

4. Can Title X recipients begin to limit receipt of services to only residents from their state if the influx of clients from other states becomes too burdensome?

No, Title X recipients cannot limit receipt of services to only residents from their states. Title X recipients are required to provide services without the imposition of any durational residency requirement or a requirement that the client be referred by a physician. (42 CFR § 59.5(b)(5))

5. Can Title X recipients remove pregnancy testing and counseling from their Title X projects?

Title X recipients are required to provide a broad range of acceptable and effective medically approved family planning methods (including natural family planning methods) and services (**including pregnancy testing and counseling**, assistance to achieve pregnancy, basic infertility services, sexually transmitted infection (STI) services, preconception health services, and adolescent-friendly health services). If an organization offers only a single method of family planning, it may participate as part of a project as long as the entire project offers a broad range of acceptable and effective medically approved family planning methods and services. (42 CFR § 59.5(a)(1))

As a result of the requirement in § 59.5(a)(1), Title X recipients cannot completely remove pregnancy testing and counseling services from their Title X projects. Title X service sites are expected to provide most, if not all, of acceptable and effective medically approved family planning methods and services on site and to detail the referral process for family planning methods and services that are unavailable on-site. However, as long as the entire Title X project offers a broad range of acceptable and effective medically approved family planning methods and services, including pregnancy testing and counseling, not all individual service sites participating in the project must offer the broad range of methods and services.

Furthermore, Title X recipients are required to ensure that Title X service sites that are unable to provide clients with access to a broad range of acceptable and effective medically approved family planning methods and services, must be able to provide a prescription to the client for their method of choice or referrals to another provider, as requested. (42 CFR § 59.5(a)(1))

6. Given the Supreme Court decision in *Dobbs v. Jackson Women's Health Organization*, can Title X recipients still provide emergency contraception to clients?

Yes, Title X recipients are required to provide a broad range of acceptable and effective medically approved family planning methods (including natural family planning methods) and services (including pregnancy testing and counseling, assistance to achieve pregnancy, basic infertility services, sexually transmitted infection (STI) services, preconception health services, and adolescent-friendly health services). (42 CFR § 59.5(a)(1))

The questions and answers included below aim to provide guidance and clarification from OPA for Title X recipients regarding the impact of the U.S. Supreme Court decision in *Dobbs v. Jackson Women's Health Organization* on the Title X Program.

Title X recipients may still consider emergency contraception as part of the required broad range of methods and services because it is a medically approved method of contraception. "Emergency contraception is a [FDA-approved] method of birth control you can use if you had sex without using [birth control](#) or if your birth control method did not work correctly. Emergency contraception pills are different from the abortion pill. If you are already pregnant, emergency contraception pills do not stop or harm your pregnancy." (womenshealth.gov) Click [here](#) for more information on emergency contraception.

7. Who should Title X recipients contact with questions about the impact of the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*?

For questions related to the impact of *Dobbs* on their Title X projects, Title X recipients should contact their respective OPA project officers; in addition, they should refer to the Title X Program Handbook for further guidance on all Title X recipient expectations. For questions about *Dobbs* outside the scope of their Title X projects, recipients should contact their private counsel.

Counseling and Referral Questions

8. Given the Supreme Court decision in *Dobbs v. Jackson Women's Health Organization*, are Title X recipients still allowed to provide counseling to clients about abortion?

Not only are Title X recipients **allowed**, but per the 2021 Title X rule, Title X recipients are **required** to offer pregnant clients 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. If requested to provide such information and counseling, provide neutral, factual information and nondirective counseling on each of the options, **and referral upon request**, except with respect to any option(s) about which the pregnant client indicates they do not wish to receive such information and counseling. (42 CFR § 59.5(a)(5))

9. Given the Supreme Court decision in *Dobbs v. Jackson Women's Health Organization*, are Title X recipients still allowed to provide clients with counseling and a referral for an abortion?

