



American
Public Health
Association

800 I Street, N.W. • Washington, DC 20001-3710
Phone: (202) 777-APHA • Fax: (202) 777-2534
www.apha.org • comments@apha.org

Protect, Prevent, Live Well

September 25, 2008

The Honorable Michael O. Leavitt
Secretary
U.S. Department of Health and Human Services
Office of Public Health and Science
Attn: Brenda Destro
Hubert H. Humphrey Building
200 Independence Avenue, SW
Room 728E
Washington, DC 20201

Re: RIN 0991-AB48

Dear Secretary Leavitt:

On behalf of the American Public Health Association (APHA), the nation's oldest and most diverse organization of public health professionals in the world, and the undersigned affiliated organizations, I write to express our opposition to the "Provider Conscience" regulation proposed on August 26, 2008 by the Department of Health and Human Services (HHS). APHA takes the position that patients' health and well-being must come first in health care delivery and in the formulation of health policy. The proposed regulation threatens public health by allowing health care institutions and individuals to deny health information and services while providing no protections for the rights of patients to access the full range of health information and services.

The proposed regulation claims to interpret three existing federal refusal clauses that protect the rights of institutions and individuals to deny abortion and sterilization services to patients on moral or religious grounds—the Church Amendments (42 USC 300a-7), the Public Health Service Act § 245 (42 USC 238n) and the Weldon Amendment (Consolidated Appropriations Act 2008, PL 110-161, Div. G, 508d). HHS argues that the proposed regulation is necessary to clarify these existing laws and educate recipients of HHS funds and their employees about the legal obligations and protections afforded under the laws. However, the proposed regulation contains expansive and ambiguous language that will threaten patients' access to critical health care services and information and will lead to confusion among health care providers, state and local governments, and research institutions faced with the uncertain interaction between the proposed regulation and existing federal and state laws.

The proposed regulation broadly defines the institutions that may refuse to provide abortion and sterilization services and even extends the laws' applicability to foreign and international organizations that receive U.S. funding, such as the United Nations. It also fails to define the term abortion, opening the door for insurers, hospitals and other entities to define the term in ways that could include common forms of contraception, including birth control. Use of contraceptives is not only widely accepted in the

U.S., it also reduces unintended pregnancies and the need for abortions. In addition, the proposed regulation greatly expands the scope of services to which individuals can object to “any activity with a reasonable connection to a procedure, health service or health service program, or research activity,” including “counseling, referral, training, and other arrangements for the procedure, health service, or research activity.”

While the proposed regulation provides greater protections to health care institutions, individual providers and other employees of health care entities, it fails to consider the needs of patients and poses a serious risk to patients’ health by limiting their right to receive complete and accurate health information and services. The expansive and ambiguous language will make it more difficult for patients to access family planning and reproductive health services – including birth control, counseling and information – as well as HIV/AIDS care, end-of-life care, fertility care, and other services. For example, HIV prevention counseling for at-risk patients may be restricted by institutions that refuse to provide contraceptives counseling and services. The effects of the proposed regulation will be especially acute in time sensitive and emergency situations. For example, rape survivors could be denied emergency contraception, which is most effective when taken within the first 24 hours after unprotected intercourse and has no demonstrated efficacy after 120 hours. Moreover, patients might not even learn which services, information or referrals they may have been denied, eliminating their right to fully informed consent, which involves a discussion on all medically recommended treatments and alternative treatment methods.

The proposed regulation does not include any mechanism to ensure that health services will be available elsewhere in the community or that the community will continue to have access to a full range of health services. This will be especially problematic in medically underserved areas that have fewer health resources, such as rural and inner city communities. Low-income, uninsured and under-insured Americans will also be disparately impacted because they are more likely to rely on HHS-funded programs for health information and services. These groups face additional challenges to obtaining services which a particular provider or health facility does not offer, such as financial barriers, lack of private insurance, geographic isolation, and lack of both public and personal modes of transportation. Moreover, the proposed regulation does not prohibit using “conscience claims” to justify discriminatory attitudes towards certain patients, such as people with HIV/AIDS or lesbian, gay, bisexual or transgender individuals.

The proposed regulation ignores existing federal laws that strike a careful balance between respecting employees’ moral and religious beliefs and protecting employers’ ability to provide patients access to health care services currently maintained under Title VII of the Civil Rights Act of 1964. Under Title VII, an employer must reasonably accommodate an employee’s or prospective employee’s moral or religious beliefs unless doing so places an “undue hardship” on the employer’s business. The proposed regulation also leaves unclear whether employers will be permitted to change an employee’s job to one where he or she would not be expected to provide the service he or she finds objectionable. In addition, the proposed regulation could conflict with the requirements of other HHS-funded programs, like Medicaid and the Title X family planning program that guarantee women access to contraceptive counseling and services. The proposed regulation also disregards state laws protecting and expanding access to certain health care services, such as laws ensuring contraceptive equity in insurance, access to emergency contraception for victims of sexual assault and access to birth control at pharmacies. Because the proposed regulation ignores existing federal and state laws, it could cause confusion among health care employers, employees and patients regarding their rights.

The impact analysis provided by HHS greatly underestimates the costs associated with expanding the rights of any individual member of a health care entity's workforce to refuse to perform any part of a health service program or research activity on moral or religious grounds. HHS has assessed the cost of implementing the proposed rule to be about \$44 million, which covers the cost of HHS-funded entities collecting and maintaining records certifying their compliance with the proposed regulation. However, this analysis fails to consider the cost and hardship of hiring and retaining workers who refuse to perform an activity, even if the activity is among the duties for which they were hired to perform. In fact, the regulation gives as an example an employee whose job it is to clean surgical equipment could refuse to do so because they object to the procedure that the equipment was used for. Similarly, an employee whose job it is to schedule patient appointments would be permitted to refuse to schedule patients seeking services that they oppose, such as contraceptives counseling. Scientific research also will be adversely affected under this proposal, including federally funded stem cell research, research involving animal testing and defense research on things like biological weapons. Small entities in particular would face undue hardship because they employ smaller workforces. For example, pharmacies that do not have more than one pharmacist available at all times would have difficulty upholding the rights of a pharmacist who objects to filling certain prescriptions and the rights of patients to obtain those prescribed medications in a timely manner.

According to HHS, the proposed regulation will impact over 584,000 health care entities, including hospitals, health centers and private physicians' offices. The proposed regulation could have a debilitating effect on these health care entities and could put at risk the health of the millions of individuals and families that rely on them for complete and accurate health care services and information. APHA urges you to withdraw this proposed regulation immediately.

Sincerely,



Georges C. Benjamin, MD, FACP, FACEP (Emeritus)
Executive Director
American Public Health Association

Alaska Public Health Association
Arizona Public Health Association
California Public Health Association – North
Connecticut Public Health Association
Georgia Public Health Association
Hawaii Public Health Association
Indiana Public Health Association
Louisiana Public Health Association
Maine Public Health Association
Massachusetts Public Health Association
Michigan Public Health Association
Minnesota Public Health Association
Montana Public Health Association
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