August 13, 2019

Submitted Electronically

Secretary Alex M. Azar II
U.S. Department of Health and Human Services
Office for Civil Rights
Attn: Section 1557 NPRM, RIN 0945-AA11
Hubert H. Humphrey Building, Room 509F
200 Independence Ave. SW
Washington, DC 20201

Re: Proposed Rule, Nondiscrimination in Health and Health Education Programs or Activities, RIN 0945-AA11

Dear Secretary Azar:

On behalf of Americans United for Life, I write in strong support of the proposed rule revising Section 1557 of the Patient Protection and Affordable Care Act (PPACA)[1] to better comply with Congressional mandates, reduce confusion, and clarify the scope of Section 1557 in keeping with pre-existing civils rights statutes and nondiscrimination regulations. Specifically, I write in support of the clarification that sex discrimination does not include "termination of pregnancy," the explicit inclusion of Title IX's abortion exemption, and the identification and incorporation of federal religious freedom, conscience, and nondiscrimination laws.

Americans United for Life (AUL) is the first and most active pro-life nonprofit legal advocacy organization in the country. Founded in 1971, before the Supreme Court's decision in *Roe v. Wade*,[2] AUL has dedicated nearly 50 years to advocating for comprehensive legal protections for human life from conception to natural death and for conscience rights of healthcare professionals. To this end, AUL has created model bills protecting rights of conscience in healthcare,[3] supported legislation to comprehensively prohibit both funding and insurance coverage for abortion through

[1] Pub. L. 111-148, 124 Stat. 119.
[2] 410 U.S. 113 (1973).
[3] AUL's model legislation in available on its website here: https://aul.org/what-we-do/legislation/.

the PPACA,[4] and successfully defended the Hyde Amendment—which ensures that federal and state governments do not have to fund elective abortion—before the U.S. Supreme Court in *Harris v. McRae*.[5]

I have thoroughly reviewed the proposed rule as it relates to abortion and conscience protections, and it is my legal opinion that the proposed regulations are legal and sound public policy.

Discrimination "on the basis of sex" under Section 1557 should not include "termination of pregnancy."

Under Section 1557, Congress prohibits discrimination by referencing four existing federal civil rights laws, including Title IX of the Education Amendments of 1972.[6] Title IX prohibits discrimination "on the basis of sex."[7] At the time Title IX was passed, the plain and ordinary meaning of "sex" meant biological sex.[8] Title IX also contains a "religious exemption" and an "abortion exemption," which state, respectively, that Title IX does not apply to a covered entity controlled by a religious organization if its application would be inconsistent with the religious tenets of the organization,[9] and it cannot be "construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion."[10] Thus, to the extent Section 1557 incorporates Title IX's grounds for discrimination, it must be constrained by the statutory contours of Title IX, including its religious and abortion exemptions.

In addition to Section 1557, Section 1303 of the PPACA states that nothing in the Act shall be construed to require qualified health plans to cover abortion services as an essential health benefit.[11] Section 1303 further states that the Act shall have no effect on federal laws regarding abortion, specifically federal laws regarding "(i) conscience protection; (ii) willingness or refusal to provide abortion; and (iii) discrimination on the basis of the willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion."[12]

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[4] *See, e.g.*, Memorandum from Ams. United for Life on the Protect Life Act & Its Application to the Affordable Care Act (June 25, 2012).
[5] 448 U.S. 297 (1980).
[6] 42 U.S.C. § 18116(a).
[7] 20 U.S.C. § 1681(a).
[8] *See Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660, 687 (N.D. Tex. 2016) ("[T]he meaning of sex in Title IX unambiguously refers to 'the biological and anatomical differences between male and female students as determined at their birth.'"); *see also id.* ("It is also clear from Title IX's text, structure, and purpose that Congress intended to prohibit sex discrimination on the basis of the biological differences between males and females.").
[9] 20 U.S.C. § 1681(a)(3).
[10] 20 U.S.C. § 1688.
[11] 42 U.S.C.S. § 18023(b)(1)(A)(i) (special rules relating to coverage of abortion services).
[12] 42 U.S.C.S. § 18023(c)(2)(A) (application of state and federal laws regarding abortion).

In blatant disregard of the statutory mandates of Congress, the Department of Health and Humans Services (HHS) under the Obama Administration issued Section 1557 regulations in 2016 redefining discrimination "[o]n the basis of sex" to include "termination of pregnancy" (and "gender identity").[13] These regulations also failed to incorporate Title IX's religious and abortion exemptions, despite incorporating exemptions from the other three federal civil rights laws referenced in Section 1557.[14]

The 2016 regulation's expansive redefinition of "sex" to include "termination of pregnancy," coupled with the absence of Title IX's religious and abortion exemptions, resulted in sex discrimination under Section 1557 being interpreted to possibly cover refusal to provide abortion-related services and health insurance coverage of abortion-related services. This in turn put substantial pressure on covered entities to provide or insure abortion-related services, despite any religious or conscience objections an entity might have.[15]

As such, it is unsurprising that when challenged, the 2016 regulation's redefinition of "sex" was preliminarily enjoined nationwide by a federal district court.[16] As the court explained, "Congress clearly addressed the question at issue by incorporating Title IX's existing legal structure, and HHS had no authority to interpret such a significant policy decision—the scope of sex discrimination under Title IX."[17] This proposed rule is necessary to ensure that the definition of "sex" discrimination under Section 1557 is supported by the text, complies with the mandates of Congress, and adequately addresses the legal concerns raised by the courts.

