

April 9, 2009

Office of Public Health and Science
Department of Health and Human Services
Attention: Rescission Proposal Comments
Hubert H. Humphrey Building
200 Independence Avenue, SW
Room 716G
Washington, DC 20201

Dear Acting Secretary Johnson,

The undersigned organizations are writing to strongly support the proposed regulation, “Rescission Proposal,” published on Tuesday, March 10, 2009, by the Department of Health and Human Services (“HHS” or “Department”) to fully rescind the HHS regulation entitled “Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law” (“HHS Regulation” or “Regulation”).

The Regulation was issued in the waning days of the Bush Administration despite overwhelming opposition from patient advocates, religious leaders, health care providers, and many others. The Rescission Proposal is needed to stop this unnecessary regulation from undermining patients’ access to critical health care services and information, sowing confusion and uncertainty about the rights and obligations of patients, doctors, and health care institutions throughout the U.S. health care system, and imposing burdensome and unnecessary requirements on health care providers.

Background

On August 26, 2008, when HHS issued its proposed regulation, it claimed that the regulation is needed to educate recipients of Department funds about their legal obligations under three statutes—often referred to as the Church Amendments (42 U.S.C. 300a-7), the Coats Amendment (42 U.S.C. 238n), and the Weldon Amendment (Consolidated Appropriations Act 2008, PL 110-161, Div. G, 508d). These laws ensure that certain individuals and institutions are not discriminated against if they refuse to provide or participate in certain health services or research activities.

The Bush Administration published the final regulation on December 19, 2008, making the HHS Regulation effective on January 20, 2009. Contrary to its stated purpose, the Regulation does not clarify health care providers’ obligations and rights under the underlying statutes; rather, it serves only to confuse and to limit patient access to health care services and information.

The Rescission Proposal Will Protect Patient Access to Information and Health Care Services, Particularly for Low-Income Women and Other Vulnerable Communities

The Rescission Proposal is necessary because the HHS Regulation undermines patient access to health care services in a range of areas, particularly for low-income individuals and other vulnerable communities.

The HHS Regulation Broadly Threatens Patients' Access to Health Care Services

The Rescission Proposal will protect patient access to health care information and services and restore the trust between health care providers and patients put in jeopardy by the HHS Regulation. The Regulation could endanger access to information and services – regardless of the impact on patients – in a broad range of areas, including HIV/AIDS care, drug addiction, fertility care, psychology, sexually transmitted infections, end-of-life care, mental health services, and many others. The Regulation does not even require that patients be notified about the services and information their health care providers refuse to provide, undermining the relationship between providers and patients, who rely upon their providers for complete and accurate information. The Rescission Proposal is therefore needed to ensure that providers can continue to take into account the needs of patients, protecting patient access to information, referrals, and services in a wide range of areas.

The HHS Regulation Particularly Jeopardizes Access to Health Care Services for Low-Income and other Vulnerable Americans

Low-income individuals are more likely to rely on federal programs administered or funded by HHS for their health care services and, because they are less likely to have private health care coverage, may have access to a more limited pool of providers. As a result, the burdens associated with the HHS Regulation fall disproportionately on low-income individuals. Therefore, low-income individuals will benefit most from the Rescission Proposal.

The Rescission Proposal will particularly benefit low-income women of child-bearing age, who often bear the brunt of providers' refusals to provide health care services. In particular, the Regulation threatens the ability of low-income women to receive comprehensive information and referrals under the Title X family planning program, which provides contraceptive services and cancer screenings to 5 million low-income women annually. Rescission of the Regulation will restore the long-standing protections that ensure that women served by the Title X program can get complete and accurate family planning services, as well as information about and referrals for all their pregnancy options, including prenatal care, adoption, and abortion.

Communities of color also will be particularly benefited by the Rescission Proposal because more individuals of color rely on HHS-funded health care programs than their white counterparts and therefore are disproportionately harmed by the Regulation. For instance, 24 percent of African Americans, 23 percent of American Indians/Alaska Natives, and 23 percent of Hispanics rely on Medicaid, compared to 9 percent of non-Hispanic whites.¹ The Rescission Proposal will help prevent communities of color – who already are more likely to lack health insurance, receive lower quality care, and suffer from worse health outcomes – from being further burdened by a Regulation that permits refusals to provide basic health care and information.