Not only are Title X recipients **allowed**, but per the 2021 Title X rule, Title X recipients are **required** to offer pregnant clients 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. If requested to provide such information and counseling, provide neutral, factual information and nondirective counseling on each of the options, **and referral upon request**, except with respect to any option(s) about which the pregnant client indicates they do not wish to receive such information and counseling. (42 CFR § 59.5(a)(5))

However, there are limitations on what abortion counseling and referral is permissible under the statute. 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

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benefits. And, while 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. (65 Fed. Reg. 41281 (July 3, 2000))

Where 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 a Title X project is not prohibited by section 1008 and is required by 42 CFR § 59.5(b)(1). The limitations on referrals do not apply in cases in which a referral is made for medical indications. (65 Fed. Reg. 41281 (July 3, 2000)).

10. Can Title X grantees accept referrals from clients living in a different state from where the service site is located?

Yes, Title X recipients can provide services for clients living outside of the community and state that the service site is located in. Title X recipients are required to provide services without the imposition of any durational residency requirement. (42 CFR § 59.5(b)(5))

11. Can Title X recipients make referrals for a client to a provider in a different state?

There are no geographic limits for Title X recipients making referrals for their clients.

Title X recipients are required to provide for coordination and use of referrals and linkages with primary healthcare providers, other providers of healthcare services, local health and welfare departments, hospitals, voluntary agencies, and health services projects supported by other federal programs, **who are in close physical proximity to the Title X site, when feasible**, in order to promote access to services and provide a seamless continuum of care. (42 CFR § 59.5(b)(8))

Title X recipients have flexibility to refer clients for services across state lines if necessary.

12. Can Title X recipients provide pregnancy counseling via telehealth?

Yes, Title X recipients are required to provide for medical services related to family planning (including consultation by a clinical services provider, examination, prescription and continuing supervision, laboratory examination, contraceptive supplies), **in person or via telehealth**, and necessary referral to other medical facilities when medically indicated, and provide for the effective usage of contraceptive devices and practices. (42 CFR § 59.5(b)(1))

13. When providing clients with a referral for an abortion, are Title X recipients allowed to take any further steps to help clients secure an appointment?

While 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

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

Where 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 a Title X project is not prohibited by section 1008 and is required by 42 CFR § 59.5(b)(1). The limitations on referrals do not apply in cases in which a referral is made for medical indications. (65 Fed. Reg. 41281 (July 3, 2000)).

Prohibition of Abortion Questions

14. Can Title X projects provide abortion services for clients now in need of such services?

No, Title X recipients are not allowed to provide abortion as a method of family planning as part of the Title X project. (Section 1008, PHS Act; Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, 136 Stat. 49, 444 (2022); 42 CFR § 59.5(a)(5))

15. Are Title X projects allowed to provide medication abortion pills for clients now in need of such services?

No, Title X recipients are not allowed to provide abortion as a method of family planning as part of the Title X project. (Section 1008, PHS Act; Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, 136 Stat. 49, 444 (2022); 42 CFR § 59.5(a)(5))

16. What is the Title X program's requirement on abortion as a method of family planning and abortion counseling and referral?

Title X recipients are not allowed to provide abortion as a method of family planning as part of the Title X project. (Section 1008, PHS Act; Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, 136 Stat. 49, 444 (2022); 42 CFR § 59.5(a)(5))

Title X recipients are required to offer pregnant clients 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. If requested to provide such information and counseling, provide neutral, factual information and nondirective counseling on each of the options, and referral upon request, except with respect to any option(s) about which the pregnant client indicates they do not wish to receive such information and counseling. (42 CFR § 59.5(a)(5))

Furthermore, Title X recipients are prohibited from providing services that directly facilitate the use of abortion as a method of family planning, such as providing transportation for an abortion, explaining and obtaining signed abortion consent forms from clients interested in abortions, negotiating a reduction in fees for an abortion, and scheduling or arranging for the performance of an abortion, promoting or advocating abortion within Title X program activities, or failing to

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preserve sufficient separation between Title X program activities and abortion-related activities. (65 Fed. Reg. 41281 (July 3, 2000))

17. What is considered “sufficient separation” between Title X program activities and abortion-related activities?

Title X recipients are required to ensure that non-Title X abortion activities are separate and distinct from Title X project activities. Where recipients conduct abortion activities that are not part of the Title X project and would not be permissible if they were, the recipient must ensure that the Title X-supported project is separate and distinguishable from those other activities.

