

September 10, 2008

Ms. Diane M. Gianelli
Director of Communications
The President's Council on Bioethics
1425 New York Avenue, NW, Suite C100
Washington, DC 20005

Re: Public Comment on "Exercises of Conscience in the Practice of the Health Professions"

Dear Ms. Gianelli,

The National Women's Law Center ("Center"), based in Washington, D.C., is a nonpartisan, non-profit organization dedicated since 1972 to improving the lives of women and girls. Through its Health Care Religious Restrictions Project, the Center has worked to ensure that religious restrictions will not be imposed to the detriment of women's reproductive health.

The Center welcomes the President's Council on Bioethics's exploration of "exercises of conscience in the practice of the health professions." The Center appreciates the opportunity to comment on this important issue. The Center's comments will explain how religious restrictions uniquely affect women. The Center will also address the legal landscape on refusals in the health care profession, explaining how existing law protects health care providers' right to refuse while ensuring that patients' needs are met.

Religious Restrictions Disproportionately Affect Women, Impeding Their Access to Needed Health Care Services

More and more, religious restrictions are limiting patient access to critical, necessary care. Both institutions – such as hospitals, HMOs, and employers – and individual health care providers impose their beliefs on patients seeking services or reimbursement for services. The refused services might include abortion, contraception, sterilization procedures, infertility treatment, counseling on the use of condoms to prevent the spread of HIV and STDs, research or treatment involving fetal or stem cells, and certain end-of-life care. Patients may also be denied information, referrals, and counseling on these services.

A major source of religious restrictions on health care services is the sale, merger, or affiliation of secular health care providers with providers who adhere to religious restrictions on services. While many different religions provide health care services, the largest systems – and those with the most restrictions on services – are Catholic owned and affiliated.¹ Catholic hospitals are subject to the Ethical and Religious Directives for Catholic Health Care Services,

¹ Religious hospitals constitute seven of the ten largest nonprofit health care systems, based on number of acute care beds. Five of the ten largest healthcare systems, as measured by patient revenue, are Catholic affiliated. *Modern Healthcare's Annual Hospital Systems Survey*, MOD. HEALTHCARE, June 6, 2005, at 32.

which bar the delivery of vital health care services, including contraceptive services, sterilization, infertility treatment, abortion, and certain end-of-life care.² Catholic facilities operate in every state in the nation, and according to the most recent data available, 15.1 percent of all hospital beds are in Catholic hospitals.³

Religious restrictions are not a problem faced only in Catholic hospitals. Rather, patients may face refusals in a variety of settings. For example, pharmacists in retail pharmacies have refused to dispense legally valid prescriptions because of their personal beliefs.⁴ In one instance, a medical technician imposed his religious beliefs to the detriment of patients.⁵ Similarly, there have been instances of EMT workers and nurses putting their religious beliefs before patients' needs to receive medical care, including emergency care.⁶

While all patients may face religious restrictions, women are overwhelmingly the victims of refusals in health care settings. This is because women's reproductive health care services are the subject of the vast majority of refusals. For example, women living in communities where a Catholic and non-Catholic hospital merge have been left without access to abortion, contraception, sterilization, and infertility treatment services.⁷ Women seeking treatment for miscarriages at Catholic hospitals have been denied the standard of care and placed in life- and health-threatening situations.⁸ Rape survivors seeking emergency care at Catholic hospitals have been refused information about and access to emergency contraception (the morning-after pill).⁹ Women seeking to fill their legally valid prescriptions for birth control have been refused by pharmacists,¹⁰ and pharmacies have refused to stock certain contraceptives altogether.¹¹ Women workers are denied coverage for their prescription contraceptives under their employer's prescription drug plan, even when the plan covers other prescription drugs.¹²

² Nat'l Conference of Catholic Bishops and U.S. Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Service*, 4th ed. (2001), available at <http://www.usccb.org/bishops/directives.shtml>. Adventist and some Baptist facilities also have policies restricting reproductive health care. Presbyterian, Methodist, Episcopalian and Jewish facilities do not limit reproductive health care. See Am. Pub. Health Ass'n, *Preserving Consumer Choice in an Era of Religious/Secular Health Industry Mergers* (2003).

³ Catholic Health Ass'n, *Catholic Health Care in the United States* (Jan. 2008), available at

<http://www.chausa.org/NR/rdonlyres/68B7C0E5-F9AA-4106-B182-7DF0FC30A1CA/0/FACTSHEET.pdf>.

