



Policy Memorandum

To: AMCHP Members
From: Brent Ewig, Director of Policy and Government Affairs
Re: Proposed HHS Provider Conscience Regulation
Date: September 2, 2008

On August 26, 2008, the U.S. Department of Health and Human Services released a proposed regulation “to ensure that Department funds do not support morally coercive or discriminatory practices or policies in violation of federal law.” According to HHS, the proposed regulation would increase awareness of, and compliance with, three separate laws protecting federally funded health care providers’ right of conscience. In order to ensure that recipients of Department funds know about their legal obligations under existing nondiscrimination provisions, the Department proposes to require written certification by most recipients of HHS funds that they will comply with existing nondiscrimination statutes.

The proposed rule follows an earlier leaked draft that incited significant controversy because it defined many common forms of contraception as abortion, and listed some recent state legislative or executive actions that HHS interpreted to require some providers “to violate their consciences by providing or assisting in the provision of controversial medicine or procedures.” The proposed regulation issued by HHS eliminates the most controversial language from the leaked draft, but continues to raise concerns among the women’s and reproductive health community that the rule would allow doctors, nurses, and others employed in a health care setting to deny women access to birth control, based on their own personal beliefs. The release triggered a 30-day public comment period. Administration officials will review comments as they work to implement a final regulation, with written or electronic comment due to HHS by September 25, 2008. The proposed regulation and information on submitting comments is available at <http://www.hhs.gov/news/press/2008pres/08/20080821reg.pdf>.

AMCHP’s Position

AMCHP has not yet taken a position on the proposed regulation, but our Board of Directors is discussing the proposal and possible options for responding. The Association of Maternal and Child Health Programs strongly supports access to comprehensive health care for women, including family planning services.

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Impact of the Proposed Rule

According to HHS, over the past three decades Congress has enacted several statutes to safeguard certain freedoms, also known as provider conscience rights, and the proposed regulation would increase awareness of and compliance with these laws. Specifically, the proposed rule would:

- Clarify that non-discrimination protections apply to institutional health care providers as well as to individual employees working for recipients of certain funds from HHS;
- Require recipients of certain HHS funds – **including state health departments** - to certify their compliance with laws protecting provider conscience rights;
- Designate the HHS Office for Civil Rights as the entity to receive complaints of discrimination addressed by the existing statutes and the proposed regulation; and
- Charge HHS officials to work with any state or local government or entity that may be in violation of existing statutes and the proposed regulation to encourage voluntary steps to bring that government or entity into compliance with the law. If compliance is not achieved, HHS officials will consider all legal options, including termination of funding and the return of funds paid out in violation of the nondiscrimination provisions.

The proposed regulation would require that most recipients of HHS funds – estimated to affect close to 600,000 health care entities - shall certify when applying for HHS fund that they “*will not discriminate on the basis of an entity’s past involvement in, or refusal to assist in the performance of, the practices of abortion or sterilization, and will not require involvement in procedures that violate an individual’s conscience as part of any part of any health service program...*”

Many groups are still in the process of conducting legal analysis of the potential impact of the regulation, is complicated by language that apparently leaves it up to individual providers to define abortion. While other impacts are unclear, the regulation opens the door to litigation. It could also potentially impact states’ ability to enforce their own laws and policies protecting access to care, including laws ensuring contraceptive equity insurance, access to emergency contraception for sexual assault victims, and laws to ensure access to birth control at pharmacies.

What is Being Said About the Proposed Regulation

Much of the controversy about the proposed regulation is focused on concerns about the true intent of the HHS action. In front page coverage on August 22nd, the Washington Post reported that the regulation “was welcomed by conservative groups, abortion opponents and others as necessary to safeguard workers from being fired, disciplined or penalized in other ways. Women’s health advocates, family planning advocates, abortion rights activists and others, however, condemned the regulation, saying it could create sweeping obstacles to a variety of health services, including abortion, family planning, end-of-life care and possibly a wide range of scientific research.”

Upon its release, HHS Secretary Mike Leavitt said, “This proposed regulation is about the legal right of a health care professional to practice according to their conscience. Doctors and other health care providers should not be forced to choose between good professional standing and violating their conscience.”

Dr. David Stevens, CEO of the Christian Medical Association (CMA), praised the proposed regulation as "desperately needed" to fight back against widespread coercion of health care professionals to perform against their moral or religious beliefs.

The National Family Planning & Reproductive Health Association stated, “The proposed regulations, and Secretary Leavitt’s public comments about them, leave the door open as to whether institutions and individuals can deny access to contraception...The regulations are very troubling; they expand the ability of individuals to refuse to provide basic information, counseling and referral of important health care services. Federal law has for years carefully balanced protections for individual religious liberty and patients’ access to reproductive health care. This vague and unnecessary expansion of existing law will only foster confusion.” Similarly, Planned Parenthood has released a statement saying, “The new regulation complicates rather than clarifies the law. It lets health care providers define abortion, which could threaten access to birth control and broader reproductive health care.”

The National Women's Law Center has stated that the proposed regulation “will harm women’s health by impeding access to care and by denying women the information they need to make responsible decisions about their health and lives...This rule goes beyond limiting access to birth control and abortion; it allows any employee of a health care provider working in a program that receives HHS funding to refuse to treat any individual receiving any service if doing so would violate his or her moral beliefs — without regard for the needs of the patients. This rule is dangerous, and is especially problematic because current federal employment law, Title VII, successfully strikes a careful balance by providing protection for the religious beliefs of all employees including health care providers while also allowing employers to ensure that patients get access to vital health care services and information.”

Next Steps

The comment period on the proposed regulation is open until September 25. AMCHP’s board is considering the sensitive issues involved to determine the advisability of taking a position. Individual state MCH programs, however, may wish to comment on the proposed regulation if permitted by their state’s guidelines. You may submit electronic comments on this regulation to <http://www.Regulations.gov> or via e-mail to consciencecomment@hhs.gov. To submit electronic comments to www.Regulations.gov, go to the Web site and click on the link “Comment or Submission” and enter the keywords “provider conscience.” You may also mail written comments (one original and two copies) to the following address only: Office of Public Health and Science, Department of Health and Human Services, Attention: Brenda Destro, Hubert H. Humphrey Building, 200 Independence Avenue, S.W., Room 728E, Washington, DC, 20201.

AMCHP will continue to monitor and report on the possible finalization and implementation of this regulation.

