

## **The HHS Rule on Providers' Right to Refuse to Provide Health Care: Reaching Even Further Than Family Planning and Abortion Services**

While attention has been given to the proposed HHS rule's possible damage to family planning and abortion, the proposed rule has an even broader reach. It has the potential to limit information on and access to the entire range of health care services – including treatment of infertility, depression, drug addiction, HIV, and more.

By its express terms, the rule limits employers' ability to require their workers to perform or assist in the performance of any health care service. The proposed rule states clearly: "any entity, including a state or local government, that carries out any part of any health service program funded in whole or in part under a program administered by the Department of Health and Human Services ... **shall not require any individual to perform or assist in the performance of any part of a health service program or research activity** funded by the Department if such service or activity would be contrary to his religious beliefs or moral convictions."

Despite the extraordinary breadth of its impact, the proposed rule puts no limits on a worker's ability to refuse to provide virtually any health care service, because the proposal provides no protections whatsoever for patients—even in emergency situations. Title VII, the fundamental federal law prohibiting discrimination in employment, makes it clear that employers are permitted to deny a worker's request for an accommodation of religious practice that would interfere with the functioning of the employer's business, including interference with patients' access to services or information. Yet the HHS rule makes no mention of any limits on a worker's right to refuse, and no mention of patient protections. The proposed rule's failure to address employers' ability to provide needed health care services will result in widespread confusion, and could lead workers to believe that they are entitled to deny services and information to patients seeking legal and medically indicated health care.

Moreover, the proposed rule applies to nearly every person employed in a health care setting that carries out a federally funded program administered by HHS. "Assist" is defined broadly to include any participation with a "reasonable connection" to a health service, including "counseling, referral, training, and other arrangements" for the health service. "For example," the regulation states, "...an employee whose task it is to clean the instruments used in a particular procedure would be considered to assist in the performance of the particular procedure."

What might all of this mean in practice? For example, an oncologist working in a federally funded prostate cancer treatment program could withhold information from a patient about the option of extracting and freezing sperm before cancer treatment. If the oncologist believes that the use of assisted reproduction amounts to "playing God," he may believe that the rule supports his failure to inform the patient about his last chance to have genetically-related children.

Under Title VII, the oncologist in the above scenario must inform his employer that his religious belief prevents him from doing a part of his job and ask to be accommodated. The employer then only has to accommodate the request if it can be met without having a negative impact on the business, including on patients' access to care. At a minimum, the new rule calls into question this basic protection for patients' access to information and services.

Below are some further examples of how employees could try to use the rule to deny health care services and information to patients:

- A pharmacist who works in a federally funded program to provide HIV medications may decide to fill prescriptions only for those who acquired the disease at birth or through a blood transfusion, citing the “immoral decisions” of other patients as a justification for refusing to provide them with life-saving and life-prolonging drugs.
- A doctor in a federally funded drug treatment program may refuse to tell patients about medications intended to lessen the severity of drug withdrawal, believing that the “moral failure” of drug use warrants the highest degree of suffering.
- An obstetrician employed by a federally funded prenatal screening program could interpret this rule to justify withholding tests that would confirm that a pregnant woman is carrying a fetus with a fatal anomaly. The obstetrician might believe that her religiously based opposition to abortion allows her to impede access to information that might result in the patient terminating the pregnancy.
- A physician's assistant in a federally funded community health center may refuse to tell single women about the vaccine to prevent a virus which can cause cervical cancer, based on her religious conviction that any woman who engages in sexual activity outside of marriage deserves to be punished with a deadly disease.
- A counselor in a federal funded adolescent health program may refuse to refer depressed teens to therapy, believing that only religion, and not mental health counseling, should provide a solution.
- A receptionist in a state program that receives federal Medicaid dollars may refuse to schedule appointments for patients who suspect they have a sexually transmitted infection, based on his belief that those who are sexually active are immoral and deserve to have the infections run their course.

This rule could result in patients being denied access to health care, as well as the information that is most essential to decisions that should be theirs, and theirs alone, to make.