

BOARD OF REGISTERED NURSING
SPECIAL BOARD MEETING
Agenda Item Summary

AGENDA ITEM: 3.0

DATE: May 28, 2019

ACTION REQUESTED: Take an oppose position on the proposed changes to the federal rules regarding Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 83 Fed. Reg. 3880 (Jan. 26, 2018) and delegate authority to the Executive Officer to assist the Office of the Attorney General in opposing it.

REQUESTED BY: Trande Phillips, RN, President
Chairperson, Administrative Committee

BACKGROUND:

The attached Rule promulgated by the Office for Civil Rights within the Department of Health and Human Services (Department) creates a broad exemption that permits any individual, entity, or provider, ranging from physicians to front office staff, to deny patients health care on the basis of “religious, moral, ethical or other reasons.” (84 Fed. Reg. 23170, at p. 23263, located at <https://www.govinfo.gov/content/pkg/FR-2019-05-21/pdf/2019-09667.pdf>.) This Rule significantly broadens existing federal conscience protections and will permit refusals of any health care services by almost any individual in the health care industry, even those not involved in the provision of the care. Moreover, there is no exception for medical emergencies. Consequently, this Rule is in conflict with several federal and California laws, as well as the Board’s primary mission of consumer protection.

For instance, this Rule disregards the Emergency Medical Treatment and Labor Act (EMTALA) enacted by Congress in response to growing concern about the provision of adequate medical services to individuals, particularly the indigent and the uninsured, who seek care from hospital emergency rooms. (42 U.S.C. § 1395dd(a).) Instead, the Rule places conscience protection over patient care without exception, even for emergencies. The American College of Emergency Physicians (ACEP), commented that the proposed rule failed to reflect the moral and legal duty of emergency physicians to treat everyone “who comes through our doors,” stating that “[b]oth by law and by oath, emergency physicians care for all patients seeking emergency medical treatment,” and concluding that “[d]enial of emergency care or delay in providing emergency services on the basis of race, religion, sexual orientation, gender identity, ethnic background, social status, type of illness, or ability to pay, is unethical.” (ACEP comment at 1, available at <https://www.regulations.gov/document?D=HHS-OCR-2018-0002-71219>.)

The Department failed to meaningfully address these concerns, and summarily dismissed them, stating that “[w]ith respect to EMTALA, the Department generally agrees with its explanation in the preamble to the 2008 Rule that the requirement under EMTALA that certain hospitals treat and stabilize patients who present in an emergency does not conflict with Federal conscience and anti-discrimination laws.” (84 Fed. Reg. at 23183.)

Under California law, a health care provider may decline to comply with an individual health care instruction or health care decision for reasons of conscience (but not on the basis of discrimination). (Prob. Code § 4734(a).) Also, a health care institution may decline to comply with an individual health care instruction when it is contrary to a policy of the institution that is

expressly based on reasons of conscience, if the policy was timely communicated to the patient. (Prob. Code § 4734(b).) However, a health care provider or institution that declines to comply with an individual health care instruction must (1) promptly so inform the patient; (2) immediately make all reasonable efforts to assist in the transfer of the patient to another provider or institution that is willing to comply with the instruction; and (3) provide continuing care to the patient until the transfer is accomplished or until it appears that a transfer cannot be accomplished. (Prob. Code § 4736.)

California laws also carefully balance provisions for conscience protections and a woman's right to reproductive health. For example, California law provides that no employer or other person shall require a physician, or any other person employed by or with staff privileges at a hospital, facility, or clinic to directly participate in the induction or performance of an abortion "if the employee or other person has filed a written statement with the employer or the hospital, facility, or clinic indicating a moral, ethical, or religious basis for refusal to participate." (Health & Safety Code § 123420(a).) Additionally, no employee or person shall be subject to any penalty or discipline for refusing to participate in the induction or performance of an abortion. (Id.) However, this provision does not apply to "medical emergency situations and spontaneous abortions" (Health & Safety Code § 123420(d); Health & Safety Code § 1317(a) & (e).)

Further, pursuant to California Business and Professions Code section 125.6, a California licensed health care professional is subject to discipline "if, because of any characteristic listed or defined in subdivision (b) or (e) of Section 51 of the Civil Code [sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status], he or she refuses to perform the licensed activity or aids or incites the refusal to perform that licensed activity by another licensee, or if, because [of such characteristics], he or she makes any discrimination, or restriction in the performance of the licensed activity."

Under the Rule, however, physicians and other health care providers may be emboldened to disregard California's anti-discrimination protections, and interfere with patients' access to health care due, in part, to how broadly the Rule defines terms. (See 84 Fed. Reg. at 23263-23264.)

The American Nurses Association and the American Academy of Nursing jointly provided the following comment against the proposed rule:

ANA and AAN strongly support the right and prerogative of nurses - and all healthcare workers - to heed their moral and ethical values when making care decisions. However, the primacy of the patient in nursing practice is paramount, and the moral and ethical considerations of the nurse should never, under any circumstance, result in the inability of the patient to receive quality, medically necessary, and compassionate care.

ANA and AAN are concerned that this proposed rule, in strengthening the authority of OCR to enforce statutory conscience rights under the Church Amendments, the Coats-Snowe Amendment, the Weldon Amendment, and other federal statutes, could lead to inordinate discrimination against certain patient populations - namely individuals seeking reproductive health care services and lesbian, gay, bisexual, transgender, and queer or questioning (LGBTQ) individuals. Proliferation of such discrimination - which in the case of LGBTQ individuals is

unlawful under Section 1557 of the Affordable Care Act (ACA) – could result in reduced access to crucial and medically necessary health care services and the further exacerbation of health disparities between these groups and the overall population.

Discrimination in health care settings remains a grave and widespread problem for many vulnerable populations and contributes to a wide range of health disparities. Existing religionbased exemptions already create hardships for many individuals. The mission of HHS is to enhance the health and well-being of all Americans, by providing for effective health and human services and by fostering sound, sustained advances in the sciences underlying medicine, patient care, public health, and social services. This proposed rule fails to ensure that all people have equal access to comprehensive and nondiscriminatory services, and dangerously expands the ability of institutions and entities, including hospitals, pharmacies, doctors, nurses, even receptionists, to use their religious or moral beliefs to discriminate and deny patients health care. All patients deserve universal access to high quality care and we as health care providers must guard against any erosion of civil rights protections in health care that would lead to denied or delayed care.

(Letter dated March 23, 2018, located at https://www.nursingworld.org/~4988e1/globalassets/docs/ana/anaaanletter-statutoryconsciencerrights_final-03232018.pdf.)

The consequences of this Rule are expected to disproportionately impact access to care for women, sexual abuse victims, religious minorities, people living with HIV/AIDS, and lesbian, gay, bisexual, and transgender (LGBT) people. Individuals in rural and other underserved communities may experience even more barriers to obtaining care. Under the Rule, patients could be denied care, without explanation or referral. In light of the above, this Rule is in conflict with the Board highest priority of protection of the public. (Bus. & Prof. Code, § 2708.1.)

RECOMMENDATION:

Take an oppose position on this Rule and delegate authority to the Executive Officer to assist the Attorney General in opposing it.

NEXT STEPS:

Collaborate with the Office of the Attorney General to determine what form of support is requested.

FISCAL IMPACT, IF ANY:

Staff estimates no fiscal impact except for a small amount of staff time.

PERSON(S) TO CONTACT:

Stacie Berumen
Chief of Enforcement
(916) 574-7600