

# SOUTHWEST WOMEN'S LAW CENTER

1410 Coal Avenue SW  
Albuquerque, NM 87104  
Phone: (505) 244-0502  
Fax: (505) 244-0506  
www.swwomenslaw.org

September 24, 2008

Department of Health and Human Services  
Office of Public Health and Science  
Attn: Brenda Destro  
Hubert Humphrey Building  
200 Independence Avenue SW  
Room 728E  
Washington, DC 20201

Re: RIN 0991-AB48 – “Provider Conscience Regulation”

Dear Secretary Leavitt:

The Southwest Women's Law Center is submitting these comments on behalf of itself and a diverse group of over thirty New Mexico organizations to urge you to abandon the proposed “Provider Conscience” regulations announced on August 21, 2008 and published in the Federal Register on August 26, 2008. The organizations listed below include medical providers, religious leaders, reproductive health providers and advocates, agencies supporting compassionate care at the end of life, anti-poverty organizations, agencies working with sexual assault survivors, and other advocates promoting increased healthcare access throughout New Mexico. These regulations completely ignore the needs of patients and the promotion of public health and we are particularly concerned that they might be interpreted to undermine New Mexico statutes guaranteeing access to family planning and other healthcare services.

We oppose what appears to be an effort in these regulations by HHS to expand healthcare refusals beyond abortions to include common forms of birth control, and are concerned about their impact on patients' end-of-life healthcare directives and the provision of healthcare treatment to lesbian, gay, bisexual and transgender (LGBT) patients. We believe these regulations will create significant barriers to healthcare services in communities throughout New Mexico where patients may have only one clinic, hospital or provider available to provide healthcare or where confusion over exactly what these regulations authorize and mean will result in delays or – worse – the complete failure to provide healthcare services to patients.

## **HEALTH CARE SERVICES AND ACCESS IN NEW MEXICO**

New Mexico has among the highest poverty rates and rates of uninsured in the nation. According to the Current Population Survey released by the Census Bureau just last month, about 22.5 percent of New Mexico's population was uninsured last year, compared to 15.3 percent uninsured across the nation. New Mexico Voices for Children, which tracks health insurance coverage in our state, estimated that there was a 2.4 percent increase in the number of uninsured in New Mexico since 2004-05 numbers were analyzed.

New Mexico has a strong commitment to ensuring access to family planning services throughout the State. New Mexico's Medicaid Program includes a Family Planning Waiver which covers women of child-bearing age up to 185% of poverty. Tens of thousands of New Mexico women are dependent on publicly-funded family planning services. According to the Guttmacher Institute, 23% of women aged 15-44 in New Mexico have incomes below the federal poverty level, and 31% of all women in this age-group are uninsured (i.e., do not have private health insurance or Medicaid coverage). The Guttmacher Institute's report, based on data available as of November 1, 2005, also described the impact of publicly funded family planning clinics in New Mexico. According to the report:

- 168 publicly funded family planning clinics provide contraceptive care to 68,500 women – including 17,330 sexually active teenagers.
- Family planning clinics in New Mexico serve 54% of all women in need of publicly supported contraceptive services and 52% of teenagers in need.
- 97% of counties in New Mexico have at least one family planning clinic.

See "Contraception Counts" New Mexico Fact Sheet, Guttmacher Institute (March 2006) ([http://www.guttmacher.org/pubs/state\\_data/states/new\\_mexico.pdf](http://www.guttmacher.org/pubs/state_data/states/new_mexico.pdf)) (last accessed September 22, 2008).

The New Mexico Legislature has adopted several laws ensuring access to contraceptive services. *The New Mexico Family Planning Act, N.M. Stat. Ann. §§ 24-8-1 et seq. (2008)* recognizes that family planning is "an essential component of standard health care and has been recognized nationally and internationally as a universal human right." N.M. Stat. Ann. § 24-8-3(A)(1). The Legislature further found that family planning services are not available to many persons in New Mexico, that it is "desirable that family planning services be readily accessible to all who want and need them" and that the purpose of the statute is to assure that "comprehensive family planning services are accessible on a voluntary basis to all who want and need them." *Id.* § 24-8-3(A)(3) and (4) and 24-8-3(B). The NM Family Planning Act prohibits health facilities from including in bylaws or other governing policy statements any statement that "interferes with the physician-patient relationship in connection with the provision of any family planning service." *Id.* § 24-8-6(A)(1).

*The New Mexico Sexual Assault Survivors Emergency Care Act, N.M. Stat. Ann. §§ 24-10D-1 et seq. (2008)* requires hospitals that provide emergency care to sexual assault

survivors to counsel them regarding emergency contraceptives (EC) and to provide EC if requested by the patient. There is no exception for a “religious or moral conscience” objection to counsel or dispense EC. We are particularly concerned about the impact of the regulations on this important law that was adopted to serve the needs of rape victims throughout New Mexico.

