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August 13, 2019

Secretary Alex Azar
U.S. Department of Health and Human Services
Hubert H. Humphrey Building
Room 509F
200 Independence Avenue, S.W.
Washington, D.C. 20201

RE: Public Comment in Response to NPRM, Nondiscrimination in Health and Health Education Programs or Activities, RIN 0945-AA11

To Secretary Azar:

Family Equality submits the following comment in response to the request for public comment regarding the proposed rule entitled "Nondiscrimination in Health and Health Education Programs or Activities," published June 14.

Family Equality connects, supports, and represents the three million parents who are lesbian, gay, bisexual, transgender and queer (LGBTQ) in this country and their six million children. We are a community of parents and children, grandparents and grandchildren that reaches across this country. For 40 years we have raised our voices toward fairness for all families.

We thank you for the opportunity to comment on the U.S. Department of Health and Human Services' (HHS') proposed rule, RIN 0945-AA11, entitled "Nondiscrimination in Health and Health Education Programs or Activities" (proposed rule).

The proposed rule will threaten LGBTQ patients' access to health care and coverage

Family Equality opposes the proposed rule. If finalized, this rule would threaten LGBTQ patients' access to all forms of health care, create confusion among patients and providers about their rights and obligations, and promote discrimination. Every day too many LGBTQ people face discrimination and other barriers to accessing lifesaving care. These barriers are especially pronounced for transgender patients. The proposed rule will undoubtedly lead to increased discrimination and denials of care for some of the most vulnerable members of our community.

The proposed rule would encourage hospitals to deny care to LGBTQ people and enable insurance companies to deny transgender people coverage for health care services that they cover for non-transgender people. The rule would also make it harder for other people experiencing discrimination in health care to know and exercise their rights, including people suffering from chronic health

conditions like HIV. American patients, particularly those already at heightened risk for discrimination in health care services as documented by HHS' own Office for Civil Rights, deserve better.[1] Family Equality urges the HHS to withdraw the proposed rule.

Family Equality and partner organizations have documented numerous instances of mistreatment, discrimination and denial of health care services to LGBTQ people and our children in amicus briefs to the United States Supreme Court and other courts. These stories illustrate not only the discrimination and degrading treatment LGBTQ individuals face when seeking medical care, but also the impact such treatment has on our families:

- Kinsey, a one-week old infant who had a life-threatening reaction to vaccine but was not immediately treated by hospital staff because the lesbian mother who had brought her could not prove she was her "real" mom.[2]

- M.C., a two-year old whose emergency treatment by a pediatric dentist was delayed because, as she was told, "a child cannot have two mothers."[3]

- A.S. and M.S., a married lesbian couple in Tennessee, who were denied service by multiple midwives and a birthing class provider during A.S.' pregnancy.[4]

- K.S., a transgender woman seeking mental health services who was subject to abusive treatment, inappropriate questioning and breaches of confidentiality, and who attempted to commit suicide twice while at the facility.[5]

- M.H., a gay man who checked into a New York City hospital with a severe infection and was treated roughly, called a 'faggot' multiple times, dragged down the hall in an office chair causing him to fall out of chair, and left on the ground where he had a seizure and convulsions.[6]

Additionally, in a recent study, nearly one in five LGBTQ people, including 31% of transgender people, said that it would be very difficult or impossible to get the health care they need at another hospital if they were turned away. That rate was substantially higher for LGBTQ people living in non-metropolitan

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[1] See for example Sharita Gruberg & Frank J. Bewkes, *The ACA's LGBTQ Nondiscrimination Regulations Prove Crucial, 2018* https://www.americanprogress.org/issues/lgbt/reports/2018/03/07/447414/acas-lgbtq-nondiscrimination-regulations-prove-crucial/

[2] Brief of Amici Curiae Family Equality Council, Colage, and Kinsey Morrison in Support of Petitioners, Addressing the Merits and Supporting Reversal, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2015, https://www.familyequality.org/_asset/mhfjym/VoCSCOTUS2015.pdf

[3] Brief of Amici Curiae Lambda Legal Defense and Education Fund, Inc., Family Equality Council et al., in Support of Respondents, *Masterpiece Cake Shop v. Colorado Civil Rights Commission,* (S. Ct. 2017), https://www.familyequality.org/_asset/5xtc7j/20171030-LambdaLegal-FamEq-Amicus-Brief-Masterpiece.pdf

[4] Ibid.

[5] Ibid.

[6] Ibid.

areas, with 41% reporting that it would be very difficult or impossible to find an alternative provider.[7] For these patients, being turned away by a medical provider is not just an inconvenience; it often means being denied care entirely with nowhere else to go.

