

## Trump Administration Rules Prioritize Refusal of Care and Conservative Ideology Over Protecting Patients Against Discrimination

By Adam Sonfield

Two major regulatory actions taken by the Trump administration in May 2019 highlight different facets of the same agenda. First, the Department of Health and Human Services (HHS) issued its final version of a refusal-of-care rule that broadly interprets long-standing federal laws to maximize social conservatives' ability to exploit them. With this new tool at their disposal, religiously affiliated health care institutions have increased power to impose their values and agenda on society at the expense of patients' health and rights.

Later that same month, HHS issued a proposed rule that narrowly interprets a nondiscrimination protection in the Affordable Care Act (ACA)—a provision known as the Health Care Rights Law—in service of that same socially conservative agenda. Under the guise of protecting health care providers' religious rights, the agency is attempting to roll back the rights of LGBTQ patients, patients seeking abortion and other reproductive health services, and many other patients.

The contrast between the Trump administration's approaches to these two rules is stark. In its refusal-of-care rule, the administration takes every opportunity to expand the reach and enforcement of federal law in support of health care providers' refusal rights, which it treats as inviolable. In its proposed changes to the rules governing the Health Care Rights Law, the administration does the opposite: It narrows key definitions and enforcement powers in order to downplay the importance of nondiscrimination protections and

### HIGHLIGHTS

- *In a pair of new rules, the Trump administration has expanded the right of providers and institutions to refuse to offer health care and information, while limiting nondiscrimination protections for LGBTQ patients and patients seeking reproductive health care.*
- *The rules are designed to allow social conservatives to both ignore a law enacted by Congress and undermine it for the entire country, effectively converting a legal prohibition on discrimination into a protection that only exists at the will of health care institutions and professionals.*
- *Taken together, the rules show how the administration is seeking to impose its brand of religious values on the entire country, undermining legal requirements to which social conservatives have long objected.*

instead prioritizes other concerns, such as health care providers' religious rights and financial bottom line.

Taken together, these moves demonstrate a dangerous logic that stretches refusal rights so far that they effectively become a way for social conservatives to veto public policies they have failed to stop in Congress and the states. In service of its ideology, the administration is attempting to shift the societal default from one where obeying nondiscrimination laws is required and expected to one where each health care provider must "opt in" to abide by them.

### Expanding Refusal-of-Care Rights

The new refusal-of-care rule builds on a series of federal laws, some dating back to the 1970s,

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that were designed to allow doctors, nurses and hospitals to opt out of providing abortion care, and, in some cases, other procedures such as sterilization. Over the ensuing decades, social conservatives have attempted to expand the scope of these laws in court and to enact more expansive laws in Congress and state legislatures. They have tried to ensure that any health care institution or person in the health care field can refuse to take any action they find objectionable, regardless of the consequences for patients' health, rights or dignity.

The Trump administration's refusal rule is designed to advance this longtime agenda. It broadly defines key terms in about two dozen federal laws in ways that greatly expand their scope, just as social conservatives have demanded.<sup>1</sup> At the same time, the rule grants the HHS Office of Civil Rights and its new Conscience and Religious Freedom Division sweeping enforcement powers to impose this extreme interpretation of federal refusal laws on health care institutions, state and local governments, foreign governments and international agencies.

The full consequences of the refusal-of-care rule are not yet known, because the Trump administration and its allies could use it in numerous ways.<sup>2</sup> For example:

- Employers might be empowered to deny employees and their dependents coverage for abortion and contraceptive care, because the rule counts "plan sponsors" as health care entities with certain refusal rights;
- Health care providers might deny patients the information they need to provide informed consent about all of their medical options, because of the rule's expansive definitions of terms like "assist" and "refer" and because HHS essentially argues that providers are under no obligation to inform patients about options they do not offer;
- Hospitals and individual health care providers might delay or deny emergency care related to abortion, ectopic pregnancy and miscarriage, because the rule points to lawsuits involving such denials as potential violations of federal refusal laws;

- Pharmacists and pharmacies might refuse to fill prescriptions that they see as related to contraception or abortion, even when required by state law, because the rule explicitly adds them to its definition of health care entities;
- Organizations and individuals might claim the right to ignore federal, state and local policies that bar discrimination against patients on the basis of gender identity, sexual orientation and other characteristics, because the rule contains no clear exceptions for those policies;
- Foreign governments, foreign nongovernmental organizations and intergovernmental organizations such as the United Nations that receive HHS-administered funding might be forced to grant refusal rights to health care workers, possibly in conflict with other countries' own laws, because those foreign and international agencies are explicitly included in the rule's definitions.

In short, the Trump administration has provided potent new tools for already powerful health care, educational and social services institutions to impose their values and agenda on society.<sup>3</sup> Yet, the administration will not have the last word on this subject. As of mid-September, eight cases had been filed in four federal courts challenging the new rule, and enforcement of the rule had been delayed until November 2019.<sup>4,5</sup> Also, in June, the U.S. House of Representatives passed an appropriations bill containing language that would block HHS from implementing the refusal-of-care rule;<sup>6</sup> unfortunately, President Trump has threatened to veto it, so it is unlikely to be included in the final law.<sup>7</sup>

### **Narrowing Nondiscrimination Protections**

The nondiscrimination provision commonly referred to as the Health Care Rights Law (Section 1557 of the ACA) was enacted in March 2010.<sup>8</sup> It protects people against discrimination on the basis of race, color, national origin, sex, age and disability, and applies to health programs that receive federal financial assistance (including grant programs and reimbursement by Medicaid or Medicare), that are administered by a federal executive agency, or that are administered by entities established under the ACA, such as federal and state health insurance marketplaces.