What must be looked at is whether the abortion element in a program of family planning services is so large and so intimately related to all aspects of the program as to make it difficult or impossible to separate the eligible and non-eligible items of cost. The Title X project is the set of activities the recipient agreed to perform in the relevant grant documents as a condition of receiving Title X funds. A grant applicant may include both project and non-project 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.

Separation of Title X from abortion activities does not require separate recipients or even a separate health facility, but separate bookkeeping entries alone will not satisfy the spirit of the law. Mere technical allocation of funds, attributing federal dollars to non-abortion activities, is not a legally supportable avoidance of section 1008. Certain kinds of shared facilities are permissible, so long as it is possible to distinguish between the Title X supported activities and non-Title X abortion-related activities:

- a. a common waiting room is permissible, as long as the costs properly pro-rated;
- b. common staff is permissible, so long as salaries are properly allocated, and all abortion related activities of the staff members are performed in a program which is entirely separate from the Title X project;
- c. a hospital offering abortions for family planning purposes and also housing a Title X project is permissible, as long as the abortion activities are sufficiently separate from the Title X project; and
- d. maintenance of a single file system for abortion and family planning patients is permissible, so long as costs are properly allocated. (65 Fed. Reg. 41281, 41282 (July 3, 2000))

18. Can Title X recipients use Title X funds to fund speakers to present in opposition to the Supreme Court decision in *Dobbs v. Jackson Women's Health Organization*?

No, Title X recipients are prohibited from promoting or encouraging 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. Films that present only neutral, factual information about abortion are permissible. A Title X project may be a dues paying participant

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in a national abortion advocacy organization, so long as there are other legitimate program-related reasons for the affiliation (such as access to certain information or data useful to the Title X project). A Title X project may also discuss abortion as an available alternative when a family planning method fails in a discussion of relative risks of various methods of contraception. (65 Fed. Reg. 41281, 41282 (July 3, 2000))

19. How can Title X projects support clients with positive pregnancy tests and are experiencing early pregnancy symptoms such as bleeding, nausea and vomiting, or pain?

For clients experiencing early pregnancy symptoms before the client realizes they are pregnant, and/or immediately following a positive pregnancy test, Title X providers should assess the client and provide clinical care to address their immediate needs.

Subsequently, as detailed in 42 CFR § 59.5(a)(5), providers must offer pregnant clients the opportunity to be provided information and counseling regarding the following options: prenatal care and delivery; infant care, foster care, or adoption; and pregnancy termination. If requested to provide such information and counseling, providers must provide neutral, factual information and nondirective counseling on each of the options, and referral upon request, except with respect to any option(s) about which the pregnant client indicates they do not wish to receive such information and counseling.

Title X recipients are required to provide a broad range of acceptable and effective medically approved family planning methods (including natural family planning methods) and services (including pregnancy testing and counseling, assistance to achieve pregnancy, basic infertility services, sexually transmitted infection (STI) services, preconception health services, and adolescent-friendly health services). (42 CFR § 59.5(a)(1))

Title X recipients are required to provide services in a manner that ensures equitable and quality service delivery consistent with nationally recognized standards of care. (42 CFR § 59.5(a)(3))

In addition, Title X recipients are required to provide for medical services related to family planning (including consultation by a clinical services provider, examination, prescription and continuing supervision, laboratory examination, contraceptive supplies), in person or via telehealth, and necessary referral to other medical facilities when medically indicated, and provide for the effective usage of contraceptive devices and practices. (42 CFR § 59.5(b)(1))

Confidentiality Questions

20. What is Title X's requirement on maintaining client confidentiality?

As detailed in 42 CFR § 59.10(a), the Title X program requires that 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

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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 that does not identify particular individuals. Reasonable efforts to collect charges without jeopardizing client confidentiality must be made. Recipients must inform the client of any potential for disclosure of their confidential health information to policyholders where the policyholder is someone other than the client. (42 CFR § 59.10(a))

Exhibit B



DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Assistant Secretary for Health
Office of the Assistant Secretary for Health
Office of Population Affairs
Washington, D.C. 20201

June 29, 2022

Dear Title X Colleagues,

For more than 50 years, Title X family planning clinics have delivered a broad range of family planning and preventive health services for millions of low-income or uninsured individuals and others. In light of the Supreme Court's consequential decision in *Dobbs v. Jackson Women's Health Organization*, the U.S. Department of Health and Human Services (HHS) Office of Population Affairs (OPA) reaffirms its commitment to Title X, the nation's family planning program, and the imperative to support communities' access to equitable, affordable, client-centered quality family planning and related preventive health services.

