



Office of the General Counsel

3211 FOURTH STREET NE • WASHINGTON DC 20017-1194 • 202-541-3300 • FAX 202-541-3337

Submitted Electronically

August 1, 2019

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

**Re: Nondiscrimination in Health Programs and Activities
RIN 0945-AA11**

Dear Sir or Madam:

On behalf of the United States Conference of Catholic Bishops, we respectfully submit the following comments on the proposed regulations on nondiscrimination in health programs and activities. 84 Fed. Reg. 27846 (June 14, 2019).

The proposed regulations would implement Section 1557 of the Affordable Care Act (“ACA”). Section 1557 forbids discrimination in federally-funded health programs and activities on any basis proscribed by, among other things, Title IX of the Education Amendments of 1972. Title IX, subject to certain exceptions, forbids discrimination based on sex.

Under an earlier administration, the U.S. Department of Health and Human Services’ Office for Civil Rights (“OCR”) issued regulations interpreting Section 1557’s ban on sex discrimination to forbid discrimination based on “termination of pregnancy” and “gender identity.” A federal district court enjoined the regulations’ interpretation of sex discrimination nationwide before the regulations took full effect. HHS did not appeal. Subsequently, HHS conceded in court papers, and again concedes in the preamble to the proposed regulations, that the earlier interpretation of Section 1557 to include abortion and gender identity was erroneous. In its court papers, the U.S. Department of Justice further acknowledges that this misinterpretation violated the Administrative Procedure Act.

Commendably—and appropriately, given the nationwide injunction and the government’s confession of error—the proposed regulations correct this earlier misinterpretation. In addition, the proposed regulations include some important and helpful clarifications. The proposed regulations state, for example, that nothing in Part 86 of the regulations (relating to

nondiscrimination in Title IX) shall be construed to require the performance of, or payment for, an abortion or require the provision or payment of any benefit or service (including the use of facilities) related to an abortion. The proposed regulations also state that Part 86 shall be construed in a manner consistent with the First Amendment to the U.S. Constitution, Title IX's religious exemptions, the Religious Freedom Restoration Act ("RFRA"), and various federal laws related to abortion. As these provisions mirror the relevant constitutional provision and statutes, we applaud the administration for taking these important and corrective steps in its interpretation and enforcement of Section 1557.

We do have one suggested change in the proposed regulations. The government has proposed eliminating tagline requirements which ensure that patients receive, in pertinent languages, timely and important information about their health care. We object to the proposed elimination of the tagline requirements, and we recommend that these requirements be retained in the final regulations.

I. Abortion

The current regulations define sex to include "termination of pregnancy." The proposed regulations would eliminate that definition. We agree with this proposal and urge the administration to adopt it.

Section 1557 does not forbid discrimination based on abortion, and therefore does not require the performance or coverage of abortion, for at least three reasons.

First, far from mandating coverage of abortion, the ACA expressly leaves it up to issuers of health plans to decide whether to cover abortion. ACA § 1303, 42 U.S.C. § 18023. Congress could not have intended in Section 1557 to *mandate* abortion coverage when, in Section 1303 of the very same Act, Congress is explicit that the ACA does *not* mandate abortion coverage. *Id.* Any conflict, if there were one (which there is not, because declining involvement in abortion is not sex discrimination), would have to be resolved in favor of Section 1303 by virtue of the "except" clause in Section 1557. ACA, § 1557 (prohibiting certain forms of discrimination "[e]xcept as otherwise provided for in this title"). Therefore, in giving issuers the discretion whether to cover abortion, Section 1303 trumps any construction of the nondiscrimination requirement of Section 1557 to the extent the construction would create any inconsistency. In fact, Section 1303 explicitly says: "*Notwithstanding* any other provision of this title [meaning Title I of the ACA, which includes Section 1557] ... *nothing* in this title ... shall be construed to require a qualified health plan to provide coverage" of any abortion. ACA, § 1303(b)(1)(A) (emphasis added). It is therefore clear that nothing in the ACA, including Section 1557, requires coverage of abortion.

