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March 26, 2018

Roger Severino  
Director, Office for Civil Rights  
Department of Health and Human Services  
Hubert H. Humphrey Building  
200 Independence Avenue, S.W., Room 515F  
Washington, DC 20201

***Re: HHS—OCR—2018—0002, Protecting Statutory Conscience Rights in Health Care;  
Delegations of Authority; Proposed Rule (Vol. 83, No. 18) Jan. 26, 2018.***

Dear Mr. Severino:

On behalf of our nearly 5,000 member hospitals, health systems and other health care organizations, our clinical partners – including more than 270,000 affiliated physicians, 2 million nurses and other caregivers – and the 43,000 health care leaders who belong to our professional membership groups, the American Hospital Association (AHA) appreciates the opportunity to comment on the Department of Health and Human Services (HHS) Office for Civil Rights' (OCR) proposed rule regarding certain statutory conscience protections.

Hospitals and health systems are committed to respecting the conscience objections of hospital employees and medical staff. Conscience protections for health care professionals are long-standing and deeply rooted in our health care delivery system. For decades, the AHA and its members have supported policies to accommodate the differing convictions of our employees and medical staff by making provisions for them to decline to participate in delivering services they say they cannot perform in good conscience. Existing federal and state laws protect health care workers who express religious objections related to performing certain procedures.

At the same time, hospitals and health systems have obligations to their patients and are committed to providing the care they need. Existing laws create protections for patients and impose certain obligations on providers to ensure that patients have access to necessary care. Hospitals and health systems value every individual they have the opportunity to serve, and oppose discrimination against patients based on characteristics such as race, religion, national origin, sexual orientation or gender identity.



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The intersection of these equally important obligations can present unique challenges. Neither obligation can or should be addressed in a vacuum. OCR's framework for enforcing the conscience protections at issue should account for this intersection of hospitals' obligation to ensure needed care for patients and the obligation to honor conscience objections of employees.

With this as a backdrop, we make the following recommendations.

**THE POLICIES, PRACTICES, AND COURT PRECEDENT GOVERNING ENFORCEMENT OF OTHER CIVIL RIGHTS PROTECTIONS SHOULD BE THE MODEL FOR ENFORCEMENT OF THE CONSCIENCE PROTECTIONS AT ISSUE.**

OCR observes that the conscience protections at issue are civil rights to be enforced no less than other civil rights protections. The AHA agrees that the conscience protections are among the civil rights of hospital employees and medical staff. They should, therefore, be duly protected.

**In keeping with the principle that the conscience protections should be treated akin to other civil rights, the AHA urges OCR to ensure that the enforcement policies and practices applicable to the conscience protections are comparable to the long-standing policies and practices applicable when guaranteeing other civil rights protections for employees and staff.** OCR should not invent new, distinct, or additional policies and practices that add unnecessary complexity and burden or prefer conscience protections over other civil rights. Rather, OCR should use existing civil rights frameworks as the model for the conscience protections at issue. This not only would place the conscience protections on a level playing field with other civil rights, but would ensure that the conscience protections are guaranteed through an enforcement framework that already has proven effective in analogous civil rights contexts.

To this end, **OCR should explicitly adopt a reasonable accommodation framework that provides the flexibility for HHS to take into account particular facts and circumstances to determine that a hospital has done all it reasonably could under the circumstances to accommodate conscience objections of employees or medical staff** (*Bruff v. North Miss. Health Servs.*, 244 F.3d 495 (5th Cir. 2001)).

Employment discrimination on the basis of religion is prohibited and employers are required to reasonably accommodate the sincerely held religious beliefs of employees, absent a showing of undue hardship on the employer (*See* 29 C.F.R. § 1605.2). This has been true for over a half century, and this framework has successfully protected employees, including those of hospitals and health systems, from religious discrimination. Analogous reasonable accommodation frameworks also have been successfully employed in other civil rights contexts, such as the Rehabilitation Act of 1973.

This framework has proven successful in the hospital context, in part, because it allows for an assessment of the reasonableness of a requested accommodation in context. The requirement of reasonably accommodating the sincerely held religious beliefs of employees and medical staff, absent a showing of undue hardship, guarantees robust protections for the religious beliefs of hospital employees and medical staff.