OPA is keenly aware of the impact of the Court's decision and is intent on maintaining Title X as a safe haven for robust, quality, client-centered family planning services. **For example, all Title X recipients continue to operate under the federal requirements of the 2021 Title X rule, including the requirement to provide nondirective pregnancy options counseling in the event of a positive pregnancy test and client-requested referrals.** The full text of the 2021 Title X rule is available at <https://www.ecfr.gov/current/title-42/part-59/subpart-A>. A few of the Title X requirements especially relevant given this recent decision are highlighted below and include:

- Providing a broad range of acceptable and effective medically approved family planning methods (including natural family planning methods) and services (including pregnancy testing and counseling, assistance to achieve pregnancy, basic infertility services, sexually transmitted infection (STI) services, preconception health services, and adolescent-friendly health services). (42 CFR § 59.5(a)(1))
- Providing services in a manner that ensures equitable and quality service delivery consistent with nationally recognized standards of care. (42 CFR § 59.5(a)(3))
- Offering pregnant clients 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. If requested to provide such information and counseling, provide neutral, factual information and nondirective counseling on each of the options, and referral upon request, except with respect to any option(s) about which the pregnant client indicates they do not wish to receive such information and counseling. (42 CFR § 59.5(a)(5))
- Ensuring that 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. Information may otherwise be disclosed only in summary, statistical, or other form that does not identify the individual. Reasonable efforts to collect charges without jeopardizing client confidentiality must be made. Recipients must inform the client of any potential for disclosure of their confidential health information to policyholders where the policyholder is someone other than the client. (42 CFR § 59.10(a))

Prior to the Supreme Court decision, OPA had taken several meaningful actions to restore access to equitable, affordable, client-centered, quality family planning services, such as amending the Title X Family Planning regulations, awarding over \$260 million in grant funding for Title X service delivery, and playing a vital role in the HHS Intra-agency Task Force on Reproductive Healthcare Access. Looking toward the future, we are committed to helping you bolster your efforts to maintain and expand access to equitable, affordable, client-centered, quality family planning services. OPA's charge for the field is threefold:

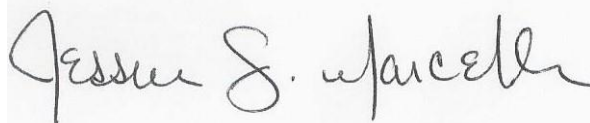
1. *Bolster access* - Including continuing to provide and/or expand mobile services, drive-thru services, and telehealth services; as well as thinking about how to expand access for additional subrecipients to join Title X networks by reducing burdensome paperwork and/or taking other steps to encourage new partners to join Title X networks.
2. *Advance equity* - Including engaging communities to ensure services are client-centered, using data to evaluate patterns in services provided, assessing clinic locations and hours, equity training for staff, and hiring staff specifically focused on equity work.
3. *Ensure quality* - Including updating clinical protocols, rethinking training, and providing ongoing support for clinical providers.

At OPA, we feel an immense responsibility to provide continued and timely support to assist you in providing access to equitable, affordable, client-centered, quality family planning services. To help you navigate this challenging time, OPA has prepared the attached list of Questions and Answers to provide additional guidance and clarity on the potential impact of the Supreme Court decision on the Title X program. We will continue to monitor how the Court's decision impacts the family planning field and will provide updated guidance and technical assistance as needed. We encourage you to continue openly communicating with your OPA project officer so that we can stay abreast of what is happening in your communities and states.

Your project officer is on stand-by to answer any questions you may have and to support you in any way we can. In addition, both the Reproductive Health National Training Center (RHNTC) and the National Clinical Training Center for Family Planning (NCTCFP) are available to provide Title X recipients with a wide range of intensive and individualized technical assistance (TA) tailored specifically to meet your needs. Please reach out directly to your RHNTC grantee liaison via email or through <https://rhntc.org/contact-us>, and reach out to the NCTCFP at ctcfp-cahs@umkc.edu to begin discussing how these two OPA-funded training centers can help you.