Other provisions of the ACA reinforce this conclusion with respect to both the coverage and provision of abortion. For example, Section 1303(a)(1) allows a State to "prohibit abortion coverage" in all its qualified health plans. And Section 4101(b) of the ACA, establishing funding for school-based health centers, excludes from the program any center that performs abortions, and bars any federal funds in the program from being used for abortions. 42 U.S.C.

§§ 280h-5(a)(3)(C), 280h-5(f)(1)(B). Obviously, Section 1557 cannot forbid as “discrimination” a refusal to provide or fund abortion or abortion coverage, as other provisions of the same title of the ACA permit exactly such a refusal on the part of the federal government itself and states.

Second, 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 other federal law, including the Weldon amendment. The Weldon amendment, which has been included in every Labor/HHS appropriations law 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.”¹ 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 facility’s receipt of various kinds of HHS funding on a willingness to provide abortions contrary to its moral or religious convictions, and that facilities receiving such funds may not discriminate against a student, employee, or candidate for study or employment because of that individual’s moral or religious objection to abortion. In other words, under longstanding federal law, it is a mandate for involvement in abortion that constitutes illegal discrimination.

Third, under the Danforth amendment to Title IX, “[n]othing in this chapter [*i.e.*, Title IX] shall be construed to require ... any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion.” 20 U.S.C. § 1688. Since no abortion-related benefit or service is required under *any* provision of Title IX (“[n]othing in this chapter”), it follows that non-provision or non-coverage of abortion is not sex discrimination under Section 901 of Title IX. *A fortiori*, the non-provision or non-coverage of abortion is not sex discrimination under Section 1557 of the ACA.

For these reasons, Section 1557 does not require the provision or coverage of abortion. Agreeing with this conclusion, a federal district court enjoined the portion of the existing regulation that defines sex to include “termination of pregnancy.” *Franciscan Alliance v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016). The federal government did not appeal and earlier this year indicated in court filings, as it now acknowledges in the preamble to the proposed regulations, that its earlier construction of sex discrimination was in error. Defendants’ Memorandum in Response to Plaintiffs’ Motions for Summary Judgment, *Franciscan Alliance v. Azar*, No. 7:16-cv-00108-O, at 1 (Apr. 15, 2019) (“Defendants [HHS and Secretary of HHS] agree with Plaintiffs and the Court that the Rule’s prohibitions on discrimination on the basis of ... termination of pregnancy conflict with Section 1557 and thus are substantively unlawful under the APA.”); 84 Fed. Reg. at 27849.

¹ Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, Div. B, tit. II, § 507(d).

For all these reasons, the proposal to eliminate “termination of pregnancy” from the definition of sex discrimination should be adopted.

The proposed regulations also helpfully clarify that nothing in Part 86 of the regulations (relating to Title IX) shall be construed to require the performance of, or payment for, an abortion or require the provision of, or payment for, any benefit or service (including the use of facilities) related to an abortion. Helpfully, the proposed regulations also state that Part 86 shall be construed in a manner consistent with the First Amendment, Title IX’s religious exemptions, RFRA, the Church, Coats-Snowe, Hyde, Weldon, and Helms amendments, and the abortion-related provisions of the ACA. We agree with these proposals because they faithfully mirror the Danforth amendment, the other referenced statutes, and the U.S. Constitution.

II. Gender Identity

The current regulations define sex to include “gender identity.” The proposed regulations would eliminate this definition. We agree with this proposal and urge the administration to adopt it.

Section 1557 does not forbid discrimination based on gender identity for at least three reasons.

