



Physicians Caring for Texans

August 3, 2012

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Division of Family and Community Health Services  
Community Health Services Section  
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RE: Proposed Rules, Subchapter B. Texas Women's Health Program

Dear Ms. Garcia:

On behalf of the Texas Medical Association, Texas Association of Obstetricians and Gynecologists, American Congress of Obstetricians and Gynecologists/Texas District, Texas Academy of Family Physicians, and Texas Pediatric Society, we appreciate the opportunity to review and offer comments on the proposed rules pertaining to the Texas Women's Health Program. Together, our organizations represent more than 47,000 physicians and medical students.

Ultimately, the issue of support or opposition to abortion is an individual decision based on personal values and beliefs. Our respective organizations have members on both sides of this issue, and are therefore not advocating for or against abortion by this letter. Rather, our organizations are advocating for the preservation of a physician's right and duty to provide his or her patient with truthful and uninhibited medically appropriate information within the patient-physician relationship. The proposed program rules impose a "gag order" on physicians' discussions with patients, regardless of whether those patients are enrolled within TWHP or not. We strongly oppose any interference into a physician's ability to use his or her medical judgment as to the information that is in the best interest of his or her patient.

The TWHP provides low-income women--mothers, daughters, sisters, and wives--with access to important health screenings, family planning services and contraception. These services are basic and necessary for the health and well-being of hundreds of thousands of Texas women. Because of the proposed rules, we are very concerned about the future viability of this important program. If adopted as proposed, the rules will undoubtedly dramatically decrease the number of physicians willing to participate in TWHP. Based on feedback from our respective members,

countless Texas physicians will be unwilling to participate in the program because it will force them to choose between practicing medicine in accordance with the standard of care and medical ethics, or in accordance with a rule created to serve a political ideology. Whether the issue is guns, smoking, illicit drugs, abortion, or any other controversial issue, the politics *du jour* should not interfere with the patient-physician relationship. The relationship between patient and physician is based on trust and creates the physician's ethical obligations to place the patient's welfare above his or her own personal politics, self-interest and above obligations to other groups.<sup>1</sup>

A rule should not compromise a physician's medical judgment regarding what should or should not be discussed with a patient. The proposed rules would prevent physicians from freely discussing medical care and procedures with patients, and would set a dangerous precedent for future restrictions on patient-physician communications based upon the political agenda of the day.

Our organizations offer the following specific comments to the proposed rules.

**Section 39.31.** Our organizations strongly recommend that DSHS consider adding a new goal (c)(5) similar to that already in the DSHS Family Planning Program that clearly states it is the intent of TWHP to provide accessible and comprehensive reproductive health care for low income women.

**Section 39.38(b)(1).** Section 39.38(b) provides the qualifications for a provider to be included in the TWHP, as follows:

A TWHP provider must ensure that: (1) the provider does not perform *or promote* elective abortions *outside the scope* of the TWHP and is not an affiliate of an entity that performs or *promotes* elective abortions...

Furthermore, the proposed definition of "promote" includes "counseling concerning the use of abortion as a method of family planning or within the continuum of family planning services."<sup>2</sup>

When one reads section 39.38(b)(1) in concert with the definition of "promote" the conclusion is that a physician cannot provide non-directive counseling or otherwise discuss abortion with a patient "outside the scope of the TWHP."<sup>3</sup> This is overly broad and interferes with the patient-physician relationship with patients outside the TWHP. Furthermore, it is a "gag order" on discussions a physician may be required, pursuant to the standard of care and medical ethics, to have with his or her patient. This proposed rule affects all patients in a provider's practice—those enrolled in TWHP as well as patients covered by Medicaid, private insurance, or cash payers. A physician is unable to "promote" ( i.e. counsel, discuss, answer questions regarding)

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<sup>1</sup> AMA Council on Ethical and Judicial Affairs, E-10.015, The Patient-Physician Relationship, adopted June 2001.

<sup>2</sup> Section 39.38(c)(1).