The Legislature has also adopted a *contraceptive equity law* which requires individual and group health insurance policies that provide a prescription drug benefit to include coverage for “prescription contraceptive drugs or devices approved by the food and drug administration.” *N.M. Stat. Ann. § 59A-22-42(A) (2008)*. A similar provision applies to individual and group health maintenance organization contracts. *See N. M. Stat. Ann. § 59A-46-44(A) (2008)*. Each statute contains a provision permitting a “religious entity” to elect to exclude such coverage. *See N. M. Stat. Ann. § 59A-46-44(A) (2008)*. But there is no individual refusal clause in these statutes. The draft regulation which was widely available made clear that the stated intent of these regulations is to cover insurance entities and subject them to the “nondiscrimination” provisions. The extension of “conscience” refusals to insurance companies could raise significant questions if individual employees object to processing insurance claims for contraceptives.

The *New Mexico Uniform Health Care Decisions Act, N.M. Stat. Ann. §§ 24-7A-1 et seq. (2008)*, (NM UHCDA) applies to a wide range of health care decisions and includes provisions regarding appointment of surrogate decision-makers should a patient become incompetent. While many consider it most relevant to end-of-life decisions and honoring of advance health care directives, the NM UHCDA was written to include all health care decisions, broadly defined, not only those involving patients at an end-of-life situation. *Protection and Advoc. Sys., Inc. v. Presbyterian Healthcare Servs.*, 1999-NMCA-122, at ¶15, 128 N.M. 73, 76-77, 929 P.2d 890, 893-94 (1999).

The NM UHCDA contains refusal provisions for both individual and institutional health care providers. Under N.M. Stat. Ann. §24-7A-7E, “*a health-care provider* may decline to comply with an individual instruction or health-care decision for reasons of conscience. A *health-care institution* may decline to comply with an individual instruction or health-care decision *if the instruction or decision is contrary to a policy of the health-care institution that is expressly based on reasons of conscience and if the policy was timely communicated* to the patient or to a person then authorized to make health-care decisions for the patient.” N.M. Stat. Ann. § 24-7A-7E (2008) (emphasis added). If a provider or institution refuses to comply with an individual health care decision, the statute requires that the provider/institution promptly inform the patient, continue to provide care until the patient can be transferred, and immediately help to transfer the patient to a place where the decision will be honored. N.M. Stat. Ann. § 24-7A-7G (2008). The draft regulation may be used to challenge even these basic patient protection provisions.

Significantly, there is no effort to balance patient needs in these regulations. For years, Title VII of the Civil Rights Act has required employers to accommodate employees’ religious objections to providing healthcare services, *so long as the accommodation does not pose an undue hardship on the employer’s overall ability to provide healthcare services to its patients*. These regulations, in contrast, do not even consider the needs of patients or how services will be delivered if individuals refuse to “assist” in providing the healthcare that their employer provides

and that their patients need. The regulations appear to create standards inconsistent with Title VII.

The existence of these sweeping regulations will create new barriers to health care. The proposal states that nearly 600,000 entities will be subject to the regulation. In addition to hospitals, clinics and offices of healthcare providers, the list includes Nursing Homes, Home Health Care Services, Pharmacies, and nursing, medical, public health and other healthcare training and educational programs. Any agencies that receive funding for public health programs originating from HHS through contracts or grants would also be covered. Programs providing services for teen pregnancy prevention and at-risk youth could be covered if they receive funds originating at HHS. Hospices and other entities that attempt to provide compassionate care to terminally ill patients could face objections by individuals who disagree with the decisions of patients and family members at the end of life. And human resources departments in health care institutions everywhere will be scrambling to understand and explain to staff what these new “discrimination” provisions mean in the context of managing and operating their institutions.

Many New Mexicans are dependent on public benefits programs for a wide variety of healthcare services. Many New Mexicans access health care in small rural communities. At a time when we are seeking to increase access to healthcare, these regulations would create new barriers to healthcare. They will also require state and local government entities and healthcare entities and providers to devote significant resources to analyze the regulations and determine what their obligations are under these regulations. And, significantly, the regulations are so confusing and vague that the end result will be widespread confusion regarding which types of refusals are and are not authorized in particular settings. If there is disagreement over how to interpret them – and it seems clear there will be – even more resources will be wasted in trying to address and resolve those disagreements. It is particularly disappointing that the federal agency responsible for promoting public health and overseeing public benefits programs for healthcare services would adopt regulations that fail to consider the impact on patients and the delivery of healthcare services.

We have the following specific comments and objections to the proposed regulations. We urge the Department to abandon them in their entirety. But if the Department goes forward, we have identified some specific changes that at a minimum should be made to ensure that the regulations do not unlawfully expand existing federal refusal clauses and ensure that patients’ needs are met.

