CENTER FOR INQUIRY
Washington, D.C.

Office of Public Policy

621 Pennsylvania Ave., SE Washington, DC 20003 • Office: (202) 546-2330 Fax: (202) 546-2334 • www.cfidc.org

Provider Conscience Regulation.

Comments by the Center for Inquiry Office of Public Policy.

The proposed Provider Conscience Regulation purports to provide rules designed to help enforce three federal statutes, namely the Church Amendments (42 U.S.C. § 300a-7), Public Health Service (PHS) Act §245 (42 U.S.C. § 238n), and the Weldon Amendment (Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 508(d), 121 Stat. 1844, 2209) (hereinafter "the statutes"). Collectively, in material part, the statutes provide that certain health care workers and entities cannot be discriminated against if they refuse to engage in, provide, pay for, or provide coverage of, certain activities or procedures, in particular abortion or sterilization.

The Center for Inquiry /Office of Public Policy strongly recommends that the Secretary of Health and Human Services (HHS) not implement the proposed Provider Conscience Regulation as a final rule for the following reasons:

1. There is no evidence that the regulation is needed. The proposed regulation cites no factual support for its supposition that health care professionals are at risk of being subject to illegal discrimination or that persons are discouraged from entering the health care professions because of concern about discrimination;

2. The regulation's rationale is based on a thorough misunderstanding of employment discrimination law as applied to workers outside the health care professions. The regulation provides far greater rights to health care workers than are enjoyed by workers in other professions, while improperly discounting the rights of patients;
3. The extension of the original statutes to require written assurances of non-discrimination goes beyond the original intent of the legislation, and unnecessarily burdens health care providers and institutions;
4. The proposed regulations will have a serious adverse impact on family well-being, contrary to the assertions on p. 29 of the proposed regulation;
5. The absence of a specific, scientifically supported definition of "abortion" and/or "sterilization" will cause confusion and could result in contraception, misunderstood by some as a form of abortion, being included as a service to which some health care workers will object.

Each of these points will be discussed in detail below.

1. No Factual Support for the Regulation

Federal regulations must be rational and based on careful consideration of all relevant factors. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983). An essential component of the agency's requisite reasoned analysis is the development of an administrative record that provides clear support for the agency's position that the proposed regulation is necessary. *Id.* In this regard, the proposed regulation is severely deficient.

HHS cites no evidence that any of the existing statutes are routinely violated or ignored. In fact, the proposed regulation fails to cite one instance of a confirmed violation of any of the statutes. The sole justification for the proposed regulation is the agency's speculation that there "appears to be an attitude towards the health care professions that health care professionals and institutions should be required to provide or assist in the provision of medicine or procedures to which they object, or else risk being subjected to discrimination" (proposed regulation, p. 9). However, appearances are not facts. Appearances cannot legally provide a justification for federal regulation.

Significantly, the one reference that HHS cites to support its speculation about an appearance of discrimination is a report (specifically, an ethics committee opinion) of the American College of Obstetrics and Gynecology (ACOG) that HHS interprets as posing a potential conflict with the statutes. However, the ACOG has issued a statement denying that its policy presents any conflict with the statutes. In fact, the committee opinion is a reasoned discussion of the meaning of conscience

in a professional context. *See ACOG Committee Opinion*. Number 385. November 2007, p.1. www.acog.org/from_home/publications/ethics/co385.pdf). It proposes four criteria for determining the limits of conscientious refusal and makes seven recommendations that would ensure that a patient's welfare is a provider's primary concern, while advising providers on acceptable ways to refuse. Thus, the ACOG's report provides absolutely no justification for the proposed regulation.

At a minimum, to justify the proposed regulation, HHS must provide details about actual cases of statutory violations and describe how its proposed regulations would eliminate or reduce such misconduct. In the absence of such a factual record, the proposed regulation is "arbitrary and capricious," and, therefore, a violation of the Administrative Procedure Act, 5 U.S. § 706. See *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43 (agency action arbitrary and capricious if there is no rational connection between the facts found and the choice made.)

2. **Inconsistency with Federal Employment Discrimination Law**

The proposed regulation states that one of the principal reasons it is supposedly needed is that there is a perception that health care professionals lack the same "rights of conscience and self-determination" that extend to others (proposed regulation, p. 10). This rationale is seriously flawed, and cannot provide a justification for the proposed regulation. There is no evidence of such a misperception. Furthermore, the proposed regulation would provide *greater* rights to health care workers than other workers currently enjoy under federal law. Effectively, the proposed regulation would create two classes of employees: those inside and those outside the health care professions, with the former having the special privilege of being able to refuse to provide a service regardless of the adverse effect of the refusal on the needs of their employer or the public.

Title VII of the Civil Rights Act of 1964, 42 U.S. §§ 2000e-2000e-15, is the principal federal statute providing protection to workers against discrimination. Title VII includes an explicit prohibition of discrimination based on religion, and this prohibition has been interpreted to require employers to accommodate an employee's religious beliefs, including a belief that providing a certain service, such as working on the Sabbath, is immoral.

However, Title VII carefully balances the rights of employees against the employer's needs and the needs of the public. Employers are required to excuse an employee from providing service *only* if excusing the employee results in no significant cost or adverse effects. *See Trans World Airlines v. Hardison*, 432 U.S. 63, 80-81 (1977). Accordingly, almost every court applying Title VII has concluded that the obligation to refrain from discriminating against an employee does not require an employer to allow an employee to categorically refuse to perform the essential functions of a job on the basis of religion if such a refusal has significant consequences for others. *See, e.g., Shelton v. University of Med. and Dentistry of New Jersey*, 223 F.3d 220 (3d Cir. 2000) (employer could discharge a nurse who refused to assist in treating a patient who required an emergency caesarian section, which would have terminated the pregnancy).

