



March 26, 2018

U.S. Department of Health and Human Services,
Office for Civil Rights
Attention: Conscience NPRM, RIN 0945–ZA03
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue SW
Washington, DC 20201

Re: RIN 0945–ZA03, Protecting Statutory Conscience Rights in Health Care

The Guttmacher Institute is writing in opposition to the above-referenced rule proposed by the Department of Health and Human Services (HHS) on January 26, 2018, to interpret and enforce more than 20 federal statutory provisions related to “conscience and religious freedom.”

Collectively, as interpreted by this proposed rule, these statutes would grant broad powers to individuals and organizations in the health care field and beyond to refuse to provide or be involved with services, information and referrals to which they have religious or moral objections. That includes services related to abortion, contraception, end-of-life care, global health care assistance, vaccination, and much more. The proposed regulations and steps to enforce them have real potential to undermine existing legal and ethical protections for patients’ access to sexual and reproductive health information and services, and other critical care. For these reasons, as detailed further below, we urge that the rule be withdrawn.

Redefining Statutory Terms to Expand Their Reach

In proposing the new rule, HHS insists that it is seeking to clarify key terms in statutes that have been on the books for years—in one case (the Church Amendment), since the early 1970s. In truth, HHS is attempting to redefine many of those terms in order to expand the laws’ reach.

For example, the regulations broadly define “assist in the performance” as participating “in any program or activity with an articulable connection” to a given procedure or service. The definition goes on to include several specific examples, including “counseling, referral, training, and other arrangements,” and it is so broad as to include the provision of even basic factual information. Similarly, the definition for “referral” encompasses “any information...by any method...that could provide any assistance” to someone seeking care or financing for that care.

The regulations define the actors as broadly as it does the actions. Notably, “workforce” would include not just employees, but also “volunteers, trainees, contractors...and providers holding admitting

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privileges.” The term “health care entity” would include a wide array of individuals (not just health care professionals, but any personnel) and institutions (not just health care facilities and insurance plans, but also plan sponsors and state and local governments). A “recipient” or “sub-recipient” of federal funds may include not only U.S.-based entities but also “foreign or international organizations (such as agencies of the United Nations).”

All of these definitions get tied together in the rule’s expansive definition of “discriminate.” Under that definition, in responding to religious or moral objections, government agencies and private institutions would be barred from denying or restricting: grants and contracts; certifications and accreditations; jobs, positions and titles; or any benefits or privileges. The definition of discrimination also includes enacting and enforcing “laws, regulations, policies, or procedures...that tends to subject individuals or entities...to any adverse effect.” This definition of discrimination seems to elevate religious and moral objections above all laws and rules.

In all of these cases, HHS is going beyond common understanding of what these terms mean and how they have been interpreted by prior administrations, state officials and the courts over years and, in some cases, decades.

Undermining Patient Protections

The clear intent of HHS’s proposed regulations and its attempts to expansively redefine key terms is to allow individuals and institutions claiming religious and moral objections to undermine a wide range of existing patient protections. The examples described below are by no means all-inclusive, and it is impossible to predict all of the potential consequences of the proposed regulations. However, by attacking existing patient protections, HHS is undermining individuals’ access to health care information and services, and threatening their health, rights and dignity. With these proposed regulations, HHS is making its priorities clear: If there is ever a conflict between religious and moral objections and patients’ health and rights, HHS will always side with religious and moral objections.

Insurance Coverage Requirements

The HHS regulations explicitly target laws in several states (currently, California, New York and Oregon) that require many health insurance plans to cover abortion care. HHS argues that the Obama administration misinterpreted federal law (the Weldon Amendment) by ruling that employers sponsoring health insurance plans for their employees and dependents did not count as health care entities with conscience rights. The proposed regulations overturn that earlier guidance and add plan sponsors to the definition of “health care entities,” laying the groundwork for HHS to issue a different ruling and undermine these state laws.

Along the same lines, the new refusal rule could be used to target state-level contraceptive coverage requirements. The Affordable Care Act’s contraceptive coverage guarantee has famously generated dozens of lawsuits—several of which reached the U.S. Supreme Court—from employers and schools with religious objections to some or all contraceptive methods. The Trump administration (wrongly, in our view, as expressed in earlier comments to HHS) expanded religious and moral exemptions to this requirement in separate rules last year (currently enjoined), but those rules did not affect state-level requirements. The proposed refusal rule could be used to undermine those state-level requirements, particularly in cases where the plan sponsor wrongly asserts that methods of contraception are actually methods of abortion.

