A Passionate Voice for Compassionate Care

November 9, 2015

U.S. Department of Health and Human Services
Office for Civil Rights
Hubert H. Humphrey Building
Room 509F
200 Independence Avenue, SW
Washington, DC 20201

Attention: 1557 NRPM (RIN 0945-AA02)

**RE: Nondiscrimination in Health Programs and Activities: Proposed Rule
80 Fed. Reg. 54172, September 8, 2015**

Dear Sir or Madam:

I am writing on behalf of the Catholic Health Association of the United States (CHA), the national leadership organization of more than 2,200 Catholic health care systems, hospitals, long-term care facilities, sponsors, and related organizations. Our ministry is represented in all 50 states and the District of Columbia, and one in every six patients in the United States is cared for in a Catholic hospital each year. CHA appreciates the opportunity to comment on the referenced proposed rule, implementing Section 1557 of the Patient Protection and Affordable Care Act ("ACA").

Section 1557 of the ACA provides that an individual shall not be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any health program or activity receiving Federal financial assistance, or administered by an Executive Agency or entity created by Title I (e.g., state-based Marketplaces and federally-facilitated Marketplaces), on the grounds prohibited under Title VI of the Civil Rights Act of 1964 (race, color, national origin) ("Title VI"); Title IX of the Education Amendments of 1972 (sex) ("Title IX"); the Age Discrimination Act of 1975 (age) ("the ADA"); or Section 504 of the Rehabilitation Act of 1973 (disability) ("Section 504").

As a Catholic health ministry, our mission and our ethical standards in health care are rooted in and inseparable from the Catholic Church's teachings about the dignity of each and every human person, created in the image of God. Access to health care is essential to promote and protect the inherent and inalienable worth and dignity of every individual. These values form the basis for our steadfast commitment to the compelling moral

implications of our heath care ministry and drove CHA's long history of insisting on and working for the right of everyone to affordable, accessible health care. As lawmakers were developing the health care reform package that culminated in the passage of the ACA, we made clear that our vision for health care demanded that everyone receive the same level and quality of care, without limits or variation based on age, race, ethnicity, or financial means, or one's health, immigration or employment status. Our members are committed to providing health care services to any person in need of care, without regard to race, color, national origin, sex, age, or disability, or any other category or status.

Thus, we believe it was appropriate for the ACA to establish a principle of nondiscrimination in the provision of health programs or activities receiving Federal financial assistance, or administered by an Executive Agency or entity created by Title I. However, we do have some comments on and concerns about the Office for Civil Rights' ("OCR") proposed regulations implementing Section 1557 of the ACA.

Access for Individuals with Limited-English Proficiency

CHA and the Catholic health ministry are committed to welcoming each patient as an individual with inherent dignity, which includes respecting the cultural backgrounds, preferred languages and styles of communication of every person seeking care. Language barriers can keep individuals who do not speak English or have limited English proficiency from seeking and receiving the high quality health care they need and deserve. Effective communication between health care providers and patients is essential to facilitating access to care, reducing health disparities and medical errors, and supporting patients' adherence to treatment plans.

CHA supports HHS' attention to access to language assistance services in the proposed rule. In particular, we agree that relying on children to provide translation or interpretation is inappropriate, except in an emergency. We urge HHS to work with stakeholders to ensure that adequate resources are available for the training and funding of qualified healthcare interpreters and translators.

Discrimination on the basis of sex

Under the proposed rule, "on the basis of sex" would be defined to include discrimination on the basis of "pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping or gender identity." In the preamble HHS seeks comment on whether the proposed rule appropriately protects sincerely held religious beliefs to the extent the proposed provisions may conflict with such beliefs. CHA appreciates HHS' sensitivity to this issue and urges HHS to make certain revisions to the proposal to ensure that nondiscrimination on the basis of sex is achieved in a manner that also preserves the religious liberty interests of covered entities.

Abortion

There is some concern that including "termination of pregnancy" among the prohibited bases of sex discrimination in any health program or activity receiving federal financial assistance could imply that health plans, insurers or providers are required to provide, cover or refer for abortions. Such an interpretation of Section 1557 of the ACA would clearly be in conflict with other provisions of federal law, including the ACA itself. Section 1303 of the ACA establishes a very clear policy *against* requiring abortion coverage to be included in health plans, affirmatively stating that the ACA does not require abortion to be included as an essential health benefit in a qualified health plan and that the decision whether to include abortion services in a plan shall be determined by the insurer. Section 1303 also protects providers who refuse to perform abortions, prohibiting qualified health plans offered on the Exchanges from discriminating against a health care provider or facility because of an unwillingness to provide, pay for, cover or refer for abortions.

