

April 8, 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

RE: Provider Conscience Regulation 45 CFR 88

Docket ID: HHS-OPHS-2009-0001

Document ID: HHS-OPHS-2009-0001-0001

Document Title: Rescission of the 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”; Proposal

RIN: 0991-AB49

Electronic comments submitted through the Federal eRulemaking Portal <http://www.regulations.gov>.

On behalf of the more than 100,000 bipartisan members of the American Association of University Women (AAUW), I write to share AAUW’s comments in response to the following U.S. Department of Health and Human Services’ proposed rule: Rescission of the 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.”

AAUW strongly urges the Department to rescind the aforementioned regulation. It is a vague and ambiguous rule with negative consequences for women’s health. The rule fails to strike the critical balance between patients’ rights to care and the moral and religious beliefs of health care providers; rescission would help restore that balance. The rule omits any mention of current statute, both federal and state, that may be contradictory in nature, posing serious confusion for health care providers. Further, it expands the services that providers can refuse to perform to include counseling and information about health care options, an unnecessary expansion that undermines women’s ability to make informed health care decisions and provide informed consent.

AAUW’s Position on Reproductive Rights

AAUW supports the right of every woman to safe, accessible, affordable, and comprehensive family planning and reproductive health services. This position stems from AAUW’s 2007-09 Public Policy Program, which advocates: “choice in the determination of one’s reproductive life” and “increased access to health care and family planning services and expansion of patients’ rights.”¹ AAUW members have

made reproductive rights a policy principle since 1977, and have supported physician dispensation of contraceptive information since 1935.

AAUW trusts that every woman has the ability to make her own informed choices regarding her reproductive life within the dictates of her own moral and religious beliefs. Further, AAUW believes that these deeply personal decisions should be made without governmental interference.

The U.S. Supreme Court's 1973 ruling in *Roe v. Wade* legalized abortion for all women and found abortion to be a constitutionally protected "fundamental right." All women—regardless of race, religion, age, or socioeconomic standing—have a constitutionally protected right to choose. In contrast to the previous administration, President Barack Obama is "a consistent champion of reproductive choice and will make preserving women's rights under *Roe v. Wade* a priority in his Administration."² Moreover, AAUW is especially pleased to note that the president is committed to preventing unintended pregnancies through various legislative and executive initiatives, including passage of the Prevention First Act.³ AAUW is committed to ensuring this new era for reproductive rights and health will result in women having real access to a full range of reproductive health and family planning options. The new political environment represents a major opportunity for advancing issues related to woman's reproductive rights, an effort that includes full rescission of this last Bush administration rule.

Background on the Current Rule

The Department of Health and Human Services proposed regulations on September 26, 2008 that claim to educate recipients of Department funds about their legal obligations to respect the religious and moral refusals of employees. The current statutes are often referred to as the Church Amendments (42 USC300a-7), the Coats Amendment (42 USC 238n), and the Weldon Amendment (Consolidated Appropriations Act 2008, PL 110-161, Div. G, 508d). These laws are intended to give individuals and institutions the ability to refuse to provide, and to prohibit required participation in, abortion and sterilization services.

AAUW was among dozens of advocacy and public health groups that submitted and generated over 200,000 comments in opposition to the rule. AAUW was concerned that the vague language and expansive terms of the rule would have a negative impact on women's access to care. Not only does the rule send a message that is at best confusing when compared to current federal or state statutes, it also makes no mention of a patient's right to care—a serious omission.

Despite these obvious flaws, the Bush administration went ahead and issued the final rule on December 19, 2008. It took effect on January 20, 2009—the same day President George W. Bush left office, making it one of the more notorious "midnight regulations" put forth in the Bush administration's final days.

The Current Rule is Expansive

This new regulation, currently in effect, allows health care employees to refuse to provide any health care service that is in any way contrary to their personal beliefs, without any consideration for patients' guaranteed access to care and full information. The rule does this by expanding the group of individuals who can refuse to perform a service, using very broad definitions of "entity," "health care entity," and "workforce."⁴ This means that any members of health care facilities' paid and voluntary staff, from appointment schedulers to janitorial staff, are included. Further, it broadens the scope of services that may be refused to include, "any activity with a reasonable connection to a procedure, health service, or health service program, or research activity" as well as "counseling, referral, training, and other arrangements."⁵

Individuals working in medical practices are permitted to withhold information about a variety of services, from contraceptive availability and appropriateness to abortion access and sterilization services. In addition, they could also refuse to refer patients to other locations or providers where such services could be obtained. What is even more troubling is that many women would be completely unaware of any omitted information and available services. This deliberate omission will completely undermine women's ability to make informed health care decisions and provide informed consent. Quite frankly, AAUW believes the rule seriously jeopardizes the health of women and undermines women's own self-determination regarding the direction of their health care.

