September 30, 2022

The Honorable Xavier Becerra
Secretary, U.S. Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

Submitted at https://www.regulations.gov

Re: Comment on Docket ID: the Department–OS–2022–0012

Dear Secretary Becerra:

The Foundation Against Intolerance & Racism (FAIR) is a nonpartisan, nonprofit organization dedicated to advancing civil rights and liberties for all Americans, and promoting a common culture based on fairness, understanding, and humanity. We submit this comment regarding the Department of Health and Human Services's proposed regulations titled, "Nondiscrimination in Healthcare Programs and Activities" (the "Proposed Rule").

In summary, FAIR agrees that individuals should have access to healthcare that does not discriminate against them based on their immutable characteristics; however, the Department cannot and should not unreasonably burden healthcare providers' freedoms of religion, conflict of conscience, or professional medical judgment. FAIR respectfully requests that the Department amend the Proposed Rule as set forth in Section IV of this comment.

I. Background and the Proposed Regulations

A. Section 1557 of the Affordable Care Act

The Patient Protection and Affordable Care Act was passed in 2010 to increase accessibility of healthcare for Americans. Section 1557 of that Act is a nondiscrimination provision that applies to Medicare inpatient service providers, Medicaid-enrolled providers, and other recipients of federal financial assistance. Section 1557 does not currently apply to Medicare Part B (outpatient services) providers. Section 1557 prohibits covered providers from discriminating against patients based on race, skin color, national origin, sex, age, and disability. At times, the list of protected traits has been interpreted to include gender identity, sexual orientation, and pregnancy status. Currently, providers are exempt from providing certain healthcare services if they have objections based on their religion, conscience, or professional medical judgment. See 45 C.F.R. § 92.6(b).

B. The Proposed Rule

The Proposed Rule seeks to dramatically narrow (if not eliminate) those exemptions, while also significantly increasing the scope of covered healthcare providers. First, it seeks to include Medicare Part B providers within the scope of persons and entities who must comply with Section 1557. Second, the Proposed Rule seeks to narrow the protections for those with religious, conscience, and professional judgment objections to performing abortions or sex-transition services. Specifically, it would add a new Section 92.206 that would effectively require *all* providers whose practice includes reproductive or cosmetic surgeries to perform such services:

> [Covered providers may not d]eny or limit health services sought for purpose of gender transition or other gender-affirming care that the covered entity would provide to an individual for other purposes if the denial or limitation is based on a patient's sex assigned at birth, gender identity, or gender otherwise recorded.
> …
>
> Nothing in this section requires the provision of any health service where the covered entity has a legitimate, nondiscriminatory reason for denying or limiting that service, including where the covered entity typically declines to provide the health service to any individual or where the covered entity reasonably determines that such health service is not clinically appropriate for a particular individual. However, a provider's belief that gender transition or other gender-affirming care can never be beneficial for such individuals (or its compliance with a state or local law that reflects a similar judgment) is not a sufficient basis for a judgment that a health service is not clinically appropriate.

The Proposed Rule whittles down healthcare providers' protections and ignores Congressional intent by eliminating application of Title IX's religious exemption and abortion neutrality provision. Specifically relevant to sex-transition and abortion services, the Department states that it is "not incorporating the Title IX religious exception" and "that Section 1557 does not require the Department to incorporate the language of Title IX's abortion neutrality provision." While the Department goes on to say that it is "fully committed to respecting conscience and religious freedom laws when applying this rule," that sentiment falls flat. It is true that other Federal laws exist in order to protect religious and conflict of conscience freedoms, but it is not clear if those laws will protect covered providers.

II. The Proposed Rule Disregards Religious- and Conscience-Based Freedoms and Principles of Professional Medical Judgment

Despite recent court findings to the contrary, the Proposed Rule would unreasonably burden providers' rights by creating a presumption that covered healthcare providers who decline to provide sex-transition and abortion services are unlawfully discriminating on the basis of sex. Last month, the 5th Circuit found in favor of upholding religious freedoms. That court affirmed the lower court's decision to permanently enjoin the Department from requiring a religious organization to perform gender reassignment surgeries or abortions in violation of its religious beliefs. *See Franciscan Alliance v. Becerra*, 2022 WL 3700044

(N.D. Tex. Aug. 26, 2022). The Proposed Rule goes even further by imposing *additional* burdens on providers who object to providing sex-transition or abortion services for reasons of religion or conscience. A provider with such objections must "notify" the Office of Civil Rights, which in turn is given unlimited discretion to determine whether to grant the exemption.

Additionally, proposed subsection 92.206(c) includes a Department-created presumption that sex-transition services are always medically appropriate. Thus, even if a provider objects to providing those services because it is his or her professional medical judgment that such services cannot be beneficial, the Proposed Rule will nonetheless require them to provide such services. In its preamble, the Department states:

> Claims of medical necessity that are not based upon genuine medical judgments will be considered evidence of pretext for discrimination. For example, issuers have historically excluded services related to gender affirming care for transgender people as experimental or cosmetic (and therefore not medically necessary). Characterizing this care as experimental or cosmetic would be considered evidence of pretext because this characterization is not based on current standards of medical care. Such exclusions are a form of disparate treatment discrimination, as they distinguish between care that is covered and care that is not solely by whether such care is provided as gender affirming care for transgender people.

