F I S C A L I M P A C T R E P O R T

SPONSOR Schmedes/Montoya **ORIGINAL DATE** 2/20/19 **LAST UPDATED** _____ **HB** 525

SHORT TITLE Health Care Freedom Of Conscience Act **SB** _____

ANALYST Chilton

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis ( ) Indicate Expenditure Decreases)

SOURCES OF INFORMATION
LFC Files

Responses Received From
Public School Insurance Authority (PSIA)
Department of Health (DOH)
Human Services Department (HSD)

SUMMARY

Synopsis of Bill

House Bill 525 expresses the stated sense of the Legislature as respecting and protecting the freedom of conscience of medical providers, health care institutions, and health care insurors to decline to perform, counsel about, or pay for medical procedures or services toward which they have philosophical or religious views in opposition to those procedures or services.

The sections of the act would offer protection for each class: individuals, health-care institutions, and insurers, and would establish damages if the right of one of those entities to freedom of conscience were judged to have been violated.

The bill may be summarized by sections as follows:

Section of HB 525	Provisions
1	Naming of bill
2	Stating the sense of the Legislature, as above. Establishes the result of all

	three class members (providers, institutions, and payers) to refuse to counsel, advise, perform, assist, or participate in providing services or procedures that conflict with their personal or company-held beliefs.
3	Definitions. Includes broad definitions of "conscience" and "discriminate" as applied to this bill: "discriminate" would be any job-related action against a provider; any adverse action including denying a grant or contract to or company request for change in status, and any "other penalty or disciplinary retaliative action." "Health care institution" includes clinics, hospitals, medical nursing or schools, pharmacies and many others. "Health care provider" includes physicians, nurses, pharmacists, researchers, and students at schools of medicine or nursing, counselors, health care aids, or anyone "furnishing or assisting in providing health care services." "Health care service" includes medical procedures, prescribing or dispensing and drug or device, or "any other care provided by a health care provider or institution."
4	**Health Care Provider Freedom of Conscience.** Health care providers could not be disciplined or found liable for refusing to perform procedures or services in conflict with their beliefs. Employers must make "reasonable accommodation" to an employee's beliefs and specify in writing if the procedure or service the employee is objecting to is a fundamental requirement of his/her position.
5	**Health Care Institutions' Freedom of Conscience.** Health care institutions would be able to decline to participate in procedures or services to which they have a conscious objection, provided they promptly inform patients of the restrictions in care that would occur, and effectuate a transfer to an institution that would provide the service. It is specified that institutions are not authorized to decline to serve individuals, only to allow them to decline to perform specific services. No entity could discriminate against a health care institution on the basis of its declining to provide a procedure or service.
6	**Health Care Payers' Freedom of Conscience.** Payers could decline to pay for services or procedures to which they had conscientious objection, as long as they filed an annual filing of which procedures and services they declined to provide with the Office of the Superintendent of Insurance and made each beneficiary of that payer's plans aware of its restrictions. Payers could not discriminate against any health care provider or institution on the basis of difference in beliefs about given procedures and services.
7	Health care services and life-sustaining care must be provided to all patients.
8	Provides for civil penalties of three times the amount suffered by the aggrieved party, and not less than $5000, in the case of violation of the provisions of this act.
9	This act would supplement existing conscience protections in New Mexico.

FISCAL IMPLICATIONS

There is no appropriation.

It is not clear that there would be a fiscal impact on any part of state government. If the conscience clause resulted in some patients being denied services, for example access to

contraception, the initial impact on the state budget might be to decrease expenditures, but, given that many of these services, again using the example of contraception, are cost effective in the longer term, (in the case of contraception, in the prevention of the costs of unintended pregnancy), the long term effect would be the increase expenditures. DOH makes the point that "it is not clear if HB525 will have a direct fiscal impact on NMDOH. HB525 may have a fiscal impact on state government through a reduction in services by providers or denial of claims by payers who claim freedom of conscience."

In addition to this, HSD states that "If services are not available, due to conscientious objection, there could be an increase in case appeals, which would increase the workload of the [HSD] Office of General Counsel. There could be an implication of discrimination and state endorsement of a belief system such as could clash with the First Amendment of the U.S. Constitution and Article 2, Section 11 of the Constitution of the State of New Mexico.

SIGNIFICANT ISSUES

It is clear enough when an individual provider (physician, nurse, pharmacist) invokes conscience as making them unable or unwilling to perform a given procedure or provide a given prescription. It is much less clear how such a decision is to be made by an institution or especially by a health care payer: by what group is the decision made – by the board of directors or by the owner in the case of a privately held corporation, by a poll of some or all of those who work for the organization?