- The regulations intentionally leave ambiguous the issue of birth control and invite individuals and institutions to claim that they have a “right to refuse” to provide birth control services, counseling and referrals and that they cannot be “discriminated” against if they so refuse. To the extent the regulations would allow such refusals, they unlawfully expand the “abortion refusal clauses” that HHS claims to be interpreting. ***HHS should clarify that the “abortion refusal” clauses in federal statutes and in these regulations have no applicability to birth control and family planning services, including specifically emergency contraception.***
- As drafted, the “discrimination” provisions could invite challenges to established

state laws in New Mexico that ensure access to comprehensive family planning services and counseling and that ensure rape victims receive emergency contraception. *See* New Mexico Family Planning Act, N.M. Stat. Ann. §§ 24-8-1 et seq. (2008), and the New Mexico Sexual Assault Survivors Emergency Care Act, N.M. Stat. Ann. §§ 24-10D-1 et seq. (2008). They could also invite challenges and create significant confusion under New Mexico's contraceptive equity laws. *See* N.M. Stat. Ann. § 59A-22-42(A) (2008); N. M. Stat. Ann. § 59A-46-44(A) (2008). ***HHS should clarify that nothing in these regulations undermines or is designed to authorize challenges to existing state laws ensuring access to family planning and contraceptive services.***

- The regulations expand federal law by creating a broad definition of what it means to “assist in the performance” of an objectionable activity to include “counseling, referral, training, and other arrangements.” (Proposed Section 88.2) That means that someone seeking birth control at a clinic could encounter a receptionist who may refuse to provide any information regarding the services the patient is seeking, and may even refuse to refer the patient to someone on staff ready and able to provide services to the patient. The regulations invite such refusals without any safeguards to ensure patients receive the care they seek and are entitled to. ***HHS should make clear that nothing in these regulations contradicts or is inconsistent with Title VII of the Civil Rights Act and that healthcare providers are entitled to establish mandatory procedures for invoking an individual refusal that ensure that patients receive the information, counseling and services they are entitled to.***
- The regulations expand the institutions subject to these provisions to include, among others, pharmacies and insurance companies. ***HHS cites no legislative history or authority to support such an interpretation of the federal refusal clauses. The inclusion of these entities, which were the subject of the background discussion in the draft regulations, provides further support for the argument that HHS is attempting to unlawfully expand the abortion refusal clauses to address contraception.***
- The regulations contain a sweeping refusal clause that enables individuals in healthcare settings and programs to object to anything that is contrary to their own “religious conscience or moral convictions,” and could extend to HIV treatment, end-of-life care, and family planning counseling and services without any balancing of the needs of patients. The structure of the regulations, the broad definitions they contain, and the effort to fold very different refusal clauses applying to different entities in different contexts into one set of regulations with one basic certification requirement is designed to expand this refusal provision in the Church Amendments well beyond the more narrow context in which it applies. In New Mexico, it also raises significant concerns about the impact on the New Mexico Uniform Health-Care Decisions Act. ***HHS should clarify that the regulations do not undermine in any way the careful balancing of conscience refusals and the rights of patients to make their own healthcare decisions reflected in the NM Uniform Health-Care Decisions Act, including the procedural protections for patients set forth in the statute. The***

***regulations should clarify that healthcare entities are entitled to establish policies and procedures that will ensure patients receive the information, counseling and services they are entitled to.***

The very complexity of the regulations is part of the problem – they confuse and conflate ten different refusal provisions containing different language that apply to different entities in different circumstances. Despite these many different restrictions that apply in different ways to different entities, all entities are required to sign the same broad certification acknowledging that they will lose funding if they violate any of the restrictions that apply to them. Because federal funding is at stake, the regulations will empower individuals to assert moral and religious objections and place the risk on the employer to decide whether the regulations really authorize such an objection. ***The regulations should not combine all these different refusal clauses. The cost of attempting to interpret and implement these regulations at the community level is staggering. One employee or volunteer or one applicant for a position could claim “discrimination” and the “right to refuse,” could seek to engage state officials in that claim, and raise questions about the applicability of the regulations and the validity of state laws, while threatening a healthcare entity with the potential loss of federal funding without any guidance at all from HHS regarding what these regulations mean.***

Here are just some examples of questions that we believe could arise under these regulations in New Mexico:

Can a hospital citing religious or moral objections claim that the regulations permit it to violate New Mexico’s Sexual Assault Survivors Emergency Care Act and refuse to provide – and refuse to allow its staff to provide – emergency contraception and counseling about emergency contraception to rape victims?

Can a hospital citing religious or moral objections claim that it can violate New Mexico’s Family Planning Act and bar all of its healthcare personnel from providing contraceptive counseling and services to patients?

