

March 26, 2018

## PUBLIC COMMENT LETTER

### **U.S. Department of Health and Human Services, Office for Civil Rights**

Attention: Conscience NPRM, RIN 0945-ZA03

Hubert H. Humphrey Building, Room 509F

200 Independence Avenue SW

Washington, DC 20201

*Submitted Electronically:* [www.regulations.gov](http://www.regulations.gov)

Re: Proposed Rules – Protecting Statutory Conscience Rights in Health Care;  
Delegations of Authority.

Dear Sir or Madam:

On behalf of our more than 470 member hospitals and health systems, including rural, urban, children's, teaching and specialty hospitals, the Texas Hospital Association ("THA"), appreciates the opportunity to provide comments on the above-referenced proposed rules, published January 26, 2018. THA and its members are committed to providing and increasing access to appropriate health care for all. We appreciate your time and work in developing these rules.

THA believes every individual's religious, moral, ethical, or other objection should be respected. This extends to both the providers and recipients of health care. No individual should face discrimination or retaliation for conscientiously objecting to the provision of care. However, THA is concerned the proposed rules are overbroad and could lead to an inability to provide or receive care when necessary, and unintentionally reduce the availability of services to certain populations.

For example, the proposed rule broadly defines the terms "referral" and "refer for." As set forth in the proposed rule's discussion, these definitions would include activities such as: providing, to a patient, the contact information of a physician or facility that may provide an abortion, informing a patient that funding may be available and otherwise providing a referral to abortion services or funding. To continue this example, in some cases an abortion may be necessary to protect the life or health of a mother, and limiting the availability of services could lead to a negative outcome. The health and wellbeing of a patient should take precedent and, in such circumstances, there must be an option for that patient to receive the care they require.

THA is also concerned these definitions are overbroad to the extent that a provider might decline to refer a patient to another provider for unrelated care. For example, could a provider decline to refer to a specialist who provides other services the referring provider objects to, even if the referral does not contemplate the patient seeking such services? If so, this reduction in the availability of services would be unnecessary, unrelated to a provider's objections, and needlessly detrimental to

the patient – especially if the referral is necessary for the patient to receive a proper course of treatment.

Moreover, requiring hospitals to provide assurances and certifications regarding compliance, as well as conspicuous notices to employees and the public, regarding the proposed rules and their applicability would create unnecessary burdens and costs. Health care entities already comply with a myriad of state and federally-mandated notice requirements; creating additional, unnecessary notification burdens in a time of decreased funding and ever-expanding regulatory requirements would be onerous. The notice requirement is also overly broad in that it would require a multi-site organization to post notice at every site where workforce notices are customarily posted, even if a particular site has no connection to the funding or activity giving rise to the obligations and protections set forth in the notice. The proposed rule contains broad enforcement provisions, which should serve to ensure compliance without additional assurances or provision of notice.

Further, the record-keeping requirement found in section 88.6(b) is unnecessary and burdensome, and is problematic in that it is vague and ambiguous and in some instances impossible to comply with. Subsection (b) requires each recipient to “maintain complete and accurate records evidencing compliance with ... conscience and anti-discrimination laws....” How could a recipient “maintain complete and accurate records” that it had not discriminated against an individual in violation of an anti-discrimination law? In other words, if an individual refused to perform an action based on conscience and a covered recipient did not discriminate against that individual as a result, what would the recipient do to maintain a complete and accurate record that it complied with the anti-discrimination law in that instance? What would be the “complete and accurate record” of complying with a notice requirement (if that requirement remains a part of the final rule)? More generally, the record-keeping requirement is an additional burden and an additional obligation that is unnecessary and gives rise to an additional regulatory violation that has no statutory basis.

Finally, THA requests additional clarity in the proposed rule’s enforcement provisions, as there is concern that the current broad and unclear provisions could lead to inconsistent enforcement and penalties. Since possible penalties include the reduction, termination, and return of funding, as well as any other remedial action deemed appropriate, THA believes enforcement should be uniform with clear potential penalties, to minimize disparate results among providers and facilities.

THA supports the promotion of individual rights and conscientious objections based on religious, moral, ethical, or other grounds. However, providing appropriate care to patients is the hospital’s paramount concern – especially when such care is necessary to preserve life. THA does not support or promote discrimination or retaliation against an individual for their conscientious objections, but believes that alternative methods of providing necessary care should be explored. Individuals and organizations of all religious beliefs and moral convictions should be welcomed in the health care industry, and play an integral role in the provision of appropriate care to all. THA respectfully asks that all possible effects of the proposed rules be thoroughly analyzed, with a focus on concerns stated herein, to ensure that providers, facilities, and patients have access to the full spectrum of care and that no individual is denied care essential to their health, safety, and wellbeing.

Your attention to this is very much appreciated. We again thank you for the opportunity to participate in the rulemaking process, for your time and attention to this matter, and look forward



1108 Lavaca Street, Suite 700  
Austin, Texas 78701  
512/465-1000  
[www.tha.org](http://www.tha.org)

to working with you. Please feel free to contact me with any questions, comments, or if there is anything else THA can assist with.

Very Truly Yours,

A handwritten signature in blue ink, appearing to read "Cesar J. Lopez".

Cesar J. Lopez  
Associate General Counsel  
(512) 465-1027  
[clopez@tha.org](mailto:clopez@tha.org)