DOH provides information about federal court actions that impact the issue of health care providers' conscientious or religious beliefs:

> In *Burwell (Secretary of HHS) v. Hobby Lobby Stores, Inc.*, the U.S. Supreme Court held that the Religious Freedom Restoration Act of 1993 (RFRA) prohibits the Government from substantially burdening a person's exercise of religion, even if the burden results from a rule of general applicability, unless the Government demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest. The *Burwell* case prevented the Department of Health and Human Services (HHS) from compelling the Hobby Lobby plaintiffs to provide pregnancy prevention measures that they claimed violated their religious beliefs. The case noted that it has also been found that Congress by the RFRA may not apply such restrictions to the States. HB525 proposes to apply similar protections in New Mexico under state law for health care providers, payers and institutions in the context of the provision of individual health care services.

DOH goes on to list a number of federal actions that impact family planning services, and states that "HB525 may impact the current delivery of services or operations by permitting clinicians or nurses the right to refuse to provide services based on personal conscience or health care payers the right to deny payment for services based on personal conscience. As an organization that provides safety net services to vulnerable citizens who are often underinsured or uninsured, denial of services could be problematic for individual and population health outcomes."

HSD notes that federal regulations would not allow it to comply with the mandates of HB 525 in enforcing freedom of conscience for institutions or Medicaid managed care organizations. It states that

> Federal regulations at 42 CFR §438.100 govern the rights of Medicaid managed care enrollees, which include the requirement of the state to ensure that each enrollee is free from any form of restraint or seclusion used as a means of coercion, discipline, convenience, or retaliation; and to ensure that each enrollee is free to exercise his or her rights, and that the exercise of those rights does not adversely affect the way the MCO and its providers treat the enrollee. In accordance with 42 CFR §438.210, each contract between the state and a MCO must require that services are provided in an amount, duration, and scope that is no less than the amount, duration, and scope for the same services furnished to beneficiaries under Fee for Service (FFS) Medicaid as set forth in 42 CFR §440.230 and for enrollees under the age of 21, as set forth in subpart B of part 440. Furthermore, in accordance with 42 CFR §438.206, the state must ensure that all services covered under the Medicaid State Plan are available and accessible to enrollees of MCOs in a timely manner. Longstanding Medicaid regulations at 42 CFR §441.20 specifically safeguard the freedom of choice of Medicaid enrollees to choose a method of family planning service free from coercion and mental pressure.

The federal Affordable Care Act states the following with regard to conscientious objection and abortion:

> (4) NO DISCRIMINATION ON BASIS OF PROVISION OF ABORTION.— Section 1303, page 64
> No qualified health plan offered through an Exchange may discriminate against any individual health care provider or health care facility because of its unwillingness to provide, pay for, provide coverage of, or refer for abortions
> (c) APPLICATION OF STATE AND FEDERAL LAWS REGARDINGABORTION.—
> (1) NO PREEMPTION OF STATE LAWS REGARDING ABORTION.—Nothing in this Act shall be construed to preempt or otherwise have any effect on State laws regarding the prohibition of(or requirement of) coverage, funding, or procedural requirements on abortions, including parental notification or consent for the performance of an abortion on a minor.
> (2) NO EFFECT ON FEDERAL LAWS REGARDING ABORTION.—
> (A) IN GENERAL.—Nothing in this Act shall be construed to have any effect on Federal laws regarding—
> (i) conscience protection;
> (ii) willingness or refusal to provide abortion; and
> (iii) discrimination on the basis of the willingness or refusal to provide, pay for, cover, or refer for abortion

An important American Psychological Association statement on freedom of conscience is attached.

TECHNICAL ISSUES

The definition of "discriminate" in section 2B would appear to be very broad as it would include any "other penalty or disciplinary retaliatory action." The definitions of "health care provider" and "health care service" are similarly broad, with similar "elastic clauses" at the end of each list.

LAC/gb

Understanding Conscience Clause Legislation
in the context of Religious Liberty Traditions in the United States

This document is one of a series of resources created by a joint work group of the Board of Educational Affairs and Board of Professional Affairs of the American Psychological Association (APA) to inform and guide practitioners, educators, graduate students, and policy makers about the topic of conscience clause legislation. Some conscience clause bills permit practicing psychologists or those who are training to become psychologists to refuse to provide treatment they deem to be contrary to their religious beliefs without adverse consequences. In this document we highlight historical factors that have influenced the development of religious freedom in the United States as embodied in First Amendment Rights, describe how these factors relate to conscience clause legislation and professional training for competence, and then provide a brief overview of common tensions. To engage effectively in policy debates regarding conscience clause legislation in their states, psychologists can benefit from understanding relevant historical contexts and tensions.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

First Amendment to the United States Constitution (1791)

