AMERICAN ATHEISTS

August 13, 2019

Secretary Alex Azar
Department of Health and Human Services
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue SW
Washington, DC 20201

Re: Section 1557 NPRM, Docket ID HHS-OCR-2019-0007, RIN 0945-AA11, "Nondiscrimination in Health and Health Education Programs or Activities"

Dear Secretary Azar:

American Atheists strongly opposes the Affordable Care Act § 1557 proposed rule entitled "Nondiscrimination in Health and Health Education Programs or Activities."[1] This proposed rule creates broad and unjustifiable religious exemptions that encourages hospitals and medical professionals to deny care to some of the most vulnerable patients, such as LGBTQ people and individuals in need of reproductive care. If finalized, this proposed rule would severely threaten patients' access to health care, create confusion among patients about their rights and among providers about their obligations, and promote discrimination. American Atheists urges the Department of Health and Human Services ("the Department") to withdraw the proposed rule in its entirety.

American Atheists is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the "wall of separation" between government and religion created by the First Amendment. We strive to create an environment where atheism and atheists are accepted as members of our nation's communities and where casual bigotry against our community is seen as abhorrent and unacceptable. We promote understanding of atheists through education, outreach, and community-building and work to end the stigma associated with being an atheist in America. As advocates for the health, safety, and well-being of all Americans, American Atheists objects to efforts to subordinate medical care to the religious beliefs of providers and institutions.

[1] Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27846 (proposed June 14, 2019).

American Atheists
225 Cristiani St.
Cranford, NJ 07016

phone 908.276.7300
fax 908.276.7402
www.atheists.org

The proposed rule creates *ex nihilo* a broad religious exemption that promotes discrimination against LGBTQ patients and patients seeking reproductive health care.

The proposed rule attempts, without statutory support, to create a broad religious exemption to § 1557's protections against discrimination on the basis of sex. The Department's attempts to apply the Title IX religious exemption are contrary to the express purpose of § 1557 and violate the plain language of the statute. Adding a religious exemption opens the door for discrimination and emboldens health care providers to deny patients care, threatening the health and well-being of millions of patients. This rule is unnecessary, misapplies the Title IX exemption, and unconstitutionally burdens third parties.

The Department claims that this religious exemption protects medical professionals from being forced to participate in procedures to which they are morally opposed.[2] However, the 2016 implementing rule for § 1557 does not displace any existing federal religious laws, which allow providers to refuse to participate in certain procedures because of their religious beliefs.[3] Although American Atheists opposes many of these provisions when they burden third parties or apply to institutions rather than health care workers, it is inarguable that they already provide protection for health care providers seeking to practice in alignment with their beliefs. Therefore, it makes little sense for the Department to reach into another field of law and apply education-related exemptions out of context.

Nevertheless, the proposed rule incorporates the Title IX religious exemption, intended to be applied narrowly to religiously affiliated educational institutions, and broadly applies it to all entities covered by § 1557. The Title IX regulations were specifically intended and written only for federally funded educational institutions.[4] Moreover, there are already specifically applicable exemptions within the Patient Protection and Affordable Care Act ("ACA") that apply to all covered entities.[5] Having already created one such exemption, it is plainly obvious that Congress could have created other religious exemptions or additional "conscience" protections if it had

[2] We also note that nondiscrimination protections like those established by § 1557 do not prevent the use of professional medical judgment— they simply ensure that patients can access the same standard care provided to other patients, despite who they are and how they identify.

[3] *See, e.g.*, 42 U.S.C. § 300a-7 (1973); 42 U.S.C. § 238n (1996); 42 U.S.C. § 18113; National Research Act of 1974, Pub. L. No. 93-348 (enacted July 12, 1974); Danforth Amendment to the Civil Rights Restoration Act, Pub. L. No. 100-259 (enacted Mar. 22, 1988); Affordable Care Act, Pub. L. No. 111-148 (as amended by Pub. L. No. 111-152 (enacted Mar. 23, 2010); *Burwell v. Hobby Lobby Stores, Inc.*, 134 U.S. 2751 (2014).