In sharp contrast to the balancing that takes place under Title VII, the proposed regulation contains no discussion of any limitations of the need to accommodate an employee's religious beliefs. It provides a blank check to employees who want to invoke religion any time they choose to decline to provide a service. This inconsistency with Title VII will cause confusion and uncertainty among health care institutions and patients and will lead to conflicting legal results.

The problems caused by the proposed regulation's failure to balance the rights of health care workers against the needs of patients is exacerbated by the proposed regulation's excessively broad definition of covered individuals. Any individual who "assists in the performance" of a health care activity or service can refuse to provide such assistance on grounds of conscience. This regulation could cause chaos in the delivery of services. As HHS candidly admits, the proposed regulation would include not only operating room nurses who might have religious objections to a procedure, but also "an employee whose task it is to clean the instruments used in a particular procedure" (proposed regulation, p. 14). But since the regulation applies both inside and outside the operating room, the regulation would also "protect" a secretary who refuses to schedule an urgent procedure and also refuses to refer the patient to another health care provider, a dietician who refuses to prepare a meal for a patient undergoing an "immoral" procedure, a hospital warehouse worker who refuses to unload a truck delivering "immoral" medical supplies, or even the truck driver herself were she employed by a health care entity. The harm to patients could be unimaginable, even though the health care entity they thought would help them is funded in part by their own tax dollars.

3. Requirement for Written Assurances

The proposed regulation requires written certification by recipients of federal funds that they will comply with the statutes. This requirement was not part of any of the three original statutes and goes beyond their original intent. The reason for this requirement given by HHS is that it worries that "the public and many health care providers are largely uninformed of the protections afforded to individuals and institutions under these provisions" (proposed regulation, p. 9). But HHS does not supply any figures or even any anecdotal evidence that there is a lack of information about these protections or that this lack of information has caused harm. The written requirement seems like a remedy for a nonexistent problem.

The requirement to provide written assurances of compliance in order to receive federal funds is also excessively burdensome. The Department's claim that "the future benefits will exceed the costs of complying with the regulation" (proposed regulation, p. 23)

is doubtful in view of the table on the following page, where almost 590,000 health care "entities" are listed as affected by the regulation. Even if one could accept HHS's estimate of the costs as $44.5 million per year, experience demonstrates that the expenses of compliance with federal regulations always increase as paperwork inundates administrators. Thus the services provided by federally funded health care providers will lose at least $44.5 million a year, affecting, among other things, the care given to about 17 million women a year who use federally funded services for family planning.

4. Impact on family well-being

The claim that the regulations will not have an impact on family well-being (proposed regulation, p. 29) is belied by logic as well as experience. If a woman cannot obtain emergency contraception because a pharmacist mistakenly believes that it causes abortion, she may have either an unwanted child or have to undergo an expensive abortion. No one could deny that such an event would have an adverse impact on family well-being. The Guttmacher Institute reports that 60 percent of women who seek abortions already have one or more children, so family well-being is uppermost in their minds (Guttmacher Institute. 2008. *Facts on Induced Abortion in the United States*. www.guttmacher.org/pubs/fb_induced_abortion.html). The ACOG, in the committee opinion referenced above, cites cases of provider refusal that clearly affected families adversely.

The Department cannot claim that this Provider Conscience Regulation will not have an impact on family well-being, especially when it is crafted to privilege the religious beliefs of health care workers over the welfare of patients.

5. Definition of abortion and sterilization

The draft of this regulation issued in July was severely criticized by many who value the separation of church and state as well as those who promote women's welfare because it included a controversial and scientifically unsupported definition of abortion. That definition has been removed from the proposed regulation; indeed, the regulation contains no definition of abortion. However, the absence of any definition is not necessarily an improvement.

As indicated, "abortion or sterilization" are now undefined. By leaving these terms undefined, HHS has deliberately left open the possibility of wide and mistaken definitions of abortion. Pharmacists who refuse to dispense emergency contraception on the grounds that it is an abortifacient misunderstand the facts about its operation.

Emergency contraception prevents fertilization, not implantation of a fertilized ovum. But such scientific facts are easily misunderstood and distorted. Because the regulation speaks only of "abortion," there is room for personal interpretations of the word based on religious and ideological beliefs.

Thus a secretary or receptionist in a health clinic, who entertains factually unsupportable but "sincere" religious beliefs about the effects of contraception, can refuse to make an appointment for a woman or a man seeking help with effective contraception on the grounds that he/she objects to abortion. This is outrageous in the United States, where 73% of voters support policies making contraception available to all, including those who depend on federally funded health care providers.

Conclusion

HHS should not implement the proposed regulation. There is no factual record demonstrating a need for the regulation; the regulation is based entirely on conjecture; it is inconsistent with other federal laws and regulations; it exceeds the scope of the authorizing statutes; it imposes unjustified burdens on health care providers; it contains ill-advised definitions or no definitions at all where they are needed; and it will have a serious adverse impact on patient care and on reproductive rights.

A health care provider's first priority must be the welfare of the patient, and accommodation of his/her own personal beliefs must not come at the expense of patient care. After all, the health care worker voluntarily chose her/his profession, and the obligations that derive from offering health care services. Without any justification, this regulation reverses that priority, elevating a health care worker's personal feelings over patient need. As a result, the proposed regulation attaches burdens on health care to the distribution of federal funds designed to promote health care. No more glaring example of an irrational regulation can be imagined.

Respectfully Submitted September 25, 2008
Contact: Toni Van Pelt

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