CPPP CENTER for PUBLIC POLICY PRIORITIES
WORKING FOR A BETTER TEXAS™

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Imelda M. Garcia,
Department of State Health Services
Division of Family and Community Health Services
Community Health Services Section
Mail Code 1923
P.O. Box 149347
Austin, Texas 78714-9347

Via email to CHSS@dshs.state.tx.us

RE: Proposed Rules, Chapter 39, Subchapter B. Texas Women's Health Program

Dear Ms. Garcia:

We appreciate to the opportunity to offer comments on the proposed rules to transition the Texas Medicaid Women's Health Program (WHP) to the Texas Women's Health Program (TWHP). We fear that the proposed rules create a program that is not viable because few providers will be able or willing to participate, harming the health and economic security of low-income women in Texas. We recommend that DSHS delay further consideration of these rules while current WHP rules and the federal denial of Texas' WHP waiver are being challenged in court.

The Center for Public Policies is a nonpartisan, nonprofit 501(c)(3) policy institute established in 1985 and committed to improving public policies to better the economic and social conditions of low- and moderate-income Texans. Improving access to health care for Texans has been at the core of our mission and activities since our founding.

The center has strongly supported the Medicaid Women's Health Program, which provides essential well-woman services including Pap smears, breast exams, and birth control to low-income women. It saves the state over $40 million annually in the cost of unplanned births, and, by reducing unplanned pregnancies, it reduces abortions. WHP accomplishes all of these important goals in the most cost-effective manner for the state—as part of Medicaid, a federal-state partnership. For every dollar the state spends in the program, the federal government provides nine more.

Federal funding in WHP was forfeited when Texas adopted existing program rules designed solely to exclude Planned Parenthood. These rules conflict with federal Medicaid law by denying women freedom of choice to select their own health care providers, and are currently being challenged in court.

We have serious concerns about the proposed rules to transition WHP to the GR-funded Texas Women's Health Program. As proposed in these rules, TWHP cannot accomplish the same goals as WHP and may cease to be a viable program all together. The onerous restrictions on provider qualifications described in

detail below will dramatically reduce the number of providers who will participate in TWHP, leaving eligible women without access to check-ups, family planning, and contraception. Access to birth control is central to maintaining the health of women and children and ensuring economic opportunity for families. Women need birth control to reduce high and growing rates of pre-term births, births too close together causing medical risks for the newborn and mother, and births to unmarried teen moms. Birth control to plan the timing and size of families is also critical to ensuring Texas families can escape poverty and join the middle class. With more than half of all Texas births unplanned, our state should be expanding, not restricting, access to birth control.

Loss of access to family planning through TWHP will have the ripple effects of increasing unintended pregnancies, increasing costs to the state for Medicaid, and increasing abortions. The Guttmacher Institute reports that among low-income women, over 40 percent of unintended pregnancies end in abortion. If the goal is to reduce abortions, reducing unintended pregnancies is the key, which requires accessible providers willing to provide family planning services.

Through TWHP, Texas also loses the generous 90-10 federal match for family planning available to the Medicaid Women's Health Program. Moving to a fully GR-funded family planning program is bad fiscal policy. We will leave millions of available federal dollars on the table and instead use scarce GR. The GR HHSC has identified for TWHP comes from savings identified within its existing budget. If not redirected to TWHP, these savings would reduce the need for supplemental appropriation for HHSC in the current biennium that legislators will be faced with when they return in January.

We recommend that the state postpone pursuing these proposed rules while the courts decide its authority to exclude affiliates of abortion providers under the existing WHP rules. If it wins its case, then it can implement its rule excluding Planned Parenthood without jeopardizing federal funding. If it loses its case, then the legislature can decide whether it wishes to continue WHP as part of Medicaid or transition to a GR-funded TWHP.