[4] 34 C.F.R. § 106.12.

[5] *See, e.g.*, 42 U.S.C. § 18113 (providing protection for health care providers which do not perform "assisted suicide, euthanasia, or mercy killing.").

chosen to do so. By twisting the Title IX exemptions to this new context, the Department inappropriately ignores both rules of statutory construction and Congressional intent.

The Department claims that it is amending the rule to incorporate a Title IX religious exemption to comply with the *Franciscan Alliance* court decision.[6] However, incorporating a religious exemption based on an incongruent ruling by a single district court is illogical and counterproductive. Numerous other courts have examined this and related issues concerning to the applicability of § 1557, and no other court read into the statute a broad religious exemption based on education law.[7] Moreover, the *Franciscan Alliance* court did not fully consider and decide upon this issue, merely finding that "there was a likelihood that plaintiffs would prevail on the claim that '[t]he Rule's failure to include Title IX's religious exemptions renders the Rule contrary to the law.'"[8] Under these circumstances, the Department had the responsibility to appeal the outlying *Franciscan Alliance* court decision, but it instead chose to read that court's plainly ideological and legally farcical interpretation into the statute. By doing so, the Department needlessly risks liability for health care providers by providing guidance that is clearly at odds with prevailing legal interpretation.

The religious exemptions in the proposed rule are also vague and ambiguous. The Supreme Court has made clear that the Religious Freedom Restoration Act, like the other listed provisions do not allow for discrimination,[9] so their inclusion in proposed rule is unclear and confusing. Moreover, while the proposed rule incorporates by reference the Title IX religious exemption, the rule provides no clarity as to how the Title IX's religious exemption applies to the context of health care.[10] For example, does this exemption apply only to health care offered by educational institutions controlled by religious organizations to the extent that prohibiting discrimination would not be consistent with their religious tenets, or does the Department mean to apply this more broadly? The proposed rule also fails to provide a clear process by which providers to which this provision applies may provide notice to patients and claim this exemption.

---

[6] *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660, 670-71 (2016).

[7] *See, e.g., Rumble v. Fairview Health Servs.*, No. 14–cv–2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015) ; *Flack v. Wis. Dep't of Health Servs.*, No. 3:18-cv-00309-wmc (W.D. Wis. July 25, 2018); *Cruz v. Zucker*, 195 F.Supp.3d 554 (S.D.N.Y. 2016); *Boyden v. Conlin*, No. 17-cv-264-WMC, 2018 (W.D. Wis. September 18, 2018); *California v. Health and Human Services*, 351 F. Supp. 3d 1267 (N.D. Cal. Jan. 13, 2019).

[8] Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27846 (proposed June 14, 2019) (quoting *Franciscan Alliance, Inc.*, 227 F. Supp. 3d at 670-71).

[9] *Burwell v. Hobby Lobby*, 573 U.S. __ (2014) ("The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction…. Our decision today provides no such shield.").

[10] "This section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization." 20 U.S.C. § 1681(a)(3); *see also* 34 C.F.R. § 106.12(a).

Unfortunately, this vague and ambiguous provision, clearly intended to provide the Department with broad and unhindered discretion in these matters, will result in result in a flood of litigation as the courts seek to define the applicability and breadth of this new, extra-statutory exemption.

Finally, the proposed rule completely fails to meet HHS's mandate under the Establishment Clause of the First Amendment to consider the impact that any accommodation or exemption for religious health care providers would have on third parties. Specifically, the Constitution bars the federal government from crafting "affirmative" accommodations within its programs if the accommodations would harm any program beneficiaries.[11] The Constitution commands that "an accommodation must be measured so that it does not override other significant interests;"[12] "impose unjustified burdens on other[s];"[13] or have a "detrimental effect on any third party."[14] Therefore, any regulations established by HHS to accommodate religion must do so without substantially burdening third parties or beneficiaries.