Consistent with this framework, a hospital should be responsible for providing *reasonable* conscience-based accommodations and an employee is responsible for providing fair notice of a specific and sincerely held religious or moral objection. A hospital should not be sanctioned for failing to accommodate the moral or religious beliefs of an employee or medical staff where, despite being on notice of his or her right to do so, the individual did not give the hospital advance notice of his or her objection (*Wessling v. Kroger Co.*, 554 F. Supp. 548 (E.D. Mich. 1982) (no Title VII violation when the employee did not give the employer notice of a desire for a religious accommodation)).

Adoption of this framework in the conscience rule would assure hospitals that they may continue with a time-tested way of honoring their responsibilities to ensure access to necessary care for all patients, while effectively protecting the religious and other conscience rights of employees and medical staff. It also would avoid the unnecessary and duplicative administrative burdens for hospitals that imposing an additional and different framework would create.

Hospitals have existing policies, procedures, and best practices. They also have decades of experience with how to meet their responsibility to provide reasonable accommodations. Adopting a parallel framework for the conscience protections would enable hospitals to seamlessly incorporate the conscience rights of employees and medical staff into the existing compliance frameworks. The religious and moral beliefs of hospital employees and medical staff would be protected, while reducing the complexity and burden for hospitals. **OCR should expressly affirm these guiding principles.**

#### **DUE PROCESS PROTECTIONS SHOULD BE EXPLICITLY INCLUDED IN THE REGULATIONS.**

The proposed regulations are silent on procedural protections for a recipient of funding before the Department may take an adverse action. OCR should affirmatively recognize the due process rights of recipients of federal funds. The regulations should reinforce those rights with a clear acknowledgement of the procedural protections applicable to any action by the Department that would adversely affect a recipient's continued receipt of, or future eligibility for, federal funding. For example, the Social Security Act controls whether participation in, or receipt of funding from, the Medicare program may be limited or terminated; the Medicare law and regulations control the procedural protections for providers.

As discussed above, there are existing and proven civil rights policies and practices that should apply equally here. In particular, the conscience regulations should expressly adopt the longstanding due process protections for Title VI enforcement. The same protections should apply for challenges to any finding of noncompliance with the conscience protections that OCR may make or any penalty or other adverse action for noncompliance with the conscience protections that OCR may seek to impose.

Additionally, the regulations should be explicit about the grounds for imposing any contemplated sanction and the procedural protections. The proposed regulation lists numerous potential adverse actions available to OCR or the Department without delineating the specific circumstances that must occur before taking any such action. The implication is that they are

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available at OCR's or the Department's discretion, without reference to any reasonable standards. The regulation should expressly identify which sanction is applicable under which circumstances. It also should identify the related procedural protections, including notice and hearing rights. This would further the government's interests in not only ensuring fundamental fairness but also avoiding inappropriate disruption of health services that are federally funded.

**REGULATORY BURDEN SHOULD BE EASED WHEREVER POSSIBLE.**

**The proposed requirement that a recipient report reviews, investigations, and complaints to any component of the Department from which it receives funding is burdensome and unnecessary. So, too, is the proposed requirement that a recipient seeking new or renewed funding report reviews, investigations, and complaints from the prior five years.** No such requirements apply in other civil rights contexts. Because OCR will know of all such reviews, investigations, and complaints, OCR should instead be the source of this information within the Department. OCR will be the central repository of all such data and can make it readily available to other Departmental components, greatly reducing unnecessary burden on regulated parties.

Additionally, the sweep of these proposed disclosures is problematic. There is no distinction in the proposed treatment of, for example, general compliance reviews (unprompted by any particular concern), rejections of frivolous complaints, findings of compliance, or cases where a sanction is ultimately overturned. With new, renewed, or continuing funding at stake, the proposed reporting requirement risks inappropriately suggesting to the decision-maker that there is a cause for concern when there is in fact none, improperly biasing the decision-making against the recipient. The regulation should not effectively create a presumption of noncompliance. **The proposed reporting requirement should not be finalized.**

We appreciate your consideration of these issues. Please contact me if you have questions or feel free to have a member of your team contact Maureen Mudron, AHA deputy general counsel, at (202) 626-2301 or [mmudron@aha.org](mailto:mmudron@aha.org).

Sincerely,

/s/

Thomas P. Nickels  
Executive Vice President