Highlighting Historical Factors Impacting Early Religious Liberty Traditions

- **European precipitants:** European immigrants came to the new world after a protracted series of religious wars.
  - European nations held the ancient and widespread view that religious uniformity was essential for kingdoms and any threat to state religion was also a threat to the state itself.
  - European settlers initially came to the U.S. for freedom to practice their own faith, but not for religious liberty per se. They expected a common faith to be practiced in their new communities.
  - The Radical Reformation, including groups that later became known as the Mennonites or Amish, cultivated a dissenting view arguing that the state should not compel or force compliance in matters of religious belief and practice.
- **Religious liberty traditions**: Roger Williams left Plymouth Bay, a Puritan settlement, to build another colony (Rhode Island) that would recognize the right of people to follow their own free conscience in matters of religious belief. William Penn adopted this same principle of freedom of conscience in Pennsylvania and that colony became a mecca for religious dissidents from many areas.
- **Federalizing religious liberty**: When the U.S. won its independence, state churches were still in place in most colonies representing groups as divergent as Catholic, Anglican, or Congregational. There was no way to establish one sect as the religion of the new country without plunging America back in the religious

conflicts of Europe. To avoid this problem, the religious liberty model of Roger Williams and William Penn inspired the new federal government's approach to these matters. This meant that freedom of belief on religious matters without any state compulsion became federal law.

- **The first liberty**: This religious liberty tradition embodied in the first amendment has been called the "first liberty." It grants freedom of conscience on religious beliefs, prohibits establishment of religion by the government, and implicitly acknowledges the U.S. as a place that accommodates religious pluralism.
- **Freedom of religion as freedom of belief and practice**: Freedom of religion has subsequently been interpreted by the Supreme Court to mean freedom of belief for the religious and non-religious alike. It is freedom of belief or "soul liberty" that allows dissenting minorities to be protected in their beliefs rather than forced to conform to majority religious beliefs or practices.

Conscience Clause Legislation

- The Supreme Court of the United States has interpreted the First Amendment to require that state actors maintain a non-hostile neutrality towards religion and ensure freedom of conscience.
- Yet, the right to *free exercise of religion* does not require a state to accommodate religious practices in opposition to a valid rule or law that is neutral, generally applicable, and does not target any particular religious group.
- Conscience clause initiatives have arisen over time, from the freedom to be a conscientious objector during wartime to the freedom from having to engage in professional practices not consistent with one's faith.
- Although educational and practice settings are generally expected to respect or accommodate the religious liberty rights for students and employees, protections for conscience are not absolute and a wide range of court decisions has limited these rights. When there is compelling public interest, such as access to quality health care, or quality assurance in education, certain accommodations may not be required.

Common Tensions Impacting Mental Health Professions

- **Training competence and religious liberty:** Institutions with training programs have a joint obligation to instill minimum profession-wide competencies in graduate students and respect their religious liberty.
- **Freedom of religion and non-discrimination*:*** It is a complex issue as to whether there should be limits to the accommodation of religious beliefs when religious beliefs and practices potentially result in a discriminatory impact. Whereas some have argued that conscience clauses sanction unfair discrimination, others argue that not making room for conscience is itself discriminatory against religious beliefs. These worldviews can include biases and stereotypes about others that exacerbate tensions and polarize dialogue.
- **Psychologists accept public oversight**: Licensed mental health professions are regulated by state jurisdictions for the purpose of public protection. Graduate

students in training programs and practitioners licensed in a regulated profession accept public oversight to protect the general welfare of those they serve. Although training programs and employment settings may infringe upon religious practices to achieve important educational and public welfare interests, such as ensuring the non-injurious and competent care of clients, they must also be mindful of the religious liberties of graduate students and psychologists,

This document was prepared as an informational summary by the BEA/BPA Joint Working Group, and reviewed by the Board of Educational Affairs and Board of Professional Affairs in March 2017. The document was not reviewed by APA Council and thus not adopted as APA policy.

For more information about conscience clause matters as related to psychological practice and graduate training, we provide four resources:

Advocacy Tips for Conscience Clause Legislation:
http://www.apa.org/ed/graduate/conscience-clause-advocacy.aspx

Practice Statement about Serving a Diverse Public:
http://www.apa.org/ed/graduate/diversity-preparation.aspx

Education and Training Statement about Serving a Diverse Public:
http://www.apa.org/ed/graduate/diversity-preparation.aspx

Wise, E. H., Bieschke, K. J., Forrest, L., Cohen-Filipic, J., Hathaway, W. L., & Douce, L. A. (2015). Psychology's proactive approach to conscience clause court cases and legislation. *Training and Education in Professional Psychology, 9*, 259-268. http://dx.doi.org/10.1037/tep0000092.

For more information or assistance, contact: Susan R. Lazaroff, J.D., Director, State Advocacy, American Psychological Association. Phone: 202-336-5868 Email: slazaroff@apa.org