



AMERICAN ATHEISTS

May 17, 2019

U.S. Department of Health and Human Services
Office of the Secretary
Hubert H. Humphrey Building
200 Independence Avenue SW
Washington, DC 20201

Re: Comments Regarding “Health Information Privacy and Civil Rights/Conscience and Religious Freedom Discrimination Complaint” (Doc. Identifier 0945-0002-60D)

Dear Madam or Sir:

American Atheists writes in response to the agency information collection request entitled “Health Information Privacy and Civil Rights/Conscience and Religious Freedom Discrimination Complaint” (Document Identifier 0945-0002-60D), published in the Federal Register on March 18, 2019.¹ Pursuant to this information request, we requested and received the proposed “Health Information Privacy & Security Complaint” form, the proposed “Civil Rights & Conscience and Religious Freedom Discrimination Complaint” form, and the supporting statements for these forms from the Department. With regard to the “Civil Rights & Conscience and Religious Freedom Discrimination Complaint” form (hereinafter “proposed complaint form”), we believe that this form is confusing, overly burdensome, and it fails to meet statutory requirements.² We urge you to withdraw the proposed complaint form, or, at a minimum, to create a new form which pertains solely to refusals of care rather than conflating these complaints with civil rights complaints.³

We note that since the issuance of this information request, the Department has finalized its rule pertaining to “Protecting Statutory Conscience Rights in Health Care; Delegations of Authority.”⁴ American Atheists previously commented in opposition to this rule,⁵ and so we will limit discussion of our concerns with the Final Rule to relevant interactions with the proposed complaint form.

American Atheists is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the “wall of separation” between government and religion created by the First Amendment. We strive to create an environment where atheism and atheists are accepted as members of our nation’s communities and where casual bigotry against our

¹ 84 FR 9802.

² American Atheists takes no position on the proposed “Health Information Privacy & Security Complaint” form.

³ American Atheists also joins the comments on the proposed complaint form submitted by the Center for American Progress and associated organizations.

⁴ Dept. of Health and Human Services, “Protecting Statutory Conscience Rights in Health Care; Delegations of Authority,” 45 CFR Part 88, RIN 0945-AA10 (May 2, 2019) (Hereinafter, “Final Rule”).

⁵ American Atheists, Public Comments Regarding Proposed Rules on “Protecting Statutory Conscience Rights in Health Care,” RIN 0945-ZA03, Docket HHS-OCR-2018-002, submitted March 26, 2018.

community is seen as abhorrent and unacceptable. We promote understanding of atheists through education, outreach, and community-building and work to end the stigma associated with being an atheist in America. As advocates for the health, safety, and well-being of all Americans, American Atheists objects to efforts to subordinate medical care to the religious beliefs of providers and institutions.

Complaints about adverse consequences due to refusals of care are legally distinct from civil rights discrimination complaints, and collecting them on the same form creates confusion.

The proposed complaint form, which is an adaptation of the previous civil rights discrimination complaint form, would collect complaints of two separate types: civil rights complaints and so-called “conscience and religious freedom discrimination” complaints.⁶ However, the statutory authority for the Department to take and investigate these two types of complaints is non-overlapping and distinct, creating different requirements for making complaints, time periods for dealing with complaints, varying applicability to different types of health care providers, and different potential outcomes and remedies, among other parameters.

The Department is authorized to take civil rights complaints on the basis of race, color, national origin, disability, age, sex, and religion, and each of these bases are captured in the complaint form.⁷ While there is minute variation between the complaint and investigation procedures based upon the authorizing statutes, the Department’s long history of adjudicating such complaints, the establishment of similar complaint processes in other federal agencies (such as the Equal Employment Opportunities Commission), and a significant body of case law guidance from courts which have looked at these issues has resulted in a complaint and investigation process that is rather uniform.

However, this uniformity of approach does not extend to religious refusal complaints. For these complaints, the authorizing statutes cited by the Department⁸ vary widely in scope and applicability. In fact, many of the statutes cited by the Department for this purpose fail to provide any authorization to

⁶ Because this phrase is inaccurate and misleading, we will instead refer to these complaints as complaints about adverse actions due to refusals of care based on religious beliefs or simply “religious refusal complaints.”

⁷ As noted in the supporting statements for the proposed complaint form, “Federal laws barring discrimination by recipients of Federal financial assistance on grounds of race, color, national origin, disability, age, sex, or religion under programs and activities receiving Federal financial assistance from HHS, including, but not limited to, Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794), the Age Discrimination Act of 1975 (42 U.S.C. §6101 *et seq.*), Title IX of the Education Amendments of 1972 (20 U.S.C. §1681 *et seq.*), Sections 794 and 855 of the Public Health Service Act (42 U.S.C. §§295m and 296g), and Section 1557 of the Affordable Care Act (42 U.S.C. §18116).”

