Obama Administration Rescinds Most of Controversial 'Conscience' Regulation

On February 18, the Department of Health and Human Services (DHHS) rescinded virtually all of a federal regulation finalized in the waning days of the Bush administration that, under the rubric of "clarifying" three long-standing federal laws establishing conscience protections for health care providers and institutions, would have greatly expand the laws' reach. DHHS did retain one aspect of the Bush rule, a provision establishing a new mechanism for enforcement of the three laws, and it also promised stepped-up public education around them.

When the Bush administration first proposed the regulation in August 2008, it generated opposition from a long list of medical associations, health officials, policymakers, advocacy groups dedicated to civil, human, religious and reproductive rights, and other stakeholders—as well as considerable support from groups in favor of expansive conscience rights. These critics cited its potential to impede patients' access to necessary services and information, in the field of reproductive health and far beyond, and its conflicts with established standards of medical ethics and the government's own antidiscrimination policies. Yet, the final version of the Bush administration's rule, adopted in December 2008, ignored or dismissed these concerns.

One well-publicized criticism of the rule was that by failing to include a medically accurate definition of abortion and leaving a door open for those who conflate most modern contraceptives with abortion, the regulation could undermine state and federal requirements expanding coverage of contraception under public and private health plans and access to contraception at hospitals and pharmacies. Critics also highlighted the potential to abuse conscience rights to discriminate against entire categories of patients on the basis of such characteristics or behaviors as sexual orientation, nonmarital sex or HIV status. Medical associations spearheaded the charge that the regulation redefined federal law to allow health care professionals to withhold the information and counseling their patients need under the ethical and legal principle of informed consent; that could endanger knowledge about and access to a wide range of services—not only to reproductive health services like contraception, STI services and infertility care but also vaccination, blood transfusion and end-of-life pain management. The same set of definitions, critics argued, would extend conscience rights well beyond doctors and other clinicians to include those cleaning surgical instruments, filing insurance claims or scheduling appointments. Opponents further pointed to the regulation's apparent conflicts with a wide array of other policies protecting patients' rights and health, including requirements that hospitals provide emergency care and that states provide Medicaid coverage of abortion in the most extreme circumstances.

By rescinding most of the regulation, including sections defining key terms and describing the laws' applicability, requirements and prohibitions, DHHS asserts that it has eliminated "confusion" and "ambiguity" that may have been created by the original rule. Moreover, the preamble to the new version of the regulation makes it clear that abortion has never been defined by the federal government to include contraception; that conscience laws do not give a license to practice discrimination or to deny a patient needed information; and that the three federal conscience laws have long been read in harmony with other federal and state laws protecting patients' rights and access to care. However, DHHS agreed with other commenters that there was a need for an enforcement mechanism, so the final rule retains language designating the department's Office for Civil Rights to receive and address complaints under the conscience laws. DHHS also found, based on the comments to the rescission proposal itself, that there is a "lack of understanding" about the federal statutes and promised to provide outreach and education to raise awareness of the laws and the new enforcement mechanism among federal grantees and health care providers.—*Adam Sonfield*