



August 13, 2019

Alex M. Azar II, JD, Secretary
U.S. Department of Health and Human Services
Attention: Office for Civil Rights
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue SW
Washington, DC 20201

Re: Nondiscrimination in Health and Health Education Programs or Activities, Proposed Revision to Section 1557: NPRM, RIN 0945-AA11, Document Number: 2019-11512

Dear Secretary Azar:

The Catholic Medical Association and The National Catholic Bioethics Center represent over 4,000 members, committed to promoting health care that is driven by the highest standards of scientifically based practice and consistent with the natural moral law, which can be clearly defended by human reason. Both organizations recognize the inherent and inviolable dignity of the human person and strive within the discipline of medical ethics to promote that dignity. Members are comprised of physicians and other health care professionals, ethicists, educators, clergy and vowed religious, as well as consumers of health care. Their members are active in all fields of health care and academics and have been consistent advocates for the dignity of the human person regardless of how they identify sexually, as well as the rights of health care providers to exercise care that promotes that dignity as well as the best interest of all recipients of health care. To be able to do so, and to enable health care providers to be patient advocates, require the exercise of a free conscience and religious liberty, as enshrined in the First Amendment of the Constitution of the United States, as well as the federal *Religious Freedom Restoration Act*. This proposed revision (Revision) to the 2016 Rule by the U.S. Department of Health and Human Services (HHS) implementing Section 1557 of the *Patient Protection and Affordable Care Act* (ACA) creates no new law.¹ Rather, it requires that Section 1557 shall be enforced consistent with these

¹ U.S. Dept of Health and Human Services, "Nondiscrimination in Health and Health Education Programs and Activities, A Proposed Rule by the Center for Medicare and Medicaid Services," *Federal Register* (June 14, 2019).

forementioned conscience protections as well as those set forth in the *Church, Coats-Snowe, Weldon, Hyde and Helms Amendments*.

The National Catholic Bioethics Center and the Catholic Medical Association strongly support the prohibition of unjust discrimination on the basis of race, color, national origin, sex, age, or disability. Characteristics protected equally under the law are those inherent in a person's make-up that are immutable and identifiable, enabling society to identify when discrimination is perpetrated based upon them. Gender identity is changeable and for some fluid. Ensuring and enforcing anti-discrimination laws in a consistent and just way for something as variable as gender and gender identity would be impractical if not impossible. On the other hand, sex, commonly defined and widely understood as the state of being either male or female, as determined by one's chromosomes, leaves no ambiguity and applies to everyone.

The Revision will affirm these distinctions consistent with existing law while protecting persons from discrimination on the basis of sex or how they self-identify. It will accomplish this by reversing the artificial definition of sex to include gender identity that was applied to ACA in the Rule promulgated in 2016: "one's internal sense of being 'male, female, neither, or a combination of male and female.'"² The unfounded definitions in the 2016 Rule also expanded the prohibition of discrimination on the basis of sex to include termination of pregnancy.³ Nowhere in existing law does such a definition exist, nor can it be reasonably inferred that is what Congress intended when promulgating the ACA. Section 1557 of the ACA is a civil rights provision prohibiting discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs or activities. Section 1557 references four longstanding federal civil rights laws: Title VI of the *Civil Rights Act* of 1964 (prohibiting discrimination on the basis of race, color, and national origin); Title IX of the *Education Amendments* of 1972 (prohibiting discrimination on the basis of sex); Section 504 of the *Rehabilitation Act* of 1973 (prohibiting discrimination on the basis of disability); and the *Age Discrimination Act* of 1975 (prohibiting discrimination on the basis of age). Nowhere in these statutes is sex defined as gender identity or a right to involve others in the termination of a pregnancy.

The proposed Revision would avert injustices against religious liberties, already in evidence against Catholic health care, which would force institutions to expend significant resources that could be used on health care and to defend its right to provide care consistent with existing law, as evidenced in challenges to Dignity Health for refusing to provide mutilating transgender surgery inconsistent with its Catholic mission.⁴ Furthermore, the Franciscan Alliance was forced to seek legal recourse against the 2016 Rule, resulting in at least a temporary injunction, but requiring wasted time and resources to secure justice already mandated by existing law.⁵

Available at <https://www.federalregister.gov/documents/2019/06/14/2019-11512/nondiscrimination-in-health-and-health-education-programs-or-activities>.