First, Title IX says nothing about “gender identity.” Instead, it uses the term “sex.” The ordinary dictionary definition of “sex” is the character of being male or female. Webster’s New World Dictionary (3d College ed.). Because Title IX says nothing about “gender identity,” there is no basis for including it in regulations implementing Section 1557. *Texas v. United States*, 201 F. Supp. 3d 810, 833 (N.D. Tex. 2016) (holding that the term “sex,” as used in Title IX, unambiguously refers to “the biological differences between male and female students as determined at their birth”). As OCR points out in the preamble (84 Fed. Reg. at 27853), Congress knows how to reference gender identity when it wants to, and it did not do so in Section 1557. Therefore, Section 1557 does not address gender identity.

Second, the legislative history of Title IX does not support the inclusion of gender identity in the definition of sex discrimination. Title IX was intended to provide equal educational opportunities for both sexes. *Lothes v. Butler County Juvenile Rehabilitation Center*, 243 Fed. App’x 950, 955 (6th Cir. 2007). There is no basis for concluding that Congress intended, in Title IX, to protect an individual’s “internal sense of gender” as opposed to his or her biological sex. The phrase “gender identity” was never used in congressional debate over Title IX. Indeed, construing Title IX’s ban on sex discrimination to include gender identity not only fails to advance equal educational opportunities for women, but actively *undermines* that objective. This is already becoming evident in school athletic competitions, where women athletes are being denied opportunities because male athletes who identify as women are depriving women of athletic recognition and scholarships.²

² See, e.g., News Release, *Female Athletes Challenge Connecticut Policy That Abolishes Girls-Only Sports* (June 18, 2019) (alleging that Connecticut Interscholastic Athletic Conference policy, which allowed males claiming a female identity to compete in girls’ athletic competitions, “consistently deprived the female athletes ... of dozens of medals,

Third, interpreting Section 1557 to forbid gender identity discrimination would turn what is a rather straightforward nondiscrimination provision into a national mandate that health care providers, contrary to their professional judgment and in many cases contrary to their religious and moral convictions, provide gender transition procedures. These procedures are controversial and their effects disputed.³ By contrast, decisions not to provide hormonal or surgical interventions have been shown to yield positive results.⁴ In light of this evidence, a health care provider could reasonably conclude that hormonal or surgical treatment for gender dysphoria is bad medicine. In addition, a provider, whether secular or religious, could conclude that such treatment is unethical or immoral because it involves amputation or mutilation of a healthy reproductive system as a response to what is a treatable psychological problem. *See Franciscan Alliance*, 227 F. Supp. 3d at 687-93 (concluding that Section 1557 regulations violated the APA and RFRA by requiring health care providers to provide and cover gender transition procedures). The proposed elimination of regulatory language which had suggested that gender transition procedures must be provided and covered is all the more important because faith-based health care providers are already being sued by those demanding that they provide or cover such procedures. *See* 84 Fed. Reg. at 27855 (listing cases). As the court in *Franciscan Alliance* found, this construction of section 1557 creates conscience and religious freedom issues for such entities in likely violation of the APA and RFRA.

For these reasons, Section 1557 does not forbid discrimination based on gender identity. Agreeing with this conclusion, a federal district court enjoined the portion of the existing regulations that defined sex to include “gender identity.” *Franciscan Alliance*, 227 F. Supp. 3d at 688-89. The government did not appeal and earlier this year indicated in court filings, as it now acknowledges in the preamble to the proposed regulation, that its earlier construction of sex discrimination was erroneous. Defendants’ Memorandum in Response to Plaintiffs’ Motions for Summary Judgment, *Franciscan Alliance*, No. 7:16-cv-00108-O, at 1 (Apr. 15, 2019) (“Defendants [HHS and Secretary of HHS] agree with Plaintiffs and the Court that the Rule’s prohibitions on discrimination on the basis of gender identity ... conflict with Section 1557 and thus are substantively unlawful under the APA.”); 84 Fed. Reg. at 27849.

opportunities to compete at a higher level, and the public recognition critical to college recruiting and scholarship opportunities”), <https://www.adflegal.org/detailspages/press-release-details/female-athletes-challenge-connecticut-policy-that-abolishes-girls-only-sports>.