The Rescission Proposal is necessary to ensure that Americans living in rural areas do not face further barriers when seeking access to complete health care information and services. Individuals living in rural areas are also disproportionately burdened by the Regulation because of their limited access to providers. For example, while 20 percent of Americans live in rural

¹ Families USA, *Health Coverage in Communities of Color: Talking about the New Census Numbers* (Sept. 2008).

areas, only 9 percent of the nation's physicians practice there.² In certain rural communities, if a provider refuses to provide full information or services, there may not be an alternative source of health care.

The Rescission Proposal is therefore necessary to protect the ability of low-income individuals and other vulnerable communities to access critical health care information and services.

The Rescission Proposal Will Prevent Confusion and Ambiguity Among Patients and Health Care Providers

The HHS Regulation is riddled with ambiguity, creating confusion about how it interacts with health care program requirements and other laws. This leaves nearly 572,000 health care providers and the millions of patients they serve confused and uncertain about their rights and responsibilities.

The HHS Regulation Creates Confusion About Access to Contraception

Despite an outcry from the public and requests from commenters that HHS clarify that “contraception” is not “abortion” for purposes of the underlying laws, the HHS Regulation does not clear up the confusion created by a draft of the proposed regulation that contained a medically inaccurate definition of abortion that would have included many commonly-used forms of contraception. This lack of clarity that contraception may not be considered “abortion” under the Regulation gives an open invitation to insurance plans, hospitals, and other entities to deny women access to contraception.

The HHS Regulation Creates Confusion Regarding Employment Practices

For more than four decades, Title VII of the Civil Rights Act of 1964 has allowed employers to strike a careful balance between ensuring that patients are able to access vital health care services and information and protecting employees' religious beliefs and practices. During the public comment period, two current Commissioners and the Legal Counsel of the Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing Title VII, raised concerns about the confusion the Regulation would cause and the burden it would impose on the regulated community. The HHS Regulation did not resolve these concerns. The Rescission Proposal is therefore necessary to eliminate the confusion and restore the careful balance long achieved by Title VII.

The HHS Regulation Creates Confusion that Threatens Access to Emergency Care

The Regulation gives rise to serious concerns about enforcement of state and federal laws that protect patients in life threatening, emergency situations. The confusion created could place patients in need of emergency care in grave danger and expose them to serious harm. The Rescission Proposal therefore would help protect patient access to emergency care.

The HHS Regulation Creates Confusion About Enforcement of State Laws

² Agency for Healthcare Research and Quality, Fact Sheet: Health Care Disparities in Rural Areas: Selected Findings From the 2004 National Healthcare Disparities Report (May 2005).

State attorneys general and governors expressed concerns about what the Regulation means for their ability to enforce their own state laws and policies that protect and expand access to health care. The Regulation provided no clarity on this topic. The Rescission Proposal would allow important state patient protections, such as laws ensuring contraceptive equity in insurance, access to emergency contraception for sexual assault survivors in emergency rooms, and laws and policies that ensure access to contraception at the pharmacy, to be fully enforced.³

The HHS Regulation Creates Confusion About Its Effects on International Assistance

The Regulation allows the underlying laws to be applied to international, foreign, and multilateral organizations, without any deference to existing federal law governing U.S. foreign policy. This could 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. Requiring compliance with these laws and certification of compliance from international grantees could also create a severe burden on agencies that work with local sub-grantees in other countries and potentially force them out of Department programs, including the President's Emergency Plan for AIDS Relief.

Rulemaking is Not Needed in this Area and Any Non-Regulatory Means Should be Commensurate with the “Problem”

Regulation in this area was, and is, not needed. The underlying statutes have been on the books and in effect for many years, without any recognized need for clarification. These existing laws, as well as Title VII and related state laws, already adequately and appropriately protect employees' religious freedoms. The two Commissioners of the EEOC made this clear in their comments opposing the proposed regulation. They wrote that the proposed regulation is “unnecessary to protect the religious freedom and freedom of conscience of healthcare workers, because Title VII already serves that purpose.”