Antiabortion Counseling Centers

As another example of state law purportedly violating federal conscience rights, HHS points to laws requiring antiabortion counseling centers to post factual public notices. For example, California's Reproductive FACT Act requires facilities specializing in pregnancy-related care to post notices about the availability of public programs that provide free or subsidized family planning services, prenatal care and abortion, and for unlicensed facilities to disclose that they do not provide medical services. By including public notices in the definition of "referral," HHS aims to prevent enforcement of these requirements and to influence ongoing court cases, including one at the U.S. Supreme Court.

Emergency Abortion Care

The HHS regulations also take issue with the idea that health care providers have obligations to patients in emergency circumstances. HHS criticizes an ethics opinion by the American College of Obstetricians and Gynecologists that providers have obligations to provide emergency care, as well as lawsuits brought against hospitals that refused to provide abortion-related information and care in emergency circumstances. HHS's apparent position is that federal refusal laws are not limited by legal or ethical obligations around emergency care.

On a related note, although federal law bars federal dollars from paying for abortions under Medicaid in most circumstances, state Medicaid programs are obligated to cover abortion when a woman's life is endangered or in cases of rape or incest. States objecting to that requirement could cite the proposed refusal regulations in refusing to comply.

Counseling and Informed Consent

The HHS regulations are also an attack on patients' right to have the information they need to provide informed consent to care. Health care professionals have ethical and legal responsibilities to provide that information, but the proposed refusal regulations would allow them to deny information and counseling on topics and services they find objectionable—not just on abortion and contraception, but on any topic, such as STI testing and treatment, vaccination, blood transfusion, and end-of-life pain management.

As one specific example, the Title X national family planning program requires that Title X-supported providers must offer factual information and nondirective counseling on any of the full scope of legal pregnancy options, including abortion, as well as referral for any related services upon request. In 2008, when the George W. Bush administration promulgated similar refusal regulations (which were later rescinded), HHS argued explicitly that this Title X requirement would not be enforced for organizations objecting to it, without providing any indication of how patients' right to counseling and referral would be upheld.

The new proposed rules may also apply in the context of HHS-supported adolescent sexual health promotion programs, support services for new parents and other social services programs that provide health-related information or referral. That could allow entities or individual instructors to withhold factual information on contraception, prevention of HIV and other STIs, or other topics, regardless of a given federal grant program's requirements.

Protections Against Discrimination

The proposed regulations have the potential to pit "conscience" rights against anti-discrimination policies set by federal, state and local governments, and individual employers and schools. These laws

and policies vary widely, but are intended to protect patients, students and others against discrimination on the basis of a variety of characteristics, such as race, gender, sexual orientation, immigration status, disability and HIV status. Under the proposed regulations, it is unclear whether and in what circumstances an individual or institution would be allowed to ignore those protective policies and refuse to provide information or services in a discriminatory way. Further, health care entities could be hindered in their efforts to ensure that patients are treated appropriately under federal and state antidiscrimination laws and employers' own antidiscrimination policies.

Groups representing LGBTQ individuals are particularly concerned, because of numerous complaints and lawsuits asserting that protections against discrimination on the basis of sexual orientation or gender identity are in fact violations of religious freedom. For example, HHS specifically criticizes a lawsuit brought against a health care system that denied a hysterectomy to a transgender man, despite regularly performing hysterectomies for other patients. Separately, HHS has also signaled that it will back off from protecting LGBTQ rights under the Affordable Care Act's Section 1557 anti-discrimination provision. LGBTQ individuals, immigrants, people of color, and other groups subject to frequent discrimination, have good reason to view this refusal rule as yet another signal that HHS and the Trump administration more broadly will support and protect those who discriminate under the guise of religious liberty.

Impact on Employers and Public Programs

Currently, Title VII of the Civil Rights Act and related state laws govern religious discrimination in the workplace. Specifically, Title VII requires employers to accommodate an employee's religious practices (such as religious refusals), unless doing so would impose an undue hardship on the employer—something that, in the health care field, would include practices that undermine patient care. This legal standard and examples of how it applies in the health care field have been described in considerable detail by the Equal Employment Opportunity Commission (EEOC), which oversees implementation of Title VII, in the section of its compliance manual related to religious discrimination.

