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FEATURE ARTICLE

**MORALITY VERSUS VITAL
HEALTHCARE: THE DEBATE
OVER BUSH'S HEALTH AND
HUMAN SERVICES'
MIDNIGHT REGULATION**

by LESLEY SHERMETA

Should your doctor's moral conscience come before your medical emergency? Should a medical provider who does not believe in pre-marital sex be able to deny testing and treatment of sexually transmitted infections to unmarried couples seeking assistance? Could someone who equates emergency

contraception with abortion deny rape victims access to this method and to the means of avoiding an unintended pregnancy? These fears, as expressed by Cecile Richards, President and CEO of Planned Parenthood Federation of America (Planned Parenthood), became a reality on January 20, 2009, stemming a debate about the prioritizing of morality over medical care.¹

As one President prepares to leave office and a new administration prepares to step in, it is customary to see the outgoing administration increase its executive activity. President Clinton, for example, issued 12 Executive Orders in his final 20 days in office.² It was no surprise, then, when President George W. Bush's administration rushed out a host of problematic regulations in its final months.³ Among these so-called "midnight regulations" was the U.S. Department of Health and Human Services' (HHS) regulation called "Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law" (Regulation).⁴ The Regulation was released in draft form in August 2008, formally published in the Federal Register on December 19, 2008 and was scheduled to take effect on January 20, 2009.⁵

THE HHS REGULATION

The Regulation deals with several provisions of federal law prohibiting recipients of certain federal funds from coercing individuals in the health care field into participating in actions they find religiously or morally objectionable.⁶ These federal laws also prohibit discrimination on the basis of one's objection to, participation in, or refusal to participate in, specific medical procedures, including abortion or sterilization.⁷ The Regulation is intended to ensure that, in the delivery of health care and other health services, recipients of HHS funds do not support coercive or discriminatory practices in violation of these laws.⁸

The stated purpose of the Regulation is to "provide for the implementation and enforcement of. . .statutory provisions [that] protect the rights of health care entities. . ., both individuals and institutions, to refuse to perform health care services and research activities to which they may object for religious, moral, ethical, or other reasons."⁹

The Regulation applies to any state or local government or any other public entity receiving federal financial assistance. It allows employees, and even volunteers, of clinics and hospitals receiving government funding to deny access to a wide variety of medical services.¹⁰ Many interest groups and individuals took the chance to respond to this Regulation, but HHS went forward despite strong opposition, and the Regulation went into effect on President Barack Obama's Inauguration Day.

SUPPORT FOR THE REGULATION

Supporters of the Regulation cite the dangers of forcing health care providers to perform or participate in procedures that go against their moral, religious, or personal beliefs as a way of discouraging individuals from entering or remaining in the health care profession.¹¹ One commenter wrote that by insisting that health care professionals be willing to put their personal beliefs aside; "one contributes to the creation of a health care delivery system of professionals who blindly follow directives rather than [their] conscience, putting society at risk."¹²

Former HHS Assistant Secretary of Health, Admiral Joxel Garcia, M.D., defended the Regulation, saying that many health care providers routinely face pressure to change their medical practice – often in direct opposition to their personal convictions.¹³ During his practice as an OB-GYN, he witnessed this pressure first-hand, directly influencing his opinion that "[h]ealth care providers shouldn't have to check their consciences at the hospital door."¹⁴

The Regulation has raised an issue of whether patients' rights are being compromised in the process? With regard to commenters' concerns about patients' rights, HHS encourages full and open communication between patients and providers on sensitive issues surrounding the provision of health care services, including issues of morality and conscience.¹⁵ Patients are best served, according to the HHS, when their providers communicate clearly and early about any services in which they decline to participate.¹⁶

CRITICISM OF THE REGULATION

Anticipated Impact

Part of the danger of the Regulation, according to Jessica Arons of the Center for American Progress, is its vagueness.¹⁷ The deliberate choice to not define certain terms in the Regulation may be problematic because it allows individuals to interpret abortion to include any form of contraception, going far beyond the legal and medical definitions of the term.¹⁸ Although the rule ostensibly protects only employees who object to abortion and sterilization, Arons says it is “written so vaguely that it could also apply to contraception, fertility treatments, HIV/AIDS services, gender reassignment, end-of-life care, or any other medical practice to which someone might have a personal moral (not even religious) objection.”¹⁹ The HHS regarded these claims as unfounded, insisting that there is a lack of evidence showing that this Regulation would create new barriers in accessing contraceptive services.²⁰