⁴ See, e.g., *Noesen v. Medical Staffing Network*, No. 06-C-071-S, 2006 WL 1529664 (W.D. Wis. June 1, 2006), *aff'd by Noesen v. Medical Staffing Network, Inc.*, 232 Fed.Appx. 581, 100 Fair Empl. Prac. Cas. (BNA) 926 (7th Cir. May 02, 2007), *rehearing denied* (June 13, 2007).

⁵ *Grant v. Fairview Hosp.*, 2004 WL 326694, 93 Fair Empl. Prac. Cas. (BNA) 685 (D. Minn. 2006) (concerning an ultrasound technician who claimed a religiously-based need to "counsel" pregnant patients who were considering abortions).

⁶ See, e.g., *Shelton v. University of Med. and Dentistry of N.J.*, 223 F.3d 220 (3d Cir. 2000) (concerning a labor and delivery nurse's refusal to participate in emergency procedures to terminate pregnancies).

⁷ For examples, see MergerWatch's materials on their Hospitals and Religious Restrictions website, http://www.mergerwatch.org/hospital_mergers.html.

⁸ Lori R. Freedman et al., *When There's a Heartbeat: Miscarriage Management in Catholic-Owned Hospitals*, AM. J. PUB. HEALTH, Vol. 98, No. 10, Oct. 2008, at 1.

⁹ See, e.g., Sabrina Rubin Erdely, *Doctor's Beliefs Can Hinder Patient Care*, SELF, June 2007, available at <http://www.msnbc.msn.com/id/19190916/>.

¹⁰ See Nat'l Women's Law Ctr., *Pharmacy Refusals 101* (July 2008), available at <http://www.nwlc.org/pdf/PharmacyRefusalsJulyFINAL.pdf>.

¹¹ See Rob Stein, 'Pro-Life' Drugstores Market Beliefs, WASH. POST, June 16, 2008, at A1.

¹² See, e.g. *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001).

Women denied needed services are forced to bear the burden of additional costs, delays, and health risks incurred by going elsewhere. Some may be prohibited from going elsewhere, if their insurer imposes the restriction or prevents them from seeking care outside the plan. These burdens fall most heavily on poor women and those living in rural areas, but the reduction of available health services adversely affects all women in need of reproductive care.

Existing Law Provides Protections for Health Care Provider Refusals and Carefully Balances the Right to Refuse with Patients' Needs

A. Existing Federal Law

Federal civil rights law has struck a careful balance between respecting employee's religious beliefs and employers' ability to provide their patients with access to health care. Workers who wish to assert a religious objection to a job assignment currently have protection under the federal law prohibiting employment discrimination on the basis of religion, Title VII of the Civil Rights Act of 1964.¹³ An employer cannot fire (or refuse to hire) an employee based on his or her religious beliefs or practices; nor can an employer treat an employee in any unfavorable way in any of the terms and conditions of employment, such as assignments or benefits, on the basis of religion.¹⁴ Title VII has been applied in many cases involving the religious rights of health care workers.¹⁵

Cases interpreting Title VII have consistently held that employers have a duty to provide a reasonable accommodation of an employee's or applicant's religious beliefs or practices, if an accommodation does not place an undue hardship on the business. This gives current and adequate protection to employees whose employers do not reasonably accommodate their religious beliefs. But Title VII precedence also shows that employers are not required to make accommodations that would prevent patients and customers from securing access to health care products and services in a timely and respectful manner.¹⁶

The Equal Employment Opportunity Commission ("Commission") has just released a new section of its compliance manual in an effort to remind employers and employees about these existing rights and responsibilities under Title VII. Approved unanimously by the bipartisan Commission, the manual recognizes that the cases protecting patients' access to care strike the proper balance between respect for religious beliefs and employers' need to serve their customers and patients.¹⁷

¹³ Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

¹⁴ Title VII exempts religious employers from the religious discrimination provision. A religious employer is defined as "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. § 2000e-1(a).

¹⁵ *See, e.g.,* Grant v. Fairview Hosp., 2004 WL 326694, 93 Fair Empl. Prac. Cas. (BNA) 685 (D. Minn. 2006); Shelton v. University of Med. and Dentistry of N.J., 223 F.3d 220 (3d Cir. 2000); Hellinger v. Eckerd Corporations, 67 F. Supp. 2d 1359 (S.D. Fla. 1999).