The proposed rule would affect not only Section 1557 of the Affordable Care Act (Section 1557) but also undermine 20 years of case law and a decade of nondiscrimination rules

By proposing to eliminate protections against discrimination based on transgender status and sex stereotyping, HHS is contradicting over 20 years of federal case law[8] and clear Supreme Court precedent.[9] The overwhelming majority of courts that have been presented with the question of whether federal sex discrimination laws such as Section 1557 specifically cover anti-transgender discrimination have firmly ruled that they do.[10]

Further, Family Equality is opposed to the proposed changes to roll back other, long-standing rules that prohibit discrimination on the basis of gender identity and sexual orientation.[11] These changes are outside of the HHS Office for Civil Rights' jurisdiction and are unrelated to Section 1557. It is not appropriate for these rulemakings to be combined, and it is arbitrary and capricious for HHS to characterize them as "conforming amendments" without offering any legal, policy or cost-benefit

[7] Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care* , 2016, https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care.

[8] *See, e.g., Rumble v. Fairview Health Servs.*, No. 14–cv–2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015); *Flack v. Wis. Dep't of Health Servs.*, No. 3:18-cv-00309-wmc (W.D. Wis. July 25, 2018); *Cruz v. Zucker*, 195 F.Supp.3d 554 (S.D.N.Y. 2016); *Prescott v. Rady Children's Hosp.-San Diego*, 265 F.Supp.3d 1090 (S.D. Cal. Sept. 27, 2017); *Tovar v. Essentia Health*, No. 16-cv-00100-DWF-LIB (D. Minn. September 20, 2018); *Boyden v. Conlin,* No. 17-cv-264-WMC, 2018 (W.D. Wis. September 18, 2018); *Whitaker v. Kenosha Unified School District*, No. 16-3522 (7th Cir. 2017) (Title IX and Equal Protection Clause); *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217 (6th Cir. 2016) (Title IX and Equal Protection Clause); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (Equal Protection Clause); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (Title VII of the 1964 Civil Rights Act); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (Title VII); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (Equal Credit Opportunity Act); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (Gender Motivated Violence Act); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (Title VII); Grimm v. Gloucester County School Board, No. 4:15-cv-54 (E.D. Va. May 22, 2018); M.A.B. v. Board of Education of Talbot County, 286 F. Supp. 3d 704 (D. Md. March 12, 2018).

[9] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)

[10] *See, e.g., Rumble v. Fairview Health Servs.*, No. 14–cv–2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015) (holding that discrimination against hospital patient based on his transgender status constitutes sex discrimination under Section 1557 of the Affordable Care Act); *Flack v. Wis. Dep't of Health Servs.*, No. 3:18-cv-00309-wmc (W.D. Wis. July 25, 2018) (holding that a Medicaid program's refusal to cover treatments related to gender transition is "text-book discrimination based on sex" in violation of the Affordable Care Act and the Equal Protection Clause of the Constitution); *Cruz v. Zucker*, 195 F.Supp.3d 554 (S.D.N.Y. 2016) (holding exclusion invalid under the Medicaid Act and the Affordable Care Act); *Prescott v. Rady Children's Hosp.-San Diego*, 265 F.Supp.3d 1090 (S.D. Cal. Sept. 27, 2017) (holding that discrimination against transgender patients violates the Affordable Care Act); *Tovar v. Essentia Health*, No. 16-cv-00100-DWF-LIB (D. Minn. September 20, 2018) (holding that Section 1557 of the Affordable Care Act prohibits discrimination on the basis of gender identity); *Boyden v. Conlin,* No. 17-cv-264-WMC, 2018 (W.D. Wis. September 18, 2018) (holding that a state employee health plan refusal to cover transition-related care constitutes sex discrimination in violation of Title VII, Section 1557 of the ACA, and the Equal Protection Clause).

[11] These are: 45 CFR 155.120(c)(1)(ii) and 155.220(j)(2), 45 CFR 147.104(e), 45 CFR 156.200(e) and 156.1230(b)(3), 42 CFR 460.98(b)(3) and 460.112(a), 42 CFR 438.3(d)(4), 438.206(c)(2), and 440.262.

analysis about them and their impacts on various CMS programs. In particular, HHS offers no analysis of the impact these regulations have had during the years—in some cases over a decade—that they have been in effect or the impact of changing them now.

The proposed rule undermines the Department's mandate to protect the health and well-being of all Americans.