Federal Register, Vol. 87, No. 149, page 47874.

Contrary to the Department's statements, the scope and nature of appropriate care for transgender individuals is not a settled matter. Medical practitioners are still debating what should be the best practices in gender medicine. Several nations (including Sweden, Finland, France, and Australia) are taking a pause on unquestioned "gender-affirming care" because of adverse mental and physical effects and the growing cohort of detransitioners who report inadequate consent, misleading information, poor care, and lack of improvement of their gender dysphoria. Tavistock, which is the largest gender clinic in Europe, has been ordered to close because of the "scarce and inconclusive evidence" supporting the gender-affirming approach, the unexplained dramatic increase in female children referred for gender-affirming care, and a "lack of consensus" on the best approach. There is substantial evidence that hormones and surgeries for youth are experimental and cause irreversible physical damage and dependencies. By furthering the notion that affirming care is the only legitimate approach to gender dysphoria, the Department disregards those important developments and jeopardizes the safety of Americans.

Transgender patients should not suffer arbitrary discrimination when seeking healthcare services. However, a provider has the legal right to abstain from providing abortion and sex-transition services, such as organ removal and cosmetic surgery, if they have a sincere religious- or conscience-based objection to doing so. FAIR also affirms a provider's right to make medical recommendations consistent with their professional medical judgment. FAIR urges the Department to acknowledge the debate that exists within the medical community about whether, when, and to what extent sex-transition and gender-affirming care services are medically appropriate. The federal government should not usurp the

medical and scientific process of determining standards of care simply by declaring its own judgment as to what does or does not constitute medically-appropriate services in all cases.

III. The Proposed Rule will Result in Decreased Access and Quality of Healthcare

Adoption of the Proposed Rule will result in decreased access to quality health care. If clinicians are required to provide sex-transition or abortion services, and their ability to be exempted from such requirements is unreasonably burdened, those clincians are likely to leave federal health care programs. That is precisely the opposite of what the Department purportedly aims to accomplish with the Proposed Rule. The preamble discusses what seems to be the Department's justification for removing the current Title IX religious exemption and abortion neutrality provision:

> There are an increasing number of communities in the United States with limited options to access health care from non-religiously affiliated health care providers. As a practical matter, then, many patients and their families may have little or no choice about where to seek care, particularly in exigent circumstances, or in cases where the quality or range of care may vary dramatically among providers. Moreover, health care consumers are not always aware that the health care entities from which they seek care may be limited in the care they provide. Incorporation of Title IX's religious exception would therefore seriously compromise Congress's principal objective in the ACA of increasing access to health care.

Federal Register, Vol. 87, No. 149, page 47840-47841.

Providers who currently enjoy the ability to exercise their religious and conscience freedoms and make medical determinations based on their professional judgment will have little incentive to remain enrolled as federal health care providers under the Proposed Rule. When the number of providers enrolled in the federal health care system decreases, so will health care access for vulnerable patient populations, most notably low-income patients enrolled in Medicaid.

Importantly, there is no shortage of access to gender-affirming care for patients enrolled in federal health care. Over 200 gender clinics in the United States offer such services, including the Planned Parenthood network in all fifty states. Furthermore, emergency care is legally protected by the EMTALA Law, requiring all patients to receive a medical screening exam and stabilization for an emergency medical condition such as appendicitis, a gunshot wound, or suicidality regardless of their gender identity. FAIR urges the Department to carefully consider the impact of burdening clinicians' ability to abstain from providing medical care they sincerely disagree with, whether on the basis of religious or scientific grounds.

FAIR believes that every American should have access to high quality healthcare. With the evolving area of transgender medicine, broad access to gender care services, and recent litigation upholding medical practice pleuralism based on religious freedom and freedom of conscience laws, the Department has an obligation to prevent further division in our medical communities by proceeding carefully. Our healthcare

community is healing from a pandemic and facing unprecedented challenges with staff shortages, burnout, an aging patient population, and budgetary restraints affecting the most vulnerable. As currently written, the Proposed Rule threatens to further divide the healthcare community, thereby leading to lower quality healthcare for all Americans.

IV. FAIR's Proposed Changes

For the foregoing reasons, FAIR urges the Department to amend the proposed regulations as follows:

- Revert to the current language such that Medicare Part B services are not considered "Federal financial assistance."
- Maintain 45 CFR Section 92.6 in its current form.
- Remove the following sentence from proposed Section 92.206(c): "However, a provider's belief that gender transition or other gender-affirming care can never be beneficial for such individuals (or its compliance with a state or local law that reflects a similar judgment) is not a sufficient basis for a judgment that a health service is not clinically appropriate."

We appreciate the Department's consideration of our concerns and recommendations.

Sincerely,

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