ADVANCING FAITH, FAMILY AND FREEDOM

August 12, 2019

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

Re: Public comment regarding the Proposed Rule "Nondiscrimination in Health and Health Education Programs or Activities"
ID: HHS-OCR-2019-0007
RIN: 0945-AA11

Dear Sir,

Family Research Council welcomes this proposed rule revising the Department's regulation implementing Section 1557 of the Patient Protection and Affordable Care Act. Specifically, we agree with the Department's decision to delete the portion of the existing 2016 Final Rule[1] that defines discrimination "on the basis of sex" as including "discrimination on the basis of . . . termination of pregnancy, . . . sex stereotyping, and gender identity."[2] The following considerations show why this proposed revision is necessary.

Statutory Interpretation

Section 1557 of the Patient Protection and Affordable Care Act (ACA) states that

> "an individual shall not, on the ground prohibited under . . . title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity . . ."[3]

[1] Department of Health and Human Services, "Nondiscrimination in Health Programs and Activities," *Federal Register* 81, no. 96 (May 18, 2016): 31376-31473 [RIN 0945-AA02]; online at: https://www.govinfo.gov/content/pkg/FR-2016-05-18/pdf/FR-2016-05-18.pdf; (hereinafter "2016 Final Rule").
[2] Ibid., 31467.
[3] *Patient Protection and Affordable Care Act*, Public Law 111–148, sec. 1557, 124 Stat. 119, 260 (Mar. 23, 2010) (codified at 42 U.S.C. 18116); online at: https://www.congress.gov/111/plaws/publ148/PLAW-111publ148.pdf.

The statute referenced, Title IX, states that:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity . . ."[4]

Section 1557 ties not only the prohibited grounds but also the enforcement mechanism, to the referenced civil rights statutes, including Title IX:

> The enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection.[5]

Linking both the prohibited ground of discrimination and the enforcement mechanism to Title IX makes it clear that discrimination "on the basis of sex" under Section 1557 should only be defined as it is in the Title IX statute.

At the time Title IX was enacted, in 1972, it would have been clearly understood that discrimination "on the basis of sex" meant discrimination against women or men because of their biological sex. The Department, therefore, exceeded its regulatory authority under the statute when it redefined "sex" to incorporate "gender identity" and "the termination of pregnancy" in the 2016 Final Rule, and the current proposed rule represents a welcome correction.

Current Meaning

Even if the ACA's prohibition of discrimination "on the basis of sex" had been enacted through explicit language, rather than by reference to a 1972 statute, it would still be incorrect for the Department to interpret "sex" to incorporate "gender identity." The two concepts are completely distinct—as indicated by the glossary for the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*. It defines "gender identity" in purely social and psychological terms:

> A category of social identity that refers to an individual's identification as male, female, or, occasionally, some category other than male or female.[6]

"Sex," however, is defined purely in biological terms:

> Biological indication of male and female (understood in the context of reproductive capacity), such as sex chromosomes, gonads, sex hormones, and nonambiguous internal and external genitalia.[7]

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[4] Title IX of the *Education Amendments of 1972* (20 U.S.C. 1681); online at: https://www.govinfo.gov/content/pkg/USCODE-2010-title20/pdf/USCODE-2010-title20-chap38.pdf.
[5] *Patient Protection and Affordable Care Act*, Public Law 111–148, sec. 1557, 124 Stat. 260.
[6] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (Arlington, VA: American Psychiatric Association, 2013), 822.
[7] *Ibid.*, 829.

Judicial Interpretation

As is laid out in the Department's proposal, implementation of the prior 2016 Final Rule incorporating "gender identity" in the definition of "sex" has been enjoined by a federal district court in the case of *Franciscan Alliance v. Burwell*.[8] The court in that case ruled, "It is . . . clear from Title IX's text, structure, and purpose that Congress intended to prohibit discrimination on the basis of the biological differences between males and females. . . . Accordingly, HHS's expanded definition of sex discrimination exceeds the grounds incorporated by Section 1557."[9] And while there have been mixed rulings in lower federal courts, there is no Supreme Court precedent for the concept that discrimination "on the basis of sex" (whether in Title IX, Title VII, or any other federal nondiscrimination statute) necessarily incorporates discrimination on the basis of "gender identity." Although the Supreme Court has now agreed to hear a case testing that theory,[10] Family Research Council believes the theory is incorrect—and it was, in any case, premature at best for the Department to incorporate it into the existing Final Rule on Section 1557 in 2016.

Congressional Prerogative

Congress has repeatedly considered legislation that would *add* gender identity as a protected category in nondiscrimination laws related to education[11] (such as Title IX) or employment[12] (such as Title VII), or that would redefine discrimination on the basis of "sex"[13] in the way that the 2016 Final Rule attempted to do—but it has repeatedly failed to enact such legislation. This undermines any argument that Congress has *already* expressed an intention to make gender identity a protected category through existing statutes such as Title IX. The 2016 Final Rule interpreting sex discrimination as incorporating "gender identity" therefore represented a usurpation by the executive branch of the lawmaking role which belongs only to Congress.