The proposed refusal regulations ignore this legal standard and the balance that it attempts to strike. Without that balance, health care institutions and public programs could be forced accommodate employees who refuse to perform central functions of their job or seek to discriminate against patients. For example, family planning clinics might be forced to employ individuals unwilling to provide, discuss or even schedule appointments for contraception. Hospitals could be forced to hire personnel refusing to honor their patients' end-of-life directives. Pharmacies could be forced to hire clerks refusing to ring up purchases for medications to fight HIV and AIDS. Notably, the Bush administration's similarly expansive refusal rule was opposed by that administration's own EEOC.

For government officials responsible for enacting new laws, promulgating new regulations and administering public programs, the potential consequences of the proposed regulations are severe in additional ways. With its expansive definition of "discrimination," HHS appears to be warning state governments against enacting and enforcing any law that social conservatives might argue is an infringement on their religious liberty. Similarly, HHS is signaling that religious and moral objections can function as a backdoor way to rewrite the rules governing federal and state programs; if a potential grantee objects to a program's requirement, that requirement is essentially null and void.

Impact Beyond the United States

The proposed regulations may pose particular problems for international, foreign and multilateral organizations. The regulations apply long-standing U.S. conscience laws (most notably, part of the

Church Amendment) to organizations outside of the United States in cases where U.S. funding is administered by HHS. In doing so, HHS does not appear to be giving any deference to existing federal law governing U.S. foreign policy, nor to the agencies entrusted to set this policy. This might create confusion among federal agencies about which laws to follow, generate conflict with policies promulgated by the Departments of State and Defense and the U.S. Agency for International Development, and lead to unforeseen foreign policy complications.

Moreover, it is unclear how large international agencies, such as the World Health Organization or the Global Fund to Fight AIDS, Tuberculosis and Malaria, could require, monitor and certify compliance by their numerous local sub-grantees, particularly in cases where U.S. “conscience” laws conflict with the laws of other countries. For example, such other countries’ policies may require health care providers to offer referrals in cases of conscientious objection, a requirement that would be unenforceable under these regulations. This has the potential to force such international agencies out of HHS-administered programs altogether.

Potential Impact on Individuals

As described above, the proposed regulations cast doubt on the ability of the federal and state governments to enforce a wide variety of laws that guarantee access to reproductive health services and emergency care, that guide employers on how to address religious discrimination in the workplace, that govern international assistance, and that broadly protect individuals from discrimination. All of this is problematic from the standpoint of individuals who rely on these services and protections.

For example, undermining federal requirements for abortion-related counseling and referral under Title X, and for the limited coverage of abortion under Medicaid, could make it even more difficult for already-marginalized, low-income individuals to obtain needed services. This would further complicate situations that may already be difficult for individuals on a personal level and dangerous to their physical or emotional health. Allowing providers and institutions to ignore ethical and legal requirements to provide abortion-related emergency care can imperil individuals’ fertility, long-term health and even their lives.

Similarly, undermining state and federal policies promoting access to contraceptive care could interfere with individuals’ ability to use contraceptives consistently and effectively, and thereby increase their risk of unintended pregnancy. This would be particularly likely among low-income individuals who rely on public programs for their coverage and care, and who could struggle to find the resources to pay for contraceptives out-of-pocket, or to shop around for a health plan, hospital or pharmacy willing and able to serve them.

To the extent that the regulations could undermine U.S. international assistance programs, it would be low-income women overseas harmed the most, as they are the primary beneficiaries of a wide variety of the threatened public health programs. If states find themselves uncertain about enforcing their own anti-discrimination laws, LGBTQ individuals, immigrants, people of color and many others could face discrimination from health care providers and institutions.

HHS asserts that the regulations will foster “open and honest communication” between health care providers and patients, yet the regulations in truth undermine that communication. Providers are not

required to even notify patients and employers when they refuse to provide information or services, nor are institutions required to have safeguards in place to protect patients.

Moreover, the proposed regulations harm the provider-patient relationship by undermining informed consent protections, with far-reaching implications for patients. For example, individuals might rely on these regulations to justify their refusal to provide information or counseling about, for example, Pap tests or STI tests—or cervical cancer or STIs themselves—for adolescents or unmarried individuals they believe should be sexually abstinent. The regulations could also be used to justify denying patients information or referral for assisted reproductive technologies to individuals or couples they believe should not be parents because of their marital status, sexual orientation or other characteristics.

To reiterate, for the reasons detailed above, we urge that this rule be withdrawn. If you need additional information about the issues raised in this letter, please contact Adam Sonfield in the Institute's Washington office. He may be reached by phone at 202-296-4012, or by email at asonfield@guttmacher.org.

Thank you for your consideration.

Sincerely,



Rachel Benson Gold
Vice President for Public Policy