



AMERICAN ACADEMY of NURSING

June 16, 2023

The Honorable Xavier Becerra
Secretary
U.S. Department of Health & Human Services
Hubert H. Humphrey Building
200 Independence Avenue, S.W.
Washington, D.C. 20201

RE: RIN 0945-AA20 — HIPAA Privacy Rule to Support Reproductive Health Care Privacy

Dear Secretary Becerra:

The American Academy of Nursing (Academy) is pleased to offer the following comments in response to the April 17, 2023, proposed rule to modify the Standards for Privacy of Individually Identifiable Health Information (“Privacy Rule”) under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the Health Information Technology for Economic and Clinical Health Act of 2009 (HITECH Act). For 50 years, the Academy has been advancing health policy and practice through the generation, synthesis, and dissemination of nursing knowledge. With more than 2,900 Fellows, the Academy represents nursing’s most accomplished leaders in policy, research, administration, practice, and academia. The vision of the Academy is *Healthy Lives for All People*. To actualize this vision, the Academy’s mission is to improve health and achieve health equity by influencing policy through nursing leadership, innovation, and science.

The Academy applauds the Department of Health & Human Services (Department)’s actions to strengthen protections for individuals seeking, obtaining, or facilitating reproductive health care services, notably abortion. The Academy is on record in support of equitable access to health care—including reproductive health services—for every individual, and safeguarding access to this care without interference in the patient-provider relationship.^{1,2} The Academy supports the proposed Privacy Rule, and we believe it will promote HIPAA’s key objectives of promoting trust in the patient-provider relationship as well as improving access to high-quality and lawful health care. The Academy is concerned by the potential implementation of laws that would allow for criminal charges to be filed against individuals who obtain, assist in facilitating, or provide an abortion.³ Taking steps to ensure that an individual’s reproductive health information is protected will promote safe environments for individuals seeking out and obtaining care as well as those providing lawful and clinically-appropriate care. As the Department prepares the final rule, the Academy offers comments on areas for the

¹ American Academy of Nursing (2022, May 6). *The American Academy of Nursing Statement on the Leaked SCOTUS Draft Majority Opinion on Dobbs v. Jackson Women’s Health Organization* [press release].

https://higherlogicdownload.s3.amazonaws.com/AANNET/c8a8da9e-918c-4dae-b0c6-6d630c46007f/UploadedImages/Academy_Statement_on_Leaked_SCOTUS_Opinion.pdf

² Joint Statement from Maternal Health Specialists on Dobbs v. Jackson Women’s Health Organization (2022, June 24). https://higherlogicdownload.s3.amazonaws.com/AANNET/c8a8da9e-918c-4dae-b0c6-6d630c46007f/UploadedImages/Joint_Maternal_Health_Statement_in_Dobbs.pdf

³ *Bill raising abortion to homicide draws Republican pushback*. (2023, February 15). Associated Press. <https://apnews.com/article/abortion-us-supreme-court-politics-kentucky-health-523fbca373510135e5787a34fdd67f26>

Department to consider and clarify. To that end, our comments will be focused on the following areas in the proposed rule:

- Definitions of “Person,” “Reproductive Health Care,” and “Reproductive Health”
- Attestation Requirement
- Clarification of Child Abuse Language
- Exceptions and Further Clarifications in Cases of Sexual Assault or Involving Minors
- Impact on Members of Historically Underserved and Minority Communities

Definitions of “Person,” “Reproductive Health Care,” and “Reproductive Health”

Definition of “Person”

Given ongoing challenges in navigating definitions of personhood,⁴ especially following the Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*, the Academy appreciates the Department’s clarification of the definition of “person.” The Academy supports the definition and meaning of “person” that the Department proposes in the Privacy Rule, which is consistent with the definition Congress adopted in the original Social Security Act of 1935⁵ and enacted in 1 U.S.C. 8. Clarifying the meaning of “person,” and therefore ensuring understanding among stakeholders on whose protected health information (PHI) is protected under HIPAA, will be critical as stakeholders adapt to the reproductive health care landscape without the protections previously afforded under *Roe v. Wade*. In the final rule, we urge the Department to clarify if the adopted definition of “person” would preempt contrary state laws.

Definition of “Reproductive Health Care”

The Academy is on record supporting evidence-based policies that ensure all people have full access to affordable sexual and reproductive health (SRH) services; facilitate the expansion of clinical knowledge and evidence-based women’s preventive health services, especially related to preventing unintended pregnancies; and assure that all women’s health care, including reproductive health services and policies that support those services, are grounded in scientific knowledge and standards of care.⁶ We support the addition of the Department’s proposed definition of “reproductive health care” as a subcategory of the existing term “health care” as well as its application to care, services, and supplies related to reproductive health. The Academy encourages the Department to further broaden the term to “sexual and reproductive health care” in the final rule. The World Health Organization defines sexual health as a “state of physical, emotional, mental, and social well-being in relation to sexuality; it is not merely the absence of disease, dysfunction, or infirmity. Sexual health requires a positive and respectful approach to sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination, and violence.”⁷ Including the term “sexual” would ensure the privacy of all individuals, regardless of sexual orientation or gender identity, who obtain sexual and reproductive health care. As the proposed rule is currently written, care for those with gender dysphoria could unintentionally be excluded from privacy protections without the inclusion of the term “sexual” in the Department’s current definition of “reproductive health care.” We recommend the Department change the term to “sexual and reproductive care” in the final rule.