Conscience Protections Consistent with Current Law

The proposed rule clarifies that sex is not defined to include "the termination of pregnancy." Without this clarification, the 2016 Final Rule could be read to require the provision of, and coverage or referral for, abortion. If interpreted in this way, the availability of federal financial

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[8] *Franciscan Alliance, Inc., et al.* v. *Burwell, et al.,* 227 F. Supp. 3d 660 (N.D. Tex. 2016).
[9] Ibid., 688-689.
[10] *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC,* 139 S. Ct. 2049, cert. granted April 22, 2019.
[11] E.g., *Student Non-Discrimination Act of 2018,* H.R. 5374, 115th Congress, 2nd sess.; online at: https://www.congress.gov/115/bills/hr5374/BILLS-115hr5374ih.pdf:
"No student shall, on the basis of actual or perceived sexual orientation or gender identity . . . be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."
[12] E.g. *Employment Non-Discrimination Act of 2013,* S. 815, 113th Congress, 1st sess.; online at: https://www.govtrack.us/congress/bills/113/s815/text:
"It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual . . . because of such individual's actual or perceived sexual orientation or gender identity . . ."
[13] E.g., *Equality Act*, H.R. 5, 116th Congress, 1st sess.; online at: https://www.congress.gov/116/bills/hr5/BILLS-116hr5rfs.pdf; amends *Civil Rights Act of 1964* "by striking 'sex,' each place it appears and inserting 'sex (including sexual orientation and gender identity)' . . ."

assistance could be conditional on the promotion and performance of acts that devalue the sanctity of human life. HHS does not have a compelling interest in requiring the provision and coverage of abortion, especially when Congress has repeatedly protected health care providers' decisions not to provide or cover abortion.

The right to exclude abortion coverage from health plans, and the right of health care providers not to provide or refer for abortion, is protected under federal law. It is therefore proper for HHS to propose further regulatory provisions to ensure that existing conscience protections are enforced in relation to section 1557. Section 1303 of the ACA, as well as the Church, Coats-Snow, Weldon, Hyde, and Helms Amendments, protect the conscience of health care providers.

Specifically, the Weldon Amendment, which has been included in every appropriations law funding HHS enacted since 2004, states that "[n]one of the funds made available in this Act may be made available to a Federal agency or program … if such agency … [or] program … subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions."[14] The Weldon Amendment defines the term "health care entity" broadly to include "an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan." Moreover, the Church Amendment (42 U.S.C. § 300a-7) states that public authorities may not condition a health care entity's receipt of HHS funding on a willingness to provide abortions contrary to its moral or religious convictions. Further enforcement of these existing conscience provisions as well as a plain interpretation of discrimination "on the basis of sex" are vital to clearing up any confusion over whether section 1557 can be interpreted to require the performance or coverage of abortion.

Administrative Consistency

Within the Trump administration, other agencies have already addressed this question of defining "sex," and have interpreted it in the same manner as HHS does in the proposed rule, by clarifying that "gender identity" is not incorporated in the definition of "sex." In October of 2017, then-Attorney General Jeff Sessions sent a memo to all United States Attorneys and heads of department components regarding employment sex discrimination cases under Title VII of the Civil Rights Act of 1964. This memo states that "'Sex' is ordinarily defined to mean biologically male or female. *See, e.g.*, *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221-22 (10th Cir. 2007); *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 362 (7th Cir. 2017) (en banc) (Sykes, J., dissenting) (citing dictionaries). Congress has confirmed this ordinary meaning […] in several other statutes[.]"[15]

[14] Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, Div. B, tit. V, § 507(d) (Sep. 28, 2018).
[15] Office of the Attorney General, "Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964," October 4, 2017; online at: https://www.justice.gov/ag/page/file/1006981/download.

Similarly, on May 21, 2019, the Department of Health and Human Services published a final rule titled "Protecting Statutory Conscience Rights in Health Care, Delegations of Authority" to ensure compliance with over 25 current statutes that explicitly protect individuals and entities from being forced to promote or perform abortions.[16] By ensuring that sex is not defined to include "termination of pregnancy," this proposed rule brings section 1557 of the ACA into compliance with existing federal policy stating that it is not necessary for health care providers to cover or perform abortions.

This proposed rule would therefore bring much-desired consistency and clarity across federal agencies

Conclusion

In addition to the removal of the rule incorporating "gender identity" and in the definition of "sex" discrimination, Family Research Council also welcomes the following provisions of the proposed rule:

- Removal of the definition of "sex stereotypes,"[17] as this could be utilized or interpreted to incorporate "gender identity" even without so stating;
- Removal of the requirement stating, "A covered entity . . . shall treat individuals consistent with their gender identity,"[18] as this could violate the conscience rights of health care providers;
- Removal of the restrictions on "health-related insurance or other health-related coverage" with respect to gender identity, transgender status, or gender transition,[19] as these could be interpreted as requiring coverage of hormone therapy and gender reassignment surgery, despite the absence of convincing evidence that these procedures are medically beneficial;[20]
- Removal of Section 92.209, "Nondiscrimination on the basis of association"[21] (*Federal Register* 81, p. 31472), as this could be interpreted as prohibiting discrimination on the basis of sexual orientation—another protected category not included in Title IX and not enacted by Congress.

For all these reasons, we welcome the proposed rule and urge that the proposed revisions discussed above be finalized.

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[16] *Federal Register* 84, No. 98 (May 21, 2019), 23170; online at: https://www.federalregister.gov/documents/2019/05/21/2019-09667/protecting-statutory-conscience-rights-in-health-care-delegations-of-authority.
[17] Sec. 92.4, 2016 Final Rule, *Federal Register* 81, p. 31468.
[18] Sec. 92.206, *Ibid.*, p. 31471.
[19] Sec. 92.207, *Ibid.*, p. 31471-31472.
[20] "[T]here is not enough high quality evidence to determine whether gender reassignment surgery improves health outcomes." See: "Decision Memo for Gender Dysphoria and Gender Reassignment Surgery (CAG-00446N)," Centers for Medicare & Medicaid Services, August 30, 2016; online at: https://www.cms.gov/medicare-coverage-database/details/nca-decision-memo.aspx?NCAId=282.
[21] *Ibid.*, p. 31472.

Respectfully submitted,

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