

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

<p>STATE OF NEW YORK, <i>et al.</i>,</p> <p style="text-align: center;">Plaintiffs,</p> <p>v.</p> <p>U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, <i>et al.</i>,</p> <p style="text-align: center;">Defendants.</p>
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No. 1:19-cv-04676-PAE (rel. 1:19-cv-05433-PAE; 1:19-cv-05435-PAE)

SECOND DECLARATION OF LISA DAVID

I, Lisa David, declare and states as follows:

1. I am the President and Chief Executive Officer at Public Health Solutions (“PHS”), a Plaintiff in this action. On June 17, 2019, I submitted a declaration (“First Declaration of Lisa David” or “First David Decl.”), *see* Doc. 27-5, in support of Plaintiffs’ motion for a preliminary injunction barring enforcement of the Department of Health and Human Services regulation entitled: Protecting Statutory Conscience Rights in Health Care, 84 Fed. Reg. 23,170 (May 21, 2019) (to be codified at 45 C.F.R. pt. 88) (the “Health Care Refusal Rule” or the “Rule”).

2. Due to recent changes in the Title X program, I submit this second declaration in support of Plaintiffs’ motion for a preliminary injunction barring enforcement of the Rule, and also in support of Plaintiffs’ motion for summary judgment.

3. I incorporate by reference my background and experience as set forth in my original declaration. *See* First David Decl. ¶¶ 1–6.

PHS WITHDRAWAL FROM THE TITLE X PROGRAM

4. Earlier this year, the Department of Health and Human Services finalized a new rule that makes fundamental changes to the Title X program, including “remov[ing] the requirement for nondirective abortion counseling and referral” and “prohibit[ing] referral for abortion.” *See* 84 Fed. Reg. 7,714 (Mar. 4, 2019).

5. Because the new rule interferes with the trusted patient-provider relationship and with our ability to provide the same level of care to low-income New Yorkers that higher-income patients receive from their health care providers, *see, e.g.*, First David Decl. ¶¶ 24, 27, PHS advised the Department of Health and Human Services’ Office of Population Affairs of our voluntary relinquishment of Title X funds on August 19, 2019. As a Title X grantee for the past 36 years, this was an extremely difficult decision but one we felt compelled to make. We determined that we could not commit to complying with the new rule, as it would be a violation of PHS’s fundamental medical ethics to withhold information from clients about all their reproductive health options. Health care providers should not be gagged when counseling pregnant patients about all of their safe, legal options. Our Board of Directors also recognized that the rule would render us unable to provide comprehensive, quality family planning services for low-income New Yorkers who need them the most. As a result, we withdrew from the Title X program because we are unwilling to compromise that care by replacing our services with inadequate and incomplete health care. We received contingency funding through an appropriation in the state budget to protect access to care that will enable us to continue to operate our two sexual and reproductive health centers in Brooklyn.

**THE IMPACT OF THE HEALTH CARE REFUSAL RULE ON
PHS AND OUR PATIENTS**

6. Notwithstanding the withdrawal from Title X, because we would still be subject

to the Health Care Refusal Rule by virtue of our receipt of other federal funds, including through the Public Health Services Act, the concerns, burdens, and significant harms the Rule poses to PHS and our patients remain. *Id.* ¶¶ 10–14, 18–23, 53.

7. For example, as I explained in my first declaration, in addition to the services we provide at our sexual and reproductive health centers, we are very concerned about the impact of the Health Care Refusal Rule on the Healthy Start Program. *See id.* ¶ 11. Through the Healthy Start Program, pregnant people and children up to age two are referred for services to strengthen family resilience. PHS is the lead agency in New York City for the Healthy Start Program, and we recently received a five-year grant for the program.