Any outreach and education the Department takes in this area should be commensurate with the problem the Department is seeking to address. In this case, there is no problem; the Regulation was merely a solution in search of one. The Department itself acknowledged as much in the comments accompanying the Regulation when it said, “there is insufficient data to estimate the number of funding recipients not currently compliant with [the underlying laws]. We received no Comments indicating that there were any funding recipients not currently compliant.” 73 Fed. Reg. at 78,094-95. This means that in over 200,000 comments received by the Department, there was not a single instance of non-compliance with the underlying statutes. Clearly, the

³ Twenty-seven states (AZ, AR, CA, CT, DE, GA, HI, IL, IA, ME, MD, MA, MI, MO, MT, NV, NH, NJ, NM, NY, NC, OR, RI, VT, WA, WV and WI) have laws and/or policies requiring insurers that cover prescription drugs in general to provide coverage of the full range of FDA-approved contraceptive drugs and devices. Seven states (CO, KY, MN, ND, OH, OK and WY) require some insurance plans to cover contraception. Sixteen states (AR, CA, CO, CT, IL, MA, MN, NJ, NM, NY, OR, PA, SC, TX, WA, and WI) require hospital emergency rooms to provide emergency contraception-related services to sexual assault victims. Fourteen states (AL, CA, DE, IL, ME, MA, NV, NJ, NY, NC, OR, PA, TX, and WA) have laws or policies preventing pharmacists and/or pharmacies from obstructing access to contraception. Guttmacher Institute, *State Policies in Brief: Insurance Coverage of Contraceptives* (Mar. 1, 2009); Guttmacher Institute, *State Policies in Brief: Emergency Contraception* (Mar. 1, 2009); National Women's Law Center, *Pharmacy Refusals: State Laws, Regulations, and Policies* (Mar. 2009).

Department's claim that the Regulation is needed to educate the public and health care providers and to ensure compliance with and enforcement of the underlying laws is specious.

On the other hand, numerous commenters pointed out the problem that does exist within the patient-provider relationship: refusals to provide health care information, counseling, referrals, and services. Commenters offered specific examples of situations in which patients were denied access to critical health care services and information because of the personal beliefs of a health care provider or entity without regard for patient need, situations that resulted in diminished and delayed access to care, with the concomitant risks and threats to health and life. At this time of economic crisis, with more and more Americans losing their health care coverage and finding themselves needing to rely on these government programs, the Department should be focused on getting complete health care information and services to individuals – not taking information and services away.

Conclusion

The Rescission Proposal will help protect patient access to health care services and full and complete information, eliminate the confusion created by the HHS Regulation, and remove onerous requirements the Regulation imposed on health care providers. With 45 million Americans uninsured, the Department should prioritize the expansion and protection of health care access for women, their families, and all Americans. We fully support the Rescission Proposal because we believe it will move us closer towards that goal.

Thank you for your consideration.

Sincerely,

Abortion Care Network
Abortion Conversation Project
Advocates for Youth
AIDS Action Baltimore
AIDS Action Council
AIDS Project Los Angeles
American Association of University Women
American Humanist Association
American Nurses Association
American Psychiatric Association
American Social Health Association
American Society for Reproductive Medicine
Americans United for the Separation of Church and State
Association of Reproductive Health Professionals
Association of Women's Health, Obstetric & Neonatal Nurses
Business and Professional Women/USA
California Commission on the Status of Women
California Women Lawyers
Catholics for Choice
Center for Inquiry
Center for Women Policy Studies

Family Planning Councils of America
Girls Inc.
Health GAP (Global Access Project)
HIV Medicine Association
Human Rights Campaign
IBIS Reproductive Health
International Women's Health Coalition
Lana'i Domestic Violence Program
Law Students for Reproductive Justice
League of Women Voters of the U.S.
Los Angeles Gay and Lesbian Task Force Action Fund
NARAL Pro Choice America
National Abortion Federation
National Association of Nurse Practitioners in Women's Health (NPWH)
National Coalition of Abortion Providers
National Coalition of STD Directors (NCSD)
National Council of Jewish Women
National Council of Women's Organizations
National Family Planning and Reproductive Health Association
National Gay and Lesbian Task Force Action Fund
National Health Law Program (NHeLP)
National Institute for Reproductive Health
National Organization for Women (NOW)
National Partnership for Women & Families
National Women's Law Center
Parents, Families and Friends of Lesbians and Gays (PFLAG) National
Physicians for Reproductive Choice and Health
Planned Parenthood Federation of America
Population Connection
Republicans for Choice
Secular Coalition for America
Sexuality Information and Education Council of the U.S. (SIECUS)
Southwest Women's Law Center
State Family Planning Administrators
The AIDS Institute
The International Community of Women Living with HIV and AIDS (ICW)
Unitarian Universalist Association of Congregations
Women's Research & Education Institute (WREI)
YWCA USA