However, the proposed rule significantly burdens third parties and beneficiaries by allowing them to face discrimination based on the religious intolerance of providers. This will have a significant negative impact on millions of Americans, particularly on LGBTQ people and women. Through this broad religious exemption, in defiance of constitutional requirements, the Department would expressly allow discrimination based on sex by religious providers, regardless of the impact this discrimination will inevitably have upon patients.

The Department presents insufficient justification for the new proposed rule.

The 2016 final rule should stand. It is the product of a lengthy process of deliberation and public input. It was developed over the course of six years of study and following two comment periods, with over 25,000 comments from stakeholders, which were overwhelmingly supportive of inclusion of protections against discrimination based on sex stereotyping and gender identity. HHS engaged stakeholders through listening sessions, participation in conferences, and other outreach prior to taking regulatory action. Furthermore, the 2016 implementing rule successfully

[11] U.S. Const. amend. I; *Cutter v. Wilkinson*. 554 U.S. 709, 720, 722 (2005) (to comply with the Establishment Clause, courts "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries" and must ensure that the accommodation is "measured so that it does not override other significant interests") (citing *Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985)); *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014); *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring).
[12] *Cutter v. Wilkinson*, 544 U.S. at 722.
[13] *Id.* at 726.
[14] *Id*. at 720, 722; *See also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2781; *Estate of Thornton v. Caldor*, 472 U.S. at 710 ("unyielding weighting" of religious exercise "over all other interests…contravenes a fundamental principle" by having "a primary effect that impermissibly advances a particular religious practice."); *Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989) (religious accommodations may not impose "substantial burdens on nonbeneficiaries").

provided many patients with meaningful health care options where they previously had few or none at all, helped address the pervasive discrimination vulnerable people often face in health care and coverage, and made it possible for many individuals to access essential care.

In order to move forward with a new proposed rule, the Department must have sufficient justification for the rule change. The Supreme Court has said that "the agency must show that there are good reasons for the new policy" and that the new policy must be "permissible under the statute."[15] However, the Department present no valid justification for the new policy defined by the proposed rule. While the Department claims the proposed rule is "cost-effective," it does not demonstrate a significant cost savings and, in fact, the proposed rule merely shifts the burden of ensuring equal access to health care from providers to vulnerable patients.

The Department cannot merely refuse to fulfill its role in investigating complaints, refuse to educate patients about their rights under the law, and then justify its refusal to enforce the law as a cost savings. Congress passed § 1557 in order to ensure equal access to health care programs receiving federal funding and then charged the Department with enforcing this section. Congress did not tell the Department to enforce the law 'unless the Department decides it would be cheaper not to do so.' The Department subverts the purpose of the statute when it fails to educate vulnerable patients or when it precludes disparate impact and intersectional claims in order to avoid spending money.

The proposed rule also purports to save money by decreasing litigation. However, the current rule does not actually over-burden HHS or health care providers with expensive litigation because complaints are generally resolved through discussions and settlement outside of the courtroom.[16] Under the current rule, HHS has not threatened to sue or withhold federal funding in any single discrimination case. Instead, the Department helped health care providers and institutions with cultural competency training and making relevant policy changes to meet compliance.

---

[15] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *see also* Todd Garvey, Cong. Research Serv., R41546, A Brief Overview of Rulemaking and Judicial Review 16 (2017).

[16] This is true for every single case involving misgendering and for nearly all cases involving transition-related care. *See* Sharita Gruberg and Frank J. Bewkes, *The ACA's LGBTQ Nondiscrimination Regulations Prove Crucial*, Center for American Progress (March 7, 2018), https://www.americanprogress.org/issues/lgbt/reports/2018/03/07/447414/acas-lgbtq-nondiscrimination-regulations-prove-crucial/.

Conclusion

American Atheists strongly objects to efforts to the proposed rule, and we urge the Department to withdraw it in its entirety. This proposed rule will create broad and unjustifiable religious exemptions for the purpose of allowing discrimination, and it will harm access to health care for millions of Americans. If you should have any questions regarding American Atheists' opposition to the proposed rule, please contact me at 908.276.7300 x309 or by email at agill@atheists.org.

Sincerely,

Alison Gill, Esq.
Vice President, Legal and Policy
American Atheists