Reducing discrimination and other barriers to accessing health care services, as well as reducing the accompanying health disparities, is core to the Department's mission and its obligations under laws authorizing its programs. Weakening protections and limiting program access by limiting nondiscrimination protections fundamentally runs contrary to this mission.

The Department's core mission is to "enhance and protect the health and well-being of all Americans…by providing for effective health and human services."[12] Ensuring that beneficiaries of Department programs and other patients have fair and equal access to services and reducing barriers to those services is an inseparable and necessary component of this responsibility. The Department's ability to ensure equal access to services would be significantly weakened by the proposed rule. In order to meet its legal obligations and its statutory mission, HHS must prioritize the needs and rights of patients. Weakening nondiscrimination protections for vulnerable populations such as transgender Americans at the cost of these patients' access to health services prevents the Department from meeting its responsibilities to HHS program beneficiaries and patients around the country.

The proposed rule will impede health care access for people with HIV/AIDS and other serious or chronic conditions.

Section 1557 and the 2016 implementing regulations prohibit health insurance companies from discriminating through marketing practices and benefit design. These protections are especially important for people with HIV/AIDS or other serious and/or chronic conditions. The proposed rule seeks to exempt most health insurance plans from Section 1557's nondiscrimination protections and eliminate the regulation prohibiting discriminatory benefit design and marketing, which could result in health insurers excluding benefits or designing their prescription drug formularies in a way that limits access to medically necessary care for those living with HIV and other chronic conditions.

The proposed rule will make it harder for people to understand their legal rights and will disproportionately harm LGBTQ people who are limited English proficient (LEP), or who need access to reproductive care.

The proposed rule will make it more challenging for LGBTQ patients—including LGBTQ people who are also limited English proficient (LEP) or have LEP family members—to understand their health care rights under federal law. Many individuals may not know about their rights, how to request language services, or how to file a complaint if they face discrimination. By eliminating tagline requirements

[12] Dep't. of Health & Human Servs., *About HHS*, 2017, https://www.hhs.gov/about/index.html.

and notice standards, the proposed rule will undermine access to health care, health insurance, and legal redress for vulnerable communities.

The proposed rule applies the Title IX of the Education Amendments Act of 1972 (Title IX) religious exemption to Section 1557's protections against discrimination. The Department's attempts to add this religious exemption are contrary to the express purpose of Section 1557 and violate the plain language of the statute. Adding broadened religious exemptions opens the door for discrimination and emboldens health care providers to deny patients care, threatening the health and well-being of LGBTQ patients and patients seeking reproductive health care. In 2016, HHS provided an analysis of why the Title IX exemption does not apply to Section 1557, and in this proposed rule HHS has not provided any evidence to refute that analysis. HHS reasoned the following in the May 18, 2016 Final Rule regulating Section 1557, "Nondiscrimination in Health Programs and Activities":

> [S]tudents or parents selecting religious educational institutions typically do so as a matter of choice; a student can attend public school (if K–12) or choose a different college. In the healthcare context, by contrast, individuals may have limited or no choice of providers, particularly in rural areas or where hospitals have merged with or are run by religious institutions. Moreover, the choice of providers may be even further circumscribed in emergency circumstances.
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> Second, a blanket religious exemption could result in a denial or delay in the provision of health care to individuals and in discouraging individuals from seeking necessary care, with serious and, in some cases, life threatening results. Thus, it is appropriate to adopt a more nuanced approach in the health care context, rather than the blanket religious exemption applied for educational institutions under Title IX.[13]

In addition, by narrowing the scope of covered entities, the proposed rule would allow more insurance plans to refuse to cover reproductive health services, such as pregnancy care or fertility coverage. LGBTQ people, including transgender, nonbinary, and gender nonconforming people, need access to reproductive health care and coverage, including abortion, contraception, pregnancy care, and fertility services, free from discrimination.

Foster children face unique harms due to health care service refusals.

Foster children, including LGBTQ foster youth, are particularly vulnerable to health care service refusals, and the rule could lead to unlawful service refusals and worsened outcomes for youth in care. The rule could undermine the core statutory objectives of those providing services in the child welfare context, who must act in the best interests of the child, with the objectives of child safety, permanency and well-being. Instead, a health care provider could prioritize personal religious beliefs over the best interests of the child. The misapplication of Title IX in this way could lead to a medical professional funded by federal health programs who is providing health care services to foster children, including those in a restricted setting, to feel emboldened to refuse the child a range of services that are in his

[13] 81 Fed. Reg. 31380 (May 18, 2016).

or her best interests such as reproductive health care for a girl in care, transition related care for a transgender foster youth, or counseling for an LGBTQ-identified foster youth that affirms her or his identity.