If you chose to move forward with these rules, we request that you schedule a public hearing to examine the sweeping changes in these rules and serious concerns raised by us and others that these rules place the TWHP provider participation and client access in serious jeopardy. In particular, we ask that DSHS and/or HHSC staff testify at the hearing on some of the impacts of the proposed rules that are not addressed in the rule packet, including:

- the impact of the proposed rule on access to family planning providers and services for low-income women compared to historical access in WHP;
- identifying any areas of the state where access to publicly funded family planning may no longer exist considering DSHS family planning cuts and the proposed TWHP rule; and
- the projected increase in the number of unintended pregnancies due to a reduction in participating providers and an increase in wait times for appointments under the proposed rule along with the resulting increases in costs to the state and number of abortions.

We offer the following specific recommendations on the rules:

Fiscal Note.

The fiscal note section of the preamble is based on the assumption that women getting services through the proposed TWHP will transition to Medicaid in 2014. However, based on Governor Perry's announcement that Texas would not pursue the optional Medicaid expansion for adults up to 133 percent of the federal poverty level starting in 2014, this does not appear to be a reasonable assumption. The fiscal note should show the GR cost for the full five-year window.

§39.31(c) Objectives.

We recommend that DSHS add a program objective that clearly establishes the intent for TWHP to provide continued access to vital preventive health care, contraceptives, and screenings, as is referenced in the preamble.

§39.38 Health Care Providers.

As noted above, the onerous restrictions on provider qualifications in this section will dramatically reduce the number of providers who will participate in TWHP, leaving eligible women without access to check-ups, family planning, and contraception. This will result in an increase in unintended pregnancies, abortion, and Medicaid costs for the state.

Restrictions on activities outside of WHP.

We are very concerned about language in §39.38(b)(1), which requires that a TWHP "provider does not perform or promote elective abortion outside the scope of the TWHP…" [emphasis added].

When you read §39.38(b)(1) together with §39.38(c), which seeks to define "promote," it appears if a provider that provides non-directive counseling and referral on abortion outside of TWHP is disqualified from participation in TWHP. This gag rule would prevent providers from both participating in TWHP and practicing in accordance with the standard of care and medical ethics, which call for providers to give complete and objective counseling on all options and appropriate follow-up and referrals. Providing non-directive counseling and referral is required of clinics that receive federal Title X family planning funding—clinics that would perform much or even most of the services in TWHP.

The two sections mentioned above seem to conflict; subsection (c) focuses on activities that occur within TWHP, but the definition applies to subsection (b), which also considers activities outside of TWHP. We hope this is an incoherent rule that does not intend for physicians to violate medical ethics as opposed to an intentional gag rule, but we fear the effect of either may be the same. If providers are not certain they can practice in line with standards of care and medical ethics, they may be unwilling to participate, leaving women without access to needed care. We urge DSHS to clarify that TWHP providers can give non-directive counseling on all pregnancy options and needed referrals to their clients.

We think the best solution would be removing §39.38(b)(1) all together. Short of that, DSHS should update the language to match the current WHP practice, which excludes providers who perform elective abortion.

Affiliation restrictions

We also have serious concerns about the second half of §39.38(b)(1), which disqualifies providers that affiliate with entities that perform or promote abortion, the definition of affiliate in §39.33, and further restrictions on affiliates that perform abortions in §39.38(b)(2)(B) and (C) and §39.38(c)(4). Each of these provisions appears aimed at preventing Planned Parenthood from participating in the program. Our concerns are two-fold: (1) disqualifying Planned Parenthood as a provider will greatly diminish access to family planning services for low-income women leading to more unintended pregnancies and abortions, and (2) the rules may disqualify other providers as well, further exacerbating access issues.

Planned Parenthood provides more than 40 percent of all services in the Women's Health Program. It does so through clinics that do not provide abortion and comply with strict, court-approved DSHS rules that prevent funds from flowing from family planning clinics to affiliates that perform abortion.

TWHP simply will not be able to serve as many low-income women in Texas without Planned Parenthood. Building new capacity to serve TWHP clients formerly served by Planned Parenthood would take both time (during which women would suffer) and money (which is in short supply).

