



September 29, 2022

The Honorable Xavier Becerra
Secretary of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201

Re: Nondiscrimination in Health Programs and Activities [HHS–OS–2022–0012]

Dear Secretary Becerra,

On behalf of the American College of Physicians (ACP), I am pleased to share our comments on the Department of Health and Human Services' (HHS) proposed rule on Nondiscrimination in Health Programs and Activities that seeks to revise implementation of Section 1557 of the Affordable Care Act (ACA). As access to comprehensive health care services for LGBTQ+ individuals, women, and others are under threat, the College applauds the Agency for undertaking efforts to strengthen protections for accessing care.

ACP is the largest medical specialty organization and the second largest physician membership society in the United States. ACP members include 160,000 internal medicine physicians (internists), related subspecialists, and medical students. Internal medicine physicians are specialists who apply scientific knowledge, clinical expertise, and compassion to the preventive, diagnostic, and therapeutic care of adults across the spectrum from health to complex illness. Internal medicine specialists treat many of the patients at greatest risk from COVID-19, including the elderly and patients with pre-existing conditions such as diabetes, heart disease and asthma.

Section 1557 is a critical and impactful tool for achieving equitable access to quality health care for all individuals. Under Section 1557, health programs or activities that receive federal funding are prohibited from discriminating on the basis of race, color, national origin, sex, age, or disability. These protections are essential as one survey found that roughly 32% of Black individuals, 23% of Native American individuals, 20% of Latinx individuals, and 13% of Asian American individuals have reported experiencing racial discrimination in a health care setting.¹ Further, 18% of LGBTQ+ patients avoided seeking health care services due to fear of

¹ "Discrimination in America: Experiences and Views." RWJF, 2017.

<https://www.rwjf.org/en/library/research/2017/10/discrimination-in-america--experiences-and-views.html>.

discrimination, including 22% of transgender individuals, 10% of which have experienced discrimination in a medical setting. Numerous studies have highlighted discrimination against women in the medical system, such as not being believed about their pain or symptoms or being perceived as hysterical.² Discrimination in the health care setting can negatively impact health by causing psychological stress as well as impose barriers that restrict access to services and resources necessary for maintaining and producing health.³

Given the clearly demonstrated negative impacts or discrimination on patient health and well-being, ACP strongly opposes discrimination of any form, particularly in the medical setting. The College believes it is essential that federal health policy ensures that all persons, without regard to where they live or work; their race and ethnicity; their sex or sexual orientation; their gender or gender identity; their age; their religion, culture, and beliefs; their national origin, immigration status, and language proficiency; their health literacy level and ability to access health information; their socioeconomic status; whether they are incarcerated; and whether they have intellectual or physical disability must have equitable access to high-quality health care and must not be discriminated against based on such characteristics. As such, ACP has been on the record with other leading medical organizations in vehement opposition to prior regulatory changes to Section 1557 implemented by the previous administration that eliminated anti-discrimination protections for certain vulnerable populations.⁴ **The College commends the Agency for taking the steps to overturn these changes and urges the Agency to finalize regulations that would do so.**

Recent Developments in Anti-Discrimination Policy

In 2016, HHS issued a final rule implementing Section 1557 that interpreted discrimination on the basis of sex as encompassing sex stereotyping, gender expression, gender identity, and termination of pregnancy. Additionally, this final rule also created requirements for covered entities to provide accommodations for patients with limited English proficiency (LEP). In 2020, HHS issued a final rule eliminating the 2016 rule's expanded definition of sex discrimination, among other things. The rule also updated covered entities to include any program or activity receiving HHS funds, is administered under Title I of the ACA, or is a health insurance marketplace participant. Following the finalization of the 2020 rule, the U.S. Supreme Court ruled in the case of *Bostock v. Clayton County* that discrimination on the basis of sexual orientation and gender identity constitutes sex discrimination under Title VII of the *Civil Rights Act of 1964*. This ruling created a misalignment of the definition of sex discrimination between Title VII and Section 1557.

² Samulowitz, Anke, Ida Gremyr, Erik Eriksson, and Gunnel Hensing. "'Brave men' and 'emotional women': A theory-guided literature review on gender bias in health care and gendered norms towards patients with chronic pain." *Pain Research and Management* 2018 (2018).

³ Williams, David R., Jourdyn A. Lawrence, Briggette A. Davis, and Cecilia Vu. "Understanding how discrimination can affect health." *Health services research* 54 (2019): 1374-1388.

⁴ "Joint Letter Opposing Changes to ACA Section 1557 LGBTQ Nondiscrimination Protection." American College of Physicians, May 24, 2019.

https://assets.acponline.org/acp_policy/letters/joint_letter_opposing_changes_to_aca_section_1557_lgbtq_nondiscrimination_protection_2019.pdf.

Proposed Rule

Discrimination on the Basis of Sex

In the proposed rule, HHS seeks to revise the definition of discrimination on the basis of sex to include sex stereotypes; sex characteristics, including intersex traits; pregnancy or related conditions; sexual orientation; and gender identity. This would expand beyond the 2020 rule, which did not recognize sex characteristics, pregnancy, gender identity, or sexual orientation as forms of sex discrimination. Additionally, HHS seeks to newly prohibit sex discrimination on the basis of an individual's marital, parental, or family status.