<sup>3</sup> Because subsection (b)(1) refers to performing or promoting outside the scope of the TWHP, and the definition of promote refers to a TWHP client, the two provisions are conflicting and render the rule vague and ambiguous in that regard.

abortion to any patient, otherwise that physician is in violation of the Texas Women's Health Program.

Furthermore, this proposed rule potentially violates the First Amendment of the United States Constitution.<sup>4</sup> "The First Amendment generally prevents government from proscribing speech... because of disapproval of the ideas expressed."<sup>5</sup> Content based statutes "are presumptively invalid."<sup>6</sup> "It is rare that a regulation restricting speech because of its content will ever be permissible."<sup>7</sup> Recently, in *Wollschlaeger v. Farmer*, a federal district court judge granted an injunction blocking a Florida law limiting what physicians can say about guns to their patients, holding that it violates the First Amendment's free speech protections. In granting the permanent injunction, the Judge wrote that "the free flow of truthful, non-misleading information is critical within the doctor-patient relationship" and that the law "chills practitioners' speech in a way that impairs the provision of medical care and may ultimately harm the patient."<sup>8</sup> Likewise, these rules proposed by DSHS would chill the free flow of speech for physicians participating in the TWHP.<sup>9</sup>

Our organizations recommend that section 39.38(b)(1) be removed completely because what is done outside the scope of TWHP should be irrelevant. Nevertheless, we are cognizant of the fact that the state does not want to contract with providers who perform elective abortions, and in that regard, our organizations recommend alternatively that section 39.38(b)(1) be rewritten as follows: "the provider does not perform elective abortions outside the scope of the TWHP." With this revision, TWHP would achieve its goal of not contracting with providers who perform elective abortions, yet it would not prohibit a physician from participating based solely on physician patient communications such as non-directive counseling. Furthermore, it would permit a physician who does not perform elective abortion to participate in the TWHP, regardless of whether another physician in the group would be excluded from the program. There are many large physician group practices operating in Texas. Given the need to expand the number of physicians participating in TWHP, amending the language would allow those physicians in the group who meet the program requirements to provide services. We strongly

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<sup>4</sup> U.S.C.A. Const. Amend.1. See *Wollschlaeger v. Farmer*, 814 F.Supp.2d 1367 (2011); *Wollschlaeger v. Farmer* 2012 WL 3064336 (June 29, 2012).

<sup>5</sup> *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538 (1992); *Wollschlaeger v. Farmer*, 814 F.Supp.2d 1367 (2011).

<sup>6</sup> *Id.*

<sup>7</sup> *Wollschlaeger v. Farmer*, 814 F.Supp.2d 1367 (2011) citing *United States v. Playboy Entm't Grp., Inc.*, 120 S.Ct. 1878 (2000).

<sup>8</sup> *Wollschlaeger v. Farmer* 2012 WL 3064336 (June 29, 2012) citing *Trammel v. United States*, 445 U.S. 40, 51 (1980) ("[T]he physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment."); *Conant v. Walters*, 309 F.3d 629, 636 (9th Cir. 2012) ("An integral component of the practice of medicine is the communication between a doctor and a patient. Physicians must be able to speak frankly and openly to patients."); see also *Sorrell*, 131 S.Ct. at 2664 ("A consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.... That reality has great relevance in the fields of medicine and public health, where information can save lives.").

<sup>9</sup> To the extent DSHS argues that *Rust v. Sullivan* supports its proposed rules, that case is inapplicable here. *Rust v. Sullivan* limited the prohibition to the Title X program. See *Rust v. Sullivan* 111 S.Ct. 1759, 1772 ("a doctor employed by the project may be prohibited *in the course of his project duties* from counseling abortion or referring for abortion.") The rules at issue here, however, prohibit a physician from discussing abortion to any and all patients *outside* the TWHP.

support crafting the rules so as to allow physicians who do not perform elective abortions to participate in the TWHP, regardless of what other physicians in the same group may do in their practice.