Access through the network of non-Planned Parenthood, safety net family planning providers that clients will look to for assistance has been severely curtailed due to the legislature's drastic DSHS family planning cuts. The legislature reduced DSHS family planning funding by two-thirds, ending access for 150,000 low-income Texans. These recent cuts make it particularly hard for other providers to meet the needs of women now served by Planned Parenthood. Many family planning providers have already been forced to reduce services and staff, increasing wait times to serve their existing clients. The *Texas Tribune* reports that more than 15 family planning clinics have closed entirely. On top of the loss of access through publicly funded family planning clinics in Texas, HHSC reports that even with its aggressive outreach, only about 80 percent of WHP providers have re-certified under the existing rules.

The affiliation restrictions in this rule may also limit participation by non-Planned Parenthood providers, further exacerbating access issues. It is not clear if physicians in a group practice can participate in TWHP if they do not perform or promote abortion, but another doctor in the practice does. It is also not clear whether physicians that affiliate with hospitals or surgical centers where abortions are performed can participate. Finally, these rules may limit participation by hospitals and surgical centers at which abortions outside of TWHP are performed. Without facility providers, women in TWHP would be unable to access tubal ligations and possibly other covered services.

Rather than the affiliation provisions in the proposed rule which will limit access to vital service, we recommend that DSHS use its existing rules that govern affiliate relationships approved under Planned Parenthood of Houston and Southeast Texas v. Sanchez.

§39.38(c) Defining "promote."

As noted above, we have serious concerns that "promote" as defined by these rules will make many providers hesitant or unwilling to participate in TWHP. Although §39.38(c)(1)-(3) prohibit "promotion" through counseling and referral on abortion specifically to TWHP clients, §39.38(b)(1) also prohibits "promotion" to clients outside of TWHP for services not reimbursed through TWHP.

We are also concerned about the use of the phrase "includes, but is not necessarily limited to:," in the definition of promote. This vague language would allow a provider to be accused of "promoting" abortion

even if not doing any of the four things listed in the rule. This introduces additional uncertainty that would likely further reduce provider participation. We recommend that the phrase be removed.

If the intent of subsection (c) is to ensure that no TWHP funding is used to counsel or refer a TWHP client on abortion, it is not necessary. Women are not eligible for TWHP once they become pregnant and counseling on abortion is not a covered service in TWHP. Eligibility rules in §39.34(a)(2), non-covered services in §39.40(1), and existing billing procedures in WHP ensure that TWHP will not pay for counseling or referral for abortion.

Subsection (c) dramatically expands what can be considered "promoting" abortion beyond current WHP rule. The existing rule (Title 1, TAC §354.1362(6)) defines promote as, "advocates or popularizes by, for example, advertising or publicity." The proposed rule inappropriately expands promotion well beyond the realm of advocacy to include clinical interactions including non-directive counseling and referral in (c)(1)-(3).

As DSHS is aware, federal law requires an entity that receives family planning grant money under 42 U.S.C. chapter 6A (Title X) and the accompanying rules to provide to a pregnant client, upon request, neutral, factual information and nondirective counseling on all available options. It appears as if Title X providers would not be able to participate in TWHP under the proposed rules, which would dramatically reduce access for TWHP clients.

Medical ethics and standards of practice also require providers to give non-directive counseling on options and referrals on abortion if requested. It is possible that many providers will look at the restrictions on subsection (c) and feel uncomfortable participating in TWHP, reducing access to vital services for women.

We recommend that DSHS delete subsection (c), and if necessary, define promote as is done currently in WHP. In addition, DSHS should clarify in rule that counseling and referral on abortion and other clinical communications between patients and providers are not considered promotion.

The center supports access to preventive care, family planning, and contraceptives for low-income women. Family planning and birth control are central to maintaining the health of women and children and allowing women to plan the timing and size of their families, a critical step to help families escape poverty and join the middle class. We strongly oppose the TWHP rules as proposed because they will dramatically reduce access to vital family planning services for low-income Texas women and increase unintended pregnancies. We urge DSHS to delay further consideration of these rules until courts rule on Texas' authority to exclude affiliates of abortion providers under the existing WHP rules.

Thank you again for the opportunity to provide comments.

Sincerely,

Stacey Pogue
Senior Policy Analyst
Center for Public Policy Priorities

For More Information

For more information or to request an interview, please contact Brian Stephens at stephens@cppp.org or 512.320.0222, ext. 112.

About the Center

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