



AMERICAN ACADEMY OF NURSING

transforming health policy and practice through nursing knowledge

August 13, 2019

Roger Severino
Director, Office for Civil Rights
U.S. Department of Health and Human Services
Attn: RIN 0945-AA11
200 Independence Avenue, SW
Hubert H. Humphrey Building, Room 509F
Washington, D.C. 20201

RE: RIN 0945-AA11; Docket No. HHS-OCR-2019-0007 – Nondiscrimination in Health and Health Education Programs or Activities
(Submitted electronically via www.regulations.gov)

Dear Director Severino:

The American Academy of Nursing (Academy) appreciates the opportunity to submit the following comments in response to the June 14, 2019, proposed rule (RIN 0945-AA11; Docket No. HHS-OCR-2019-0007; 84 Fed. Reg. 115; pp. 27846-27894) "*Nondiscrimination in Health and Health Education Programs or Activities*." The Academy is deeply concerned about the significant implications the proposed rule will have on individuals' timely access to comprehensive health care services without discrimination based on race, color, national origin, gender, gender identity, age or disability. As proposed, these regulations would weaken or eliminate protections for our most vulnerable populations, and the Academy must respectfully urge you to withdraw and reconsider the proposed rule in its entirety.

The Academy serves the public and the nursing profession by advancing health policy and practice through the generation, synthesis and dissemination of nursing knowledge. It's more than 2,600 fellows are nursing's most accomplished leaders in education, management, practice and research. They have been recognized for their extraordinary contributions to the promotion of the public's health through evidence and innovation.

As you know, Congress enacted Section 1557 of the Affordable Care Act (ACA) specifically to address widespread discrimination against individuals in health care coverage and delivery. The rule proposed by the Office of Civil Rights (OCR) would almost entirely replace the 2016 regulations implementing Section 1557 by significantly narrowing the definition of sex discrimination, allowing insurers to discriminate against certain medical conditions and people with disabilities, and limiting access to care for individuals with limited English proficiency (LEP). In addition, the rule proposes to exempt certain federal health programs and health insurers from complying with Section 1557, effectively eliminating these protections for tens of millions of people. The proposed rule would also eliminate protection from discrimination related to gender identity and sexual orientation from 10 other current regulations including those governing state Medicaid programs, Medicaid managed care organizations, and Program of All-Inclusive Care for the Elderly (PACE) organizations. The policies, if implemented, would significantly weaken civil rights protections in health care for many of the most vulnerable populations,



including members of the lesbian, gay, bisexual, transgender, and queer (LGBTQ) communities, people with disabilities, and individuals with LEP.

Equitable Access to Coverage and Services

Section 1557 was the first civil rights law to prohibit discrimination in health care based on sex, including discrimination based on sex stereotyping and gender identity. These protections are critical for LGBTQ individuals, many of whom prior to the ACA, were subjected to unnecessary barriers to obtaining indispensable health care coverage and services. The proposed rule would eliminate the definition of sex discrimination from the Section 1557 regulation, inviting insurers to deny treatment to transgender and gender nonconforming patients, including the denial of treatments such as hormone therapy, counseling and surgery that are essential to transgender patients, as they see fit. Eliminating sex as a protected class from the Section 1557 regulation would put millions of people at significant risk of mistreatment. Moreover, this proposal is contrary to many current state efforts to protect access to care for LGBTQ individuals: state Medicaid programs across the country have committed to ensuring protections for LGBTQ and other vulnerable patient populations. 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. These coverage improvements and any future progress will be in jeopardy if this rule is finalized as proposed.

As with LGBTQ individuals, people with disabilities have been routinely discriminated against in the provision of health care. Prior to the enactment of the ACA, insurance companies commonly charged people with disabilities more for their care and subjected them to arbitrary denials of coverage for some conditions or health services or refused coverage altogether. Section 1557 put an end to these practices by insurance companies, hospitals, nursing homes, home health agencies, clinical laboratories, and other health care providers. The proposed rule would permit such discriminatory coverage practices to once again become commonplace, jeopardizing care for the more than 40 million Americans with disabilities. The Academy, as a champion of accessible and equitable health care for all, urges the OCR to uphold current definitions in order to ensure every American is able to seek and acquire the appropriate care.

Individuals with Limited English Proficiency

More than 21 percent of the U.S. population – 66 million people – speak a language other than English at home, with roughly 25 million speaking English less than “very well” and thus considered to have limited English proficiency (LEP). Adults and children with LEP are more likely to be uninsured than those who are proficient in English. Under the proposed rule, people with LEP could face significant additional challenges in gaining access to culturally and linguistically appropriate care, including information about accessing services and health insurance. The Academy is concerned that by proposing to eliminate language access plans and other critical protections for LEP individuals seeking care without providing other workable solutions, the OCR will allow entities to avoid taking steps to meet the needs of people with LEP. This could make access to basic health care services significantly more difficult for many marginalized or linguistically isolated communities, thus leading to less preventive primary care and greater costs in treating more serious health problems that could have



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been avoided. Language proficiency should not determine whether a person has access to care or the quality of the care he or she receives.

As stated in our June 9, 2019 comments, the Academy continues to urge the OCR to permanently approve and implement the use of video communication between interpreters, patients and health care providers. We also continue to support the importance of the reference to a language access plan as critical motivation to health care providers to ensure that there are resources and options in place for LEP individuals. Language access plans are necessary to make certain that all patients have an equal and equitable chance of both making the most informed medical decisions and receiving the best care possible. The Academy believes that the ability to communicate clearly and accurately is the first critical step of receiving health care.

Conforming Amendments

The Academy is concerned that the proposed rule seeks to implement conforming amendments that would eliminate nondiscrimination protections related to gender identity and sexual orientation from 10 other existing regulations, including those governing state Medicaid programs, Medicaid managed care organizations, PACE organizations, and other programs. These conforming changes would permit managed care entities and state Medicaid programs to discriminate against LGBTQ beneficiaries in enrollment or allow PACE programs to exclude older LGBTQ individuals from accessing benefits to which they are entitled. The Academy strongly believes in every individual's right to health care and cannot condone the potential risks this revision would put patients in. We believe the proposed conforming amendments would increase the discriminatory loss of health care coverage and are outside the scope of this rulemaking. We urge the OCR to reconsider these amendments in the interest of preserving equitable access to health care in all coverage programs.

In summary, the Academy is grateful for the opportunity to express its serious concerns about the proposed regulations, which we believe would be a significant step in the wrong direction – weakening or eliminating critically important protections for some of our most vulnerable populations. We strongly urge you to withdraw the proposed rule in its entirety and encourage you to work with us to improve access to timely, equitable care for our nation's patients. The Academy is eager to work with you toward that goal. Please contact the Academy's Strategic Outreach Manager, Ellie Cook, at ecook@aannet.org if you have any questions or need additional information.

Sincerely,

Karen Cox, PhD, RN, FACHE, FAAN
President
The American Academy of Nursing