¹⁶ See cases referenced in *supra* note 15.

¹⁷ See <http://www.eeoc.gov/policy/docs/religion.html>.

Health care providers also receive protection under three additional federal statutes. The Church Amendment, enacted in 1973, prevents any court, public official, or public authority from requiring any individual health care provider or entity who receives certain public funds to perform in, assist in, or make available abortion or sterilization procedures against their moral or religious convictions. It also prevents institutions receiving certain federal funds from taking action against personnel because of their participation, nonparticipation, or beliefs about abortion or sterilization.¹⁸ The Church Amendment concerns only the provision of services, and does not address refusals to provide information or make referrals. The Coats Amendment, enacted in 1996, prohibits federal, state, or local government from discriminating against any entity or individual that refuses to receive or provide abortion training, perform abortions, or provide abortion referrals or referrals for abortion training.¹⁹ The Weldon Amendment of 2004 prohibits federal, state, or local government from discriminating against any entity or individual on the basis that the entity or individual refuses to provide, pay for, provide coverage of, or refer for abortion.²⁰

It is worth noting that the right to refuse health care services granted in these three statutes is limited to abortion and sterilization. Additionally, these statutes must be read alongside other federal laws that protect patients. This includes the Emergency Medical Treatment and Labor Act (EMTALA), which governs when and how a patient may be refused treatment or transferred from one hospital to another when s/he is in an unstable medical condition.²¹

B. Existing State Law

In addition to federal legal protections, individual health care providers and health care entities who object to abortion and sterilization also receive protection from state law. Forty-six states allow some health care providers to refuse to provide abortion services; 17 states allow some health providers to refuse to provide sterilization services.²² Only a few states allow refusals beyond abortion and sterilization. For example, only 13 states allow some health care providers to refuse to provide services related to contraception.²³

For the most part, states have taken action to protect women's access to contraception. This has involved a careful consideration of the balance between religious beliefs and women's access to the care they need. For example, 24 states have passed laws that require insurance plans to cover prescription contraceptives to the same extent other prescription drugs are covered.²⁴ Eighteen of those states have exceptions to the mandate for religious employers or

¹⁸ 42 U.S.C. § 300a-7.

¹⁹ Public Health Service Act § 245, 42 U.S.C. § 238n.

²⁰ Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 508(d), 121 Stat. 1844, 2209.

²¹ 42 U.S.C. § 1395dd.

²² For details on each state's law, see Guttmacher Inst., *State Policies in Brief: Refusing to Provide Health Services* (Sept. 1, 2008), http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf.

²³ *Id.*

²⁴ The twenty-four states are: Arizona, Arkansas, California, Connecticut, Delaware, Georgia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North

insurers whose religious tenets prohibit the use of contraceptives. It is important to note that in some states with such a religious exemption, the religious entity is required to provide clear notice of its refusal to cover contraception. And in a few states, like New York and Hawaii, the law goes even further and allows individuals of religious employers to purchase contraceptive coverage directly from the insurance company.

Additionally, states have acted to guarantee that rape survivors who visit hospital emergency rooms for care receive information about and access to emergency contraception (“EC”), a time-sensitive method of preventing pregnancy. Currently, fourteen states have laws that require hospital emergency rooms to provide information about or access to EC to sexual assault survivors.²⁵ None of the fourteen states allows institutions to opt out – all health care facilities specified in the laws must comply. Arkansas’s and Colorado’s laws allow individual health care professionals to refuse to provide information about EC if the refusal is based on their religious or moral beliefs, but does not exempt any religiously-affiliated hospitals from having to provide the information. Connecticut’s law allows health care facilities to contract with independent providers to ensure compliance with the law, so that religiously-affiliated hospitals do not have to have their own employees provide the medication.

States have also taken action to protect women’s access to contraception at the pharmacy. Seven states require pharmacists or pharmacies to provide medication to patients.²⁶ An additional seven states have a policy allowing an individual to refuse, but prohibiting pharmacists from obstructing patient access to medication or from refusing to transfer or refer prescriptions to another pharmacy.²⁷

Carolina, Oregon, Rhode Island, Vermont, Washington, and West Virginia. For more information, see Nat’l Women’s Law Ctr., *Contraceptive Equity Laws in Your State: Know Your Rights--Use Your Rights* (Aug. 2007), available at <http://www.nwlc.org/pdf/ConCovStateGuideAugust2007.pdf>.

