



DEPARTMENT OF HEALTH & HUMAN SERVICES

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OFFICE OF THE SECRETARY

**Office for Civil Rights
200 Independence Ave., SW
Washington, DC 20201**

August 28, 2019

VIA U.S. MAIL AND ELECTRONIC MAIL (**REDACTED**)

REDACTED, Esq.
McDermott Will & Emery LLP
28 State Street
Boston, MA 02109-1775

Re: OCR Transaction Number 18-306427

Dear **REDACTED**:

On May 9, 2018, **REDACTED** (“**REDACTED**” or “Complainant”) filed a complaint with the Office for Civil Rights (“OCR”) of the U.S. Department of Health & Human Services (“HHS”).¹ The complaint alleges that **REDACTED** and other employees of the University of Vermont Medical Center (“UVMMC”)² “suffer[ed] discrimination and violations of [their] conscience rights under federal law.”³ As part of its investigation, OCR gathered facts, interviewed witnesses, and offered UVMMC multiple opportunities to provide relevant evidence and otherwise respond to the allegations.⁴

Based on the facts ascertained through its investigation, OCR finds UVMMC in violation of section 300a-7 of Title 42 of the U.S. Code (“the Church Amendments”), specifically, paragraph (c)(1)(A) and (B). OCR has specifically determined that:

- UVMMC has forced and attempted to force health care personnel (including nurses) into assisting with abortions over their conscience-based objections;

¹ The Secretary has delegated authority for handling such complaints to OCR. *See e.g.*, OCR Statement of Organization, Functions, and Delegations of Authority, 83 Fed. Reg. 2,802, 2,803 (Jan. 19, 2018).

² Prior to 2014, UVMMC was formerly named Fletcher Allen Health Care. UVMMC, *Fletcher Allen to the UVM Medical Center*, <https://www.uvmhealth.org/medcenter/Pages/About-UVM-Medical-Center/Fletcher-Allen.aspx> (last visited June 11, 2019).

³ Letter from Counsel for **REDACTED** to Centralized Case Mgmt. Operations, Office for Civil Rights, U.S. Dep’t of Health & Human Servs., 2 (May 9, 2018) (hereinafter “Complaint”) (on file with OCR).

⁴ UVMMC responded to OCR’s notice of investigation and information request by denying that it had violated the religious and conscience rights of its employees, taking issue with OCR’s investigative authority, and providing substantive responses to less than half of OCR’s questions. *See* Letter from **REDACTED**, Partner, McDermott Will & Emery LLP, to Mandi Ancalle and David Hyams, Office for Civil Rights, U.S. Dep’t of Health and Human Serv. (Dec. 14, 2018) (on file with OCR).

- UVMMC intentionally, unnecessarily, and knowingly schedules nurses or other health-care personnel who have religious or moral objections to abortion to assist with abortions;
- UVMMC subjects health-care personnel (including nurses) who have religious or moral objections to abortion to different terms or conditions of employment than health-care personnel who do not share the same religious or moral objections;
- UVMMC discriminates against health care personnel (including nurses) because of their religious beliefs or moral convictions in opposition to abortion; and,
- UVMMC maintains a Conflict-of-Care policy that facially violates provisions of the Church Amendments.

I. JURISDICTION

Paragraph (c)(1) of the Church Amendments prohibits recipients of funds for programs authorized under the Public Health Service Act (“PHSA”) from discriminating against health care personnel who decline to perform or assist in the performance of abortions contrary to their religious or moral convictions. Paragraph (c)(1)(A) and (B) state:

(1) No entity which receives a grant, contract, loan, or loan guarantee under the Public Health Service Act, . . . after June 18, 1973, may—
 (A) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or
 (B) discriminate in the extension of staff or other privileges to any physician or other health care personnel,
 . . . because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.⁵

Since October 1998, UVMMC has received a grant from the Health Resources and Services Administration (“HRSA”), a component of HHS, for Part C of the Ryan White HIV/AIDS Program,⁶ as authorized by sections 2651-67 of the PHSA.⁷ For the most recently completed three-year project period, which ended April 30, 2018, UVMMC reported that it cumulatively expended

⁵ 42 U.S.C. § 300a-7(c)(1). Paragraph (c)(1) of the Church Amendments also reference the Community Mental Health Centers Act, Public Law 88-164, 77 Stat. 282 (1963), and the Developmental Disabilities Services and Facilities Construction Amendments of 1970, Public Law 91-517, 84 Stat. 1316 (1970).