Federal law forbids mandating involvement with abortion in other ways as well. The Weldon Amendment, attached to the annual Labor/HHS/Education appropriations law every year since 2004, forbids funding under that law to a Federal agency or program that discriminates against an institutional or individual health care entity because of a refusal to provide, pay for, provide coverage of, or refer for abortion. The Church Amendment (42 USC §300a-7) prohibits public authorities from requiring as a condition of certain forms of HHS funding that health facilities be willing to provide abortions contrary to moral or religious convictions. Title IX, on which Congress based Section 1557's prohibition against sex discrimination, makes clear that it does not require the provision of or payment for any service related to abortion. (20 USC § 1688).

CHA recommends that HHS eliminate any uncertainty on this issue by providing in the final rule that Section 1557 does not require the provision of, referral for, or coverage of abortion.

Gender Identity/Gender Transition

The proposed rules would require covered entities to provide equal access to health programs or activities without discrimination "on the basis of sex" (defining sex to include gender identity) and to treat individuals consistent with their gender identity (Section 92.206). The rules would also prevent covered entities that provide or administer health-related insurance or coverage from denying or limiting coverage of services related to gender transition (Section 92.207(b) (4). The requirements with respect to insurance coverage would also apply to covered entities which are principally engaged in providing or administering health services or health insurance coverage and offer employee health benefit programs. (Section 92.208). Thus, as the preamble makes clear, Section 1557

would apply to hospitals and other health care providers with respect to both the services they provide to their patients and the health benefits they offer to their employees.

In addition, the employee health benefit programs of *non-covered* entities may also be subject to the insurance requirements. According to the preamble, HHS intends to apply this requirement to all of the insurance products and services offered by issuers which receive federal financial assistance with respect to some of their products and are therefore "covered entities." For example, if an issuer offers a plan on a Health Insurance Marketplace, the issuer "will be covered by the proposed regulation for all of its health plans, as well as when it acts as a third party administrator for an employer-sponsored group health plan." (80 Fed. Reg. at 54189).

CHA believes strongly that individuals should not be denied access to needed health care services merely because of their gender identity. Refusing to provide medical assistance or health care services because of discomfort with or animus against an individual on the basis of how that person understands or expresses gender is unacceptable.

However, health services related to gender transition present a potential conflict with the equally important principle of the free exercise of religion. Mandating the provision or coverage of these services would substantially burden faith-based organizations, such as Catholic health care facilities and insurance issuers, which have sincerely held religious beliefs regarding the sexual difference between men and women, bodily integrity and the harming or altering of otherwise healthy bodily organs. In addition, mandating that health services related to gender transition be included in *all* policies issued or administered by covered entity issuers could result in faith-based employers (including those not subject to Section 1557) having no option but to cover these services in their health plans in violation of their sincerely held religious beliefs.

As HHS notes in the preamble, federal law currently includes protections with respect to religious beliefs, including conscience laws that protect providers with religious concerns over providing certain services such as abortion and sterilization. These laws demonstrate the federal government's commitment to finding a balance between the free exercise rights of health care providers and others with moral or religious objections to providing certain health care services, and the ability of those who seek such services to receive them. However, we do not believe these laws adequately protect those with moral or religious objections to certain medical or surgical gender transition services.

Accordingly, we strongly urge HHS to include in the final rule a religious exemption from the proposed requirements with respect to sex discrimination for organizations that hold themselves out as religious organizations to the extent that applying the requirements would be inconsistent with their religious tenets. Title IX, which Congress used as the model for the Section 1557 prohibition on sex discrimination, includes a similar

exemption. HHS also should make clear that this exemption would allow covered-entity issuers to offer to a faith-based organization an employee health benefits plan that reflects the organization's religious tenets or to act as third party administrator for such a plan.

Including a religious exemption also makes sense given that, without one, the final regulations are certain to be challenged under the Religious Freedom Restoration Act ("RFRA") and based on recent U.S. Supreme Court jurisprudence the challenging plaintiffs are likely to win. Having protracted and costly litigation to determine on a case by case basis the breadth of protection for faith-based organizations is not a desirable or workable solution.

We also urge HHS to provide more clarity and guidance with respect to the difficult issue of room assignments. While hospitals, nursing homes and other residential facilities should be compassionate in how they treat transgender patients, they must also be sensitive to the privacy concerns of other patients. In addition, they often must prioritize room assignments based on clinical conditions. These could be difficult conflicts to manage, and the option of single room occupancy may not always be available. Facilities which are not able to resolve the situation to everyone's satisfaction despite a good faith effort should not be held liable for unlawful discrimination. CHA recommends HHS indicate in the final rule that facilities making such a good faith effort will not face liability.

In closing, thank you for the opportunity to provide comments to the proposed rule implementing the ACA's non-discrimination provision. If you have any questions about these comments or need more information, please do not hesitate to contact Kathy Curran, Senior Director, Public Policy at 202-296-3993.

Sincerely,

Sr. Carol Keehan, DC
President and CEO