



VIA ELECTRONIC MAIL (AttorneyGeneral@doj.ca.gov)

The Honorable Rob Banta
Attorney General
State of California
Department of Justice
1300 I Street
Sacramento, CA 95814

August 13, 2021

Re: OCR Transaction Numbers 17-274771 and 17-283890

Dear Attorney General Banta:

We are writing to inform you that the U.S. Department of Health and Human Services (HHS) Office for Civil Rights (OCR) has completed a review of its January 24, 2020, Notice of Violation (2020 NOV), in which OCR determined that the State of California and the California Department of Managed Health Care (DMHC) violated the Weldon Amendment.¹ OCR conducted this review after receiving a referral from the Centers for Medicare & Medicaid Services (CMS), Center for Medicaid and CHIP Services.

On May 14, 2021, CMS withdrew its January 15, 2021, Medicaid disallowance imposed on the State due to an underlying finding of the State's "continued non-compliant status under the Weldon Amendment."² As noted by CMS, California's March 15, 2021, Request for Reconsideration of the Medicaid disallowance raised issues related to OCR's underlying Weldon violation determination; CMS thus referred the matter to OCR for further review.

Having completed its review of the 2020 NOV, OCR has determined that it will withdraw its 2020 NOV and close the complaints filed with OCR, on which the 2020 NOV was based.

¹ The Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2021, Pub. L. No. 116-260, div. H, title V, § 507 (Dec. 27, 2020).

² The now-rescinded disallowance indicated that the Department would disallow \$200,000,000 every quarter, for an annual disallowance total of \$800,000,000, until the State complied with the Weldon Amendment.

Discussion

The Weldon Amendment provides that:

None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.³

The statute defines “health care entity” to include “an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.”⁴ The statutory definition of “health care entity” does not include health plan sponsors or employers.

On August 22, 2014, California DMHC sent a letter to seven insurers, informing them that some of their plans limited or excluded coverage of termination of pregnancy and further informing them that this coverage exclusion violated California law. The DMHC letter instructed the plans to amend their plan documents to cover abortions and to submit amended materials to the State. Thereafter, OCR received three complaints – dated September 10, 2014, September 30, 2014, and October 9, 2014 – in combination from a church, a religious organization, a church-run school, and employees of a religiously-affiliated university, against DMHC, alleging that the actions DMHC required of the insurers in its letter violated the Weldon Amendment.

In 2016, after conducting an extensive investigation, OCR closed the complaints without finding a violation (2016 Closure Letter).⁵ OCR concluded that the term “health care entity” in the Weldon Amendment included individual and institutional providers of health services and health insurance coverage, but did not include employers or individuals insured by a health care entity (2016 Closure Letter, p. 4). This legal interpretation later received support through two federal court decisions, in the context of challenges to OCR’s 2019 final regulation, *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*, 84 Fed. Reg. 23170 (May 18, 2019).⁶

The 2016 Closure Letter found that the only entities that met the definition of “health care entity” in connection with the 2014 DMHC letter were the seven health insurers to which the DMHC letter was sent, as the complainants before OCR did not themselves meet the definition of health care entity (2016 Closure Letter, p. 4). OCR further found that none of the seven insurers that received the DMHC letter objected to amending their plans to cover abortion; indeed, all changed their plans to cover abortion as required by the State. *Id.* OCR therefore concluded that

³ See note 1.

⁴ *Supra*, note 1, § (d)(2).

⁵ Letter from Jocelyn Samuels, Director, Office for Civil Rights, to Catherine W. Short, Vice President of Legal Affairs, Life Legal Foundation (and others) (June 21, 2016).

⁶ *City and Cty. of San Francisco v. Azar*, 411 F. Supp.3d 1001, 1018 (N.D. Cal. 2019) (appeal in abeyance) (including “plan sponsors” in the regulatory definition of “health care entity” exceeded the Department’s authority under the Administrative Procedure Act because these entities were not included or contemplated in the statute); *cf.*, *New York v. HHS*, 414 F. Supp.3d 475, 574 (S.D.N.Y. 2019) (appeal in abeyance) (the Department lacked authority to promulgate rule defining “health care entity” in the Weldon Amendment to include plan sponsors under Housekeeping authority); *see also Washington v. Azar*, 426 F.Supp.3d 704, 721-22 (E.D. Wash. 2019) (vacating rule in its entirety).

DMHC had not “subject[ed] any institutional or individual health care entity to discrimination on the basis that the health care entity does not . . . provide coverage of . . . abortions.” *Id.*

Thereafter, on June 26, 2017, October 9, 2017, September 22, 2017, January 9, 2018, and August 24, 2018, OCR received five new complaints against DMHC regarding the same 2014 DMHC letter that was the subject of the 2014 complaints. 2020 NOV, pp. 4-5. Two of those complaints were filed by Skyline Wesleyan Church and Missionary Guadalupanas, a religious order, and they were filed on their own behalf. *Id.* The three other complaints were filed by individuals, as well as the Catholic Benefits Association, which assists employers in obtaining benefits. After investigating the complaints filed by Skyline Wesleyan Church and Missionary Guadalupanas, OCR issued its 2020 NOV, finding that DMHC had discriminated against health care entities in violation of the Weldon Amendment. 2020 NOV, p. 9. OCR did not resolve the other three complaints, instead simply noting in the 2020 NOV that those complaints “rais[ed] similar allegations.” 2020 NOV, p. 5.

In reviewing the 2020 NOV in light of the Weldon definition of health care entity, and the underlying investigative record, we have determined that the violation finding cannot be sustained. Neither Skyline Wesleyan Church nor Missionary Guadalupanas meets the definition of a “health care entity” under the Weldon Amendment. Neither are “an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.” Further, OCR did not find that either complainant had filed its complaint on behalf of any other entity that itself would meet the definition of “health care entity” under the Weldon Amendment. Nor do any of the complainants in the three other OCR complaints raising similar allegations meet the definition of “health care entity.” The only entities that meet the definition of “health care entity” in connection with the DMHC’s efforts to enforce California law requiring abortion coverage are the seven health insurers to which the DMHC letter was sent.

As for the seven insurers that received the DMHC letter, the 2020 NOV did not find that any of them objected to amending their plans to cover abortion to comply with California law. Further, the 2020 NOV did not call into question the accuracy of OCR’s previous 2016 Closure Letter’s factual findings regarding the seven insurers’ lack of assertion of an objection to amending their plans to comply with California law. There also is no evidence in the investigative record that any of the insurers claimed that they had been subject to discrimination under Weldon.⁷

Given the definition of health care entity under the Weldon Amendment and the absence of evidence that any of the seven insurers that received the DMHC letter objected to amending their plans to cover abortion, the conclusion in the 2020 NOV that DMHC discriminated against health care entities on the basis that they did not cover abortions has no support in OCR’s investigative record. Accordingly, OCR’s determination in the 2020 NOV that DMHC subjected health care entities to discrimination in violation of the Weldon Amendment is hereby withdrawn. OCR will close the complaints at issue with no further action required of the State.

⁷ As noted in the 2016 Closure Letter, one of the seven insurers, Anthem Blue Cross, requested and obtained an exemption from the State for one or more religious employers after the 2014 DMHC letter was issued. As a result, the State imposed no requirement on the insurer for which the insurer sought an exemption.

OCR is providing a copy of this letter to counsel for the Complainants in this matter.

Sincerely,



Robinsue Frohboese, J.D., Ph.D.
Acting Director and Principal Deputy
Office for Civil Rights
U.S. Department of Health and Human Services