² U.S. Dept of Health and Human Services, "Nondiscrimination in Health Programs and Activities, A Proposed Rule by the U.S. Department of Health and Human Services," Federal Register (May 18, 2016), § 92.4 Definitions.

Available at https://www.federalregister.gov/documents/2016/05/18/2016-11458/nondiscrimination-in-health-programs-and-activities?utm_campaign=subscription+mailing+list&utm_medium=email&utm_source=federalregister.gov.

³ Ibid.

⁴ *Evan Minton, Plaintiff, v. Dignity Health; Dignity Health D/B/A Mercy San Juan Medical Center*.

⁵ On December 31, 2016, the U.S. District Court for the Northern District of Texas issued an opinion in *Franciscan Alliance, Inc. et al. v. Burwell*, preliminarily enjoining HHS's attempt to prohibit discrimination based on gender identity and termination of pregnancy as sex discrimination in the Section 1557 regulation. This federal court concluded the provisions are likely contrary to applicable civil rights law, the *Religious Freedom Restoration Act*, and the *Administrative Procedure Act*. The preliminary injunction applies on a nationwide basis. A separate federal

No health care agency or professional should be forced to provide procedures they have been determined not to be in the patient's best interest. In the case of gender identity there is little scientific data to support procedures that reinforce such identity inconsistent with biological reality. In fact, reputable data that exist document the harm that can be caused to patients, regardless of their demands for such procedures.⁶ Why, for example, should a Catholic hospital be forced to provide procedures with which it disagrees based either on professional medical opinion or on deeply held and firmly established religious principles? And yet the 2016 Rule, inaccurately interpreting the ACA, already is being used to attempt to force Catholic health care to provide gender transition surgery for those who identify themselves as other than their actual physical sex. The proposed Revision will halt this socially engineered distortion of existing and established law.

Furthermore, to regard "termination of pregnancy" as being included as a protected class deserving equal protection under the law also results from social engineering. The presumption reportedly is that by including termination of pregnancy in the definition of sex, women would be protected from being denied treatment on the basis of having had an abortion.⁷ Those who advocate for the protection of all of human life recognize that in pregnancy there are at least two patients: the mother and her unborn baby. And even if the mother, herself, rejects her unborn child through abortion, if in the process a health crisis ensues, every person respectful of human life is obligated to help her. No Catholic hospital would deny her life sustaining care.

The truth is that the attempt to include "termination of pregnancy" within the definition of sex is an attempt to disguise the real issue, which is to force all health care providers to cooperate in providing abortions. Refusing to do so, regardless of the Free Exercise Clause of the Constitution and the *Religious Freedom Restoration Act*, could be termed discrimination against women.⁸ Clearly, life-affirming health care providers do not discriminate against any person, but object to procedures that violate human life and mutilate the human body. Discrimination is person focused. No person is discriminated against and there is no objection to providing true care to a woman based on her sex. What is objected to are procedures, not persons, violative of the ethical foundations of practice, the Hippocratic Tradition.

The Revision assures that Section 1557 shall be enforced consistent with conscience protection laws set forth in the *Church, Coats-Snowe, Weldon, Hyde and Helms Amendments*, including the *Religious Freedom Restoration Act* and the First Amendment to the Constitution. This is vital to allowing health care providers to practice in a manner that is consistent with the Hippocratic dictum, "do no harm." We once could rely on professional associations to support such edicts, and the professionals who practice accordingly. However, increasingly there is evidence of professional associations abandoning their own members who refuse to cooperate in lethal or mutilating procedures.⁹

court in North Dakota agreed with the reasoning of the Franciscan Alliance decision and stayed the Rule's effect on the plaintiffs before it.

⁶ Lawrence S. Mayer, Paul R. McHugh, "Sexuality and Gender: Findings from the Biological, Psychological, and Social Sciences," *New Atlantis* (Fall 2016).

⁷ Timothy Jost, "ACA Pregnancy Termination, Gender Identity Protections Blocked; Wellness Program Incentives Survive (Updated)," *Health Affairs*, January 2, 2017,

<https://www.healthaffairs.org/doi/10.1377/hblog20170102.058190/full/>.

⁸ Roger Severino and Ryan T. Anderson, "Proposed Obamacare Gender Identity Mandate Threatens Freedom of Conscience and the Independence of Physicians," *Background*, No. 3089, January 8, 2016, 1-9, 8.

<https://www.heritage.org/health-care-reform/report/proposed-obamacare-gender-identity-mandate-threatens-freedom-conscience>.