A leaked draft of the rule contained an inaccurate expanded definition of abortion. While that clause was eliminated from the formally adopted regulations, the omission of any guidance leaves the door open for insurance plans, hospitals and other entities to define abortion in any way they choose—including common forms of birth control. This additional omission, along with the expansion of the definition of who can refuse to provide what service, is a poison pill for women's health.

Current Law Already Protects Employees

The Department's current rule allows any employee of a health care provider to refuse to treat any individual if doing so would violate his or her religious beliefs or moral convictions—without any mention of the needs of the patient. In doing so, the current rule fails to address the critical balance between respecting employees' religious beliefs and respecting employers' ability to provide their patients with access to health care. This balance is currently defined in federal law under Title VII of the Civil Rights Act of 1964, but the final rule explicitly dismisses any notion that the Department ought to have taken this fact into consideration.

Title VII provides a balance between employers' need to accommodate their employees' religious beliefs and practices, including their refusal to participate in specific health care activities to which they have religious objections, with the needs of the people the employer must serve. Under Title VII, employers have a duty to reasonably accommodate an employee or applicant's religious beliefs or practices, unless doing so places an "undue hardship" on the employer's business. This law

provides protection for individual belief while still ensuring patients' access to health care services. In July 2008 the Equal Employment Opportunity Commission (EEOC) released guidance on exactly the topic that the current rule claimed needed clarifying. The EEOC information goes to great lengths to explain the extent of employers' obligations to accommodate the religious beliefs of their employees.

Because the current rule ignores Title VII and the EEOC guidance, confusion and uncertainty among employees, employers and patients regarding their rights surrounding these refusals will only grow. Further, because the current rule ignores the rights of patients, their access to health care is at risk. Both circumstances are unacceptable to AAUW.

The Bush administration made no secret of its hostility to reproductive rights; indeed, the current regulation was regarded as a "parting gift" to those who shared their outlook. There will always be two sides to the abortion debate, but AAUW shares the Obama administration's conviction that common ground can be achieved on matters pertaining to reproductive health, and that outreach and education are more effective than divisiveness. For instance, a bill such as the Prevention First Act is a comprehensive package of preventive health and education measures designed to help reduce unintended pregnancy and to support reproductive health – goals that can be supported by both the pro-choice and pro-life camps which will result in fewer abortions being performed by doctors. This commonsense legislation includes measures to help women obtain family planning services, access contraception, and receive complete reproductive health education. These types of programs will ensure that all women have access to comprehensive family planning and reproductive health services. Whereas the current regulation does far more harm than good, passage of legislation such as the Prevention First Act would instead take meaningful steps to advance women's health and reduce abortions. That, in addition to rescinding the current rule, is the type of action worth pursuing.

Conclusion

The Bush administration estimated that the regulation would impact nearly 572,000 health care entities, including hospitals, private physicians' offices, and health centers. Moreover, the cost associated with compliance is pegged at \$43.6 million. Consequently, if left intact, the current regulation could have a debilitating effect on these health care entities and on the millions of individuals and families who rely on them for accurate information and health care. AAUW is committed to continued access to reproductive health care for all women. The current rule is not only an unnecessary intrusion, but it actually increases barriers to quality women's health care. AAUW urges you to rescind the current rule in its entirety.

If you have any questions, please feel free to contact me at 202-785-7720, or Adam Zimmerman, regulatory affairs manager at 202-728-7617. Thank you for the opportunity to submit comments on these important regulations.

Sincerely,



Lisa M. Maatz
Director, Public Policy and Government Relations

¹American Association of University Women. (August 2007). *2007-09 AAUW Public Policy Program*. Retrieved April 8, 2009, from http://www.aauw.org/advocacy/issue_advocacy/upload/2007-09-PPP-brochure.pdf.

²The White House (2009). *The Agenda: Women – Reproductive Choice*. Retrieved March 18, 2009, from <http://www.whitehouse.gov/agenda/women/>.

³The White House (2009). *The Agenda: Women – Reproductive Choice*. Retrieved March 18, 2009, from <http://www.whitehouse.gov/agenda/women/>.

⁴Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 78072 - 78101. (December 19, 2008).

⁵Ibid.