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BY E-MAIL

March 26, 2018

U.S. Department of Health and Human Services
Office for Civil Rights
Attention: Conscience NPRM, RIN 0945-ZA03
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue SW
Washington, D.C. 20201

Re: Docket HHS-OCR-2018-0002

On behalf of the Anti-Defamation League, we are writing to offer our comments on the proposed 45 CFR Part 88, "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority," as outlined at 83FR 3880 ("Proposed Rule" or "Part 88").

For more than a century, the Anti-Defamation League (ADL) has been an active advocate for religious freedom for all Americans – whether in the majority or minority. Among ADL's core beliefs is strict adherence to the separation of church and state effectuated through both the Establishment Clause and the Free Exercise Clause of the First Amendment. We believe a high wall of separation between government and religion is essential to the continued flourishing of religious practice and belief in America, and to the protection of all religions and their adherents.

ADL believes that true religious freedom is best achieved when all individuals are able to practice their faith or choose not to observe any faith; when government neutrally accommodates religion, but does not favor any particular religion; and when religious belief is not used to harm or infringe on the rights of others by government action or others in the public marketplace.

The "play in the joints" between the Establishment Clause and Free Exercise Clause allows and, in many instances, mandates government to accommodate the religious beliefs and observances of citizens. Religious accommodation, however, has its limitations. The United States government should not sanction discrimination or harm in the name of religion. The right to individual religious belief and practice is fundamental. But there should be no license to discriminate or to do harm with government authority.

As noted in the background for this Proposed Rule, healthcare providers – whether individuals or entities – already have robust statutory religious or moral exemptions from performing abortions or sterilization procedures, or complying with advanced directives, and in certain international programs, they have even broader exemptions ("Statutory Exemptions").[1] Provided that the health and safety of patients are safeguarded, such

[1] *See* The Church Amendments, 42 U.S.C. 300a-7; The Coats-Snowe Amendment, 42 U.S.C. 238n; Consolidated Appropriations Act, 2017, Pub. L. 115-31, Div. H, Tit. V, sec. 507(d) (the Weldon Amendment) and at Div. H, Tit. II, sec. 209; Patient Protection and Affordable Care Act related to assisted suicide 42 U.S.C. 18113; 42 U.S.C. 1395cc(f), 1396a(w)(3), and 14406; 22 U.S.C. 7631(d); Consolidated Appropriations Act, 2017, Pub. L. 115-31, Div. J, Tit. VII, sec. 7018 (Helms Amendment).

accommodations are appropriate for doctors, nurses, and others, who actually may be called on to perform these medical procedures or services.

The Proposed Rule, however, crosses the line from providing appropriate accommodations to allowing individuals or entities with incidental or tangential relationships to such procedures or services to detrimentally impose their religious or moral beliefs on patients and other third parties. It does so in two ways. First, Part 88 provides excessively broad and vague definitions of persons, entities, and activities covered by Statutory Exemptions. Second, it includes an excessively broad interpretation of Statutory Exemptions the enforcement of which is delegated to the Office of Civil Rights ("OCR").

As a result, Part 88 would impede access to federally-supported healthcare and in particular have a disparate impact on women, LGBTQ people and religious minorities. It thereby would undermine the mission of OCR, which is to "... enforce laws against discrimination based on race, color, national origin, disability, age, sex, and religion by certain health care and human services." Moreover, the Proposed Rule and the accompanying creation of a new OCR division to implement it convey the distinct message that enforcement of civil rights protections for such groups is secondary.

The Proposed Rule Provides Excessively Broad Definitions of Persons and Entities Covered by Statutory Exemptions

The "Descriptions of the Proposed Rule" ("Rule Descriptions") advise that the term "Entity" means a person or any legal entity whether private or public, and the definition of "Health Care Entity" is not definitive. Rather, it includes examples of covered persons or entities such as "...an individual physician or other health care professional, health care personnel, ... a hospital, a laboratory, an entity engaging in biomedical or behavioral research, ... a or health insurance plan ... , or any other kind of health care organization." However, these examples are "... an illustrative, not an exhaustive list." Additionally, while Part 88 contains a definition of "Health Program or Activity," which will be discussed, *infra*, it does not appear to contain a definition of "health care."

