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October 3, 2022

Submitted via www.regulations.gov

Secretary Xavier Becerra
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: ED Docket No. ED-2021-OCR-0166, RIN 1870-AA16, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.

Dear Secretary Becerra,

Thank you for the opportunity to submit comments on the Department of Health and Human Services (HHS) proposed rule entitled “Nondiscrimination in Health Programs and Activities,” RIN 0945-AA17.

Family Equality is the nation’s leading organization for lesbian, gay, bisexual, transgender, and queer (LGBTQ+)-headed families and those who wish to form them. For over 40 years Family Equality has advocated for legal and lived equality for LGBTQ+ families, including access to healthcare free from discrimination. We also serve as a primary resource and advocate for LGBTQ+ individuals who are seeking to build a family via assisted reproductive technology (ART), a process which is sometimes stymied by discrimination and refusals to provide care to LGBTQ+ people.

Family Equality has been a proponent of Section 1557 of the Affordable Care Act (ACA) since it was originally enacted, and has worked to promote the 2016 Section 1557 regulations which ensured that health facilities, programs, and activities receiving federal funding could not deny insurance coverage or care on the basis of, among other things, sex and gender identity and expression.¹ We also strongly opposed the Trump administration’s 2020 rulemaking, which removed these protections and left millions of LGBTQI+ individuals and their families in danger of losing access to necessary health care.² Notably, a mere three days after their finalization the 2020 rules were contradicted in the Supreme Court decision in *Bostock v. Clayton County* which ruled that discrimination based on sexual orientation and gender identity is sex-based discrimination.

We are pleased to submit this comment in support of the proposed changes to Section 1557 rules that HHS is now considering. Significantly, the proposed rules directly address the widespread discrimination against LGBTQI+ families in our healthcare system by restoring provisions which prevent healthcare entities and insurance companies from discriminating against anyone based on sex and reaffirms that discrimination based on sexual orientation and gender identity is considered unlawful discrimination. These rules are consistent with the *Bostock* decision and with current legal precedent, and they ensure that discrimination on the basis of association also is expressly prohibited. This means that children and other family members of LGBTQI+ people are explicitly protected from unlawful

¹ Family Equality (2016), Section 1557 of the Affordable Care Act: What Does It Mean for LGBTQ Families, <https://www.familyequality.org/2016/05/18/section-1557-of-the-affordable-care-act-what-does-it-mean-for-lgbtq-families/>.

² Family Equality (2019), Family Equality Fights Back Against Trump Administration’s Attacks on LGBTQ+ Healthcare, <https://www.familyequality.org/2019/08/14/put-patients-first/>.

refusal of care. Addressing this discrimination, which often puts the health of children at risk, is vital to address ongoing health disparities and to improve the nation's overall health outcomes.

We must ensure that all people are able to access healthcare. We urge HHS to move quickly to finalize these rules and offer some minor suggestions for improvement noted below. In addition to these comments below, Family Equality also has signed onto a comment letter submitted by the National Woman's Law Center ("NWLC"), and we echo and agree in full with the comments and recommendations set forth in that letter.³

LGBTQI+ Families and Children

LGBTQI+ people face discrimination and barriers to health care which can directly lead to disparities in health outcomes. A [recently published report by](#) the Center for American Progress highlighted 2022 data revealing the continued extent of discrimination and disparities faced by LGBTQI+ people when seeking health care.

- Fifteen percent of LGBTQ respondents, including 23 percent of LGBTQ respondents of color, reported experiencing some form of care refusal by a doctor or other health care provider in the year prior.
- 32 percent of transgender or nonbinary respondents, including 46 percent of transgender or nonbinary respondents of color, reported that they experienced at least one kind of refusal by a health care provider in the past year.
- 55 percent of intersex respondents reported that a health care provider refused to see them because of their sex characteristics or intersex variation, with over half of those cases being due to the religious beliefs or tenants of the hospital or health care facility.