The provision itself took effect immediately upon the ACA's enactment in 2010 and the Obama administration issued a final rule in 2016 to help interpret and enforce it.<sup>9,10</sup> The rule defined key terms in line with earlier court decisions: for example, making it clear that sex discrimination includes discrimination on the basis of gender identity, sex stereotyping, pregnancy, abortion and childbirth, and that discrimination on the basis of national origin includes discrimination on the basis of limited English proficiency. The rule also clarified which health care providers and insurance plans are subject to the provision, explicitly barred discriminatory marketing practices and insurance benefit design (such as additional copayments or coverage limitations), included specific standards related to language assistance and disability, required notices to patients and plan enrollees about their rights, and described procedures for enforcing the law.

Social conservatives took aim at several parts of the Obama administration's rule, most notably by filing lawsuits against its explicit protections for people on the basis of gender identity and termination of pregnancy. And in December 2016, Judge Reed O'Connor of the Northern District of Texas (a "go-to" judge for conservatives who has also ruled against the entire ACA) issued a nationwide injunction prohibiting HHS from enforcing those parts of the rule.<sup>11</sup> Despite this injunction, the Health Care Rights Law itself—the legal protection established by Congress—remains in effect. Moreover, several other federal judges have found that the law itself, regardless of whether HHS has a rule in place, prohibits discrimination on the basis of gender identity.<sup>12</sup>

The Trump administration's proposed rule<sup>13</sup> would roll back numerous parts of the Obama-era rule, including the provisions enjoined by Judge O'Connor, and narrow its scope and enforcement.<sup>12,14-17</sup> For example, the proposed rule would:

- Eliminate most of the current rule's definitions, including its definition of discrimination on the basis of sex, thereby undermining protections for LGBTQ patients and for people on the basis of their reproductive health decisions;

- Apply abortion- and religion-related exemptions from a separate federal sex discrimination law (Title IX, which governs sex discrimination in education), and assert the primacy of federal refusal clauses over the Health Care Rights Law's nondiscrimination protections;
- Weaken the current rule's standards that protect people with limited English proficiency;
- Narrow the entities covered by the law, for example, by asserting that health insurance companies and health plans are largely exempt;
- Remove protections regarding discriminatory marketing and benefit design, endangering care for HIV-positive patients and many others;
- Eliminate the current rule's notice requirements, making it more difficult for patients and enrollees to learn about and exercise their rights; and
- Eliminate many of the current rule's enforcement procedures, including going back on the Obama administration's conclusion that patients and enrollees can sue under the Health Care Rights Law.

HHS received more than 150,000 public comments on the proposed rule by the mid-August 2019 deadline and must review and appropriately respond to them before it can finalize the rule. If the final version of the rule is similar to what the Trump administration has proposed, multiple lawsuits seem all but certain.

### Refusal Rights or Veto Rights?

The two rules demonstrate how supporters of refusal rights are ultimately looking for veto rights over others' health care options. The logic involved is a three-step chain. First, supporters argue that any person or institution should be able to refuse to provide any type of information or service for any religious or moral reason. Second, they argue that if anyone can refuse to provide that service, a requirement to provide it is meaningless and unenforceable. Third, they argue that if a requirement is unenforceable, it should be eliminated.

That logic is one major argument behind what the Trump administration has done with the Health Care Rights Law, rolling back protections against

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gender identity and termination of pregnancy discrimination based on the argument that these protections amount to religious discrimination against health care providers and insurance companies. The administration has skipped over the idea of granting a religious exemption to those rules, and is instead eliminating the protections entirely.

In effect, the Trump administration is using its regulatory powers to flip the societal default around nondiscrimination protections, in a way that contradicts the will of Congress when it acted to better protect individuals and bolster their access to health care. Under the Health Care Rights Law, the default is supposed to be that providers must treat their patients in a way that is free from discrimination. If the administration added a religious exemption to that requirement (for instance, via its refusal-of-care rule), that would amount to an “opt-out” policy. What the administration has actually done is to go further: It is proposing to eliminate nondiscrimination protections entirely in some cases, most notably around gender identity and termination of pregnancy. In other words, it is converting those legal protections into something that each health care provider must voluntarily “opt in” to obeying.

This shift would be deeply meaningful from a philosophical perspective because of what it says about the United States and its values. Through these rules, the Trump administration is granting government imprimatur to the values of religious and social conservatives. It is elevating these values over the values of those who believe that it is morally wrong to discriminate against people on the basis of their sexual orientation or gender identity, or on the basis of their reproductive health decisions.

This shift is also meaningful from a more practical perspective. Administration officials understand that how they set the default matters, because there are major differences between how people respond to an opt-out policy (a requirement with an exemption) and how they react to an opt-in policy (no requirement at all). Far more people will contribute to a retirement plan or agree to be an organ donor if the default is “in” than if the default is “out,” even when the option to make

the opposite choice is clear. That science has led public health authorities to recommend an “opt-out” approach to services like vaccination and routine HIV screening.<sup>18,19</sup> There is good reason to believe that same dynamic influences the behavior of health care providers toward their patients. In other words, an opt-in approach to nondiscrimination protections might lead more providers to discriminate against LGBTQ patients or patients seeking reproductive health care.

What the Trump administration and its allies are doing through this pair of rules is dangerous for patients and society. For patients, it would mean new barriers to accessing the services they need, and fewer rights, protections and choices. For society, it would mean that social conservatives are able to upend the nation’s democratic processes and institutions, claiming a religious veto over federal and state laws. The Trump administration is putting the weight of the government behind the values of religious and social conservatives, at the expense of the needs, rights and values of everyone else, and that cannot be allowed to stand. ■

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