Thank you for your commitment to serving your communities. We are grateful to have you as a part of the Title X network.

Sincerely,



Jessica Swafford Marcella, M.P.A.
Deputy Assistant Secretary for Health and Director,
Office of Adolescent Health
Office of Population Affairs

Exhibit C



DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Office of the Assistant Secretary for Health
Office of Population Affairs
Washington, D.C. 20201

January 25, 2023

Joyce Marshall
Director, Maternal & Child Health Services
Grant #FPHPA006507
Oklahoma State Department of Health (OSDH)
Family Planning Services Project
123 Robert S. Kerr Avenue
Oklahoma City, OK 73102-6406

Dear Ms. Marshall,

On November 9, 2022, the Office of Population Affairs (OPA) sent a letter stating that the proposal submitted by the Oklahoma State Department of Health (OSDH) on August 29, 2022, to change its policy and procedure for providing nondirective options counseling within its Title X project was not in compliance with the Title X regulatory requirements set out in 42 CFR § 59.5(a)(5)(ii) and, therefore, could not be approved. OSDH was instructed to provide written assurance by November 28, 2022, to OPA stating that the project is in compliance with the Title X nondirective options counseling requirement at 42 CFR § 59.5(a)(5)(ii). On November 22, 2022, OSDH submitted to OPA a request for reconsideration/appeal of OPA's denial of OSDH's request to change its policy and procedure for providing nondirective options counseling within its Title X project.

OPA has reviewed your request for reconsideration/appeal and reiterates that the changes proposed to your policy and procedure for providing nondirective options counseling within your Title X project are not in compliance with the Title X regulatory requirements and, therefore, cannot be approved. Specifically, your proposal to provide clients seeking options counseling with a link to the HHS OPA website is not compliant with the 2021 Title X implementing regulations at 42 CFR § 59.5(a)(5)(ii).

You have 10 calendar days to provide written assurance to OPA as a Grant Note in GrantSolutions, stating that you are complying with the Title X nondirective options counseling requirement at 42 CFR § 59.5(a)(5)(ii), by continuing to follow the OSDH "Current Policy and Procedure" related to "Pregnancy Diagnosis and Counseling," as set out in the proposal you submitted on August 29, 2022. Your failure to provide the requested assurance and supporting documentation, and to show that you are in compliance with the 2021 Title X regulatory requirements at 42 CFR § 59.5(a)(5)(ii), will constitute material noncompliance with the terms and conditions of your award. You must also provide OPA with the OSDH current policy and procedure related to referrals as requested in OPA's November 9, 2022, letter.

As another option, you may submit an alternate compliance proposal **by February 6, 2023**. Examples of compliance with 42 CFR § 59.5(a)(5)(ii) include:

- Providing nondirective options counseling on-site by Title X providers on (A) prenatal care and delivery; (B) infant care, foster care, or adoption; and (C) pregnancy termination, and referral upon request, except with respect to any option(s) about which the pregnant client indicates they do not wish to receive such information and counseling;
- Providing nondirective options counseling, using a telehealth partnership with another entity, on (A) prenatal care and delivery; (B) infant care, foster care, or adoption; and (C) pregnancy termination, and referral upon request, except with respect to any option(s) about which the pregnant client indicates they do not wish to receive such information and counseling ; or

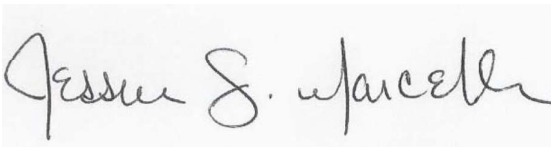
- Providing clients with a referral to another entity (e.g., All-Options Talkline) that provides nondirective options counseling on (A) prenatal care and delivery; (B) infant care, foster care, or adoption; and (C) pregnancy termination, and referral upon request, except with respect to any option(s) about which the pregnant client indicates they do not wish to receive such information and counseling.