8. The Health Care Refusal Rule would have a devastating impact on the Healthy Start Program, in particular, because the providers are visiting clients in their homes. *See id.* ¶¶ 31–38. Providers counsel clients on family planning options, which include carrying the pregnancy to term and raising a child, carrying the pregnancy to term and placing the baby for adoption, or abortion. If a provider were willing to discuss the pregnancy options that involve carrying a pregnancy to term, but not abortion with a client, we cannot simply transfer the client to another provider, because there is only one provider in the client’s home. Additionally, assuming we learned of the provider’s objections, assigning the client to a new provider who is willing to provide full options counseling would undermine the efficacy of the program, which is intended to create continuity in health care providers for patients who otherwise endure multiple clinical transitions from their pregnancies, to giving birth, to postpartum and pediatric care.

9. Importantly, transferring the patient to a different provider stigmatizes abortion, and sends a message to the client that the provider is making a judgment about abortion and

will not even discuss it. *See id.* ¶ 39. Sending such a message to our patients is unacceptable, as it is contrary to PHS’s non-judgmental approach. If, after a home-visit, a client is left without access to abortion and feels judged by the provider, it will disrupt the candor in the relationship. This could lead clients to withdraw from the program, causing negative health outcomes for the clients and their families. Further, such clients are unlikely to refer others to the Healthy Start Program, and many of our clients learn about us through such referrals.

10. Additionally, we cannot transfer a client to another provider if we are not aware of providers’ objections. In the Healthy Start Program, where providers are visiting clients in their homes—outside the clinical setting and away from other PHS staff—it is particularly challenging to ascertain whether and when providers are objecting to offering care to clients. *See id.* ¶¶ 31–33. Under the Health Care Refusal Rule, PHS may not even know when a staff member is withholding information or services from our clients, meaning we cannot transfer clients to another provider even if it were feasible to do so. This means clients are at risk of missing out on those critical resources, and PHS is at risk of violating our ethical and legal obligations. *See id.* ¶¶ 40–41.

11. I understand the Rule has suggested that providers simply “double staff” positions to attempt to mitigate these harms and ensure that patients continue to receive care, but that’s not how federal grant programs work. We do not have the funding to hire any additional staff, and our grant programs are very restrictive in how the funding can be used. *See id.* ¶ 37.

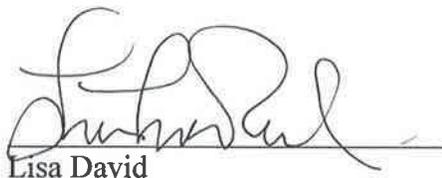
12. Moreover, we are always hiring for positions in the Healthy Start Program. For example, in my first declaration, I explained that we were hiring for a nurse and how the Rule would interfere with our ability to assess candidates. *See id.* ¶ 31. Now, PHS has an open position for a Family Support Coordinator in the Healthy Start Program. A primary role for

that position is to assist individuals in accessing health care, including family planning services. Under the Health Care Refusal Rule, we would be unable to ask job applicants if they are willing to provide information about and referrals for abortion, for example, to patients who request it without “persuasive justification,” but the Rule provides no guidance on what that means. And, if anything, the Rule strongly suggests employers cannot use these questions to determine whether the applicant is the right fit for a certain job, based on the job requirements. As such, unless we want to jeopardize all our federal funding, we could not evaluate whether applicants are comfortable with providing all services required as part of our home-visiting model. Changes to our hiring process would cause delays in filling the role, and, more importantly, PHS will not know if we have hired a candidate who would not help a client needing non-directive pregnancy options counseling or family planning services. *See id.* ¶¶ 27–31.

13. Finally, as I have already explained, the Rule drastically underestimates the costs of compliance, *see, e.g., id.* ¶¶ 44–49, particularly in light of how vague some of these requirements actually are, *see, e.g., id.* ¶¶ 35, 54. And, as I have also already explained, the ramifications of alleged violations of the Rule are particularly severe for an organization such as ours that relies on multiple different federal funding streams to provide care, as well as for our patients should we lose that funding and be unable to provide services to them. *See, e.g., id.* ¶¶ 43, 52, 54.

14. Thus, for all these reasons and the ones I set forth in my first declaration, the Health Care Refusal Rule would inflict serious and irreparable harm on PHS and our patients if the Rule is not blocked.

I declare under penalty of perjury that the foregoing is true and correct. This declaration was executed on September 4, 2019, in New York, New York.



Lisa David