Can healthcare providers and institutions ignore the procedural protections set forth in New Mexico’s Uniform Healthcare Decisions Act if they seek to invoke a conscience objection to honoring an advance healthcare directive? *See* N.M. Stat. Ann. § 24-7A-7E and § 24-7A-7G (2008).

Could HHS threaten to withhold healthcare dollars from New Mexico state agencies if the State takes steps to enforce any of these New Mexico statutes?

Can a Title X family planning clinic refuse to hire or terminate someone who refuses to provide contraceptives or counseling or referrals regarding contraceptives to clinic patients?

Can the New Mexico Department of Health refuse to provide Title X funding to an entity that objects on religious or moral grounds to providing patients with information, counseling, and services regarding certain forms of birth control, including IUDs and emergency contraception?

Can an administrative staff member within a large hospital refuse to process payroll, leave requests, or benefits for a staff member that participates in embryonic stem cell research? For a staff member who provides abortion counseling and services? For a staff member who provides birth control counseling and services? For a staff member who withholds hydration and nutrition consistent with a patient's instructions? Can a receptionist refuse to forward a patient's call to any such staff member on the grounds of conscience because the receptionist believes the patient is calling to receive such services?

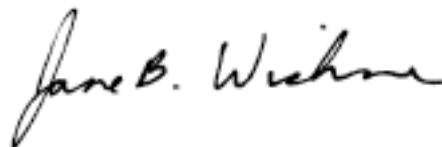
Is a teen pregnancy program that receives HHS funding required to allow peer counselors or educators to refuse to discuss birth control rather than replace them with someone will provide such information and counseling consistent with the program's goals?

Is an HHS-funded behavioral health program focusing on adolescent youth required to allow its counselors to refuse to counsel minors regarding contraceptives and protection against sexually transmitted infections because the counselors object to providing such information to minors on moral or religious grounds? Because they object to providing such information to LGBT youth because they object to doing so on moral or religious grounds?

Has HHS's estimate of the expected cost of these regulations taken into account the cost of researching and analyzing the impact of the regulations by every covered entity and the cost of addressing and attempting to resolve all refusals attempted under the regulations?

Public outcry led HHS to eliminate some of the most egregious provisions in the draft regulation. We are deeply concerned that these changes are masking the huge impact these regulations would have if adopted. At a time when so many people are uninsured and depend on federally funded healthcare services, the federal government should be promoting access to healthcare, not creating new barriers to healthcare and new unnecessary burdens for state health agencies and community providers. We urge you to withdraw these proposed regulations in their entirety.

Sincerely,

A handwritten signature in black ink that reads "Jane B. Wishner". The signature is written in a cursive, flowing style.

Jane B. Wishner  
Executive Director  
Southwest Women's Law Center

Submitted on behalf of the following organizations:

Southwest Women's Law Center

ACLU of New Mexico  
American Association of University Women – New Mexico  
American College of Nurse Midwives, New Mexico Chapter  
American College of Obstetricians and Gynecologists - NM Section  
Carlsbad Medical Center Sexual Assault Nurse Examiners (SANE) Unit  
Community Against Violence, Inc. (Taos, NM)  
Compassion & Choices of Albuquerque  
Compassion & Choices of Santa Fe  
Desert View Family Counseling (Farmington, NM)  
Equality New Mexico  
Health Action New Mexico  
La Pinon Sexual Assault Recovery Services of Southern New Mexico  
Medical Students for Choice, University of New Mexico School of Medicine Chapter  
NARAL Pro-Choice New Mexico  
New Mexico Center on Law and Poverty  
New Mexico Coalition of Sexual Assault Programs, Inc.  
New Mexico Nurses Association  
New Mexico Religious Coalition for Reproductive Choice  
New Mexico Teen Pregnancy Coalition  
New Mexico Voices for Children  
New Mexico Women's Agenda  
Nirvana Manana Institute  
Pegasus Legal Services for Children  
Planned Parenthood of New Mexico  
Rape Crisis Center of Central New Mexico  
Santa Fe Rape Crisis and Trauma Treatment Center  
Sexual Assault Nurse Examiners (SANE) of the 9<sup>th</sup> Judicial District of New Mexico  
Tewa Women United  
University of New Mexico Center for Reproductive Health  
University of New Mexico School of Medicine Sex Ed Project  
Young Women United

cc: New Mexico Governor Bill Richardson  
New Mexico Lieutenant Governor Diane Denish  
New Mexico Attorney General Gary King  
Pam Hyde, Secretary, New Mexico Human Services Department  
Dr. Alfredo Vigil, Secretary, New Mexico Department of Health  
Senator Pete Domenici  
Senator Jeff Bingaman  
Representative Heather Wilson  
Representative Tom Udall  
Representative Steve Pearce

New Mexico Coalition Comments on Provider Conscience Regulations

September 24, 2008

Page 9