²⁵ Those states are: Arkansas, California, Colorado, Connecticut, Illinois, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Oregon, South Carolina, Washington, and Wisconsin. Arkansas, Colorado, and Illinois require only the provision of information about EC. S.B. 847, 86th Gen. Assem., Reg. Sess., 2007 Ark. Acts 1576; CAL. PENAL CODE § 13823.11; COLO. REV. STAT. § 25-3-110 (2007); S.B. 1343, 2007 Leg., Reg. Sess., 2007 Conn. Acts 07-24; 410 ILL. COMP. STAT. § 70/2.2; ILL. ADMIN. CODE tit. 77, § 545.20, -.35, -.60, -.95; MASS. GEN. LAWS ANN. ch. 41, § 97B; MASS. GEN. LAWS ANN. ch. 111, § 70E; MINN. STAT. ANN. § 145.471 (2007); N.J. STAT. ANN. §§ 26:2H-12.6b to 26:2H-12.6g; N.J. STAT. ANN. § 52:4B-44; N.M. STAT. ANN. § 24-10D-1, -2, -3, -4, -5; N.Y. PUB. HEALTH LAW § 2805-p (2003); H.B. 2700, 74th Leg. Assem., 2007 Reg. Sess. (Ore. 2007); S.C. CODE ANN. § 16-3-1350; WASH. REV. CODE ANN. §§ 70.41.020, .350, .360 (2002); A.B. 377, 2007 Leg., Reg. Sess., 2007 Wisc. Acts 102.

²⁶ These states are: California, Illinois, Maine, Massachusetts, Nevada, New Jersey, and Washington. CAL. BUS. & PROF. CODE §§ 4314, 4315, 733 (2007); ILL. ADMIN. CODE tit. 68, § 1330.91(j) (2007); 02-392-19 CODE ME. R. § 11 (2007), *citing* ME. REV. STAT. ANN. tit. 32, § 3795(2) (2007); Letter from President James T. DeVita, The Commonwealth of Massachusetts Board of Registration in Pharmacy, to Dianne Luby, President/CEO, Planned Parenthood League of Massachusetts, Inc. (May 6, 2004) (on file with the National Women’s Law Center); NEV. ADMIN. CODE § 639.753 (2007); S.B. 1195, 2007 Reg. Sess. (N.J. 2007), to be codified at N.J. STAT. ANN. § 45:14-40 *et seq.*; WASH. ADMIN. CODE § 246-869-010 (2007). The Washington rules have been enjoined, pending litigation. *Stormans, Inc. v. Selecky*, 524 F.Supp.2d 1245 (W.D.Wash. Nov 08, 2007) (No. C07-5374RBL).

²⁷ These seven states are: Alabama, Delaware, New York, North Carolina, Oregon, Pennsylvania, and Texas. *Plan B – Options in Alabama*, ALABAMA STATE BOARD OF PHARMACY NEWS (Ala. State Bd. of Pharmacy, Birmingham, Ala.), Feb. 2007, at 1; *Considering Moral and Ethical Objections*, DELAWARE STATE BOARD OF PHARMACY NEWS (Del. State Bd. of Pharmacy, Dover, Del.), Mar. 2006, at 4; CODE DEL. REGS. 24-2500 § 3.1.2.4 (2007); Letter from Lawrence H. Mokhiber, Executive Secretary, New York State Board of Pharmacy, to Supervising Pharmacists, Re:

Health Care Professional Organizations Have Adopted Policies that Recognize Both Providers' Right to Refuse and Providers' Responsibility to Patients