⁹ American Nurses Association states, "The goal of this position statement [*The Nurse's Role When a Patient Requests Medical Aid in Dying* (2019)] is not to frame a stance for or against medical aid in dying but rather to frame the nurse's compassionate response within the scope of practice, based on the Code of Ethics for Nurses

The Revision provides enforcement of existing law, much needed by conscientiously objecting health care providers and agencies who face discrimination, even by the government. Section 1557 will apply to:

- (1) Any health program or activity, any part of which is receiving federal financial assistance (including credits, subsidies, or contracts of insurance) provided by HHS;
- (2) Any program or activity administered by HHS under Title I of the ACA; and
- (3) Any program or activity administered by any entity established under that Title.¹⁰

Thus, the rule would apply to federally facilitated and state-based health insurance Exchanges created under the ACA, and the qualified health plans offered by issuers on those Exchanges. This latter provision is essential for employers who, based on deeply held religious, moral, or ethical beliefs, do not wish to pay for lethal or mutilating procedures. Again, this is consistent with existing law.¹¹ Therefore, the civil rights of health care providers will be protected, as intended by existing law and its promulgators.

The National Catholic Bioethics Center provides a free twenty-four-hour bioethical consultation service which receives over 2000 such requests annually. The Catholic Medical Association has polled its members on violations of conscience being coerced in the delivery of care.¹² The incidents of violations of freedom of religion and conscience are increasing, from a physician being chastised for trying to provide true informed consent on transgender issues, to nurses being forced to reinforce an inaccurate sexual identity in a young child, when research supports that, when not reinforced, the vast majority of children revert to embracing their biological identity.¹³ Providers are being banned from trying to

with Interpretive Statements,” and, further, “Hallmarks of end-of-life care include respect for patient self-determination, nonjudgmental support for patients’ end-of-life preferences and values, and prevention and alleviation of suffering. In states where medical aid in dying is legal, patient self-determination extends to include a terminally ill patient’s autonomous, voluntary choice and informed request to self-administer medication to hasten death.” Available at: <https://www.nursingworld.org/~49e869/globalassets/practiceandpolicy/nursing-excellence/ana-position-statements/social-causes-and-health-care/the-nurses-role-when-a-patient-requests-medical-aid-in-dying-web-format.pdf>. Also, the American Association of Obstetricians and Gynecologists states [*The Limits of Conscientious Refusal in Reproductive Medicine* (November 2007), “In resource-poor areas, access to safe and legal reproductive services should be maintained. Providers with moral or religious objections should either practice in proximity to individuals who do not share their views or ensure that referral processes are in place. In an emergency in which referral is not possible or might negatively have an impact on a patient’s physical or mental health, providers have an obligation to provide medically indicated and requested care.” Available at <https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Ethics/The-Limits-of-Conscientious-Refusal-in-Reproductive-Medicine?IsMobileSet=false>.

¹⁰ U.S. Dept. of Health and Human Services, *Fact Sheet: HHS Proposes to Revise ACA Section 1557 Rule* (May 24, 2019). Available at <https://www.hhs.gov/sites/default/files/factsheet-section-1557.pdf>.

¹¹ ACA expressly allows issuers of health plans to decide whether to cover abortion (ACA § 1303, 42 U.S.C. § 18023). The *Danforth Amendment* prohibit coercion of any person or public or private entity to pay for abortion (20 U.S.C. § 1688). The *Weldon Amendment*, first promulgated in 2004, expressly provides the right to exclude abortion coverage from health plans, and the right of health care providers not to provide or refer for abortion (The citation for the 2017 appropriations bill’s Weldon Amendment is Consolidated Appropriations Act of 2017, Public Law 115-31, 131 Stat. 135, 562).

¹² Catholic Medical Center, “Poll of Members Concerning Violations of Conscience,” Public Comment Supporting Proposed Rule *Protecting Statutory Conscience Rights in Health Care*, RIN 0945-ZA03 (Submitted to White House Office of Management and Budget, May 1, 2019).

