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October 5, 2016

Submitted Electronically

Susan B. Moskosky, MS, WHNP-BC
Office of Population Affairs
Department of Health and Human Services
200 Independence Avenue SW
Suite 716G
Washington, DC 20201

Re: Compliance with Title X Requirements by Project Recipients in Selecting Subrecipients, RIN 937-AA04

Dear Ms. Moskosky:

On behalf of the United States Conference of Catholic Bishops, we respectfully submit the following comments on the above-captioned Notice of Proposed Rulemaking by the Department of Health and Human Services. 81 Fed. Reg. 61639 (Sept. 7, 2016).

HHS proposes to add the following single sentence to 42 C.F.R. § 59.3:

> No recipient making subawards for the provision of services as part of its Title X project may prohibit an entity from participating for reasons unrelated to its ability to provide services effectively.

The stated purpose of this proposed addition is to prevent states from excluding providers such as Planned Parenthood from subawards based on state criteria, such as a requirement that subrecipients provide comprehensive primary and preventive care in addition to family planning services. 81 Fed. Reg. at 61641; *see Planned Parenthood v. Moser*, 747 F.3d 814 (10th Cir. 2014) (upholding such a requirement).

We raise three points.

First, we believe states should retain the discretion to determine which subrecipients are best suited to provide family planning services. HHS's stated objective in *preventing* states from ensuring the seamless delivery of comprehensive care, in particular, places the Department in a self-contradictory position. Earlier this year in the Nation's highest court, HHS touted the seamless coverage of health services *as a virtue*. Indeed, the Department argued that seamlessness is a government interest of the highest order, sufficient to outweigh constitutionally and statutorily protected religious objections. Brief for Respondents at 53-72, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191). HHS continues to assert the interest in seamless coverage as a basis for further rulemaking. 81 Fed. Reg. 47741, 47742 (July 22, 2016) (requesting information on how HHS can accommodate religious objectors while "ensuring that the affected women seamlessly receive full and equal health coverage, including contraceptive coverage").

In the present NPRM, however, HHS takes the opposite position, namely, that the seamless provision of services is *a vice*, an ill to be avoided. The present NPRM would ensure that the provision of care is fragmented, rather than seamless, because it would undermine state requirements that subrecipients provide primary and preventive care in addition to family planning.

HHS cannot have it both ways. If seamlessness in the coverage and delivery of health services is a compelling interest, as the Department has asserted in rulemaking and court filings, it cannot be an evil to be avoided in the present context (both rulemaking proposals, of course, involve contraceptives, which makes the contradiction even more apparent and puzzling). Adoption of the proposed change in Section 59.3, which would prevent seamlessness in the delivery of services, would send a clear signal to the public (and the courts) that seamlessness is not at all the compelling interest that HHS claims it is. In any event, seamlessness cannot at one and the same time be a government interest of the highest order when it disadvantages religious organizations, but an affirmative ill to be avoided when it disadvantages Planned Parenthood.

Second, states may have other reasonable and persuasive grounds for disqualifying entities from subawards that go beyond the ability of such entities to "provide services effectively." 81 Fed. Reg. at 61646. For example, a subaward applicant may have been involved in fraudulent practices, or the applicant or its stakeholders may even have committed a crime, bearing on the applicant's fitness and suitability for a subaward. Indeed, the requirements for federal awards and subawards in general are typically accompanied by all sorts of standards, many of which are imposed by the federal government itself, and those standards often have little or nothing to do with the ability to provide services effectively (governmental guidelines are replete with such requirements). States may also have widely differing standards for subawardees based on the states' own policy judgment. For all of these reasons, it should be permissible for states to decline to make a subaward when the subawardee does not meet applicable criteria, whether federal or state, even if the entity is, strictly speaking, able to "provide services effectively." Those criteria, of course, themselves remain subject to applicable federal and state law.

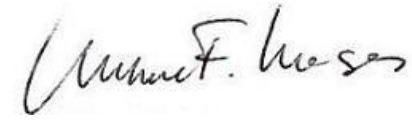
Third and relatedly, it is not entirely clear what the phrase "provide services effectively" actually means. The single sentence that HHS proposes adding to Section 59.3 offers no guidance whatsoever as to what criteria states are to consider in making such a determination.

For each of these reasons, we believe that the proposed change in Section 59.3 is ill advised and should not be adopted.

Thank you for your careful consideration of these comments.

Respectfully submitted,

Anthony R. Picarello, Jr.
Associate General Secretary &
General Counsel



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