**Section 39.33(1).** The definition of affiliate as proposed could be interpreted to prevent a physician from participating in the TWHP if another physician in the medical group performs or promotes abortions, as well as a physician who is affiliated with a medical school or hospital. Subsection (1)(B) provides that the written instruments “may include” a certificate of formation, a franchise agreement, standards of affiliation, bylaws, or a license. TMA recommends that DSHS strike the phrase “may include” and replace with “be limited to” those instruments listed. As an alternative, TMA recommends that DSHS clearly state in subsection (1)(B) that an employment agreement would not be considered to be a written instrument as referenced in subparagraph (A). Furthermore, DSHS should clearly state that physicians who are members of a group practice are not considered to be an affiliate of other physicians within that group practice, based solely on their joint employment within that group practice. DSHS should also clearly state that a professor of a medical school is not considered to be an affiliate of the medical school or resident training program for purposes of the TWHP; otherwise, any clinical professor or physician affiliated with a medical school or residency training program will be unable to participate in the TWHP because of those entities’ accreditation requirements.

**Section 39.38 (b)(2).** Subsection (b)(2)(A) states that a provider must ensure that he or she does not *promote* elective abortion within the scope of the TWHP. Although this provision applies to physicians providing care to TWHP patients, making it more directly applicable to the state’s interest in not having funds used to promote abortion, it nevertheless is a gag order on a physician’s ability to have candid, protected communications with his or her patients. As stated previously, TMA opposes such gag orders because a physician has an obligation to discuss a patient’s medical condition and provide information as is medically appropriate. As discussed later in this letter, by complying with these proposed rules a physician would potentially be subject to medical malpractice liability as well as be disciplined for violating the principles of medical ethics. As an alternative to this rule, TMA recommends that the definition of “promote” be changed to *specifically exclude patient counseling*.

**Section 39.38(c).** Section 39.38(c) provides the definition of “promote” as follows:

- (c) Defining “promote.” For purposes of subsection (b) of this section, the term “promote” includes, *but is not necessarily limited to*:
- (1) providing to a TWHP client counseling concerning the use of abortion as a method of family planning or within the continuum of family planning services;
  - (2) providing to a TWHP client a referral for an elective abortion as a method of family planning or within the continuum of family planning services;
  - (3) furnishing or displaying to a TWHP client information that publicizes or advertises an abortion service or provider; and
  - (4) using, displaying, or operating under a brand name, trademark, service mark, or registered identification mark of an organization that performs or promotes elective abortions.

The first concerning language of this definition is the phrase, “but is not necessarily limited to,” which leads into the list of activities that would be considered promotion. Such overly broad language would leave a physician wondering what behavior would be considered “promotion” and is therefore an unreasonable phrase. A physician should not be subjected to a situation where the definition will develop “as we go.” The rule and definition must be clear and definite, and a physician should be able to decide whether to participate in the TWHP based on a clear rule, rather than later be informed that he or she has violated the rule in some other way, after he or she has TWHP patients within the practice in need of care. Thus, our organizations strongly oppose inclusion of the phrase “but is not necessarily limited to” and ask that it be struck.

Additionally, subsection (c)(1), we ask that term “elective” be inserted before the word abortion so that it reads: (1) providing to a TWHP client counseling concerning the use of *elective* abortion as method of family planning...

We also recommend that each reference to “a TWHP client,” in subsections (c)(1)-(3) be changed to “a *current* TWHP client.” It is important that a physician not be subjected to the TWHP rules for a client who is no longer participating in the TWHP or for a patient that the physician does not know is a client of the TWHP.

Finally, we strongly recommend deleting subsection (c)(1), which defines promotion as “providing to a TWHP client counseling concerning the use of abortion as a method of family planning or within the continuum of family planning services.” Our organizations oppose any interference, by a government entity or any third party, into a physician’s ability to exercise independent medical judgment as to the information that should be provided to a patient. The content of discussions between a physician and patient are the foundation of the patient-physician relationship, which is based on trust, privacy, and open and candid communication. The content of communications between a physician and patient must remain outside the bounds of government interference. We not only recommend deleting subsection (c)(1) but also recommend replacing it with the following:

The term does not include confidential communications that occur between patients and physicians pursuant to an examination or treatment.