Another major concern is that the Regulation would limit access to patient care and that individuals could be denied access to services, with effects felt disproportionately by those in rural areas or otherwise underserved.²¹ Low-income and uninsured women are particularly at risk, as they rely on programs such as Title X and Medicaid for health care.²² Title X, for example, is the only federal program solely devoted to funding family planning and related reproductive health care services.²³ Its 4,400 health centers assist five million young, low-income and uninsured women annually, including many from oppressed communities, and the services are usually free or subsidized.²⁴ If these types of programs do not strictly adhere to the HHS rules, they will lose federal funds at a time of increasing economic crisis, when more women than ever will need government-funded health care.²⁵

States' Rights Conflict

Another potential issue with this Regulation is whether it conflicts with states' rights. Dick Blumenthal, the Attorney General for the state of Connecticut, stated that the Regulation “interferes with states' rights because it cannot be implemented without riding roughshod over existing state regulations and without causing states to lose billions of dollars in federal aid to deliver health care.”²⁶

Connecticut is one among 27 states with laws requiring health insurance plans that cover prescription drugs to provide equitable coverage for contraception.²⁷ Such state laws facilitating contraceptive access are at risk under this Regulation, which extends sweeping protections to health care entities seeking to restrict coverage for reproductive health care.²⁸ Blumenthal stated that the rule “would supercede carefully crafted Connecticut statutes arrived at through a painstaking and controversial process that ultimately balances the rights of women to health care and contraception with the rights of providers to follow individual, moral and religious beliefs.”²⁹

Illinois Attorney General Lisa Madigan expressed similar concerns in her letter to the former Secretary of the HHS, Michael Leavitt, showing her “strenuous opposition” to the Regulation.³⁰ In her letter to Leavitt, Madigan pointed out that the Regulation conflicts with Illinois laws that: 1) require insurers covering prescription drugs to provide coverage for the full range of FDA-approved contraceptive drugs and devices; 2) require hospital emergency rooms to provide emergency contraception-related services to sexual assault victims; and 3) mandate that pharmacies fill prescriptions for emergency contraception and other forms of contraception.³¹ Calling the Regulation an “ideologically motivated effort to effectively overturn state protections intended to help women access basic health care and make fully-informed, responsible and medically-based health-care decisions,” Madigan unsuccessfully urged Secretary Leavitt to reject the Regulation.³²

TAKING ACTION

Opponents of the Regulation are making pleas to each branch of the government to aid in their struggle.

Judicial

Richards traveled to Connecticut to file a lawsuit against the Bush Administration “on behalf of the millions of women whose healthcare has been put in jeopardy by this parting shot at women’s health.”³³ Blumenthal joined Planned Parenthood in the lawsuit “since [the Regulation] would undermine laws across the country, which currently protect women’s access to family planning, birth control and reproductive healthcare.”³⁴

The lawsuits are based on several claims, including that the process of developing, vetting and publishing the rule was flawed, and that the published rule exceeds the authority of the HHS.³⁵ So far six additional states have joined the lawsuit (California, Illinois, Massachusetts, New Jersey, Oregon and Rhode Island), as well as groups such as the National Family Planning and Reproductive Health Association (NFPRHA) and the American Civil Liberties Union.³⁶

These litigants are seeking an injunction against enforcement of the rule, calling it “an unconscionable and unconstitutional midnight regulation and a ticking legal time bomb that threatens to blow apart vital women’s rights on inauguration day.”³⁷

Legislative

Public interest organizations such as the NFPRHA are also looking to Congress for action, which could be done in a variety of ways. One option is the passage of a resolution of disapproval of HHS’s regulation under the Congressional Review Act that would repeal the rule outright.³⁸ Another option would be for Congress to attach a rider to an appropriations bill that would block funds for enforcement of the rule.³⁹ Some members of Congress are considering a third option, taking action against the broader scope of midnight regulations, suspending the effective dates of all rules for some period of time or to put in place an expedited review process.⁴⁰

