



The American College of
Obstetricians and Gynecologists
WOMEN'S HEALTH CARE PHYSICIANS

Office of the President
Ted L. Anderson, MD, PhD, FACOG

August 13, 2019

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

RE: RIN 0945–AA11: Nondiscrimination in Health and Health Education Programs or Activities

Dear Director Severino:

On behalf of the American College of Obstetricians and Gynecologists (ACOG), I appreciate the opportunity to provide comments on the U.S. Department of Health and Human Services (HHS) Office for Civil Rights (OCR) proposed rule RIN 0945–AA11: “Nondiscrimination in Health and Health Education Programs and Activities” (Proposed Rule). ACOG has more than 58,000 members representing more than 90 percent of all board-certified obstetrician-gynecologists (ob-gyns) in the United States. As the premiere national medical specialty of women’s health care physicians, we support the goals of the Patient Protection and Affordable Care Act (ACA) to expand access to continuous and meaningful health insurance coverage and reject discriminatory practices that jeopardize patient care.

Women as well as lesbian, gay, bisexual, transgender, queer and questioning (LGBTQ+) individuals face frequent barriers to health care. For example, women are more likely than men to delay care due to cost concerns.¹ Women who identify as lesbian or bisexual encounter concerns around confidentiality, disclosure, and a limited understanding as to what their health risks may be.^{2,3} Moreover, transgender individuals face lack of adequate insurance coverage, mistreatment by health care providers, and health providers’ discomfort or inexperience with the transgender population.^{4,5,6,7} According to the 2015 U.S. Transgender Survey Report, nearly 25 percent of transgender individuals did not see a doctor when they needed to in the past year because of fear of being mistreated as a transgender person.⁸ Thirty-three percent did not see a doctor due to cost.⁹

Prior to the passage of the ACA, women and LGBTQ+ people faced even greater barriers to health care, including higher patient cost-sharing and discriminatory benefit design.^{10,11} Notably, Section 1557 of the ACA provides substantial civil rights protections to our patients and prohibits discrimination in health care on the basis of sex. Existing regulations recognize that Section 1557’s broad prohibition of discrimination on the basis

of sex includes, but is not limited to, “discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, and gender identity.”¹² ACOG recognizes that ensuring women and LGBTQ+ people are able to access health care that is free from discrimination is critical for the health and safety of the patients we serve.¹³

The Proposed Rule seeks to weaken these civil rights protections by eliminating the definition of sex discrimination from the Section 1557 regulation. It also seeks to eliminate prohibitions on discrimination in health insurance products and limit the number of entities and types of insurance products subject to the nondiscrimination requirements. In addition, the Proposed Rule seeks to limit protections for individuals with limited English proficiency and virtually removes an individual’s private right of action to sue for discrimination under Section 1557. Each of these proposals will negatively impact access to care for our most vulnerable patients. For these reasons, and those explained in detail below, we urge OCR to withdraw this Proposed Rule in its entirety.

I. The Proposed Rule would eliminate the definition of sex discrimination, weakening protections for LGBTQ+ patients and access to comprehensive women’s health care.

Section 1557 broadly prohibits discrimination in health care on the basis of sex. ACOG supports existing regulations that correctly recognize that, among other things, discrimination on the basis of sex for the purposes of Section 1557 includes sex stereotyping, discrimination based on gender identity, and discrimination based on pregnancy status, including termination of pregnancy. The Proposed Rule would eliminate this definition, seeking to undermine the protections of Section 1557 and expose patients to unnecessary harm.

A. The Proposed Rule eliminates recognition that gender identity is a form of prohibited sex discrimination in health care.

ACOG endorses equitable treatment for all patients regardless of gender identity or sexual orientation.¹⁴ OCR’s proposal seeks to eliminate recognition of gender identity, which includes gender expression and transgender status, as a form of prohibited sex discrimination. ACOG opposes discrimination on the basis of gender identity and opposes the Proposed Rule’s failure to recognize gender identity and sexual orientation as forms of prohibited sex discrimination under Section 1557.^{15,16}

Each of OCR’s proposed changes related to gender identity are antithetical to Congressional intent and do not align with existing case law which recognizes that sex discrimination includes discrimination based on gender identity.^{17,18,19,20} Moreover, failing to recognize gender identity and sex stereotyping as prohibited forms of sex discrimination in health care could put millions of people at significant risk of mistreatment.

