Suggested Comment for FAIR's Healthcare Provider Supporters

I write to request amendment of the Department's Proposed Rule governing the Affordable Care Act's Section 1557 nondiscrimination regulations.

The Proposed Rule would expand the scope of coverage of the regulations to include Medicare Part B (outpatient) service providers. The Proposed Rule would also expand the classes protected by Section 1557 to include not only sex, but gender identity and sexual orientation. In expanding the protected classes under Section 1557, the Department also proposes to simultaneously remove protections currently in place that support clinician's First Amendment rights to freedom of religion and freedom of conscience. This change will result in an unreasonable burden upon providers who wish to abstain from providing sex-transition services, gender-affirming care, and abortion services. Finally, the Department seeks to usurp the medical-scientific process in determining the standard of care relating to sex-transition and gender-affirming medical treatment.

Originally implemented in 2016 and amended in 2020, the Section 1557 regulations have been the source of much debate and litigation. As a healthcare provider, I stand by and support efforts to ensure that healthcare is delivered in a high-quality, non-discriminatory manner. But I am concerned that certain provisions of the Proposed Rule would create unreasonable burdens on my own and other healthcare providers' First Amendment freedoms. Furthermore, I am greatly concerned that the Proposed Rule will impede my ability to practice medicine and deliver healthcare in accordance with my own professional, independent medical judgment.

The Proposed Rule specifically states that the Department's goal is to increase access to healthcare, with a specific emphasis on requiring that providers offer sex-transition, gender-affirming care services, and abortion services. In order to increase access to these services, the Department is not proposing a way to incentivize new providers to participate in Federal healthcare programs; instead, the Proposed Rule will make it more difficult for existing providers to abstain from providing services they might sincerely object to. I fear that this tactic is more likely to have the reverse outcome. Right now, when a covered healthcare provider wishes to abstain from providing certain services based on their religious beliefs, conflict of conscience, or independent medical judgment, the current legal landscape protects them. If the Proposed Rule is adopted as written, the protections that covered providers currently depend on will be whittled away. When faced with the choice of either: 1) providing services against their conscience or beliefs, or 2) disenrolling from Federally-backed healthcare programs, the choice will be simple. The Proposed Rule will result in a decrease in access to *all* forms of healthcare, rather than an increase in access to potentially-objectionable healthcare. It is for this very reason that it does not make sense for the Department to attempt to capture all Medicare Part B providers as covered by Section 1557.

If the Proposed Rule is adopted and Medicare Part B providers become "covered" by the Section 1557 regulations, that entire population of providers will be forced to contend with new requirements that have never applied to them. When they are faced with these new requirements, they will find that the burdens on their freedoms that stem from these new requirements are actually more unreasonable than what current covered providers contend with now. Once again, the choice to disenroll from Medicare altogether will be an easy one.

Finally, the Proposed Rule creates a presumption that sex-transition and gender-affirming care are beneficial healthcare services. In creating this presumption, the Department is creating an additional basis upon which healthcare providers who disagree can be found to have discriminated against their patients. Contrary to the Department's statements, best practices in gender medicine are being debated, and that debate is a hugely important part of the medical-scientific process to ensure the best outcomes for patients. Viewpoint diversity from healthcare clinicians is critical to excellence in transgender care, and all forms of healthcare.

As a healthcare provider, I agree with the Department that transgender patients shoud not be discriminated against when seeking healthcare services unrelated to sex-transition or abortion services, such as an eye exam or diabetes screenings. However, I believe that healthcare entities and clinicians maintain a legal right to abstain from providing abortion and sex-transition services, such as organ removal and plastic surgery, that would violate established religious protections and freedom of conscience laws. I also affirm clinicians' rights to make medical recommendations in the best interests of their patients based on professional medical judgment. I urge the Department to acknowledge the very real debate that exists within the medical community today about whether and to what extent sex-transition and gender-affirming care services are, in fact, medically-appropriate and beneficial. The government should not usurp the medical-scientific process of determining standards of care simply by declaring its own judgment as to what does or does not constitute medically-appropriate services.

For these reasons, I urge the Department to amend the proposed regulations as follows:

- Revert to current regulatory language such that Medicare Part B services are not construed as receiving "Federal financial assistance."
- Construe Section 1557 to align with Congressional intent that religious and freedom of conscience rights are upheld for all healthcare providers by maintaining 45 CFR Section 92.6 in its current form.
- Restore the healthcare community's ability to engage in the medical-scientific process of determining the standard of care for sex-transition and gender-affirming care by removing 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."

Thank you for this opportunity to provide input in response to the Department's Proposed Rule. We appreciate the Department's consideration of our concerns and recommendations.