⁴ Sable-Smith, B. (2023, May 5). Can a fetus be an employee? States are testing the boundaries of personhood after ‘Dobbs.’ *KFF Health News*. <https://kffhealthnews.org/news/article/personhood-fetal-rights-employee-jaxx-law-post-dobbs-missouri-texas-arizona/>

⁵ Section 1101(3) of Public Law 74–271, 49 Stat. 620 (Aug. 14, 1935).

⁶ Olshansky, E., Taylor, D., Johnson-Mallard, V., Holloway, S., & Stokes, L. (2018). Sexual and Reproductive Health Rights, Access & Justice: Where Nursing Stands. *Nursing Outlook*, 66(4), 416–422. <https://doi.org/10.1016/j.outlook.2018.07.001>

⁷ *Sexual Health*. World Health Organization. Retrieved May 18, 2023, from <https://www.who.int/health-topics/sexual-health>

Definition of “Reproductive Health”

The Academy does not believe that a definition of “reproductive health” is necessary to include in the final rule. Establishing a strict definition may serve to limit the availability or provision of certain care, services, or supplies in the future as scientific research on reproductive health evolves.

Attestation Requirement

Overall, the Academy supports the implementation of a requirement for covered entities in certain circumstances to obtain an attestation that a requested use or disclosure of PHI related to reproductive health care is not for a prohibited purpose (prohibited purpose being “criminal, civil, or administrative investigations or proceedings against individuals seeking, obtaining, providing, or facilitating reproductive health care that is lawful under the circumstances in which it is provided”).⁸ Obtaining written attestation would help address potential concerns that individuals and providers may have in seeking or providing reproductive health care. We note that strengthening privacy protection may require added security of computer systems to prevent unapproved sharing of PHI. In the final rule, the Academy encourages the Department to consider and clarify the extent to which attestations will be legally binding. We support the condition stated in the proposed rule that “the Department should require the attestation to include a signed declaration made under penalty of perjury that the requester is not making the request for a purpose prohibited by this proposal.” Furthermore, we encourage the Department to consider the legal responsibility of the PHI requester to ensure that any PHI disclosed is protected against others using it for a prohibited reason. The Department should consider the legal ramifications in the event a requester obtains an individual’s PHI after attestation and later discloses the information or fails to protect the information from another entity that uses the PHI for a prohibited reason.

Clarification of Child Abuse Language

The Academy appreciates that the Department has included clarification on child abuse reporting in relation to disclosure of PHI related to obtaining reproductive health care. Ensuring that an individual’s decision to seek, obtain, provide, or facilitate sexual and reproductive health care is not used as the sole basis for “child abuse” reporting will promote HIPAA’s objectives of trust in the patient-provider relationship. The inclusion of this clarification will prevent scenarios where individuals obtaining or nurses and other health care providers delivering sexual and reproductive health care be falsely accused of abuse.

Exceptions and Further Clarifications in Cases of Sexual Assault or Involving Minors

The Academy encourages the Department to consider additional clarification in the areas of PHI of minors as well as disclosure or use of PHI in cases of sexual assault. We urge the Department to clarify in the final rule whether PHI disclosed for purposes of prosecution of sexual assault criminals may be used to pursue charges against a victim if the victim chose to seek or obtain sexual and reproductive health care because of the sexual assault. Furthermore, it is unclear from the proposed rule as to whether minors have the same protections under the Privacy Rule to the extent that legal adults would. The Academy encourages the Department to include language in the final rule clarifying the degree of privacy protections for minors.

Impact on Members of Historically Underserved and Minority Communities


We applaud the Department for taking steps to address the complex equity challenges tied to seeking, obtaining, and facilitating reproductive health care. Although this is an area in need of more research,

⁸ HIPAA Privacy Rule To Support Reproductive Health Care Privacy (RIN 0945-AA20). 88 FR 23506 (2023, April 17).

we believe that individuals who are members of historically underserved and minority communities would be more likely to be subjects of investigations into or proceedings against persons in connection with obtaining, providing, or facilitating lawful sexual and reproductive health care, and would be less likely to have access to legal counsel when facing such investigations. It has been noted that Black women disproportionately use abortion services across most of the South,⁹ and approximately 75 percent of abortion procedures nationwide are performed on individuals with incomes below the federal poverty level.¹⁰ Ensuring that these populations have stronger protections for any sexual and reproductive health care received would help address concerns regarding disproportionate impact.

The Academy thanks the Department for the opportunity to provide comments on the proposed HIPAA Privacy Rule to Support Reproductive Health Care Privacy. If we can be of any assistance to you or your staff, please do not hesitate to contact the Academy's Senior Director of Policy, Christine Murphy, at cmurphy@aannet.org or 202-777-1174.

Sincerely,



Kenneth R. White, PhD, AGACNP, ACHPN, FACHE, FAAN
President

⁹ Farmer, B. (2022, June 3). Black women have much at stake in states where abortion access may vanish. *KFF Health News*. <https://kffhealthnews.org/news/article/black-women-abortion-access-south/>

¹⁰ Jerman, J., Jones, R. K., & Onda, T. (2016). *Characteristics of US abortion patients in 2014 and changes since 2008*. Guttmacher Institute. <https://www.guttmacher.org/report/characteristics-us-abortion-patients-2014>