Catholic Health Association of the United States

A Passionate Voice for Compassionate Care

August 13, 2019

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-AA11)

RE: Nondiscrimination in Health Programs and Health Education Programs or Activities: Proposed Rule, 84 Fed. Reg. 27846, June 14, 2019

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 seven patients in the United States is cared for in a Catholic hospital each year. CHA appreciates the opportunity to comment on the referenced proposal to amend regulations implementing Section 1557 of the Patient Protection and Affordable Care Act ("ACA") as well as several regulations related to marketing and enrollment practices under the ACA and Medicaid and the delivery of services under the Programs for All-Inclusive Care of the Elderly (PACE) program.

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.

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").

Discrimination on the basis of sex

Regulations implementing Section 1557 were finalized on May 18, 2016. The term "on the basis of sex" was 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." The current proposal to amend the Section 1557 regulations would delete the definition section, including the definition of "on the basis of sex." HHS has reconsidered its prior position based upon its review of existing federal civil law, including Title IX, and has concluded that the ACA Section 1557 prohibition against discrimination on the basis of sex does not prohibit discrimination based on the termination of pregnancy or on gender identity.

Abortion

When commenting on the then-proposed rule in November 2015, we had expressed concern that this definition could be interpreted to create a requirement that health care providers, including hospitals, provide, cover or refer for abortions. Given that several federal laws forbid the mandating of involvement with abortion, including the Weldon Amendment, the Church Amendment, certain provisions of the ACA[1] and Title IX,[2] we requested that the final rule clearly provide that it did not require the provision of, referral for, or coverage of abortion. While HHS did not incorporate our suggestion into the final Section 1557 regulations, it did affirm in the preamble that the final rule did not displace the protections afforded by existing provider conscience laws, the Religious Freedom Restoration Act (RFRA), provisions in the ACA related to abortion services, or regulations issued under the ACA related to preventive health services. CHA appreciates that the amendments now proposed to the regulation would make clear that declining to provide,

[1] 42 U.S.C. § 18023.
[2] 20 U.S.C. § 1688. As noted above, Title IX provides the basis for the Section 1557 prohibition against discrimination on the basis of sex.

cover or refer for abortions would not be considered discrimination on the basis of sex under Section 1557.

Gender Identity/Gender Transition

Our comments in November 2015 also addressed the proposal to include gender identity as a basis for wrongful discrimination "on the basis of sex." We expressed our concern that this would mandate the provision of certain services directly related to gender transition, which could present a potential conflict for some faith-based health care providers and requested that HHS include in the final rule a religious exemption from the proposed requirements. The final rule did not include a religious exemption. Under the new proposed revision to the Section 1557 regulations there would be no regulatory requirement that faith-based organizations perform gender transition related services despite any religious or moral objections they have to providing such services.

HHS also proposes to amend several health regulations unrelated to either Section 1557 or a requirement to provide gender-transition services, which it refers to as conforming amendments. The proposed revisions referred to by HHS as conforming amendments remove the terms "gender identity" and/or "sexual orientation" from several regulations These regulations require non-discrimination in the establishment and operation of ACA exchanges; in the marketing and design practices of health insurance issuers under the ACA; in the administration, marketing and enrollment practices of qualified health plan plans under the ACA; in beneficiary enrollment and the promotion and delivery of services under Medicaid; and the delivery of services under the PACE program. These changes could make it more difficult for people in the LGBTQ community to have access to health insurance or needed medical care.

As stated above, CHA is committed to the principle that health care must be available to any person in need of care, without regard to race, color, national origin, sex, age, or disability, or any other category or status. CHA believes strongly that individuals should not be denied access to needed health care 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. A November 2017 survey conducted by the Robert Wood Johnson Foundation, NPR, and the Harvard T.H.Chan School of Public Health found that 18 percent of LGBT people avoided medical care because of concerns about how they would be treated.

We are deeply troubled that the overall effect of all of the proposed regulatory amendments could discourage or prevent individuals from seeking medical care out of fear that they will be mistreated or turned away because of their gender identity or sexual preference. We ask that HHS not finalize the proposed conforming amendments and include in the final rule a

commitment to taking whatever steps it can to make sure no one fears seeking or is kept from receiving health care

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 agrees that the requirement that notices of nondiscrimination and taglines in 15 languages be included all significant communications has proven to be burdensome. Rather than simply repealing this requirement, however, CHA urges HHS to consult with stakeholders to determine how to most effectively and efficiently communicate with those who have limited English proficiency to ensure they know how to access health care services in languages they can understand.

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. Mary Haddad, RSM
President and CEO