The careful balance between an individual right to refuse and patients' right to care that is codified in federal and state laws is also translated into specific guidance for health care professionals by national and state based professional organizations. The Ethics Committee of the American College of Obstetricians and Gynecologists ("ACOG"), for example, released guidance on conscientious refusal in November 2007.²⁸ In the guidance, ACOG recognizes the importance of conscientious refusal while at the same time saying that such rights should be limited if they "constitute an imposition of religious or moral beliefs on patients, negatively affect a patient's health, are based on scientific misinformation, or create or reinforce racial or socioeconomic inequalities."²⁹ ACOG explains that when an individual refuses to provide standard reproductive services to a patient, s/he has a "duty to refer patients in a timely manner to other providers."³⁰ ACOG further recognizes that in an emergency situation, providers "have an obligation to provide medically indicated and requested care."³¹ The American Nurses Association's Code of Ethics similarly recognizes a nurse's right to refuse to participate in treatments to which s/he objects on moral grounds, but also recognizes the patient's right to care, by stating that "[t]he nurse is obliged to provide for the patient's safety, to avoid patient abandonment, and to withdraw only when assured that alternative sources of nursing care are available to the patient."³² Likewise, the American Pharmacists Association "recognizes the individual pharmacist's right to exercise conscientious refusal and supports the establishment of systems to ensure patient's access to legally prescribed therapy without compromising the pharmacist's right of conscientious refusal."³³ The organization notes that the patient should not have any awareness that the pharmacist was refusing to fill the prescription.³⁴

Policy Guideline Concerning Matters of Conscience (Nov. 18, 2005), *available at* <http://www.op.nysed.gov/pharmconscienceguideline.htm>; *Item 2061- Conscience Concerns in Pharmacist Decisions*, NORTH CAROLINA BOARD OF PHARMACY NEWSLETTER (N.C. Bd. of Pharmacy, Chapel Hill, N.C.), January 2005, at 1, *available at* <http://www.ncbop.org/Newsletters/Jan2005.pdf>; Oregon Board of Pharmacy, Position Statement: Considering Moral and Ethical Objections (June 7, 2006), *available at* http://www.oregon.gov/Pharmacy/M_and_E_Objections_6-06.pdf; 49 PA. CODE § 27.103 (2007) (statement of policy); Texas State Board of Pharmacy, Plan B, <http://www.tsbp.state.tx.us/planb.htm> (last visited Sept. 8, 2008).

²⁸ Committee on Ethics, American College of Obstetricians and Gynecologists, *The Limits of Conscientious Refusal in Reproductive Medicine*, Committee Opinion No. 385 (Nov. 2007), *available at* http://www.acog.org/from_home/publications/ethics/co385.pdf.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² American Nurses Association, Code of Ethics 5.4, *available at* http://nursingworld.org/ethics/code/protected_nwcoe813.htm.

³³ Am. Pharmacists Ass'n, 2004 House of Delegates, Report of the Policy Review Committee 10 (2004) (retaining 1998 Policy).

³⁴ Letter from American Pharmacists Association, to the Editor of *Prevention Magazine* (July 1, 2004) (submitted), *available at* <http://www.aphanet.org/AM/Template.cfm?Section=Search&template=/CM/HTMLDisplay.cfm&ContentID=2689>.

A Recent Proposal to Expand Existing Federal Law Would Significantly Undermine Patient Access to Vital Health Services and Information

Recently, the Department of Health and Human Services (“HHS”) proposed the “Provider Conscience Regulation” (“Proposed Rule”).³⁵ The Proposed Rule would significantly undermine patient’s access to vital health services and information by greatly expanding the Church, Coats, and Weldon Amendments, which were intended to govern the right to refuse to provide abortion care. By failing to provide a definition of abortion consistent with accepted medical standards, the Proposed Rule opens the door for doctors, nurses, insurance plans, hospitals, and nearly any other employee in a health care setting to deny access to most forms of birth control. The Proposed Rule is unnecessary in light of Title VII, which already adequately and appropriately protects worker’s religious freedoms. The Proposed Rule fails to even mention Title VII or the balance between employers’ accommodation of an employee’s religious beliefs and the needs of the people the employer must serve. The expansive language of the Proposed Rule could lead to an erroneous interpretation of existing law that would allow any employee of a health care provider to refuse to treat, or provide information to, any individual receiving *any* service – if doing so would violate his or her moral beliefs – without regard for the needs of patients.

Conclusion

The National Women’s Law Center respectfully requests that the President’s Council on Bioethics recognize the disproportionate impact of religious restrictions on women’s access to health care services; the need for a careful balance between religious beliefs and patient care, which already exists in law and policy; and the far-reaching nature of the proposed HHS regulation.

Thank you for the opportunity to submit comments on this important issue. If you have any questions, please do not hesitate to contact Gretchen Borchelt, Senior Counsel of the National Women’s Law Center at (202) 588-5180.

³⁵ 73 Fed. Reg. 50274 (Aug. 26, 2008).