ACP strongly supports HHS' proposed expansion of the definition of discrimination on the basis of sex. The College has long recommended that gender identity, independent and fundamentally different from sexual orientation, be included as part of anti-discrimination policies.⁵ Furthermore, ACP recommends that public and private insurers cover comprehensive health services to transgender persons as they would all other beneficiaries. These policies are critical as LGBTQ+ patients continue to experience discrimination and barriers to accessing care: one 2019 survey found that 8% of lesbian, gay, bisexual, and queer individuals who reported visiting a clinician in the past year were refused care because of their actual or perceived sexual orientation, while 29% of transgender individuals were refused care because of their actual or perceived gender identity.⁶

The inclusion of discrimination on the basis of pregnancy is an important development as 17.3% women reported maternity care mistreatment, including 32.8% of Indigenous women, 25% of Hispanic women, and 22.5% of Black women.⁷ Additionally, as reproductive rights are being significantly limited or eliminated across the country, changes to prohibit pregnancy-related discrimination could protect individuals from discrimination for seeking information about abortion, having an abortion, or for experiencing an adverse pregnancy outcome. The College urges HHS to expand the definition of discrimination on the basis of sex to include discrimination on the basis of termination of pregnancy.

The College also supports HHS' proposed prohibitions on sex discrimination on the basis of marital, parental, or family status. Health facility policies are not always clear or consistent about who can visit or make medical decisions for a patient if they become incapacitated or cannot do so themselves. The absence or limited access of loved ones can cause uncertainty

⁵ Daniel, Hilary, Renee Butkus, and Darilyn V. Moyer. "Lesbian, gay, bisexual, and transgender health disparities." *Annals of Internal Medicine* 163, no. 12 (2015): 963.

⁶ Mirza, Shabab Ahmed, and Caitlin Rooney. "Discrimination Prevents LGBTQ People from Accessing Health Care." Center for American Progress, January 18, 2018. <https://www.americanprogress.org/article/discrimination-prevents-lgbtq-people-accessing-health-care/>.

⁷ Vedam, Saraswathi, Kathrin Stoll, Tanya Khemet Taiwo, Nicholas Rubashkin, Melissa Cheyney, Nan Strauss, Monica McLemore et al. "The Giving Voice to Mothers study: inequity and mistreatment during pregnancy and childbirth in the United States." *Reproductive Health* 16, no. 1 (2019): 1-18.

and anxiety for the patient. In contrast, the involvement of family and outside support systems can improve health outcomes, such as management of chronic illness and continuity of care.⁸ ACP has long believed that the definition of “family” should be inclusive of those who maintain an ongoing emotional relationship with a person, regardless of their legal or biological relationship. The College encourages all hospitals and medical facilities to allow all patients to determine who may visit and who may act on their behalf during their stay, regardless of their sexual orientation, gender identity, or marital status. HHS’ proposed change will help ensure that all individuals from all types of family structures will be treated equally, regardless of whether they are a patient or are visiting a loved one.

Discrimination Against LEP Individuals

In the proposed rule, HHS seeks to clarify that covered entities must take reasonable steps to provide meaningful access to each limited English proficient individual eligible to be served or likely to be directly affected. This differs from the 2020 final rule, which required covered entities to take reasonable steps to provide meaningful access for LEP individuals as a general population, but did not require taking reasonable steps for each LEP individual. The proposed rule also requires that covered entities must provide notice of availability of language assistance services on an annual basis, as well as upon request at any time, and must also post this notice on covered entities websites and physical locations.

The U.S. Census Bureau estimates that roughly 25.6 million U.S. residents have LEP.⁹ Those with LEP often receive lower-quality care as a result of communication barriers, cultural differences, and structural barriers and biases.¹⁰ Patients facing linguistic barriers may also misunderstand diagnosis and treatment options, improperly follow treatment instructions, and have poor comprehension of care plans.¹¹ Given the linguistic diversity in the U.S., and the negative health risks for patients with LEP, **ACP supports HHS’ proposed changes to enhance protections against discrimination on the basis of national origin by expanding the obligation of covered entities to offer linguistically competent care.** The College firmly believes that physicians and other clinicians must make it a priority to meet the cultural, informational, and linguistic needs of their patients, with support from policymakers and payers.¹² It is critical that

⁸ “Changing Hospital ‘Visiting’ Policies and Practices: Supporting Family Presence and Participation.” Institute for Patient- and Family-Centered Care, October 2010. <https://ipfcc.org/resources/visiting.pdf>.

⁹ “B16001 Language Spoken at Home by Ability to Speak English for the Population 5 Years and Over 2019: ACS 5-Year Estimates Detailed Tables.” American Community Survey. U.S. Census Bureau. Accessed September 1, 2022. <https://data.census.gov/cedsci/table?q=ACSDT5Y2019.B16001&tid=ACSDT5Y2019.B16001>.