¹³ For a discussion of the studies, see Paul R. McHugh, Paul Hruz, and Lawrence S. Mayer, Brief of Amici Curiae in Support of Petitioner, Gloucester County School Board v. G.G., Supreme Court of the United States, No. 16-273 (January 10, 2017), 12.

alleviate distress by determining through therapy the root causes of gender dysphoria.¹⁴ Examples of the violation of the right to not cooperate in abortion are legion, from nurses initially being denied internships for not being willing to cooperate in abortion, to a nurse being forced to assist at an abortion or have her license threatened.¹⁵

Misrepresentations of Catholic health care abound. Catholic health care will provide life-sustaining treatment to pregnant women, including women with complications after seeking an abortion, consistent with the *Emergency Medical Treatment and Active Labor Act* (EMTALA).¹⁶ Courts have supported Catholic health care's First Amendment rights as assailed by the American Civil Liberties Union.¹⁷ The *Ethical and Religious Directives for Catholic Health Care Services* promulgated by the United States Conference of Catholic Bishops provide direction to all Catholic health care in the United States. Two relevant directives demonstrate that every effort is made to treat both patients involved when treating a pregnant woman: the mother and her unborn baby. One of them states: "Operations, treatments, and medications that have as their direct purpose the cure of a proportionately serious pathological condition of a pregnant woman are permitted when they cannot be safely postponed until the unborn child is viable, even if they will result in the death of the unborn child;"¹⁸ and another states: "For a proportionate reason, labor may be induced after the fetus is viable."¹⁹ Catholic health care never abandons a patient nor deliberately acts to end the life of one patient for the benefit of the other.

Conscience is the internal sense of what is right or wrong, beneficent or maleficent care, and to choose between them, and to act in conformity with that choice.²⁰ Protecting the conscience rights of health care providers also is protective of patients and the trust between patients and providers. Healthcare communities are moral communities, and those of us who are members of such moral communities must be allowed to provide care consistent with such an ethos. Patient autonomy and managerial authority can be construed to create false obligations along with the threat of being charged with patient abandonment. Furthermore, providers can be prevented from exercising professional judgment as to what constitutes the best interest of the patient. The relationship between a patient and healthcare provider cannot be compromised by attempting to force providers to act contrary to their consciences. Today patient autonomy, while an important principle in health care, appears to trump all other ethical principles. Without provisions for protecting conscience rights of providers acting with beneficence on behalf of their patients, conflicts with personal beliefs and values can lead to escalating ethical dilemmas faced by health care providers. The self-perception of the provider is

¹⁴ Movement Advancement Project, "Conversion Therapy Laws." Available at https://www.lgbtmap.org/equality-maps/conversion_therapy.

¹⁵ Alliance Defending Freedom, "Vanderbilt University abandons illegal policy that forced nursing residents to sign abortion pledge" (January 12, 2011). Available at <http://www.adfmedia.org/News/PRDetail/21984?search=1>. And *Cenzon-DeCarlo v. Mount Sinai Hosp.*, 626 F.3d 695 (2d Cir. 2010).

¹⁶ The federal *Emergency Medical Treatment and Active Labor Act* (1986) ensures patient access to emergency medical care, particularly to prevent the practice of patient dumping, in which uninsured patients are transferred, solely for financial reasons, from private to public hospitals jeopardizing their medical condition or stability for the transfer.

¹⁷ Erica Teichert, "Federal appeals court rejects ACLU-backed Catholic hospital ethics lawsuit," *Modern Healthcare* (Sept 2016). Available at <https://www.modernhealthcare.com/article/20160909/NEWS/160909887/federal-appeals-court-rejects-aclu-backed-catholic-hospital-ethics-lawsuit>.

¹⁸ U.S. Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services*, 6th ed. (Washington, DC: USCCB, 2018), 47.

¹⁹ *Ibid.*, 49.

²⁰ C. Lamb, et al., "Conscience, conscientious objection, and nursing: A concept analysis," *Nursing Ethics* 26:1 (Feb 2019; Epub April 2017), 1237-49. Retrieved from <https://www.ncbi.nlm.nih.gov/pubmed/28399688>.

impacted causing stress leading to care-provider burnout. Compromising moral integrity can compromise patient care.

The religious liberty protections of the First Amendment, the *Religious Freedom and Restoration Act*, and the *Church, Coats-Snowe, Weldon, Hyde and Helms Amendments* trump any misapplication of Section 1557 or ensuing regulations which infringe upon those protections. To misuse the civil rights provisions of Title VI of the *Civil Rights Act* of 1964, Title IX of the *Education Amendments* of 1972, Section 504 of the *Rehabilitation Act* of 1973, and the *Age Discrimination Act* of 1975, to violate the civil right to religious and conscience rights of health care providers, is a gross misuse of the regulatory process. We welcome this Revision to the 2016 Rule pertaining to Section 1557 of the *Affordable Care Act*. It is critically needed to assure that health care workers of conscience remain welcomed among the ranks of such professionals.

Sincerely yours,



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