



March 06, 2023

U.S. Department of Health and Human Services
Office for Civil Rights, Attention: Conscience NPRM, RIN 0945-AA18
Hubert H. Humphrey Building
Room 509F
200 Independence Avenue SW
Washington, DC 20201

[SUBMITTED ELECTRONICALLY]

To Whom It May Concern:

We are writing today as an organization representing hundreds of thousands of members from across the country who share deep concerns with the U.S. Department of Health and Human Services' (HHS) Notice of Proposed Rulemaking (NPRM), "Safeguarding the Rights of Conscience as Protected by Federal Statutes" (RIN: 0945-AA18/ HHS-OCR-2023-0001-0001).

There are several specific aspects of the recently Proposed Rule we are concerned about and would like to raise in this letter in the interest of furthering more robust protections for conscience rights.

We appreciate the fact that HHS is addressing the 2011 finalized rule, "Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws," that woefully undermined and attacked conscience rights of health care professionals.¹ To that end, the Biden Administration has stated that the intent of the most recent NPRM is to strengthen the rights of conscience for the medical community.

We are concerned, however, that this Proposed Rule does the opposite by stripping protections and safeguards from the medical community that the previous Administration established for very specific reasons through the 2019 rule: "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority."² This Administration is proposing to partially rescind the 2019 rule here in this NPRM. Crucial aspects to be rescinded include: the elimination of explicit conscience protection explanations, the removal of underlying definitions, and the exclusion of compliance requirements and necessary enforcement mechanisms.

¹ 75 FR 9968 (2011).

² 84 FR 23170 (2019).



Explicit explanation of conscience protection amendments

HHS claims that the 2019 rule “undermine[d] the balance Congress struck between safeguarding conscience rights and protecting access to health care”³ and that the new rule will re-establish that balance of rights. However, it is clear that Congress was intentional in their desire to protect the First Amendment rights of medical professionals and continuously airs on the side of protecting that community from being forced to perform or be engaged in procedures, such as abortions or sterilizations, that go against their strongly held beliefs.

One example of this is the Church Amendments, which prohibit federal officials from forcing a medical professional “to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions.”⁴

There are, however, 25 Congressional amendments listed in the 2019 rule that directly affect HHS, expressly provide context, and make clear what is expected of entities when it comes to protecting conscience rights. This Proposed Rule removes all context for these amendments and simply cites them, leaving the door open to confusing interpretation of the Proposed Rule.

The text of the newly Proposed Rule explicitly states that the purpose, in part, is to ensure “health care systems must effectively deliver services—including safe legal abortions—to all...” This would seem to say that the true intention of partially rescinding the 2019 rule would be to expand abortion rights, labeled as healthcare access, rather than advance the right of conscience. We propose maintaining the full authority and context of these 25 amendments in order to clearly indicate HHS’s willingness to fully enforce these laws.

Reinsert crucial definitions

Although the rule states that the use of definitions are duplicative, we are concerned that the removals of these definitions in 88.2, such as “assist in performance” or “discriminate,” will only lead to confusion on how this rule will strengthen the conscience rights of individuals dealing with extremely difficult and life-altering decisions. While some have continuously labeled elective abortions for any reason up until the moment of birth as “health care,” we vehemently disagree with that assessment. We recognize that many within the health care system would agree that the unborn child

³ 84 FR 23170 (2019).

⁴ 42 U.S. Code § 300a-7.

is a second patient to care for and not to discard purely because the mother decides to end the life of the child.

Elective abortions, which by definition end a human life in the womb, cannot be considered health care. Providing gender transition interventions, which require doctors to adhere to an ideology that states that a person's concept of their maleness or femaleness can—and should, in many cases—be divorced from their biology cannot be considered health care. This ideology can lead to sterilization, double mastectomies on healthy minor girls, and much more. No doctor should be discriminated against and forced to perform an elective abortion or harmful gender transition interventions. It is very reasonable for a doctor to find that elective abortions and gender transition interventions are deeply harmful to the individuals receiving them, especially when those victims are minors.

Apply Stronger Compliance and Enforcement Requirements

We are also deeply concerned about the removal of the 2019 final rule's enforcement mechanisms and certification requirements that would ensure compliance with laws, such as the Weldon Amendment.⁵ This removal would result in the medical community ultimately having even fewer protections and losing their ability to be rectified when their rights are violated. Specifically, under this new NPRM, the Office of Civil Rights is given watered-down authority to enforce “by informal means” existing conscience laws, rather than the 2019 rule which overtly allows for the referral of cases to the Department of Justice for lawsuits or for the withholding of federal funds in the case of a violation of the conscience laws.

Additionally, there is a removal of necessary certifications of compliance and record-keeping under the 2019 rule that assured compliance. We strongly ask for these 2019 additional compliance and enforcement mechanisms to be added to the final rule. This will provide clarity on how conscience rights are expected to be enforced to the fullest extent.

Conclusion

Leading political figures today have widely promoted as a core belief that women should have the right to access abortions for any reason any time before birth. This gives us great pause as the Administration has supported efforts in other areas, such as laws in Congress and administrative actions to advance abortion rights at all costs.

⁵ 84 FR 23170 (2019).

On February 28, 2023, President Biden released the following statement⁶:
“My Administration will continue to defend reproductive freedom to ensure that all Americans – regardless of their gender, race, ethnicity, sexual orientation, gender identity, or income – have the ability to make the choices that are right for themselves and their families. I have taken executive action to safeguard access to reproductive care, including medication abortion, help ensure women can receive emergency medical care, protect patients’ privacy and access to accurate information about their reproductive rights, and combat discrimination in the health care system. I continue to call on the Congress to pass a Federal law restoring the protections of Roe v. Wade so all women in every State have the right to choose.”

His words not only seem to validate our concerns that the final rule will only strip away conscience protections but also underscore his Administration’s ongoing efforts to end the lives of children in the womb at any cost. It is unacceptable to force doctors into this scheme that completely denies the humanity of the unborn child and casts aside the conscience rights of the physician. A doctor should never be forced to harm one of his two patients, and this rule will go far beyond what is medically necessary to save the life of the mother.

We trust our health care professionals with our best interest—to heal and make whole, not to end the life of a child or do irreparable harm by causing sterilization under gender transition interventions.

The bottom line is this rule will only hurt the medical community’s ability to provide patients real medical care and will force them to violate their consciences or even force them out of the medical field at a time when caring medical professionals are needed, especially in rural communities. We ask that the Administration reconsider these changes to reflect the requests above and protect, not harm, families and their doctors.

Thank you for reviewing and considering this comment.

Sincerely,

Ruth Ward
Director of Government Affairs
Family Policy Alliance

⁶ Biden, Joseph R. “A Proclamation on Women’s History Month.” *White House Briefing Room*, 28 Feb 2023, www.whitehouse.gov/briefing-room/presidential-actions/2023/02/28/a-proclamation-on-womens-history-month-2023.