American College of Emergency Physicians®
ADVANCING EMERGENCY CARE

March 6, 2023

The Honorable Xavier Becerra
Secretary
Department of Health and Human Services
Hubert H. Humphrey Building
Room 509F
200 Independence Avenue, SW Washington, DC 20201

RIN 0945-AA18

Re: Safeguarding the Rights of Conscience as Protected by Federal Statutes

Dear Secretary Becerra:

On behalf of the 40,000 members of the American College of Emergency Physicians (ACEP), we wish to comment on the "Safeguarding the Rights of Conscience as Protected by Federal Statutes" proposed rule, as it affects the practice of emergency medicine and the patients that our emergency physician members serve.

As background, in 2008, the U.S. Department of Health and Human Services (HHS) issued a proposed rule 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 50274) to address the conscience provisions in effect at that time. In the preamble to the 2008 Final Rule, HHS concluded that regulations were necessary in order to educate the public and health care providers on the obligations imposed, and protections afforded, by Federal law. The Final Rule went into effect on January 20, 2009.

In 2011, HHS issued a final rule entitled "Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws" (2011 Final Rule) (76 FR 9968) rescinding much of the 2008 Final Rule, including provisions defining certain terms used in one or more of the conscience provisions and requiring entities that received Department funds, both as recipients and subrecipients, to provide a written certificate of compliance with the 2008 Final Rule.

In 2019, HHS finalized a regulation (initially proposed in 2018) that reinstated the 2008 rule while revising and expanding on its provisions, including by (1) adding additional statutory provisions to the rule's enforcement scheme; (2) adopting definitions of various statutory terms; (3) imposing assurance and certification requirements; (4) reaffirming the Office of Civil Rights' (OCR's) enforcement authority; (5) imposing record-keeping and cooperation requirements; (6) establishing enforcement provisions and penalties; and (7) adopting a voluntary notice provision. However, the rule was challenged in multiple lawsuits and struck down. The rulings cited that the regulation exceeded HHS' authority and its provisions were inconsistent in certain respects with the conscience statutes or other statutes, including the Emergency Medical Treatment & Labor Act (EMTALA) and Title VII of the Civil Rights Act. Thus, HHS has been operating under the 2011 Final Rule since it was finalized.

WASHINGTON, DC OFFICE
901 New York Ave, NW
Suite 515E
Washington DC 20001-4432

202-728-0610
800-320-0610
www.acep.org

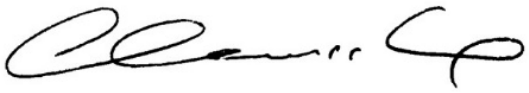
ACEP supports the proposal in this rule to partially rescind the 2019 Final Rule. In response to the 2019 rule when it was first proposed,[1] ACEP had expressed concerns that it did not reflect nor allow for our moral and legal duty as emergency physicians to treat everyone who comes through our doors. Both by law[2] and by oath, emergency physicians care for all patients seeking emergency medical treatment. Denial 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.[3]

We were similarly concerned that the previous rule did not in any way address how conscience rights of individuals and institutions interact with the mandated provision of emergency services. EMTALA requires clinicians to screen and stabilize patients who come to the emergency department (ED). Such patients have every right to expect the best possible care and to receive the most appropriate treatment and information about their condition. Patients with life-threatening injuries or illnesses may not have time to wait to be referred to another physician or other health care professional to treat them if the present provider has a moral or religious objection. Likewise, EDs operate on tight budgets and do not have the staffing capacity to be able to have additional personnel on hand 24 hours a day, 7 days a week to respond to different types of emergency situations that might arise involving patients with different backgrounds, sexual orientations, gender identities, or religious or cultural beliefs. The previous rule seemed to demand that, in order to meet EMTALA requirements, an ED anticipate every possible basis for a religious or moral objection, survey its employees to ascertain on which basis they might object, and staff accordingly. This is an impossible task that jeopardizes the ability to provide care, both for standard emergency room readiness and for emergency preparedness. EDs serve as the safety net in many communities, providing a place where those who are most vulnerable and those in need of the most immediate attention can receive care. By not addressing the rights and needs of patients undergoing an emergency, the legal obligations of emergency physicians, and the budget and staffing constraints that EDs face, the previous rule undermined the critical role that EDs play across the country.

In all, we strongly believe that discrimination in any form should be prohibited in health care, and therefore we encourage HHS to finalize this rule as proposed. The 2019 policy did not reflect nor allow for our moral and legal duty as emergency physicians to treat everyone who comes through the doors of the ED.

If you have any questions, please contact Jeffrey Davis, ACEP's Director of Regulatory and External Affairs, at jdavis@acep.org.

Sincerely,



Christopher S. Kang, MD, FACEP
ACEP President

[1] The proposed rule was issued in 2018, prior to being finalized in 2019.
[2] 42 U.S. Code § 1395dd - Examination and treatment for emergency medical conditions and women in labor.
[3] ACEP Code of Ethics for Emergency Physicians; Approved Jan 2017; https://www.acep.org/patient- care/policy-statements/code-of-ethics-for-emergency-physicians/.