The National Institute for Health has determined that LGBTQI+ individuals experience worse physical health compared to their heterosexual and cis-gender counterparts.⁴ While historically HIV/AIDS has been a devastating health issue for the LGBTQI+ community, the range of health issues which disproportionately affect the community are much more varied, including chronic conditions, early onset disabilities, cancer, and cardiovascular disease.⁵

HHS has acknowledged many of these issues in its preamble to its Notice of Proposed Rulemaking as well as the pressing necessity to ensure that as many Americans as possible have access to health care services in the wake of the COVID-19 pandemic. Family Equality also would like to highlight a crucial segment of the population that is often overlooked: the children and families of LGBTQI+ individuals. Nearly 3.7 million children in the US have LGBTQ+ parents, and 77% of LGBTQ+ millennials either are already parents or are considering expanding their families in the years ahead.⁶ It is estimated that around 3 million LGBTQ+ are the primary caregiver for someone over the age of 50.⁷ LGBTQI+ people don't just face the prospect of a doctor refusing to treat them, they must grapple with the reality that the people that they love and care for might also be refused treatment, even in emergency situations.

³ National Women's Law Center, Attention: Nondiscrimination in Health Programs and Activities (Section 1557 NPRM), RIN 0945-AA17, October 2022.

⁴ KFF (2018), Health and Access to Care and Coverage LGBT Individuals in the US – Health Challenges, <https://www.kff.org/report-section/health-and-access-to-care-and-coverage-lgbt-individuals-in-the-us-health-challenges/>.

⁵ Id.

⁶ Family Equality (2019) LGBTQ Family Building Survey. <https://www.familyequality.org/fbs>.

⁷ SAGE, Caregiving in the LGBT Community, <https://www.lgbtagingcenter.org/resources/pdfs/SAGE%20Caregiver%20Guide%20Final%20Interactive.pdf>.

For example, in 2014 a Detroit pediatrician refused to provide pediatric care to a six-day old baby, because the parents were a lesbian couple.⁸ The doctor met with the mothers during their pregnancy and agreed to take the baby as a new patient upon birth, and yet turned the family away unexpectedly and at the most vulnerable moment. This decision not only flew in the face of professional guidance and ethics, but also could have endangered the health of the child. At best, it caused extreme emotional harm and distress to new parents, left to find a new doctor for their newborn.

Similarly, the young child of a lesbian couple in Texas, experienced a delay in care due to discrimination because she had two moms. When their two-year-old daughter fell and knocked out her front tooth, one of the mothers rushed the crying, bleeding child to a pediatric dentist only to be told that “a child cannot have two mothers” and that they would not treat her child until the “real” mother (aka the mother who gave birth to the child) arrived with a birth certificate. This mother later stated that:

Although my wife and I ... expected we might face discrimination at some point in our lives ..., we never expected to face discrimination from a medical provider—especially from someone taking care of our child. I don’t think anything could have prepared us for this.⁹

Children and family members of LGBTQI+ individuals should never have their health endangered due to their association with LGBTQI+ people, nor should LGBTQI+ parents and caregivers have to live in a state of fear that their loved ones will not be able to receive necessary health treatment. The finalized Section 1557 rules must reflect that goal.

Discrimination Prohibited (§ 92.101)

As noted above, the discrimination against LGBTQI+ individuals in healthcare is widespread and has detrimental effects on patient and public health outcomes. Significantly, proposed Section 92.101 not only confirms that healthcare entities cannot discriminate “on the basis of race, color, national origin, sex, age, or disability,” but also defines “on the basis of sex” to include discrimination based on sex stereotypes, sexual orientation, gender identity, and sex characteristics. This aligns with the Supreme Court’s decision in *Bostock v. Clayton County* and the Biden administration’s continued efforts to apply this case across federal anti-discrimination law.

We urge HHS to ensure that the final rules carry forward these definitions. We also offer minor suggestions to clarify the definitions both here and throughout the rule:

- We suggest that the language in this section and throughout be amended to explicitly include transgender status. While the terms “gender identity” and “transgender status” are often used interchangeably, there have been instances in which those seeking to permit discrimination against transgender people have justified it by pressing distinctions between the two concepts.
- We suggest that the rule explicitly note that “pregnancy or related conditions” includes the termination of pregnancy, preventing discrimination against individuals who may have previously sought an abortion or seeking medically necessary care which may prevent a patient’s future fertility or pregnancy.