Executive

Perhaps the most promising attempt to overturn the Regulation, though, belongs to the executive branch. Richards found hope in President Obama’s administration when the global gag rule, which was an obstacle to women’s reproductive health care around the world, was immediately overturned.⁴¹ This move established women’s health as a priority of the administration and Planned Parenthood as well as other organizations are encouraging President Obama to work with them to overturn this Regulation.⁴²

Overturning the Regulation would be no quick process, but on March 10, 2009, Obama’s administration took the first step by proposing a rescission of the Regulation.⁴³ The HHS, under the new administration, initiated a review and public comment period in response to comments on the originally pro-

posed Regulation, finding that a number of questions warranted further careful consideration.⁴⁴

The public has 30 days to submit written or electronic comment on the regulatory changes proposed, at which point HHS will review the rescission to ensure its consistency with current administration policy.⁴⁵

CONCLUSION

The Regulation has already had a profound impact on people on both sides of the issue, allowing medical care providers to practice in accordance with their personal beliefs while also making certain types of medical care unavailable to patients in need. This debate centers on a fundamental question of whose rights should be compromised—the doctor's or the patient's—a decision apparently left to the current administration.

NOTES

1 Jodi Jacobson, *Midnight Cowboy Part 2: Taking Bush's Midnight HHS Regulation to Court*, Jan. 15, 2009, <http://www.rhrealitycheck.org/blog/2009/01/15/midnight-cowboy-part-2>.

2 *Obama Halts All Regulations Pending Review*, Jan. 20, 2009, <http://www.msnbc.msn.com/id/28758810/>.

3 *Id.*

4 Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 78,071 (Dec. 19, 2008) (to be codified at 45 C.F.R. pt. 88).

5 Jacobson, *supra* note 1.

6 73 Fed. Reg. 78,072 (2008).

7 *Id.*

8 *Id.*

9 *Id.* at 78,096-97.

10 *Id.* at 78,097.

11 *Id.* at 78,081.

12 *Id.*

13 Press Release, U.S. Department of Health and Human Services, HHS Issues Final Regulation to Protect Health Care Providers from Discrimination (Dec. 18, 2008) (*available at* <http://www.hhs.gov/news/press/2008pres/12/20081218a.html>).

14 *Id.*

15 73 Fed. Reg. 78,081 (2008).

16 *Id.*

17 Jacobson, *supra* note 1.

18 *Id.*

19 *Id.*

20 73 Fed. Reg. 78,081 (2008).

21 Kathy Durkin, *Bush Aims Attacks on Women, Cutting Birth Control*, July 26, 2008, http://www.workers.org/2008/us/bush_0731/.

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

26 Jacobson, *supra* note 1.

27 *Id.*

28 *Id.*

29 *Id.*

30 Letter from Lisa Madigan, Illinois Attorney General, to Michael Leavitt, Secretary of the U.S. Department of Health and Human Services, (Sept. 16, 2008) (*available at* http://www.plannedparenthood.org/files/IL_AG_Letter.pdf).

31 *Id.*

32 *Id.*

33 Planned Parenthood Federation of America, *Planned Parenthood Sues Bush Administration over Disastrous Midnight Regulation*, Jan. 15, 2009, <http://www.plannedparenthood.org/newsroom/press-releases/planned-parenthood-sues-bush-administration-over-disastrous-midnight-regulation-23566.htm>.

34 *Id.*

35 Jacobson, *supra* note 1.

36 *Id.*; Press Release, American Civil Liberties Union of Connecticut, National Family Planning & Reproductive Health Association and ACLU Ask Court to Block Health Care Denial Rule (Jan. 15, 2009) (*available at* <http://www.acluct.org/aboutus/pressroom/nationalfamilyplanningrepr.htm>).

37 Jacobson, *supra* note 1.

38 *Id.*

39 *Id.*

40 *Id.*

41 Cecile Richards, Planned Parenthood Federation of America, *Help Reverse Former President Bush's Midnight Regulation*, Dec. 18, 2008, <http://www.plannedparenthood.org/issues-action/birth-control/title-x-family-planning-funding/bushs-attack-womens-health-still-bad-medicine-23106.htm>.

42 *Id.*

43 Rescission of the Regulation Entitled "Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law," 74 Fed. Reg. 10,207 (proposed Mar. 10, 2009) (to be codified at 45 C.F.R. pt. 88).

44 *Id.* at 10,208.

45 *Id.* at 10,209.