Foster children are uniquely dependent on those providing their care, including health care. For example, a child placed in a group home may not have access to the internet, phone service, email, or other means to communicate with health providers other than those entrusted with their care. This means if these children are refused needed health services, it may simply not be possible for them to find a viable alternative.

LGBTQ and female foster youth are particularly vulnerable. HHS-funded research has shown that LGBTQ youth, who comprised 19% of foster youth over 12 in the study of Los Angeles foster care, suffer unacceptably high rates of mistreatment, hospitalizations, placements in group homes (instead of with loving families), serial placements, and homelessness.[14] A study conducted in New York City's child welfare system further found that more than half (56%) of the LGBTQ-identified youth who had been interviewed said that they had chosen living in the streets at one point as they felt safer there than living in group or foster homes.[15] Affirming care that supports LGBTQ foster youths' identities is essential for achieving the child welfare goals of safety, permanency, and well-being. This care includes affirming health care, including reproductive care, transition-related health care for transgender youth, and mental health care that helps LGBTQ foster youth address issues of trauma related to family rejection, violence, harassment, and discrimination due to their sexual orientation or gender identity or expression. Service refusals under Title IX's broad religious exemption by medical professionals could greatly exacerbate the trauma these youth have already experienced, particularly as they face few options for accessing alternative providers.

It is impermissible to allow those who care for foster children to deny them access to reproductive health care.

The government is legally obligated to provide medical care and family planning services to the youth in its care, without exception.[16] Yet, the proposed rule could allow social service agencies that provide healthcare services to children and young people to refuse even minor assistance to a young person in foster care who needs reproductive health services, including birth control, testing or treatment for sexually transmitted infection, and abortion care.

Comprehensive, non-judgmental, and trauma informed reproductive health care is critical for youth in foster care. Girls in foster care are twice as likely as girls not in foster care to have sex and less likely to

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[14] Wilson, B.D.M., Cooper, K., Kastanis, A., & Nezhad, S. (2014). *Sexual and Gender Minority Youth in Foster care: Assessing Disproportionality and Disparities in Los Angeles.* Los Angeles: The Williams Institute, UCLA School of Law.

[15] G.P. Mallon, *We don't exactly get the welcome wagon: The experience of gay and lesbian adolescents in North America's child welfare system*, in Child Welfare League of America Best Practice Guidelines (Child Welfare League of America, 2006).

[16] *Flores v. Reno*, No. CV 85-4544- RJK(Px) (C.D. Cal. Jan. 17, 1997).

use birth control when they do have sex.[17] As a result, girls in foster care are more likely to become parents: A national study found that twice as many girls in foster care give birth compared to girls not in foster care.[18]

It is critical, therefore, that young people in foster care be able to access comprehensive reproductive health care and counseling. Girls in foster care also experience higher rates of sexual violence.[19] They are twice as likely as boys to be removed from their homes and placed in foster care because of sexual abuse (6 percent of girls versus 2.9 percent of boys),[20] making it that much more crucial that they are provided timely, unimpeded access to a full range of reproductive health care services in a manner that is both respectful and non-stigmatizing.

No young person in foster care should be denied access to needed health care services because the organizations who are supposed to care for the young person object to the care.

Conclusion

The proposed rule goes far beyond established law, improperly applies Title IX in contradiction with the purpose of section 1557, and most importantly will put the health and potentially even the lives of some of the most underserved and vulnerable patients at risk. We urge you to withdraw the proposed rule.

Sincerely,

Denise Brogan-Kator
Chief Policy Officer

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[17] Alison Stewart Ng & Kelleen Kaye, The National Campaign to Prevent Teen and Unplanned Pregnancy, *Teen Childbearing and Child Welfare*, 2013, 1, *available at* https://thenationalcampaign.org/sites/default/files/resource-primary-download/childbearing-childwelfare.pdf.

[18] Lois Thiessen Love et al., The National Campaign to Prevent Teen Pregnancy, *Fostering Hope: Preventing Teen Pregnancy Among Youth in Foster Care*, 2005, 7, *available at* https://thenationalcampaign.org/sites/default/files/resource-primary-download/FosteringHope_FINAL.pdf.

[19] Karen Banes-Dunning & Karen Worthington, "Responding to the Needs of Girls in Foster Care," *Georgetown Journal on Law & Poverty* 20 no. 2, 2013, 321-49, *available at* http://www.karenworthington.com/uploads/2/8/3/9/2839680/adolescent_girls_in_foster_care.pdf.

[20] National Women's Law Center calculations of unpublished data by National Data Archive on Child Abuse and Neglect.