HHS should adopt proposed Section 86.18.

In response to HHS's specific request for comment,[18] AUL supports the addition of Section 86.18. First, Section 86.18 will codify the abortion exemption to Title IX in the Section 1557 regulations. As mentioned above, since the PPACA incorporated Title IX, it is necessarily constrained by the contours of Title IX, including its exemptions. As such, it is appropriate to use the identical language of

[13] 45 C.F.R. § 92.4.
[14] 45 C.F.R. § 92.101(c).
[15] *See Franciscan Alliance*, 227 F. Supp. 3d at 692 ("The Rule therefore places substantial pressure on Plaintiffs to perform and cover . . . abortion procedures.").
[16] *Id.* at 695. Two other challenges to the 2016 regulations were brought, the cases were consolidated, and based on the *Franciscan Alliance* order, the district court judge stayed enforcement of the 2016 regulation's prohibitions against discrimination on the basis of termination of pregnancy against the named plaintiffs. *See* Order, *Religious Sisters of Mercy v. Burwell*, Nos. 16-386 & 16-432 (D.N.D. Jan. 23, 2017) (staying enforcement of 2016 regulations in both cases).
[17] *Franciscan Alliance*, 227 F. Supp. 3d at 687.
[18] 84 Fed. Reg. 27870.

the abortion exemption in Title IX, subject (of course) to necessary changes reflecting the difference between the statue and the implementing regulations.

AUL recommends that HHS also either codify the specific language of Title IX's religious exemption as well or mirror the language used for exemptions from the other federal civil rights laws and state that "the exemptions applicable to Title IX apply to discrimination on the basis of sex under this part."[19] This language will result in a stronger connection to what Congress mandates and what the text of Section 1557 requires, instead of merely saying that "[t]his part shall be construed consistently with, as applicable, . . . Title IX's religious exemptions."[20]

Second, proposed Section 86.18 will incorporate other relevant laws that may impact the application of the Title IX abortion exemption, including Section 1303 of the PPACA; the Church, Coats-Snowe, Weldon, Hyde, and Helms Amendments; the Religious Freedom Restoration Act; and the First Amendment to U.S. Constitution.[21] HHS is correct that all of these statutes establish congressionally required parameters that, when applicable, should constrain HHS's interpretation, implementation, and enforcement of Title IX and by incorporation Section 1557.[22] AUL supports adding explicit regulatory language ensuring that Section 1557 shall be enforced consisted with the federal conscience protection laws.

HHS should adopt proposed Section 92.6.

The 2016 regulation states that "[i]nsofar as the application of any requirement under this part would violate applicable Federal statutory protections for religious freedom and conscience, such application shall not be required."[23] This weak statement does not provide notice as to what protections actually apply, and as a result, pressures entities to perform or insure abortion related services for fear of potentially violating Section 1557's nondiscrimination requirements.

Proposed Section 92.6 would amend and replace the above statement, and help fill this gap by explaining that any application of the Act that would "violate, depart from, or contradict definitions, exemptions, affirmative rights, or protections provided by any [federal conscience laws or regulations] . . . shall not be imposed or required."[24] In addition, the section would explicitly identify and incorporate protections from specific religious freedom, conscience, and nondiscrimination laws, such as those mentioned above. The explicit identification and incorporation of these laws will help

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[19] *See* 45 C.F.R. 92.101(c).
[20] 84 Fed. Reg. 27890.
[21] *Id*.
[22] Since the district court in *Franciscan Alliance* only dealt with the laws relevant in that case, it is proper for HHS to not limit the list of applicable statutes to only the laws identified by the court.
[23] 45 C.F.R. § 92.2(b)(2).
[24] 84 Fed. Reg. 27864, 27892.

entities know what is required of them and encourage the statutorily-required enforcement of those provisions.

The proposed rule would continue enforcement of federal civil rights laws.

AUL agrees that Section 1557 and the proposed rule does not override any applicable laws protecting conscience or civil rights, or the exemptions thereto, and that it is appropriate, and even advisable, to specify in the proposed rule that HHS will continue to vigorously enforce existing civil rights laws in healthcare and that the proposed rule will not be implemented in violation of any of those laws.[25]

The proposed rule would continue assurance of compliance.

Under the proposed Rule, regulated entities are still required to submit to HHS a binding assurance of compliance with Section 1557. This is necessary to ensure both that regulated entities have knowledge of their obligations under Section 1557 and its regulations, and that they comply with Congress' mandates, including the now explicitly listed federal laws protecting conscience and religious freedom, especially as it relates to abortion services.

In sum, AUL strongly urges HHS to adopt this proposed rule.

Sincerely,

Rachel N. Morrison, Esq.
Litigation Counsel
Americans United for Life

[25] *See, e.g.*, 84 Fed. Reg. 27849, 27874–75, 27886–87.