AAPLOG

June 16, 2023

The American Association of Prolife Obstetricians and Gynecologists (AAPLOG) submits these comments on behalf of our approximately 7000 members, who are women's healthcare professionals who practice life-affirming medicine consistent with the Hippocratic Oath. As an organization, we aim to make known the evidence-based effects of abortion on women as well as the scientific fact that human life begins at the moment of fertilization, with the goal that all women, regardless of race, creed or national origin, will be empowered to make healthy and life-affirming choices.

The proposed rule amending the HIPAA act renders the duties and responsibilities of physicians and other medical professionals who care for women incomprehensible and makes it impossible for us to understand what is and is not required for compliance, especially in areas of mandatory reporting.

In areas where it applies, the Reproductive Health Care Rule (164.502(a)(5)(iii) overrides our responsibilities as physicians who are mandatory reporters of abuse. No physician would be able to know what information is allowed or prohibited now in cases of rape, child abuse or any other abuse if it relates in any way to reproductive health information.

Coerced abortion is a crime in all 50 states. If a physician becomes aware of coerced abortion, she or he is prohibited now from releasing the very information which would be vital to the case.

Similarly, if a physician sees an adolescent who is pregnant, especially if she is under the age of 16, the physician is a mandatory reporter of such cases in many states as they are often the result of rape or incest, but is now prohibited from providing the information which would prove essential to the case – especially if the physician is seeing the patent due to her seeking an abortion.

This is legally incoherent, as it places physicians in an impossible position. They will be at significant risk of liability for failing to report as mandatory reporters, or if they do report, they will now be at risk of being accused of a HIPAA violation – something that will often lead to termination of their employment and also potentially loss of licensure and/or board certification as this is considered unethical behavior.

The inherent confusion in this new proposed rule is illustrated at 164.512 (c.)(3) where it says "based *primarily* on the provision of reproductive health care"? Nowhere does HHS explain what they mean by "based primarily on." Clearly, a physician treating a complication from an abortion in a 10-year-old who was brought in by her 30-year-old abuser is basing his or her mandatory report on a patient encounter "based primarily on" providing "reproductive health care". However, under this proposed rule, the reporting of any such criminal activity would be discouraged or potentially even prohibited (*it is difficult for me as a physician and not a lawyer to know for sure – highlighting the incoherency of the language throughout this rule*), protecting the abuser and rendering the prosecution of such criminal sexual abuse impossible. The ultimate victim of this rule, or at the very least the confusion it creates, is the vulnerable young girl. The second is the medical professional who just wants to make sure she receives excellent care and is removed from her abuser.

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The HHS explanation at p 23538 is incoherent:

> "The proposed provision is *intended to safeguard the privacy of individuals' PHI against claims that uses and disclosures of that PHI are* warranted because the provision or facilitation of reproductive health care, in and of itself, may constitute abuse, neglect, or domestic violence. Similar to the discussion above in section IV.D.1 [pp. 23537-38], the Department also does not intend for this proposal to obstruct oversight related to professional conduct or similar legal proceedings for which PHI related to reproductive health care is needed."

This almost seems to be intentionally confusing and does not clarify what action a physician is supposed to take in the case of the 10-year-old brought in by her 30-year-old abuser.

And it doesn't stop there. Even if the Administration clarifies the utter confusion caused in the section mentioned above, there is a new requirement under 164.509 which sows even more. The proposed rule asks the covered entity to disclose information which is "*potentially* related to reproductive health care".

For an OB/GYN, everything that we do is "potentially related to reproductive health care". Nowhere in the rule does the Administration define what they mean by "potentially related to". What does that mean for OB/GYNs? Are we now no longer to report *any* concerns we have about abuse or coercion of our patients given the fact that nearly all of the healthcare we provide our patients is related to their reproductive system? The new rule is replete with terms that are vague and undefined. Rather than adding clarity this new rule adds equivocal terminology with the underlying chilling effect that physicians will be now unable to discern what is allowable and mandatory disclosure and what would constitute a HIPAA violation.

The end result of this confusion is that physicians and health care entities will end up refusing to provide information not only in cases of abuse but in any area that could possibly be construed as "potentially related to" reproductive health care.