⁸ Sections 1303(b)(4) and 1553 of the Affordable Care Act (42 U.S.C. §§18113, 18023(b)(4)), the Church Amendments (42 U.S.C. § 300a-7), the Coats-Snowe Amendment (42 U.S.C. §238n), the Religious Freedom Restoration Act (42 U.S.C. § 2000bb *et seq.*), and the Weldon Amendment (*e.g.*, Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2019, Pub. L. No. 115-245, Div. B., §507(d)).

take or investigate complaints.⁹ Moreover, religious refusal complaints do not share the well-developed body of legal guidance applicable to civil rights complaints, and it is unclear which, if any, of the traditional safeguards for civil rights complainants, such as anti-retaliation protection, are available to religious refusal complainants.

Because religious refusal complaints are legally distinct from civil rights complaints, they will likely require different data and information to effectuate intake. For example, because of the narrow scope of the Church Amendments and other authorizing statutes, it is especially important that religious refusal complaints identify the HHS-associated funding source.¹⁰ Similarly, because many of these authorizing statutes pertain only to religious refusals based on a few specific issues (such as abortion or sterilization), a form for taking these complaints should clearly allow complainants to select the type of care they are refusing to provide. Additionally, because of the constitutional requirement to consider burden on third parties and beneficiaries due to religious exemptions (see discussion below), the complainant should be asked to provide any known information about the individual(s) to whom they refused to provide care so that the Department can investigate as necessary.

Collecting both of these types of complaints through the same form is confusing for potential complainants, investigators, and others. The proposed complaint form would be used by two distinct types of complainants: 1) health care consumers making civil rights complaints, and 2) medical providers making religious refusal complaints. These two types of complainants are not similarly situated,¹¹ and therefore complainants may not understand how these forms relate to them or apply to the violations which they encountered. Using the same form for complainants who have been discriminated against or refused care and for those who would refuse care to others can only lead to confusion and reduce the likelihood that affected individuals will file complaints. Therefore, we recommend that the Department 1) withdraw the proposed complaint form, and 2) consider whether to create a separate complaint form for religious refusal complaints.

Additionally, the proposed complaint form, which collects multiple sets of data about different types of complainants, would frustrate efforts to analyze and report the data collected. Accurate data analysis is essential for setting an appropriate budget, tracking long-term trends, identifying widespread concerns, and general good governance. As an example, the “Religion / Conscience” category in the proposed complaint form is especially confusing because it pertains both to civil rights complainants based on religious discrimination (for example, an atheist consumer who was discriminated against by a Catholic hospital) and religious refusal complaints based on so-called “conscience” protections (for example, a Catholic health care worker required to assist with an emergency abortion by a hospital). The multiple

⁹ See, e.g., the Religious Freedom Restoration Act (42 U.S.C. § 2000bb *et seq.*).

¹⁰ Moreover, because religious refusal complainants are generally medical providers in the employ of the relevant entity, they are better positioned to identify such funding sources than civil rights complainants.

¹¹ Civil rights complainants who face discrimination may be unable to find different providers, they may suffer adverse health consequences or death due to the discrimination, and such complainants are more likely to face additional complicating factors such as poverty and marginalization based on their identity. Religious refusal complainants, on the other hand, are unlikely to face the medical complications or death that can result from refusal of care.

meanings associated with this category will make accurate data analysis impossible. Moreover, for religious refusal complainants, this category will generally be the only basis selected, further illustrating the difference between these types of complainants and the need for separate complaint forms.

The proposed complaint forms place too great an emphasis on religious refusal complaints, to the detriment of civil rights enforcement.

The U.S. Department of Health and Human Services' mission is to "improve the health and well-being of all Americans by providing essential health services and human services and by fostering sound, sustained advances in the sciences underlying medicine, public health, and social services." The Office for Civil Rights (OCR) was created in recognition that invidious discrimination and violation of privacy rights in health care undermines that mission by making care less accessible to all Americans. Sadly, rather than working to fulfill this noble purpose, under this Administration the Department has reduced access to care by actively expanding religious exemptions and privileging specific religious viewpoints in the law.

Compared to civil rights complaints, religious refusal complaints are significantly less frequent, and they virtually never result in adverse medical outcomes. The Department estimates that an average of 8,433 civil rights complaints and religious refusal complaints will be made per year. However, only a very small number of these complaints pertain to adverse actions based on religious refusals. The Department reported that between 2008 and 2016, only ten complaints were filed by health care workers related to religious belief.¹² There is simply no evidence that health care workers are discriminated against and regularly forced to provide health care services against their religious beliefs. In fact, the opposite is true. Hospitals and other health care institutions regularly accommodate the desire of workers to avoid various procedures that conflict with their beliefs.

Given this situation, it is unclear why the Department would seek to so prominently highlight the "conscience & religious freedom" language on the proposed complaint form, essentially equating these religious refusal complaints with civil rights complaints. The reference to "religious freedom" is confusing and irrelevant to the purpose of the form.¹³ Complaints filed through the proposed form do not interact with nor rely upon any historical understanding of religious freedom, which is "the right to choose a religion (or no religion) without interference by the government."¹⁴ Instead, 1) the complaints made through this form generally apply to third party health care providers – not the government, and

¹² While the Department has indicated that a greater number of such complaints were filed in 2017 and 2018, the Department has failed to provide a meaningful analysis of such complaints, nor has it shown that these greater numbers reflect anything beyond advocacy by relevant interest groups.

