

Hospitals' Covid-19 Policies Face Religious-Rights Checks

Stephanie Armour, Wall Street Journal 8.10.20

The Trump administration has stepped up interventions in complaints by patients and health workers who say they've been victims of discrimination under policies that hospitals and other health organizations have adopted to combat the new coronavirus. One of the interventions involved a medical student who objected on religious grounds that he be required to shave his beard so he could wear a protective mask. Another involved a hospital's refusal under its no-visitors rule during the pandemic to allow a bedside visit by a priest.

As the Department of Health and Human Services' Office for Civil Rights has intervened in the complaints, it has been negotiating settlements and issuing guidance to remind health organizations, states and local governments about their responsibilities under federal law. Some legal experts say the agency is overstepping its statutory authority. Lawyers who advocate for religious rights disagree and say the actions are legally sound.

The office cites laws it says give it authority to intervene in religious-discrimination claims when health organizations get federal money. They also point to the Religious Freedom Restoration Act of 1993, which essentially prohibits the federal government from substantially burdening a person or institution's religious exercise. "This is a time when the safeguards are put under stress," Roger Severino, head of the Office for Civil Rights, said in an interview.

In 2018, Roger Severino announced a new HHS division on Conscience and Religious Freedom. Some legal experts and advocates said the office's actions in religious discrimination claims involving hospitals stand on shaky legal ground, saying its interpretation of the law is overly broad and is risky during a public-health emergency.

"HHS has no statutory authority to be enforcing its policy choices about religion and how to handle religion in health care," said Richard Katskee, legal director at Americans United for Separation of Church and State, a litigation and advocacy group. Luke Goodrich, vice president and senior counsel at the Becket Fund for Religious Liberty, a Washington, D.C., nonprofit that defends religious freedom, said the agency had authority because most large hospitals get federal funding. He added that protecting religious freedoms was critical even during a pandemic—and can be done safely. "You don't have to put religion and public health against each other," Mr. Goodrich said.

The Office for Civil Rights intervened after a complaint was filed June 11 on behalf of the medical student who was doing rotations at Staten Island University Hospital, in New York City. The complaint said the hospital required him to shave his beard so that he could wear a protective mask. The student said shaving would violate his religious commitment to not cut his hair. The civil rights office said it communicated with the student and provided technical assistance to the hospital. The office said the hospital then granted the student an accommodation and let him wear an alternative form of protection called a Powered Air Purifying Respirator that he could wear with a beard.

Christian Preston, a hospital spokesman, said, "When he raised concerns over his religious needs, immediate steps were taken to understand and make an accommodation that adhered with

his cultural and spiritual beliefs so he could continue his medical studies, safely.” At no point was the student asked to shave his beard, Mr. Preston said, but he was informed about safety guidelines that state a user must be clean shaved to be appropriately fit tested for an N95 mask. He said the student was reassigned to rotations in non-Covid-19 areas until a powered air-purifying respirator could be provided instead of an N95 mask.

In another complaint, Sidney and Susanna Marcus suffered severe injuries in a car accident on Memorial Day and got treatment at Prince George’s Hospital Center, in Maryland. While Mrs. Marcus’s condition improved, her husband’s condition worsened, and he was put on a ventilator because of the accident. Neither of the Marcuses had Covid-19. Mrs. Marcus asked a priest to visit her husband at the hospital to administer the sacrament of anointing the sick, which has been known as last rites. But the hospital system, University of Maryland Medical System, had implemented a policy banning visitors because of the pandemic, according to a June 9 complaint Mrs. Marcus filed with the office. The priest, who had agreed to wear personal protective equipment, wasn’t allowed in, according to the complaint.

“I didn’t know much about his condition, we couldn’t communicate, and I was very fearful for his condition,” Mrs. Marcus said. “We believe in the sacraments, our souls are united in God, and I needed to know he had access to that.”

The Office for Civil Rights provided technical assistance to the hospital, and HHS officials said the hospital system subsequently agreed to change its policy, allowing clergy to see patients. The system didn’t dispute the details of the complaint. Prince George’s Hospital Center, where Sidney and Susanna Marcus were both treated following their accident.

“We have since amended our policy, with all individuals visiting a Covid-19 positive patient provided a form acknowledging the risk, and will allow clergy visits with adherence to safety protocols,” said University of Maryland Medical System spokeswoman Jania Matthews.

Legal experts said the agency’s use of the Religious Freedom Restoration Act as the basis for its authority is unusual. Robert Tuttle, a research professor of law and religion at George Washington University’s Law School, said championing religious rights during a pandemic risked endangering others. “It risks the health and safety of others,” Mr. Tuttle said. “What’s happening under the current administration, and HHS is the poster child, is a shift to religious freedoms no matter who suffers collateral damages from it.”

The Office of Civil Rights also became involved in the spring in disputes over rationing decisions involving ventilators to ensure they weren’t discriminatory. In July, it issued reminders against discrimination to health-care providers that get federal funding, including hospitals and state agencies. The guidance included instructions to ensure minorities didn’t face longer wait times for care and weren’t denied access to intensive care.

The office has taken a number of steps to champion religious rights, including a rule that enables health-care providers to refuse to perform, accommodate, or assist with certain health-care services on religious or moral grounds. A federal judge in Manhattan blocked the rule in November, saying it exceeded the agency’s authority. HHS is appealing. The agency has also

been applauded by disability-rights advocates for getting involved in cases involving health providers' actions during the pandemic.

A complaint filed in May focused on state guidance in Connecticut on hospital policies restricting visitors during the pandemic. The policies allowed only narrow exceptions for people to support individuals with disabilities who received particular services from the state. The complaint said the policy effectively denied support to people with disabilities who couldn't understand medical decisions.

According to the complaint, one hospital broke the law when it didn't make an exception to the visitor restrictions for a 73-year old patient with aphasia and severe short-term memory loss. The woman, who is mostly nonverbal, was denied in-person support to help with her communication and comprehension during care.

After the office became involved, the state issued a new order amending the restrictions so that people with disabilities can have in-person support.

Discussion Questions:

Do you think there are occasions when public-health concerns outweigh the importance of religious freedom?

Should the public health action be upheld by evidence? If so, should the action reflect the evidence or should there be a more or less boiler plate response?

What about religious preference; should it be upheld by spiritual polity and tradition?

Who deems a particular religion to be significant or legitimate?