Please be aware that if you do not provide a response demonstrating compliance by February 6, 2023, you will be considered out of compliance with the regulatory requirements of your grant. In that case, your current award can be suspended or terminated pursuant to 45 CFR § 75.372(a)(1) for material noncompliance with the terms and conditions of the award. A termination under this section must be reported to the Office of Management and Budget-designated integrity and performance system, currently the Federal Awardee Performance and Integrity Information System. See 45 CFR § 75.372(b). Inclusion in FAPIIS may affect your ability to obtain future Federal funding.

Alternatively, you may voluntarily relinquish the grant if you so choose. Please contact your GAM Grants Management Specialist, Jessica Shields, for more information on relinquishment. A decision to relinquish your award is not reported to FAPIIS.

OPA will assist you with these concerns with the intent of ensuring compliance with the 2021 Title X implementing regulations. If you have questions, please contact your OPA Project Officer, Cynda Hall.

Very respectfully,



Jessica Swafford Marcella
Deputy Assistant Secretary for Population Affairs
U.S. Department of Health and Human Services
Office of the Assistant Secretary for Health
Office of Population Affairs



Scott J. Moore -S
2023.01.25
16:59:50 -05'00'
Scott Moore
Chief Grants Management Officer
U.S. Department of Health and Human Services
Office of the Assistant Secretary for Health
Grants and Acquisitions Management

Exhibit D



DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Office of the Assistant Secretary for Health
Office of Population Affairs
Washington, D.C. 20201

January 25, 2023

To all Title X Services Grantee Project Directors:

The Office of Population Affairs (OPA) is conducting a review of all Title X service grants to ensure compliance with the requirements for nondirective options counseling and referral, as stated in the 2021 Title X implementing regulations at 42 CFR § 59.5(a)(5).

In the past, OPA has exercised enforcement discretion in appropriate circumstances. OPA does not intend to bring enforcement actions against Title X recipients that are making, and continue to make, good-faith efforts to comply with the 2021 Final Rule. OPA is committed to working with grantees to assist them in coming into compliance with the requirements of the 2021 Final Rule.

As part of those good-faith efforts to demonstrate compliance with the requirements for nondirective options counseling and referral set out in the 2021 Title X implementing regulations at 42 CFR § 59.5(a)(5), all Title X services grantees must submit:

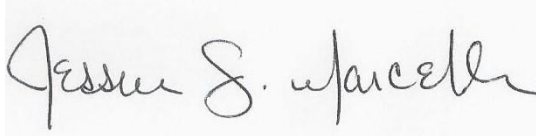
- A copy of the grantee's current policy(ies) and any other supporting documentation (e.g., procedures, subrecipient contract language) for providing nondirective options counseling and referrals within its Title X project. The policy(ies) and supporting documentation must be submitted as a Grant Note in GrantSolutions. If there are any questions or concerns about a grantee's policy(ies) and any other supporting documentation, the OPA project officer will notify the grantee within 2 weeks.
- A written statement, signed by the Project Director and Authorized Official, stating that the grant project is in compliance with the 2021 Title X Final Rule, including the requirements for providing nondirective options counseling and referrals within its Title X project, as required by the 2021 Title X implementing regulations at 42 CFR § 59.5(a)(5). The written statement must be submitted as a Grant Note in GrantSolutions.

You have until February 6, 2023, to provide the information outlined above to OPA as a Grant Note in GrantSolutions.

Your failure to provide the requested information and to show that you are in compliance with the 2021 Title X regulatory requirements at 42 CFR § 59.5(a)(5), may result in a determination that you are in material noncompliance with the terms and conditions of your award. If you are found to be out of compliance with the regulatory requirements of your grant, your award can be placed on cash restriction or can be suspended or terminated pursuant to 45 CFR § 75.372(a)(1). You also have the option to voluntarily relinquish your grant if you so choose.

If you have questions, please contact your OPA Project Officer or your GAM Grants Management Specialist.

Very respectfully,

A handwritten signature in black ink that reads "Jessica S. Marcella". The signature is written in a cursive style with a large initial 'J' and 'M'.

Jessica Swafford Marcella
Deputy Assistant Secretary for Population Affairs
U.S. Department of Health and Human Services
Office of the Assistant Secretary for Health
Office of Population Affairs

Scott Moore
Chief Grants Management Officer
U.S. Department of Health and Human Services
Office of the Assistant Secretary for Health
Grants and Acquisitions Management