With respect to employees of or other persons associated with Entities or Health Care Entities, the Rule Descriptions provide the following definitions for the terms "Workforce" and "Individual." Workforce means:

> *employees, volunteers, trainees, contractors, and other persons whose conduct in the performance of work for an entity or health care entity is under the direct control of such entity or health care entity, whether or not they are paid by the entity or health care entity, as well as health care providers holding privileges with the entity or health care entity.*

The term "Individual" means "a member of the workforce of an entity or health care entity," including "... volunteers, trainees, or other members or agents of a covered entity, broadly defined, when the conduct of the person is under the control of such entity" (emphasis added).

The Statutory Exemptions are intended to cover persons, who actually may be called on to perform medical procedures. Yet, based on these definitions, virtually any person, including volunteers, who work, for example, at a federally-funded or supported hospital, pharmacy, medical or nursing school, nursing home, or "any other kind of health care organization" would be covered by Statutory Exemptions. Simply put, any person performing work for such a facility

– whether paid or unpaid – would be encompassed by the Proposed Rule irrespective of their non-medical job description or role. That unnecessarily-inclusive definition would compromise and harm the rights of third parties.

The Proposed Rule Provides Excessively Broad Definitions of Activities Covered by Statutory Exemptions

The Rule Descriptions advise that term "Healthcare Program or Activity … include the provision or administration of any health-related services, health service programs and research activities, health-related insurance coverage, health studies, or any other service related to health or wellness whether directly, through payments, grants, contracts, or other instruments, through insurance, or otherwise" (emphasis added). Part 88 does not define the meaning of "health-related services" or "service related to health or wellness."

These terms must be read in conjunction with two other definitions: "Assist in the Performance" and "Referral or Refer for." The Rule Descriptions advise that the Department of Health and Human Services ("HHS") intends Assist in the Performance to "… to provide broad protection for individuals, consistent with the plain meaning of the statutes …" because "[t]he Department believes that a more narrow definition of the statutory term 'assist in the performance,' such as a definition restricted to those activities that constitute direct involvement with a procedure, health service, or research activity, would fall short of implementing the protections Congress provided (emphasis added). To this end, the term applies "… to activities with an articulable connection to the procedure, health service, health service program, or research activity in question."

Furthermore, "Referral or Refer for" includes

> *… the provision of any information (including but not limited to name, address, phone number, email, or website) by any method (including but not limited to notices, books, disclaimers, or pamphlets online or in print) pertaining to a service, activity, or procedure, including related to availability, location, training, information resources, private or public funding or financing, or direction that could provide any assistance in a person obtaining, assisting, training in, funding, financing, or performing a particular health care service, activity, or procedure, when the entity or health care entity making the referral sincerely understands that particular health care service, activity, or procedure to be a purpose or possible outcome of the referral.*

Based on these definitions a person who performs work for a federally-supported healthcare facility could refuse, without penalty, to perform their responsibilities for any service related to health or wellness that has an indirect or possible articulable connection to a statutorily-covered procedure, including providing any information about or how to obtain a procedure.

Application of the Proposed Rule's Definitions to 45 CFR Part 88's Interpretation of Statutory Exemptions Will Impede Access to Healthcare

The Proposed Rule's definitions operating in conjunction with its interpretation of substantive Statutory Exemptions could impede access to or deny federally-funded or supported healthcare. And the harm caused by enforcement of the Proposed Rule would disparately impact women, LGBT people, and religious minorities.

For example, with respect to federally supported healthcare within the United States, here are some examples of the harms that could result:

