A federal regulation issued by the US Department of Health and Human Services (HHS) under the Bush Administration broadens and clarifies existing federal law prohibiting recipients of certain federal funds from discriminating against physicians and other health care professionals who refuse to perform or assist with certain medical procedures, such as abortion and sterilization, to which they object because of religious beliefs or moral convictions. The rule, 45 CFR Part 88, commonly referred to as a “conscience clause” or “refusal clause,” went into effect on January 20, 2009. After the transition to the Obama Administration, HHS issued a proposed rule on March 10, 2009, which would rescind the previously finalized rule.

Since the 1970s, federal law has contained protections for physicians and other health care professionals who refuse to participate in care they consider objectionable. Specifically, according to the introduction of the Bush Administration regulation in the Federal Register,

“several provisions of federal law prohibit recipients of certain federal funds from coercing individuals in the health care field into participating in actions they find religiously or morally objectionable. These same provisions also prohibit discrimination on the basis of one’s objection to, participation in, or refusal to participate in, specific medical procedures, including abortion or sterilization. In addition, there is a statutory provision that prohibits the federal government and state and local governments from discriminating against individual and institutional providers who refuse, among other things, to receive training in abortions, require or provide such training, perform abortions, or refer for or make arrangements for abortions or training in abortions. An appropriations provision has been enacted (and reenacted or incorporated into every appropriations act since the appropriations act for Fiscal Year 2005) that prohibits certain federal agencies and programs and state and local governments that receive certain federal funds from discriminating against individuals and institutions that refuse to, among other things, provide, refer for, pay for, or cover, abortion.”

HHS stated under the Bush Administration that the regulation was intended to ensure that, in the delivery of health care and other health services, recipients of HHS funds do not support coercive or discriminatory practices in violation of these laws. The federal government is able to cut off federal funding for any state or local government, hospital, health plan, clinic, or other entity that does not abide by existing laws requiring accommodation of those health care workers who refuse to perform certain medical acts.

HHS stated that the final regulation also
• clarifies that non-discrimination protections apply to institutional health care professionals as well as to individual employees working for recipients of certain funds from HHS
• requires recipients of certain HHS funds to certify their compliance with laws protecting provider conscience rights
• designates the HHS Office for Civil Rights as the entity to receive complaints of discrimination addressed by the existing statutes and the regulation.

In the preamble to the final regulation, HHS encouraged providers to engage their patients early on in “full, open, and honest conversations” to disclose what services they do and do not provide. HHS states that while it would strengthen provider conscience rights, the regulation would in no way restrict health care professionals from performing any legal service or procedure. Also, HHS stated that if a procedure is legal, a patient will still have the ability to access that service from a medical professional or institution that offers it. For example, the regulation does not affect the ability of medical

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be required to allow sterilizations or abortions, that members of the staff or employees of a hospital who state in writing their objection to such procedures on religious or moral grounds shall not be required to participate in such procedures, and that refusal shall not be the basis for a claim for damages or for discipline.

The statute also states that no hospital or employee shall be liable for damages resulting from a refusal to perform sterilizations or abortions, if the refusal is based on religious or moral precepts. The statute also bans hospitals, schools, or employers from discriminating against any person with regard to admission, hiring or firing, tenure, term, condition or privilege of employment, student status, or staff status on the grounds that the person refuses to recommend aid or perform sterilizations or abortions if the refusal is based on religious or moral precepts.

Finally, the statute also states that the receipt of any grant, contract, loan, or loan guarantee under state or federal law does not authorize any court or public official or any other public authority to require an individual to perform or assist in sterilizations or abortions if it would be contrary to the person’s religious beliefs or moral convictions, or to require an entity to make its facilities available for the performance of sterilizations or abortions, if such procedures are prohibited by the entity based on religious beliefs or moral convictions, or to require personnel for the performance of sterilizations or abortions, if such procedures would be contrary to the religious beliefs or moral convictions of such personnel.

References
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