⁸ [Pediatrician refuses to treat baby with lesbian parents and there’s nothing illegal about it - The Washington Post.](#)

⁹ Brief Of Amici Curiae Lambda Legal Defense And Education Fund, Inc., Family Equality Council, Et Al., In Support Of Respondents, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. ____ (2018), <https://www.familyequality.org/wp-content/uploads/2018/07/20171030-LambdaLegal-FamEq-Amicus-Brief-Masterpiece.pdf>.

- We suggest that the rule explicitly recognize the possibility of intersectional discrimination by adding “or any combination thereof” after the list of protected characteristics.

Nondiscrimination on the Basis of Association (§ 92.209)

We support the proposed rule for explicitly enumerating protections against discrimination on the basis of association. This is a longstanding interpretation of antidiscrimination law which Family Equality has consistently championed, especially given the discrimination that children with LGBTQI+ parents oftentimes face in various aspects of their lives. While it is critical that section 1557 and its associated rules protect LGBTQI+ individuals from discrimination in healthcare, including in accessing ART to form a family, it is just as important that their children are similarly protected. As noted in the stories discussed above, there are health care providers who would seek to punish LGBTQI+ parents for forming a family by refusing to treat their children, even in emergency situations. The right of LGBTQI+ people to form families cannot truly be protected if the children of those families face the prospect of being without necessary care due to the sexual orientation or gender identity of their parents.

While the language of Section 1557 and the associated rules may already cover the children and other family members of LGBTQI+ parents, explicitly clarifying this in the language of the rule ensures that there is no doubt that this particularly vulnerable group is protected from discrimination. It means that LGBTQI+ people who provide essential caregiving roles in our society will not have to live in fear that their loved ones’ health is in danger because of their relationship. We strongly urge HHS to ensure that nondiscrimination on the basis of association remains a part of the final rule.

Equal Program Access on the Basis of Sex (§ 92.206) & Nondiscrimination in Health Insurance and other Health-Related Coverage (§ 92.207).

We strongly support the addition of these sections, which addresses requirements for covered entities to provide individuals equal access to health programs and activities without discriminating on the basis of sex. The proposed sections specifically clarify that health care providers may not refuse gender-affirming care based on a personal belief that such care is never clinically appropriate and bars insurance providers from categorical coverage exclusions of services related to gender transition or other gender-affirming care.

Both of these sections could be strengthened by including specific language barring discrimination regarding reproductive care and fertility treatments. While the language of the rule broadly encompasses these areas, they require special mention because of the discrimination that LGBTQI+ individuals face when seeking such care. Many prospective LGBTQI+ parents face an expensive path to parenthood, with insurance companies either failing to cover procedures like in vitro fertilization (IVF) or imposing unfair requirements such as asking families to prove that they have been “trying” to conceive for 6-12 months before coverage begins.¹⁰ This can prove to be an impossible barrier for some, but even if LGBTQI+ couples can fund their treatment, providers may refuse to offer the treatment on the basis of sexual orientation and gender identity. In a Center for American Progress survey, over 1 in 5 transgender individuals seeking care reported that the provider refused to provide reproductive or sexual health services, and over half of all intersex respondents noted the same.¹¹ For these reasons we urge HHS to include specific language around reproductive care and fertility treatment to these sections. We have

¹⁰ Family Equality (2019), Building LGBTQ+ Families: The Price of Parenthood, <https://www.familyequality.org/resources/building-lgbtq-families-price-parenthood/>.

¹¹ Center for American Progress (2022), Advancing Health Care Nondiscrimination Protections for LGBTQI+ Communities, <https://www.americanprogress.org/article/advancing-health-care-nondiscrimination-protections-for-lgbtqi-communities/>.

signed on to a letter submitted by NWLC which also advises this approach and provides guidance for updating the language.¹²

Policies and Procedures (§ 92.8) & Notice of Nondiscrimination (§ 92.10)

We support the requirements laid out in the proposed rules which require healthcare entities to develop and implement written policies and procedures to ensure compliance with this rule as well as requirements to provide notice of nondiscrimination to individuals and families seeking treatment. Nondiscrimination provisions are more effective when the covered entities are actually required to take steps to prevent and address discrimination and when people are fully informed of their rights. This empowers individuals to seek out redress for discrimination and forces providers to proactively engage in the process of avoiding discrimination.