- An administrator at the only healthcare provider in a rural area could refuse to perform intake or process paperwork for a woman who must terminate her pregnancy due to an ectopic pregnancy or who is getting a tubal ligation. Similarly, the administrator could refuse to do the same for a transgender person, who is undergoing gender reassignment surgery because the surgery requires a hysterectomy. At the same provider, the only administrator or receptionist on shift could refuse to provide a referral to or any information about a health clinic that provides abortions.
- An administrator at a healthcare provider, even one that does not provide abortions or sterilization procedures, could refuse to disclose the provider's policy on these procedures based on the sincerely-held belief that the person seeking the information will either obtain the procedure at the contacted provider or at an alternative provider, which offers these procedures.
- A lab technician could refuse to perform any tests for a patient who will undergo an abortion, sterilization procedure, hysterectomy, or gender reassignment surgery.
- A hospital maintenance worker or contractor directed by the healthcare provider could refuse to perform any upkeep or construction work on an operating room or other facility that is used for abortions, sterilization procedures or hysterectomies.
- A hospital orderly could refuse to provide wheelchair service to a patient who is getting a hysterectomy or gender reassignment surgery.
- An administrator or employee of an insurance company that provides federally funded Medicare or Medicaid insurance policies could refuse to disclose to a prospective purchaser of insurance whether policies cover sterilization, gender reassignment surgery or services related to advance directives.
- At a federally supported medical school, an administrator could refuse to register students based on the sincerely-held belief that they will obtain medical training on abortion, sterilization, gender reassignment surgery, or advance directives, and will perform or assist with such procedures or services during or after their training. Or an employee of such a school's bookstore could refuse to sell medical books to students that provide information on abortion, sterilization or advance directives based on the sincerely-held belief that providing these books will train students to prospectively perform such procedures or services.

In the international arena, Part 88 could have an even wider detrimental impact. Pursuant to the Proposed Rule "[a]ny entity" that receives federal financial assistance for HIV/AIDS prevention, treatment or care under section 104A of the Foreign Assistance Act of 1961 shall not "endorse, utilize, make a referral to, become integrated with, or otherwise participate in <u>any program or activity</u> to which the applicant has a religious or moral objection, as a condition of assistance" (emphasis added).

Thus, with respect to programs funded under section 104A, a health care organization, doctor, nurse or administrator, for example, could not be penalized for refusing, based on religious or moral objection, to treat or offer services to LGBT people, Muslims or other religious minorities, or sex workers.

<u>The Proposed Rule Raises Significant Constitutional Issues</u>

The U.S. Supreme Court "'has long recognized that government may (and sometimes must) accommodate religious practices.'" *See Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 334. (1987) (citations omitted). However, it cautioned that "[a]t some point, accommodation may devolve into "an unlawful fostering of religion.'" *Id* at 334-35.

Indeed, religious accommodations that unduly burden third parties violate the Establishment Clause. *See Sherbert v. Verner*, 374 U.S. 398 (1963); see also *Estate of Thornton* v. *Caldor*, 472 U.S. 703, 710 (1985). More recently, the Court has found that for statutory exemptions under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc et seq., to comport with the Establishment Clause, reviewing courts "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *See Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005).

Furthermore, in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), every member of the Court authored or joined an opinion recognizing that detrimental effects on nonbeneficiaries must be considered when evaluating requests for accommodations under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. *See Hobby Lobby*, 134 S. Ct. at 2760 ("Nor do we hold * * * that * * * corporations have free rein to take steps that impose 'disadvantages . . . on others' or that require 'the general public to pick up the tab.'" (brackets omitted)); *id.* at 2781 n.37 ("It is certainly true that in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.'"); *id.* at 2787 (Kennedy, J., concurring) (religious exercise must not "unduly restrict other persons * * * in protecting their own interests"); *id.* at 2790 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ., dissenting) ("Accommodations to religious beliefs or observances * * * must not significantly impinge on the interests of third parties."); *see also Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., joined by Sotomayor, J., concurring) (Court's recognition of right to accommodation under RLUIPA was constitutionally permissible because "accommodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief").

The Proposed Rule goes well beyond a religious accommodation that safeguards the health and safety of patients while exempting doctors, nurses, and medical professionals, who actually may be called on to perform abortions, sterilization, or other medical procedures, or to comply with advance directives. Rather, as detailed above, Part 88 broadly allows a wide swath of non-medical personnel far removed from these procedures or services to detrimentally impose their particular religious beliefs about them on innocent third parties. The Proposed Rule therefore raises serious constitutional issues because the broad exemptions provide a license to discriminate and would unduly burden – or, in some instances – deny patient access to federally-supported healthcare services.

We urge you to recall the Proposed Rule for modifications in light of these serious policy and constitutional arguments.

Sincerely,

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