Recognition by HHS that gender identity is a prohibited form of sex discrimination under Section 1557 has been a vital tool in our efforts to overcome barriers to health care for transgender patients.²¹ Since the implementation of Section 1557, 18 states have implemented affirmative coverage protocols in their respective Medicaid programs to ensure coverage of medically necessary transition-related care.²² Additionally, a 2019 Marketplace analysis of 622 silver plan options from 129 issuers in 38 states found that 41 percent of plans surveyed had affirmative coverage policies while only six percent had transgender-specific exclusions.²³ This progress – in both Medicaid and the Marketplace – is in jeopardy if OCR’s rule is finalized as proposed.

B. The Proposed Rule eliminates recognition of forms of sex discrimination against women.

Existing regulations made clear that sex discrimination under Section 1557 includes discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related conditions.²⁴ Under the Proposed Rule, OCR seeks to roll back these protections. Although the preamble of the Proposed Rule acknowledges that the prohibition against sex discrimination includes termination of pregnancy, it refuses to state whether OCR would enforce those protections. Moreover, the Proposed Rule seeks to eliminate the 2016 regulation’s clarification that the ban on sex discrimination includes all pregnancy related care. While the scope of protection under Section 1557 is clear, ambiguous implementing regulations and enforcement mean discriminatory practices are likely to flourish.

ACOG believes that health care must be delivered in a way that is respectful of patient autonomy, timely and effective, evidence based, and nondiscriminatory.²⁵ This includes all care related to pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related conditions. ACOG opposes OCR’s attempt to weaken nondiscrimination protections for women seeking basic medical care.

C. The Proposed Rule codifies overly broad exemptions to anti-discrimination requirements that threaten access to care for women.

ACOG’s Code of Professional Ethics states that the “welfare of the patient (beneficence) is central to all considerations in the patient-physician relationship.”²⁶ Moreover, the American Medical Association’s Code of Medical Ethics requires medical professionals to act in good faith to protect patient health, even when a patient’s health interests conflict with a physician’s personal views.²⁷ As physicians dedicated to providing quality care to women, ACOG supports physician autonomy and the right to practice medicine according to one’s conscience, however, ACOG does not support discrimination based on those beliefs.²⁸

The Proposed Rule would establish blanket religious exemptions to the prohibition on sex discrimination based on termination of pregnancy. Under the Proposed Rule, a patient in need of abortion services could be denied or discouraged from seeking necessary health care, placing her health or life at risk. Additionally, women who have experienced a prior

termination could be discriminated against if they disclose their prior abortion on a medical history. ACOG believes that safe, legal abortion is a necessary component of women's health care that is essential to women's health and well-being.^{29,30} Section 1557 already contains sweeping religious exemptions. ACOG does not support regulatory creation of additional exemptions that go beyond recognized law – especially if they could inhibit patients' ability to achieve full health care equity.

II. The Proposed Rule would eliminate prohibitions on discrimination in health insurance products, allowing issuers to discriminate against certain populations and medical conditions.

ACOG believes that all Americans should be provided with adequate and affordable health coverage.³¹ As women's health care physicians, ACOG is determined to stop all efforts to turn back the clock on women's health, including efforts to return to a time before the ACA where health insurance issuers openly discriminated against women and individuals with preexisting conditions.

Section 1557 includes a ban on discriminatory behavior by health insurance issuers. Under the current regulations, covered entities are prohibited from denying, canceling, limiting, or refusing to issue or renew a health insurance policy; denying or limiting coverage of a health insurance claim; imposing additional cost-sharing or other limitations or restrictions on coverage; or using discriminatory marketing practices or insurance benefit designs because of race, color, national origin, sex, age, or disability. These important protections would be eliminated under the Proposed Rule, opening the door for health insurance issuers to discriminate against certain populations and medical conditions.

For example, under the Proposed Rule, insurers could limit access to transition services for transgender individuals. ACOG recognizes that medical and mental health treatments related to gender transition are beneficial and medically necessary for many transgender patients.³² Further, when access to transgender health care is limited or denied, the results can be dire. According to a recent study published by the American Academy of Pediatrics (AAP), more than 50 percent of transgender male adolescents have attempted suicide.³³ Similarly, 41.8 percent of adolescents who do not identify as exclusively male or female have attempted suicide, followed by nearly 30 percent of transgender female adolescents.³⁴ ACOG encourages all health plans to cover the various treatments associated with gender identity disorder.³⁵ This lifesaving care should not be restricted.

The Proposed Rule would also give health insurance issuers the authority to place all drugs for certain diseases or infections – such as HIV – into the highest cost-sharing tier, making them cost prohibitive for many patients. Moreover, the Proposed Rule would allow insurance companies to implement prior authorization or step therapy requirements as well as age restrictions for certain medications, even those that have been found to be clinically effective for all ages.