### ***Potential Liability***

Physicians have an obligation to practice medicine in accordance with the standard of care and medical ethics. Physicians have an ethical duty to deal honestly with patients.<sup>10</sup> When there is a conflict between law and ethics, ethical obligations typically exceed legal duties. The TMA Board of Councilors ethics opinion, Relation between Law and Ethics, addresses this potential conflict as follows:

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<sup>10</sup> See, e.g., TMA Board of Councilors Ethics Opinion, Duty to Deal Honestly With Patients (“It is a fundamental ethical requirement that a physician should at all times deal honestly and openly with patients...”).

Ethical values and legal principles are usually closely related, but ethical obligations typically exceed legal duties. In some cases, a law is unjust because it mandates unethical conduct. In other cases, a law is unjust because it prohibits ethical conduct. In general, when physicians believe a law is unjust, they should work to change the law....

Not only do these proposed rules prohibit ethical conduct, but they would subject physicians to lawsuits for medical malpractice. Texas recognizes a "wrongful birth" cause of action. The Texas Supreme Court has held that if a doctor fails to diagnose and advise parents of a medical condition of the pregnant mother that could cause adverse consequences to the fetus, and the parents would have terminated the pregnancy had they been properly advised by the doctor, then the parents have a right to recover from the doctor the expenses for the care and treatment of the child for the child's "wrongful birth."<sup>11</sup>

By adopting these rules, the DSHS directly places physicians at risk of lawsuits, and provides the trial lawyers with new opportunities for litigation. For example, one Houston attorney advertises for wrongful birth claims on his website<sup>12</sup> as follows:

In the U.S., laws allow women to make the choice to terminate a pregnancy early in the term if they receive information from their physician that the child has a potentially fatal or severely debilitating condition. If your doctor knew or should have known of such a problem but failed to inform you, resulting in a stillborn child or a child with significant handicaps, you may have a claim for wrongful birth of the child. You want an experienced lawyer to help you recover full and fair compensation for your losses...

Our organizations are concerned that physicians will not participate in the TWHP because the rules require a physician to compromise his or her medical judgment and medical ethics in order to comply with the proposed rules and ultimately place the physician at significant risk for medical professional liability.

**Section 39.38 (d) and 39.44.** Section 39.38(d) requires a provider to provide DSHS "with all information DSHS or its designee requires to determine the provider's compliance with this section." Section 39.44(b) provides, "A TWHP provider must submit information to DSHS or its designee as DSHS or its designee requires." The language of these provisions is overly broad and unreasonable. It contains no scope or time limitations on the information required, does not provide a timeframe in which a physician must comply with the requests, and does not require the request to be reasonable or based on any evidence of wrongdoing. This provision would allow DSHS to have a fishing expedition into a physician's medical record, potentially requesting any and all records to review the contents of notes regarding conversations and treatment, "to determine the provider's compliance." We strongly oppose this provision and request that it be stricken. Alternatively, our organizations request that information required be limited in scope to information obtained and maintained pursuant to TWHP within the past year,

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<sup>11</sup> See *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975).

<sup>12</sup> See The Talaska Law Firm, [www.talaskalawfirm.com](http://www.talaskalawfirm.com).

and be based on an allegation or evidence of a violation of this section. Furthermore, a physician should be allowed 45 days to comply with a request for information.

