August 18, 2020

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

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

Dear Director Severino:

The American Academy of Nursing (Academy) appreciates the opportunity to submit the following comments in response to the June 19, 2020, final rule (RIN 0945-AA11; 85 Fed. Reg. 119; pp. 37160-37248) “Nondiscrimination in Health and Health Education Programs or Activities.” The Academy is deeply concerned about the significant implications the final rule will have on individuals’ timely access to comprehensive healthcare services without discrimination based on race, color, national origin, gender, gender identity, age, or disability. These regulations will weaken or eliminate protections for our most vulnerable populations. We respectfully request you withdraw this final 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. Its more than 2,700 fellows are nursing’s most accomplished leaders in education, management, practice, research, and policy. They have been recognized for their extraordinary contributions to the promotion of the public’s health through evidence and innovation.

This rule goes against the provisions in the Patient Protection and Affordable Care Act (ACA, Public Law No: 111–148) established to protect against healthcare coverage discrimination. In addition, as written, this rule undermines Congressional intent to expand access to health care and healthcare coverage in the ACA. Section 1557 of the ACA “prohibits discrimination on the grounds of race, color, national origin, sex, age, or disability in certain health programs and activities.” Section 1557 and its implementing regulations protect patients from discrimination based on race, color, national origin, sex, age, and disability, including gender identity and sex stereotyping. The final rule allows discrimination against lesbian, gay, bisexual, transgender and queer or questioning (LGBTQ) people as well as people who have had or will need abortion care and other reproductive health services. Section 1557 is incredibly important for these patients, who are more likely to be subject to discrimination and refused needed health care. The final rule also removes key notice requirements informing people with limited English proficiency (LEP) of their right to language assistance to obtain necessary care and insurance. These protections are vitally needed especially as our country grapples with the coronavirus (COVID-19) pandemic. This rollback will deter these vulnerable populations from receiving the health care they need as the pandemic surges across the country.
Equitable Access to Coverage and Services

Access to Care Based on Sex

As we stated in our comments to the proposed rule last year, the protections offered under Section 1557 are critical for LGBTQ individuals, of which many were subjected to unnecessary barriers to obtaining indispensable healthcare coverage and services. The final rule eliminates the definition of sex discrimination from the Section 1557 regulation, which only invites 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 the well-being of transgender patients. Eliminating sex as a protected class from the Section 1557 regulation would put millions of people at significant risk of mistreatment. Moreover, this final rule is contrary to many state efforts to protect access to care for LGBTQ individuals as state Medicaid programs across the country have committed to ensuring protections for LGBTQ and other vulnerable patient populations. Eliminating the definition of sex discrimination from Section 1557 violates the very intent of this provision within the ACA.

Eliminating this definition of sex discrimination is traumatizing for a population that historically has been stigmatized and discriminated against because of their sexual orientation, gender identity, and gender expression. The Academy has long supported policies and proposals aimed at eradicating this type of discrimination, which can have a detrimental psychological and mental health impact on the individuals affected. We strongly argue that the definition of sex discrimination offered under Section 1557 must remain in order to continue to protect individuals from sex-based discrimination. Doing so will protect one’s sexual orientation and gender identity and will have a profoundly positive impact on the health and well-being of this population as the ACA intended under Section 1557. The Academy urges you to abandon this final rule in order to ensure the LGBTQ population continues to have access to the healthcare they need and deserve.

Safe Reproductive Care

The Academy is concerned the final rule discriminates against people who have had or need access to reproductive health services. The American Academy of Nursing is on record supporting evidence-based policies that ensure all people have full access to affordable, sexual and reproductive health services; facilitate 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 evidence-based policies and standards of care.

Eliminating the 2016 Rule’s language that encompassed termination of pregnancy within the definition of “on the basis of sex” sets a dangerous precedent for women seeking access to safe reproductive care. The ACA (and implementing regulations) require all new insurance plans to cover “[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity” without cost-sharing requirements in order to protect women’s health, ensure that women do not pay more for insurance coverage than men, and advance women’s equality and well-being. Eliminating this language could severely compromise access to a variety of women’s healthcare services before, during, and post pregnancy. The Academy strongly recommends you abandon the final rule so that women continue to have access to all facets of safe reproductive care as intended under the ACA.
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. Adults and children with LEP are more likely to be uninsured than those who are proficient in English. Research suggests that language barriers encountered in healthcare settings may compromise the quality of care for LEP patients. This impacts various areas of care including decreased access to primary and preventive care, lower or impaired comprehension, decreased adherence to care instructions, and lower patient satisfaction. This final rule rolls back requirements that the vast majority of healthcare providers post information in 15 languages and make translation services readily available. The Academy remains concerned this rollback will disproportionately affect vulnerable communities with LEP.

This is especially concerning during a pandemic where information related to health care and insurance needs to be available in culturally appropriate language. While we appreciate $2.9 billion over five years has been identified as cost savings, this does not take into account the increase in costs that would ensue by delay of care, inefficiencies in care delivery, and the exceptional risk of costly errors. These provisions are not duplicative as these protections are needed now more than ever due to the COVID-19 pandemic. People with LEP will face significant additional challenges in gaining access to culturally and linguistically appropriate care, including information about accessing services and health insurance. Eliminating language access plans and other critical protections for LEP individuals seeking care without providing other workable solutions, 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 vulnerable or linguistically isolated communities, thus leading to less preventive primary care and greater costs in treating more serious health problems, such as COVID-19, that could have been avoided.

As the Administration is implementing and encouraging the use of telehealth in the healthcare system during the COVID-19 pandemic, we continue to urge the use of video communication between interpreters, patients, and healthcare providers be permanently approved and implemented. As we have stated in our August 2019 comments, we also continue to support the importance of the reference to a language access plan as critical motivation for healthcare 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 making the most informed medical decisions and receiving the best care possible.

The Academy is grateful for the opportunity to express its serious concerns about the final rule, which weakens or eliminates critically important protections for some of our most vulnerable populations. We strongly urge you to withdraw the final rule in its entirety and encourage you to work with us and others in the healthcare community to improve access to timely and equitable care for our nation’s patients. The Academy is eager to work with you toward that goal. If you have any questions or need additional information, please feel free to contact the Academy’s Senior Director of Policy, Christine Murphy, at cmurphy@aannet.org or 202-777-1174.

Sincerely,

Eileen Sullivan-Marx, PhD, RN, FAAN
President


American Academy of Nursing Letter to the Administration Regarding Nondiscrimination in Health and Health Education Programs or Activities, 2019