³ *See, e.g.*, David Batty, *Sex Changes Are Not Effective, Say Researchers*, THE GUARDIAN (July 30, 2004) (“There is no conclusive evidence that sex change operations improve the lives of transsexuals, with many people remaining severely distressed and even suicidal after the operation”), <https://www.theguardian.com/society/2004/jul/30/health.mentalhealth>; American College of Pediatricians, *Gender Ideology Harms Children* (Sept. 2017) (“puberty-blocking hormones ... inhibit growth and fertility in a previously biologically healthy child”; “cross-sex hormones ... are associated with dangerous health risks including but not limited to cardiac disease, high blood pressure, blood clots, stroke, diabetes, and cancer”), <https://www.acped.org/the-college-speaks/position-statements/gender-ideology-harms-children>.

⁴ Vanderbilt University and London’s Portman Clinic report, for example, that a large percentage of children (70 to 80%) who reported transgender feelings but received no medical or surgical intervention ultimately lost those feelings. Paul McHugh, *Transgender Surgery Isn’t the Solution*, WALL STREET J. (May 13, 2016), <https://www.wsj.com/articles/paul-mchugh-transgender-surgery-isnt-the-solution-1402615120>.

Relatedly, the proposed regulations—commendably and appropriately—eliminate the suggestion in the previously-issued regulations that health care providers must perform, and issuers of health plans must cover, gender transition procedures. Because “on the basis of sex” does not include “gender identity,” as demonstrated above, neither does a health provider’s choice not to perform, or a plan’s choice not to cover, services related to gender transition constitute sex discrimination.

For all these reasons, the proposal to eliminate “gender identity” from the definition of sex discrimination should be adopted.

III. First Amendment and RFRA

The proposed regulations state that Part 86 of the regulations shall be construed consistently with the First Amendment and the Religious Freedom Restoration Act. 84 Fed. Reg. at 27890. We agree with this proposal and urge the administration to adopt it.

The religious liberty and speech protections of the First Amendment obviously trump any application of Section 1557, or regulations thereunder, that would infringe upon those protections. RFRA is applicable to “all federal law, including the implementation of that law, whether statutory or otherwise....” 42 U.S.C. § 2000bb-3. Under RFRA, if any such law places a substantial burden on religious exercise, that law must yield to the person whose belief is thus burdened, unless the law represents the least restrictive means of serving a compelling government interest. Again, it is entirely appropriate that the regulations be construed consistently with RFRA, and that the regulations, as OCR proposes, say precisely that.

IV. Tagline Requirements

OCR proposes eliminating requirements that taglines be provided in pertinent languages to the recipients of health care information. We oppose the elimination of those requirements and ask that they be retained. The notifications in question deal with potentially serious and possibly life or death decisions, and having the details available, often in complex form, in languages that recipients may clearly understand is of utmost importance. We do not understand how a translator system would operate, and how such an outcome would result in savings, except at the cost of delaying or impeding the effective communication of critical health information. In light of the importance of these communications in the making of informed decisions by recipients of this information, we would strongly urge the retention of the requirements to provide the taglines in question.

Conclusion

We commend OCR for correcting the existing regulations, which, by the government’s admission, erroneously construed sex to include abortion and gender identity. We also support the acknowledgment in the regulatory text that Part 86 of the regulations does not require the provision or coverage of abortion and that the regulations should be construed in a manner

consistent with the First Amendment, Title IX's religious exemptions, RFRA, and abortion-related provisions enacted by Congress. We agree with these proposals and urge OCR to adopt them. We do, however, oppose the proposal to eliminate tagline requirements, and we recommend that those requirements be retained to ensure that people receive important and timely information about their health care.

Thank you for the opportunity to comment.

Respectfully submitted,

Anthony R. Picarello, Jr.
Associate General Secretary & General Counsel

Michael F. Moses
Associate General Counsel

Hillary E. Byrnes
Director of Religious Liberty & Associate General Counsel