**Section 39.39. Covered Services.** DSHS is providing services under the TWHP pursuant to the DSHS's Primary Health Care Services Program.<sup>13</sup> The Primary Health Care Services Program's website states that primary health care includes "early prevention, early detection and early intervention of health problems" with the following priority services being provided: "diagnosis and treatment, emergency services, family planning, preventive health services, including immunizations and health education, as well as laboratory, x-ray, nuclear medicine or other appropriate diagnostic services." With such a rich program, it is curious that the TWHP would exclude low-income women from receiving:

- 1) treatment for all STI's (see section 39.39(6)(C)) – the proposed rule limits coverage to *certain* STIs. All STIs, when left untreated, can result in clinical harm to a woman and her partner. In addition, physicians must be able to manage the treatment of any STI, as the treatment may have an impact on the patient's options regarding appropriate contraceptives. We applaud the state's decision to add STI treatment to TWHP, but the benefit should encompass screening and treatment for all STIs, including syphilis and HIV. It is our understanding the state specifically has proposed exclusion of the treatment of syphilis because treatment of that particular infection is available at local health departments. However, an informal poll of our members revealed that many physicians across the state prefer to treat patients with syphilis in their own offices. Many never or rarely refer their patients to the health department. Further, in many parts of the state, public health departments are too far away to be convenient for patients to travel to obtain timely care. If women forego treatment rather than trek to the local health department, it will jeopardize their health and the public's.

We also object to excluding coverage of office exams specifically for the purpose of testing and treating an STI (Section 39.40(b)). It will be confusing to patients, physicians, and other providers if STI testing and treatment is a covered benefit only if performed in conjunction with an annual exam or at a follow up appointment related to contraception. If the state is going to add STI treatment as a benefit, then TWHP should ensure women can seek testing and treatment anytime they suspect an infection is present.

- 2) a follow-up after an abnormal Pap test (Section 39.40(6))-- the program should pay for a follow up office exam to allow a woman to meet with her physician to discuss abnormal results and understand their implications; and
- 3) mammography and diagnostic services for breast cancer. At a minimum, these services should be offered to women who are not able to obtain mammograms via the DSHS Breast and Cervical Cancer Services Program.
- 4) referral for diagnosis and treatment of any identified health conditions requiring follow-up.

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<sup>13</sup> Proposed section 39.31(a).

While we understand the benefits of the TWHP are limited in scope, excluding the above benefits and services is contrary to reason as well as sound preventive health care for women. The rules should be revised to encompass the broader benefits outlined above.

**Section 39.41. Reimbursement.** Subsection 39.41(c) seeks to control how a physician uses his or her reimbursement for services rendered. That provision reads, “A TWHP provider may not use any funds received for providing a covered service to pay the direct or indirect costs (including overhead, rent, phones, equipment, and utilities) of elective abortions.” This provision is concerning because the proposed rules of this subchapter sufficiently ensure that a physician will not be participating in the conduct DSHS seeks to deter, without the use of funds requirement of section 39.41(c). Thus, opening up a physician’s financial records, personal or professional, is overly broad, burdensome, unreasonable, and an invasion of the physician’s privacy. The term “indirect costs” here is also overly broad. There are numerous accounting scenarios which could place a physician in violation of this rule, such as donating to a teaching institution or charity that performs or promotes elective abortions. Although removing “indirect costs” from this proposed rule would be an improvement, we remain concerned that DSHS would have the ability to then audit a physician’s private and proprietary financial records.

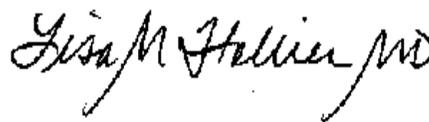
Our organizations have been steadfast supporters of TWHP since its inception. The program is vital not only to the health of our patients but also to the health of Texas because without TWHP, thousands of low-income women would be forced to forego not only preventive health screenings but also access to contraception, putting them at risk for unintended pregnancies, with all the attendant personal and societal costs. However, we believe the adoption of these rules will put the now Texas Women’s Health Program in serious jeopardy. Physicians simply will not sacrifice their medical ethics and professional standards to participate in a program that imposes such draconian restrictions. Thus, for all of the reasons outlined above, we strongly oppose the rules as drafted and respectfully urge DSHS to revise the rules to address our substantial concerns.

Thank you again for the opportunity to provide comments on these proposed rules.

Sincerely,



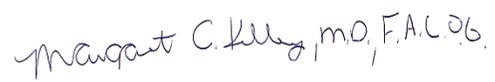
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