The new conscience regulation: gutting protections, laying landmines

Following are direct quotes excerpted from the new conscience regulation, which included discussion sections of explanations and interpretations by Obama administration HHS officials. The regulation can be viewed in its entirety at: https://www.federalregister.gov/articles/2011/02/23/2011-3993/regulation-for-the-enforcement-of-federal-health-care-provider-conscience-protection-laws

The comments in *italics* following the quoted excerpts from the regulation are by Christian Medical Association VP for Government Relations Jonathan Imbody, who also manages Freedom2Care, a coalition dedicated to conscience rights in health care.

Gutting the only conscience-protecting regulation

"Sections 88.2 through 88.5 of the 2008 Final Rule [http://www.freedom2care.org/docLib/20090313_HHS_20081218_reg_FINAL.pdf] have been removed. Section 88.2 contains definitions of terms used in the federal health care provider conscience statutes.

"The preamble to the August 26, 2008 Notice of Proposed Rulemaking (73 FR 50274) and the preamble to the December 19, 2008 Final Rule (73 FR 78072) addressing these sections are neither the position of the Department, nor guidance that should be relied upon for purposes of interpreting the federal health care provider conscience protection statutes."

> *These few sentences in the new regulation cut the heart out of the original conscience regulation. The definitions in the original regulation were the key to making sure the law was interpreted correctly, providing concrete examples of conscience protections backed by law. Examples included definitions of what constitutes "discrimination"; what it means to "assist in the performance of abortion"; what is a "health care entity" and who within a healthcare institution "workforce" enjoys protection under the law.*

"Abortion" interpreted to not include contraception

"The 2008 Final Rule did not provide that the term 'abortion,' as contained in the federal health care provider conscience protection statutes, includes contraception. However, the comments reflect that the 2008 Final Rule caused significant confusion as to whether abortion also includes contraception. The provision of contraceptive services has never been defined as abortion in federal statute. There is no indication that the federal health care provider conscience statutes intended that the term "abortion" included contraception."

> *Potential abortifacients available today simply were not in existence at the time Congress passed several conscience-protecting laws. However, the clear intent of Congress was to prevent compelling conscientiously objecting healthcare professionals to end human life, which is precisely the view many pro-life physicians take of potential abortifacients.*
>
> *Abortion advocates have been tirelessly pushing legislation to mandate the provision and prescription of contraception including potential abortifacients, and this language appears to be tailored to that drive to remove ethical choices from healthcare professionals.*

"Informed consent" may be code for mandated discussions and referrals

"Many comments expressed concern that the 2008 Final Rule would prevent a patient from being able to give informed consent, because the health care provider might not advise the patient of all health care options. Partial rescission of the 2008 Final Rule should clarify any mistaken belief that it altered the scope of information that must be provided to a patient by their provider in order to fulfill informed consent requirements."

> *Politicians and bureaucrats often speak in code, and good words too often cover up bad intentions. Every healthcare professional values informed consent. In this context, however, the concern is that insuring informed consent could easily be interpreted to mean mandating presenting the option of and referring for abortions and other controversial procedures and prescriptions to which the professional is ethically opposed.*

Misdiagnosing the real threat to healthcare access

"The Department received several comments suggesting that the 2008 Final Rule could limit access to reproductive health services and information, including contraception, and could impact a wide range of medical services, including care for sexual assault victims, provision of HIV/AIDS treatment, and emergency services. Additionally, a number of commenters expressed concern that the 2008 Final Rule could disproportionately affect access to health care by certain sub-populations, including low income patients, minorities, the uninsured, patients in rural areas, Medicaid beneficiaries, or other medically-underserved populations.

"The Department agrees with comments that the 2008 Final Rule may negatively affect the ability of patients to access care if interpreted broadly. Accordingly, the Department partially rescinds the 2008 Final Rule based on concerns expressed that it had the potential to negatively impact patient access to contraception and certain other medical services without a basis in federal conscience protection statutes."

The 2008 regulation had been in effect for over two years. No evidence was presented indicating that any of these claims were valid.

Nine of ten faith-based physicians say they will leave medicine absent the ability to practice according to their conscientiously held ethical standards. That evidence reveals that the real threat to patient access to healthcare--particularly for the poor and those in medically underserved areas and populations--is the loss of faith-based healthcare professionals and institutions who depend on strong and broad conscience protections.

Ignoring public support for the regulation

"The Department received more than 300,000 comments addressing its notice of proposed rulemaking proposing to rescind in its entirety the 2008 Final Rule. More than 97,000 individuals and entities submitted comments generally supportive of the proposal to rescind the 2008 Final Rule. Nearly 187,000 comments expressed opposition to the Department's proposal to rescind the 2008 Final Rule."