⁶ Completed application from UVMMC to HRSA for Funding Opportunity No. HRSA-18-005, Ryan White HIV/AIDS Program Part C HIV Early Intervention Services Program: Existing Geographic Service Areas, at 1, Aug. 9, 2017 (on file with HHS OCR) (summarizing grant history under the applicant’s introduction).

⁷ Codified at 42 U.S.C. §§ 300ff-51 to 300ff-67. The award notices identify that §§ 2651-2667 and 2693 of the PHSA, as amended, authorize the award. *E.g.* Notice of Award from HRSA to UVMMC for OP [Outpatient] Early Intervention Services with Respect to HIV Disease, at Box no. 16 (issued Aug. 9, 2017). The award notices identify terms and conditions, including compliance, as applicable, with 45 C.F.R. part 75. *E.g., id.* Each award cautions that “[f]ailure to comply with the remarks, terms, conditions, or reporting requirements may result in a draw down restriction being placed on your Payment Management System account or denial of future funding.” *E.g., id.* at 3.

\$1.6 million of federal financial assistance.⁸

The funding opportunity announcement for the Ryan White Part C grant states that awards are subject to the HHS Uniform Administrative Requirements Governing Awards to Non-Federal Entities⁹ (“HHS UAR”) and that the applicant is “required to have the necessary policies, procedures, and financial controls in place to ensure . . . compli[ance] with the [sic] all federal funding requirements and prohibitions such as lobbying, gun control, abortion, etc.”¹⁰ In its application for funds for the 3-year project period beginning May 1, 2018, and ending April 31, 2021, UVMMC certified that it “[w]ill comply with all Federal statutes relating to nondiscrimination,” and “[w]ill comply with all applicable requirements of all other Federal laws, executive orders, regulations, and policies governing this program.”¹¹ The notice of award terms and conditions accepted by UVMMC for this current project period reiterate that UVMMC must operate the award in compliance with the HHS UAR and any applicable statutes.¹² Section 75.300(a)-(b) of the HHS UAR further specifies that awards must comply with U.S. statutory requirements, including requirements prohibiting discrimination in HHS funded programs.¹³

II. OCR FINDINGS

A. UVMMC’s Conflict-of-Care Policy Violates the Church Amendments.

UVMMC’s current health care personnel staffing policies discriminate against professionals who cannot in good conscience participate in elective abortions for religious or moral reasons. This policy violates the Church Amendments on its face as well as UVMMC’s contractual assurances to HHS.

In 2011 UVMMC adopted policies governing when it would allow personnel to opt-out of medical procedures due to ethical or religious conflicts and updated those policies in 2014. Under these policies, UVMMC knew that several of its employees could not in good conscience participate in abortions.

⁸ Completed Federal Financial Report (SF-425) from UVMMC to HRSA (submitted Aug. 15, 2018) (for the project period of May 1, 2015 to April 30, 2018).

⁹ 45 C.F.R. pt. 75.

¹⁰ HRSA, Notice of Funding Opportunity, FY 2018, *Ryan White HIV/AIDS Program Part C HIV Early Intervention Services Program: Existing Geographic Service Areas*, Funding Opportunity Nos. HRSA-18-001, HRSA-18-004, HRSA-18-005, at 10, 33 (on file with HHS OCR).

¹¹ *Id.* (appearing in UVMMC’s *Assurances for Non-Construction Programs*, SF-424B (signed Aug. 9, 2017)).

¹² *See, e.g.*, HRSA, Notice of Award, FY 2018 (Award No. 2 H76HA002032100) (issued Apr. 2, 2018), 2 (no. 16), 3 (program specific term no. 7 (“This award is subject to 45 CFR 75 Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards.”)), 5 (standard term No. 1), 6-7 (standard term no. 12 regarding Federal law and discrimination) (on file with the Office for Civil Rights).

¹³ *See* 45 C.F.R. § 75.300(a)-(b) (imposing obligations on the Federal agency to ensure that “U.S. statutory and public policy requirements” including those “prohibiting discrimination” are incorporated in the terms and conditions of the Federal award and requiring the non-Federal entity to comply with all requirements the award).