It is foreseeable that some health plans may target contraceptive methods for prior authorization, step therapy requirements, or age restrictions. ACOG has routinely

discouraged the Centers for Medicare and Medicaid Services (CMS) from allowing entities to require prior authorization and step therapy for family planning services and supplies and for family planning-related services. We believe that medically-appropriate clinical services must be available to patients without costly delays or the imposition of additional barriers.³⁶

This is particularly concerning for adolescent access to long-acting reversible contraception (LARC). Notably, ACOG, AAP, the Centers for Disease Control and Prevention, and the Society of Family Planning support the use of LARC by adolescents as these methods have higher efficacy, higher continuation rates, and higher satisfaction rates compared with shorter-acting contraceptives among adolescents who choose to use them.³⁷ Granting health plans the power to limit access to these critical medications may create barriers for patients to access the method of their choice, potentially leading to inconsistent use of inferior methods and higher rates of unintended pregnancy. Each of these actions by health plans would constitute sex discrimination under the current Section 1557 regulations, however, these practices would be condoned under the Proposed Rule. ACOG discourages OCR from finalizing these provisions.

III. The Proposed Rule would limit the number of entities and types of insurance products subject to the nondiscrimination requirements.

The Proposed Rule would significantly narrow the applicability of Section 1557 in two ways. First, it would carve out all HHS programs and activities that were not expressly created under Title I of the ACA. This includes programs like the National Health Service Corps and the Indian Health Service, neither of which would need to comply with nondiscrimination protections under the Proposed Rule. Second, while the regulations would still apply to non-health care entities (i.e., health insurance issuers), they would only apply to lines of business that receive federal financial support. Under the current regulations, Section 1557 applies to the insurer itself, meaning any product sold by that insurer cannot discriminate based on race, color, national origin, age, disability, or sex. Under the Proposed Rule, only the lines of business sold by the insurer that receive federal funding would need to comply.

These proposed changes would dramatically limit the scope of nondiscrimination protections across federal programs and health insurance products. Moreover, the Proposed Rule expressly exempts short-term, limited-duration insurance (STLDI) products from complying with Section 1557. STLDI plans often exclude coverage for critically important health care services; vary premium rates by gender, health status, and age; and put individuals and families at significant financial risk. Further exempting these plans from ACA protections via Section 1557 will only harm patients more.

ACOG disagrees with OCR's interpretation of the statute regarding the scope of Section 1557 and the entities covered. To protect patients from discrimination across health programs and insurance types, we urge OCR to keep the 2016 regulations in place.

IV. The Proposed Rule disregards the needs of vulnerable populations.

In addition to provisions that will harm women and LGBTQ+ patients, the Proposed Rule would also undermine protections for individuals with limited English proficiency (LEP) and other vulnerable populations. Under the Proposed Rule, people with LEP could face additional challenges in access to culturally and linguistically appropriate care, including information about accessing services and health insurance. ACOG is concerned that OCR's proposal will result in fewer LEP individuals and families being aware of their health benefits and rights. Additionally, we are concerned that by proposing to eliminate language access plans and other critical protections for LEP individuals seeking care without articulating other, workable solutions, OCR is discouraging entities from taking steps to accommodate the needs of people with LEP.

This change could make health care inaccessible for many marginalized or linguistically isolated communities. According to the U.S. Census Bureau, over 21 percent of the U.S. population, or 66 million people, speak a language other than English at home, with 25 million of them speaking English less than "very well."^{38,39} ACOG believes language proficiency should not determine whether people have access to care or the quality of a person's care. Further, ACOG ardently supports the health and well-being of all women and girls, irrespective of immigration status.⁴⁰

In addition to the proposed changes for individuals with LEP, the Proposed Rule seeks to limit an individual's private right of action to sue covered entities for discrimination under Section 1557. Moreover, the Proposed Rule seeks to limit an individual's ability to pursue a disparate impact claim. ACOG supports the civil rights protections enshrined in Section 1557 and discourages OCR from scaling back these critical patient protections.

Thank you for the opportunity to comment on RIN 0945-AA11: "Nondiscrimination in Health and Health Education Programs and Activities." As articulated above, ACOG believes Section 1557's nondiscrimination protections enshrined in the current regulations are critical to the health and safety of our patients. We urge OCR not to adopt a narrow interpretation of the broad protections afforded by Section 1557 and to instead withdraw this proposal in its entirety. Should you have any questions regarding our comments, please contact Emily Eckert, Health Policy Analyst, at eeckert@acog.org or 202-863-2485.

Sincerely,



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President

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