We urge HHS to ensure that the final rules include these requirements and offer one suggestion to strengthen the requirements:

- We suggest that any provider which has been granted a religious exemption include the existence and scope of such exemption in its required notices. This would give individuals and families the most complete understanding of where they stand with regards to receiving treatment from this provider and would allow them to choose their healthcare providers accordingly and reassess their health care options if necessary.

Application (§ 92.2)

Proposed Section 92.2 restores 1557's application to all health programs or activities receiving federal funding through or administered by HHS or a Title I entity. We strongly support this rule which is consistent with the statutory language and the purpose of the ACA. The 2020 rulemaking narrowed the scope of 1557 to only covering specific activities that receive federal funding, but it did not most operations and health insurers. As LGBTQI+ individuals continue to face discrimination from insurance companies, particularly transgender and nonbinary individuals who are denied gender-affirming coverage or updates to their insurance records, ensuring that this applicability is included in the final rulemaking is crucial.¹³

In the NPRM, HHS specifically asked for comment as to whether 1557 protections should be extended to non-health related programs and activities of HHS, or which receive HHS funding. While we appreciate the question, we believe that this issue should be reserved for a separate, future request for information and/or rulemaking. We believe that all federally funded programs should be free of discrimination, including discrimination against LGBTQI+ families. However, given the urgency of the protections codified in these rules we believe it best to move forward with the proposed rulemaking without delay and consider the question of non-health programs separately with further opportunity for public comment.

¹² National Women's Law Center, Attention: Nondiscrimination in Health Programs and Activities (Section 1557 NPRM), RIN 0945-AA17, October 2022.

¹³ Center for American Progress (2022), Advancing Health Care Nondiscrimination Protections for LGBTQI+ Communities, <https://www.americanprogress.org/article/advancing-health-care-nondiscrimination-protections-for-lgbtqi-communities/>.

Notification of views regarding application of federal conscience and religious freedom laws (§ 92.302)

The Trump administration's 2020 rule largely attempted to copy the language for religious exemption under Title IX to apply in the health care context. While it is often good to look to other antidiscrimination statutes for guidance, the Title IX religious exemption is highly aligned to the educational context and makes little sense with regards to health care. HHS stated in its 2016 final rulemaking on Section 1557 that Title IX exemptions should not apply in the healthcare context, citing the fact that students and parents who select religious institutions have the choice of public schools or other private option, whereas in healthcare individuals may have limited or no choices, particularly in rural areas where hospitals have merged.¹⁴ Moreover, there are already numerous federal laws that allow health care providers to invoke a conscience objection to providing certain kinds of care, making an additional religious exemption unnecessary.

While it is unfortunate that healthcare providers might seek not to treat LGBTQI+ patients on religious grounds, HHS's approach in the proposed rulemaking allows for these exemptions to be examined on a case-by-case basis and will hopefully prevent many of the worst and most arbitrary cases.

Additional Provisions

We also would like to strongly voice our support for the following provisions of the proposed rules:

- The addition of Medicare Part B providers and programs run by the Centers for Medicare and Medicaid Services (CMS) to the list of entities covered by the rule.
- Protections to provide meaningful access for people with limited English proficiency and disabilities.
- Demographic data collection requirements which will be critical to civil rights enforcement.

We appreciate and support HHS's ongoing efforts to ensure that all LGBTQI+ and their families have access to health care. We always are more than happy to discuss our comments and recommendations. Please contact Nikhil Vashee at nvashee@familyequality.org with any question or if we can provide you with additional information. Thank you for considering our comments.

Respectfully submitted,

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¹⁴ 81 Fed. Reg. 31380 (May 18, 2016).