



JUN 13 2019

Office of the Assistant Secretary for Health
Washington, D.C. 20201

Mr. Mark L. Rienzi
The Becket Fund for Religious Liberty
1200 New Hampshire Avenue NW Suite 700
Washington, DC 20036

RE: *Obria Group, Inc. et al. (collectively, Obria) v. U.S. Department of Health and Human Services (HHS) et al.*, No. 8:19-cv-905 (C.D. Cal.)

In the above-referenced lawsuit, Obria challenges a provision of a 2000 HHS Rule that, in Obria's view, requires Title X funding recipients to provide referrals for abortion. Obria's Complaint alleges that it currently faces a "Hobson's choice" between forfeiting Title X funds or accepting the funds and facing an abortion-referral requirement to which Obria alleges "deep religious objections." For reasons HHS has expressed publicly and as explained below, Obria's interpretation rests on a mistaken premise. Nonetheless, in an effort to avoid further litigation, HHS reiterates its long-held view and repeated public pronouncements on this topic.

Federal law expressly prohibits "any institutional or individual health care entity to be discriminat[ed] against on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." §507(d), Division B, Title II, Pub. L. 115-245 (9/28/2018); *see also* 42 U.S.C. § 238n(a) (Coats-Snowe); 42 U.S.C. § 300a-7 (Church amendments). We further note that, as HHS explained in a recent rule, its "preexisting policy dating back at least to 2008 [has been not to] enforce[] requirements of the 2000 regulations where they may conflict with the federal conscience statutes as explained in this rule." Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23,170, 23,191 n.64 (May 21, 2019) (Conscience Rule). Indeed, HHS issued guidance in 2009, attached hereto, explaining this longstanding policy.

As you are aware, HHS also recently promulgated a new rule that, *inter alia*, would prohibit abortion referrals as a method of family planning within the Title X program. 84 Fed. Reg. 7714 (March 4, 2019) (2019 Rule or Rule). While the 2019 Rule has been preliminarily enjoined, HHS regards those preliminary injunctions as preserving the pre-Rule status quo as HHS implemented the Title X program prior to the Rule's publication. Moreover, HHS is currently appealing those injunctions. In any event, whether HHS may prohibit abortion referrals as a method of family planning within the Title X program is distinct from the question whether providers may be—let alone must be—required to provide them under federal conscience laws in light of the clear statutory prohibition referenced above. Indeed, immediately after HHS's announcement of the Conscience Rule on May 2, HHS filed notices setting forth this understanding in each of the five Courts hearing challenges to the 2019 Rule. To date, none of those Courts or Plaintiffs have taken issue with this understanding.

As these and other public statements confirm, HHS's longstanding policy has been, and continues to be, to not apply or enforce the provisions set forth in 42 C.F.R. § 59.5(a)(5),

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promulgated in 65 Fed. Reg. 41,270 (July 3, 2000), as those provisions relate to abortion referrals, to Title X providers with religious objections to such referrals. HHS has not, and does not, consider such providers' acceptance of Title X grant funds to signify acceptance of these provisions relating to abortion referrals. HHS has treated, and continues to treat, such providers as being in compliance with their Title X and grant-specific obligations if their services are otherwise compliant apart from policies or practice relating to abortion referrals. HHS is not aware of any reason why that longstanding policy would not apply to Obria based on its stated religious objections.

Sincerely yours,



Brett P. Giroir
ADM, USPHS

Enclosure



DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

**Assistant Secretary for Health
Office of Public Health and Science
Washington D.C. 20201**

JAN 15 2009

TO: Regional Health Administrators, I-X

FROM: Assistant Secretary for Health

SUBJECT: Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Laws - INFORMATION

It has come to my attention that your offices have received numerous questions regarding the interaction of the recently finalized regulation, "Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Laws", 73 F.R.78071 (Dec. 19, 2008) (and the statutes that it implements), and the operation of the Title X National Family Planning program. In the hope of providing a clearer understanding of what effects this new regulation may have on grantees, please provide the following information to any grantees or interested parties.

The new regulation's most significant requirement for grantees is the certification requirement. As the final rule makes clear, in order to receive funds for FY 2010, all recipients and sub-recipients of Department funding, including Title X grantees will have to sign the certification that is set out at 45 CFR 88.5(c)(4). Title X grantees do not have to comply with the certification requirement until the control numbers assigned by the Office of Management and Budget are published in the Federal Register. The OPHS Office of Grants Management and the Office of Population Affairs will work to make this certification available to grantees and applicants as part of the FY 2010 funding cycle.

Questions still arise regarding the interaction of the Public Health Service Act § 245, 42 U.S.C. 238n and the Weldon Amendment, Consolidated Appropriations Act, 2008, Public Law 110-161, Div. G, § 508(d), 121 Stat. 1844, 2209 (Dec. 26, 2007), with the Title X regulatory requirement to provide abortion counseling and referrals, 42 CFR § 59.5(a)(5). As noted in the final regulation, the requirement that grantees provide abortion counseling and referrals does conflict with the statutory protections afforded to entities and individuals under both of these statutes. The Office of Population Affairs is aware of this conflict between the requirement in the Title X regulation and the statutory requirements and, as such, does not enforce this Title X regulatory requirement on objecting grantees or applicants.

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Thank you for your assistance in helping our grantees better understand these statutory protections.


Joxel Garcia, M.D., M.B.A.

cc:

Evelyn Kappeler, Acting Director, Office of Population Affairs
Karen Campbell, Director, Office of Grants Management