Note that public comments, including those submitted by CMA members, supporting the original conscience regulation and opposing the Obama administration's plan to rescind it outnumbered those supporting the administration by a margin of 2-1.

Reporting provision retained

"While the longstanding federal health care provider conscience protection statutes have provided protections for health care providers, there was no clear mechanism for a health care provider who believed his or her rights were violated to seek enforcement of those rights. To address these comments, this final rule retains the provision in the 2008 Final Rule that designates the Office for Civil Rights (OCR) of the Department of Health and Human Services to receive complaints of discrimination and coercion based on the federal health care provider conscience protection statutes."

It is good that the new regulation retains the very important provision for reporting cases of discrimination to the HHS Office of Civil Rights. Physicians experiencing discrimination should do so. Whether an administration that holds such a narrow and tenuous view of conscience rights will aggressively pursue allegations, however, remains in question, so keep a private attorney handy.

Biased outreach education worse than none at all

"The Department received many comments expressing concern about the lack of knowledge about the federal health care provider conscience protection statutes in the health care industry. Many commenters opposed to rescission related anecdotes of hospitals and other health care entities failing to respect the conscience rights of health care providers. The Department believes it is important to provide outreach to the health care community about the federal health care provider conscience protection statutes."

Having a radically pro-abortion HHS Secretary, President and administration officials interpreting and explaining laws designed to protect pro-life healthcare professionals is hardly an appealing prospect. If one ever wondered what view of conscience rights the

administration might propagate in its "education campaign," a look at the latest HHS web site shows how selectively biased the administration chooses to be in its interpretation of existing law.

The HHS web site's summary of federal civil rights law known as the Church Amendments would leave one to conclude that it only covers performing abortions or sterilizations. In fact, however, the Church Amendments much more broadly protect the exercise of conscience in health care:

> "No individual shall be required to perform or assist in the performance of **any part** of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health and Human Services if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions" [emphasis added].

But no one would ever realize that from HHS's conveniently redacted summary, which omits the broad protections and mentions only abortion and sterilization procedures.

The medical community currently has at best only a faint idea of what conscience rights are actually protected under federal law. The Obama administration's education/propaganda campaign seems likely to make that idea even fainter.

Having eviscerated the only objective regulation protecting the professional exercise of conscience in health care, now the fox will be educating the chickens about the right to life.

No evidence backs assertion about wholesale discrimination against patients

The Department agrees with concerns that the 2008 Final Rule may have caused confusion as to whether the federal statutory conscience protections allow providers to refuse to treat entire groups of people based on religious or moral beliefs.

The phrase, "the Department agrees with concerns," *is in this case revealing; HHS political appointees are simply agreeing with the undocumented assertions of the pro-abortion allies of the administration. Federal agency officials are supposed to make regulations based on evidence--not unfounded allegations. Believe me, if "entire groups of people" actually were being denied health care "based on religious or moral beliefs," you would have heard about it on every media and political outlet.*

Throwing a sorry sop to Catholics

A substantial number of comments in opposition to rescinding the 2008 Final Rule maintained that Roman Catholic hospitals would have to close, that rescission of the rule would limit access to pro-life counseling, and that providers would either leave the health care industry or choose not to enter it, because they believed that they would be forced to perform abortions. Under this partial rescission of the 2008 Final Rule, Roman Catholic hospitals will still have the same statutory protections afforded to them as have been for decades.

Catholic and other faith-based institutions have had protection in law for decades. The problem is that without a clear implementing regulation, the law remains subject to wide misinterpretation. This new regulation actually has the potential to weaken the interpretation of conscience rights, for example, by asserting that no contraception--even those with poteitnal abortifacient action--falls under the definition of abortion.

Certification is "too costly"

"The Department received several comments addressing the costs to providers of the 2008 Final Rule. Commenters stated that the new certification requirement imposed substantial additional responsibilities on health care entities, and that the burden analysis did not sufficiently account for the cost of collecting information for, submitting, and maintaining the written certifications required by the 2008 Final Rule. The Department agrees with these commenters, and believes that the certification requirements in the 2008 Final Rule are unnecessary to ensure compliance with the federal health care provider conscience protection statutes, and that the certification requirements created unnecessary additional financial and administrative burdens on health care entities. The Department believes that amending existing grant documents to require grantees to acknowledge that they will comply with the provider conscience laws will accomplish the same result with far less administrative burden."

All of a sudden the people who brought us over a hundred new agencies through healthcare "reform" legislation are now concerned about exceessive bureaucracy and paperwork? The original regulation required certification of compliance with the law for a reason: it shows that the federal government is serious about enforcing civil rights laws, and that institutions that flout the law will be noticed and addressed accordingly.