This of course will render impotent state law reporting requirements regarding abortion complications, abortion provision, informed consent requirements, parental consent requirements, etc. It is not an unreasonable conjecture that this may be one of the main purposes of the Administration in proposing this new rule, as they have repeatedly made it abundantly clear they are opposed to any state laws that would regulate abortion or empower parents to have a say in their child's medical care in any way. These are laws that elected officials have passed per the wishes of their constituents in order to protect their state's residents.

But one of the greatest harms that will take place is the inability to prosecute criminal sexual abuse including child sexual abuse due to the provisions in the RHC Rule which OVERRIDE ALL OTHER PROVISIONS authorizing the release of health information, such as:

The proposed prohibition of disclosure "for a criminal, civil or administrative investigation into a proceeding against any person." Clearly information about pregnancy is critically important to establishing the fact of child sexual abuse in a young adolescent. Yet clearly the critical information that the physician would provide would be "for a criminal investigation" and thus be prohibited from release by the proposed rule.

This basically gives child molesters and sex abusers a free pass as it obstructs the criminal justice system from accessing the information necessary to prosecute these abusers.

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Further facilitating child sex abuse is the part of the rule which prohibits disclosure "in connection with seeking, obtaining, providing or facilitating reproductive health care." So the trafficker who tries unsuccessfully to abort one of his victims and brings her in in septic shock will escape any repercussions, because the physicians now will be unable to report his criminal activity because it was done "in connection with seeking, obtaining, providing or facilitating reproductive health care."

And lest there be any confusion, the term "reproductive health care" is defined in 160.103 as "care services or supplies related to the reproductive health of the individual." HHS says this "applies broadly" and includes but is not limited to:

- Care or services "in connection with an individual's reproductive health"
- "medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy."
- "all health care that could be furnished to address reproductive health"
- " types of care, services or supplies used for the diagnosis and treatment of conditions related to the reproductive system"
- "miscarriage management, molar or ectopic pregnancy treatment, pregnancy termination, pregnancy screening, products related to pregnancy or prenatal care, and similar or related care."
- "health care related to reproductive organs, regarless of whether the health care is related to an individual's pregnancy or ***whether the individual is of reproductive age."***

The 10-year-old girl we treat for sepsis does not benefit from this rule. The one who benefits from this rule is her abuser, as this rule impedes prosecution for sex traffickers and abusers, and provides no benefit for those abused. This rule ties the hands of OB/GYNs and any physician or health professional by forbidding their participation in the prosecutions of sex traffickers and abusers. It prevents us from fulfilling our oath to care for and protect our patients.

Yet another area where the rule contradicts the rule of law in almost all states is related to forced or coerced abortion, which is illegal in almost all states. The rule says this at 164.502 (a)(5)(iii)(B):

"seeking, obtaining, providing or facilitating" includes but is not limited to "expressing interest in, inducing, using, performing, furnishing, praying for, disseminating information about, arranging, insuring, assisting or otherwise taking action to engage in reproductive health care; or attempting any of the same"

"Inducing" is defined in the dictionary as "succeed in persuading or influencing to do something."

So this rule as written PROHIBITS medical professionals from complying with subpoenas seeking information on whether or not someone was coerced into getting an abortion. As a medical professional I would be unable to testify on behalf of my patient if she was forced into an abortion she did not want. It is obvious that the promulgator of this rule was ignorant of how this rule would actually apply in real medical situations and has no concept of what it means to actually provide compassionate and holistic healthcare to vulnerable women and girls.

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This kind of sloppy imprecise rulemaking is shocking in its broad implications which, at best, do not seem to have been considered at all by the administrative rule makers. At worst, it targets physicians who care for their patients as well as vulnerable women, while giving sexual abusers carte blanche to continue their atrocities.

Our patients, especially the most vulnerable, deserve to know that we will help protect them from abusers. This rule would bind our hands and make us make an impossible decision – save the girl sitting in front of us and lose our job or even our licensure or keep silent and know that she will continue to be abused. It will be a sad day not only for our nation but also for our profession if this rule is allowed to go into effect.

AAPLOG requests retraction of the entire proposed rule.

Respectfully submitted,

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