¹⁰ Green, Alexander R., and Chijioke Nze. “Language-based inequity in health care: who is the “poor historian”?” *AMA journal of ethics* 19, no. 3 (2017): 263-271.

¹¹ Coren, Joshua S., Frank A. Filipetto, and Lucia Beck Weiss. “Eliminating barriers for patients with limited English proficiency.” *Journal of Osteopathic Medicine* 109, no. 12 (2009): 634-640.

¹² Serchen, Josh, Robert Doherty, Genna Hewett-Abbott, Omar Atiq, and David Hilden. “Understanding and Addressing Disparities and Discrimination Affecting the Health and Health Care of Persons and Populations at Highest Risk.” American College of Physicians, November 7, 2020. https://www.acponline.org/acp_policy/policies/understanding_discrimination_affecting_health_and_health_care_persons_populations_highest_risk_2021.pdf.

health care communications be made in a language the patient understands. By requiring reasonable steps to be taken for each LEP individual, this proposed rule would protect and improve access to health care services for all LEP individuals, not just some.

While an important tool for ensuring high-quality and patient-centric care, ACP also recognizes that providing interpreter services can be costly, particularly for smaller physician practices. Some estimates place the cost at around \$45-\$150 per hour for in-person translation services, \$1.25-\$3.00 per minute for telephone services, and \$1.95-\$3.49 per minute for video services.¹³ The College affirms the need for providing translation services to ensure adequate access to care for all patients with LEP, while also emphasizing the need for clinicians to be adequately reimbursed by public and private payers to provide these translation services.

Covered Entities and Federal Financial Assistance

In the proposed rule, HHS seeks to clarify the scope of entities covered by Section 1557 by establishing a definition of health programs and activities that encompasses the provision, administration, or engagement of

- health-related services, health insurance coverage, or other health-related coverage;
- assistance to persons in obtaining health-related services, health insurance coverage, or other health-related coverage;
- clinical, pharmaceutical, or medical care;
- health research;
- or health education for health care professionals or others.

In doing so, Section 1557 compliance would be required of entities receiving federal funds such as “state or local health agenc(ies), hospital(s), health clinic(s), health insurance issuer(s), physician's practice(s), pharmac(ies), community-based health care provider(s), nursing facility(ies), residential or community-based treatment facility(ies), or other similar entit(ies).”

ACP strongly supports HHS’ clarification of the covered entities subject to Section 1557 and its anti-discrimination requirements. Discrimination against classes or categories of patients is unethical, and the physician’s duty to care for all prohibits discrimination against classes or categories of patients.¹⁴ ACP believes that health care entities and medical schools should be incentivized to use patient centered and culturally appropriate approaches to create a trusted health care system free of unjust and discriminatory practices. Patients should be free from discrimination in navigating and engaging with the health care system throughout every step of the process and in all health care settings, and HHS’ proposed clarification to covered entities would help advance this goal.

Additionally, this proposed rule clarifies the definition of federal financial assistance to include funds that are received under Medicare Part B. **The College agrees with the Agency and**

¹³ Jacobs, Barb, Anne M. Ryan, Katherine S. Henrichs, and Barry D. Weiss. "Medical interpreters in outpatient practice." *The Annals of Family Medicine* 16, no. 1 (2018): 70-76.

¹⁴ Sulmasy, Lois Snyder, and Thomas A. Bledsoe. "American College of Physicians Ethics Manual." *Annals of Internal Medicine* 170, no. 2_Supplement (2019).

believes that this proposal to consider payments received under Part B as federal financial assistance is appropriate. While clinicians were not directly reimbursed by the federal government for Part B services in the early days of the Medicare program—instead receiving payment directly from Medicare beneficiaries, who received the funds from the federal government—they now receive reimbursement directly for providing services covered under Part B. Hence, subjecting recipients Medicare Part B reimbursements to Section 1557 would ensure consistent application of anti-discrimination protections for patients.

Conclusion

With persistent societal and medical discrimination against marginalized individuals,¹⁵ it is evident that now is the time to enhance anti-discrimination policies rather than maintain the status quo. As the primary civil rights law protecting against sex-based and other forms of discrimination in health care, Section 1557 is a critical tool in ensuring equitable access to health care services for all patients. Hence, ACP strongly urges HHS to finalize this important rule. Doing so would have a meaningful impact on access to care for women, LGBTQ+ individuals, individuals with LEP, and others impacted by sex-based discrimination. Please contact Josh Serchen, Associate, Health Policy at jserchen@acponline.org if you have any questions or need any additional information.

Sincerely,

A handwritten signature in black ink, appearing to read 'RDM', enclosed within a large, loopy oval scribble.

Ryan D. Mire, MD, FACP
President

¹⁵ Nong, Paige, Minakshi Raj, Melissa Creary, Sharon LR Kardia, and Jodyn E. Platt. "Patient-reported experiences of discrimination in the US health care system." *JAMA network open* 3, no. 12 (2020): e2029650-e2029650.