Prior to 2017, UVMMC purportedly did not provide elective abortions. On or about September 2017, however, UVMMC adopted an express policy of supporting access to elective abortions and the evidence shows that UVMMC had begun staffing personnel for elective abortions months prior. UVMMC changed its abortion policies and practices with little to no input from employees or staff and implemented them without prior notice.

Although UVMMC knew several staff members, such as **REDACTED**, deeply and sincerely objected to assisting with abortions, it assigned them to participate in abortion procedures against their objections anyway. As explained below, these personnel were pressured by UVMMC to participate in abortions.

On February 5, 2018, UVMMC amended its Conflict-of-Care Policy governing when UVMMC would allow employees to decline to participate in elective abortions. The policy, which is still in effect, provides that an employee may request to be excused from participation in medical procedures, including “elective termination of a pregnancy,” that conflict with the employee’s “cultural values, ethics, or religious beliefs.” *See* Conflict of Care: Staff Conscientious Objection, University of Vermont. UVMMC, however, limits staff ability to decline to participate in elective abortions as follows:

In any scenario where circumstances prevent arrangements for alternate coverage the [objecting] staff member will be expected to provide the assigned care to ensure that patient care is not negatively impacted.

Refusal to perform assigned job functions will be addressed in accordance with established corrective action procedures, in consultation with leadership and Human Resources.

Id. at 2. The policy, therefore, expressly contemplates situations where UVMMC knows health care personnel object to participating in elective abortions, but will nevertheless require such staff to “provide the assigned care” (*viz.* an elective abortion), and will discipline them if they fail to comply with UVMMC’s demands. Such situations of conflict are only possible because UVMMC chooses to provide abortion services while not adopting staffing plans and rotations that would fully respect the known requests of its professionals to not participate in abortions.

Paragraph (c)(1)(A) and (B) of the Church Amendments, however, creates an *unqualified* right for health care personnel to decline to participate in abortions without fear of adverse employment actions or loss of staff privileges. *See* 42 U.S.C. § 300a-7(c)(1). The Church Amendments put the burden on providers who choose to provide abortion services to create staffing policies that fully respect the consciences of its professional staff. Providers may also choose not to accept PHSA funds if they are uncomfortable with the conditions such acceptance imposes by law. Because UVMMC’s Conflict of Care policy admits to circumstances where UVMMC can and will force staff—on pain of adverse action or discipline—to participate in abortions against their moral or religious objections, it facially violates paragraph (c)(1)(A) and

(B) of the Church Amendments with respect to abortion procedures.¹⁴

B. UVMMC Discriminates Against Health Care Personnel Who Have Religious or Moral Objections to Participating in Abortions.

Since at least the spring of 2017, UVMMC scheduled health care personnel, including nurses, to assist with elective abortions despite specific and repeated requests from personnel not to be assigned to elective abortions due to religious or moral objections. Nevertheless, UVMMC repeatedly assigned health care personnel to participate in elective abortions without giving advance notice of the nature of the procedure. Additionally, UVMMC scheduled objecting health care personnel to assist with elective abortions knowing that other staff, who did not have such objections, were available to assist with the procedures. Although UVMMC could have readily, and without interruption to patient services, accommodated the religious or moral objections to elective abortion of its health care personnel, it nevertheless intentionally and unnecessarily assigned objecting personnel to such procedures.

UVMMC's scheduling of objecting health care personnel to assist with abortions was discriminatory within the meaning of the Church Amendments. Once a nurse or other health care professional is assigned to a medical procedure, he or she assumes responsibility for providing the indicated care. A failure to follow through with the indicated care, if the staffer is not replaced by an appropriate substitute, may subject that professional to discipline by his or her employer and risks a referral by the employer or the patient to a professional licensing authority for potential discipline. Health care personnel who object on religious or moral grounds to assisting with abortions, once assigned to a patient undergoing an abortion, are, therefore, subjectively and objectively placed under substantial pressure to participate over their objections. Health care personnel who are coerced in that way suffer moral injury, are subjected to a crisis of conscience, and frequently experience significant emotional distress, even if they succeed in declining to assist in the procedure after the assignment is made.

