



Bill Richardson
Governor



Pamela S. Hyde, J.D.
Human Services Department Secretary
Alfredo Vigil MD
Department of Health Secretary

April 6, 2009

Kathleen Sebelius, Secretary-Designate
US Department of Health & Human Services
200 Independence Avenue, SW
Washington, DC 20201

Re: Rescission Proposal

Dear Secretary-Designate Sebelius:

As Secretaries of the New Mexico Human Services Department and New Mexico Department of Health, we are sending this letter to express strong support for your Department's Rescission Proposal concerning 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" (73 FR 78072). As policymakers and executive leaders responsible for a majority of public health care in our state, we believe that the existing rule severely limits access to patient care and may cause denials to certain basic health services, particularly among low-income and minority women living in rural and medically underserved areas of New Mexico.

In accordance with the request for comments that was published in the Federal Register on March 10, 2009, these comments address New Mexico's specific concerns regarding the following:

Reduced Access to Health Care Services

New Mexico is a rural state with nearly half of its population living in rural or frontier counties. In these areas, access to health care is already strained and a woman may have access to only one health care provider in the area where she lives. We believe that the existing rule will increase the difficulties that women already face in accessing health care in these underserved areas by further curtailing, and even eliminating in some instances, the health care choices available to them. In addition, because the regulation is directed at providers receiving public funding, it discriminates and limits choices among predominantly low-income and minority women who rely disproportionately on publicly-funded health care in New Mexico.

Our state has long been a recipient of Title X funding, and serves over 40,000 individuals through the Title X program every year. Federal Title X family planning regulations require that grantees offer pregnant women the opportunity to be provided with all-option counseling and information regarding prenatal care and delivery, infant care, foster care or adoption, and pregnancy termination. Many counties in New Mexico rely solely on Title X providers to meet the reproductive health service needs of their residents. There are no provisions in the existing rule that require a safety-net or alternative resource for patients that are denied services on the basis of religious or philosophical grounds. This appears to conflict with federal Title X regulations, and will likely leave many women in our state without any alternate options for finding reproductive health services or information.

We believe that the existing rule is sufficiently broad to allow interpretation that could severely diminish a woman's right to be informed about and choose health care options that she feels are in her best interest. The broadness and ambiguity contained in the rule could also lead to limitations of services beyond abortion, sterilization and birth control, extending to other areas to which a provider may object, such as services to those with HIV/AIDS, services for homosexuals, and those seeking end-of-life options. Specific examples of these instances are described below.

Potential Harm Resulting from Ambiguity in the Rule

We are concerned that the existing rule will invite challenges to established state laws in New Mexico that ensure access to comprehensive family planning services and counseling; and ensure that rape victims receive emergency contraception. For example, hospital providers could interpret the rule as overriding state law, and conceivably fail to counsel or provide victims of rape with any information about the existence and availability of emergency contraception. In addition, the New Mexico Family Planning Act is designed to ensure that comprehensive family planning services are accessible on a voluntary basis to all New Mexicans who want and need them. Again, we are concerned that providers might interpret the rule as countermanding existing law and deny women access to basic family planning services. Family planning is an essential component of standard health care and has been recognized both nationally and internationally as a universal human right.

While New Mexico has statutes in place that protect the rights of health care providers to refuse to comply with an individual's health care request, these providers cannot abandon their patients and must make alternative resources available. The existing regulation is so broad that any employee or contractor could object to any medical practice on the grounds that it violates their conscience, without making alternate provisions for the needs of the patient. For example, the rule would permit a clerk to refuse enrollment of a patient with HIV (i.e., assist in the performance of a health service) because the clerk is morally opposed to same-sex relationships and believes that the two are related. Under the same interpretation, a nurse could refuse to participate in the care of a woman experiencing complications from an earlier abortion or sterilization, even if the actual procedure took place long ago.

It should also be noted that the US Supreme Court has consistently held that states like New Mexico with parental consent statutes must provide a safety-net to minors seeking an abortion or family planning services. The existing rule lacks specific protections for minors, which could put our state in the position of facing additional legal challenges because providers believe they can now deny or refute the state's existing minor consent laws.

Finally, the rule includes several problematic definitions, such as the definition of a "health care entity" as inclusive of "components of State or local governments". This could be interpreted to mean that an employee of a state-run health care facility could refuse to perform certain activities or services, including counseling and referrals, despite the mission of the very same facility to provide these services.

Achieving Objectives through Non-Regulatory Means

Because there is no statutory provision requiring the promulgation of rules to implement the laws that form the basis of the existing regulation, New Mexico urges the Department to accomplish the objectives of the rule through non-regulatory means. Non-regulatory tactics include outreach and education targeting health care providers, employees and contractors receiving public funds; state and local governments; and individual patients, particularly low-income and minority women. While it is critical that the health care field provide a tolerant environment that respects individual conscience, certain religious beliefs, ethnic and cultural traditions, and moral convictions among health care providers, it cannot do so by establishing a policy that curtails and may even eliminate basic health care rights among some of our nation's most vulnerable and disadvantaged populations.

In conclusion, we want to thank you for this opportunity to comment on the Department's Rescission Proposal. Once again, we strongly urge the Department to preserve access to health care services and prevent potential harm to individuals, nationally and in our state, by rescinding 73 FR 70872.

Sincerely,

Pamela S. Hyde, JD, Secretary
NM Human Services Department

Alfredo Vigil, MD, Secretary
NM Department of Health