¹³ Note that none of the primary statutory provisions that prohibit adverse actions due to religious refusals of care refer to "conscience" or "religious freedom." This language was instead adopted by the Department to reframe these refusals of care. *See, e.g.,* The Church Amendments, 42 U.S.C. § 300a-7 (2018); The Weldon Amendment, Consolidated Appropriations Act, Pub. L. No. 111-117, 123 Stat 3034 (2009); Public Health Service Act, 42 U.S.C. § 238n (2018).

¹⁴ Dictionary.com, "freedom of religion." Available at <https://www.dictionary.com/browse/freedom-of-religion>.

2) the right being enforced is a statutory right to refuse to provide specific health care services in limited situations – not choosing a religion or engaging in religious practices.

The proposed complaint form, like the Final Rule, is clearly not intended to protect religious freedom in a broader sense. They do nothing, for example, to protect the health care provider or patient whose beliefs dictate that abortion services should be widely accessible, that contraception should be freely available to everyone, that discrimination is immoral and must be prevented, that terminally ill individuals should be able to receive medical aid-in-dying, or that only the individuals involved should be able to determine if sterilization is the best option for them.

It is ironic indeed that the actual protections for religious freedom required by HHS regulations were not referenced in the proposed “Conscience and Religious Freedom Discrimination” complaint form, nor in the Final Rule. For example, the Department has created regulations intended to protect the religious freedom of third parties and beneficiaries when funded program services are offered by religious providers.¹⁵ Among other protections, these regulations require the funded entity to provide referral to an alternative secular provider. Failing to provide these protections is clearly a form of prohibited religious discrimination that the OCR should work to address – but it is not clearly reportable on the proposed complaint form.

We also note that the Final Rule is exceedingly likely to be stayed by the courts, which would put the Department in a challenging situation if the proposed complaint form is adopted because much of the language and legal authority cited closely interact with the Final Rule. Complaints have already been filed to challenge the Department’s Final Rule,¹⁶ and despite the Department’s protestations otherwise, it is implausible to argue that the Final Rule is anything other than a significant expansion of authorization to refuse care, far beyond statutory justification.

Moreover, the Final Rule completely fails to meet the Department’s mandate under the Establishment Clause of the First Amendment to consider the impact any accommodation or religious exemption for religious health care providers would have on third parties. Specifically, the Constitution bars the federal government from crafting “affirmative” accommodations within its programs if the accommodations would harm any program beneficiaries.¹⁷ The Constitution commands that “an accommodation must be measured so that it does not override other significant interests;”¹⁸ “impose unjustified burdens on

¹⁵ See, e.g., 42 CFR Part 54A; 45 CFR 87.3.

¹⁶ Complaint for Declaratory and Injunctive Relief, *City and County of San Francisco v. Alex M. Azar II*, et al., 3:19-cv-2405-JCS (N.D. Cal. 2019).

¹⁷ U.S. Const. amend. I; *Cutter v. Wilkinson*, 554 U.S. 709, 720, 722 (2005) (to comply with the Establishment Clause, courts “must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries” and must ensure that the accommodation is “measured so that it does not override other significant interests”) (citing *Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985)); see also *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014); *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring).

¹⁸ *Cutter v. Wilkinson*, 544 U.S. at 722.

other[s];”¹⁹ or have a “detrimental effect on any third party.”²⁰

Although the Department points to the *Hobby Lobby* decision for the proposition that the government may freely burden third parties to create religious exemptions,²¹ the decision explicitly made clear that respecting religious exercise may not “unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling.”²² However, in this instance the Court considered that the accommodation offered by the government ensured that affected employees “have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing coverage.”²³ In other words, the effect of the accommodation on women would be “precisely zero.”²⁴

Conclusion

For the aforementioned reasons, American Atheists urges the Department to withdraw the proposed complaint form. If, at some point in the future, the Final Rule goes into effect, then the Department should consider creating a new complaint form for religious refusal complaints.

If you should have any questions regarding American Atheists’ opposition to proposed complaint form, please contact me at 908.276.7300 x309 or by email at agill@atheists.org.

Sincerely,



Alison Gill, Esq.
Vice President, Legal and Policy
American Atheists

¹⁹ *Id.* at 726.

²⁰ *Id.* at 720, 722; *See also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2781; *Estate of Thornton v. Caldor*, 472 U.S. at 710 (“unyielding weighting” of religious exercise “over all other interests...contravenes a fundamental principle” by having “a primary effect that impermissibly advances a particular religious practice.”); *Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989) (religious accommodations may not impose “substantial burdens on nonbeneficiaries”).

²¹ Final Rule at 246-247.

²² *See Burwell v. Hobby Lobby*, 134 S. Ct. at 2787.

²³ *See id.* at 2759.

²⁴ *Id.* at 2760.