In the particular case of the Complainant, Nurse **REDACTED** was, on at least one occasion, deliberately led to believe **REDACTED** was scheduled to assist in a procedure that did not involve the abortion of an unborn human life, when it in fact did. When **REDACTED** discovered the truth of the matter, **REDACTED** immediately objected, but was coerced by UVMMC into participating in the abortion anyway, and reasonably feared UVMMC would fire **REDACTED** or report **REDACTED** to licensing authorities if **REDACTED** followed **REDACTED** conscience. The experience left **REDACTED** deeply traumatized.

Although these, and similar coercive actions committed by UVMMC, were discriminatory *per se*, the evidence shows they were also motivated by discriminatory intent.

UVMMC effected its discrimination through certain employees, nursing leadership, and managers who expressed overt disregard or hostility to religious and moral objections to persons participating in abortions. Those employees and managers include, but are not limited to,

¹⁴ Because the Church Amendments provisions at issue explicitly cover abortion and sterilization, this facial violation finding would apply to sterilization procedures as well, which it appears UVMMC also offers. See <https://www.uvmhealth.org/medcenter/Pages/Conditions-and-Treatments/Vasectomy.aspx>.

REDACTED, REDACTED, REDACTED, and REDACTED. For example, **REDACTED** repeatedly revealed disdain for individuals who expressed religious or moral objections to abortion. It was also **REDACTED** who, knowing that Nurse **REDACTED** objected to abortions because of **REDACTED REDACTED** faith, assigned **REDACTED** to an elective abortion; deliberately misled **REDACTED** into believing that the procedure was not an elective abortion; and then refused **REDACTED** request to be relieved from the procedure despite being in a position to provide a suitable substitute even after the ruse was discovered. When Nurse **REDACTED** and other similarly situated health care providers raised concerns about UVMMC's discriminatory conduct to their supervisor, **REDACTED, REDACTED** failed to remedy the discrimination. Instead, UVMMC continued to assign health care personnel to elective abortions over their objections. At the same time, UVMMC and **REDACTED** accommodated health care personnel who had non-religious or non-moral objections to assisting with certain procedures.

III. CONCLUSION AND REMEDY

For the foregoing reasons, OCR has determined that UVMMC has violated paragraph (c)(1)(A) and (B) of the Church Amendments, both facially and as applied, by discriminating in the employment, promotion, or termination of employment of any physician or other health care personnel, and by discriminating in the extension of staff or other privileges to any physician or other health care personnel.¹⁵

OCR is charged with helping ensure entities come into compliance with Federal laws protecting conscience and prohibiting coercion in health care, including the Church Amendments. Accordingly, OCR requests that UVMMC notify OCR **within thirty (30) days from the date of this letter** whether UVMMC intends to work collaboratively with OCR to (1) change its policies and procedures requiring health care personnel to participate in abortion; and (2) take immediate steps to remedy the effect of its past discriminatory conduct. OCR is willing and able to engage with UVMMC to identify specific and appropriately tailored remedies.

However, if the above deadline expires and UVMMC has not provided OCR sufficient assurance that it will come into compliance and remedy the violations, OCR will immediately forward this Notice of Violation and the evidence supporting OCR's findings in this matter¹⁶ to HRSA for consideration and appropriate action under 45 C.F.R. §§ 75.371-374.

IV. ADVISEMENTS

The findings in this letter are not intended, nor should they be construed, to cover any issues regarding UVMMC's compliance with any part of the Church Amendments, including paragraph (c)(1)(A) or (B), that this letter does not specifically address. In addition, the findings in this letter do not cover issues or authorities, including other grant funding that UVMMC receives or may receive, that this letter does not specifically address, nor does it preclude future

¹⁵ 42 U.S.C. § 300a-7(c)(1)(A) & (B).

¹⁶ OCR's investigative file contains documents, correspondence, pleadings, Nurse **REDACTED** Complaint, records of the Equal Employment Opportunity Commission, and notes of interviews with numerous individuals who have personal knowledge of specific facts that support the foregoing OCR Findings.

determinations about compliance based on subsequent or further investigations. Nothing in this letter precludes OCR from making referrals to any other HHS component or other federal agencies, including the Department of Justice, for appropriate action.¹⁷

OCR is providing a copy of this Notice of Violation to the Complainant and **REDACTED** counsel and it will be made available, with appropriate redactions, to the public.

Sincerely,

/s/

Roger T. Severino
Director

/s/

Luis E. Perez
Deputy Director
Conscience and Religious Freedom Division

¹⁷ OCR would inform UVMMC of any such referral.