

September 29, 2022

The Honorable Xavier Becerra  
U.S. Department of Health and Human Services  
Office of Civil Rights  
Hubert H. Humphrey Building, Room 509 F  
200 Independence Avenue SW  
Washington, DC 20201

***Submitted electronically***

Re: Nondiscrimination in Health Programs and Activities (RIN Number 0945-AA17)

Dear Secretary Becerra:

The Endocrine Society appreciates the opportunity to comment on the Department of Health and Human Services' (HHS) proposed rule implementing Section 1557 of the Affordable Care Act (ACA). The Endocrine Society is the world's oldest and largest organization of scientists devoted to hormone research and physicians who care for people with hormone-related conditions. Many of our 18,000 members are recognized for their expertise in transgender research and medicine, and we advocate to improve and protect access to care for transgender patients. **As such, we are pleased that this proposed rule reverses the Section 1557 regulations implemented in 2020, which will clarify the protections for transgender patients and increase their access to the full spectrum of medical care, including gender affirming care, without fear of discrimination.**

Compared to the general population, transgender individuals are at a greater risk for physical and mental health problems. They also face numerous barriers to improving their health and well-being. It is challenging to find an appropriately trained healthcare professional because many U.S. clinicians are not formally taught how to care for transgender patients. Additionally, medical treatment for gender dysphoria/ gender incongruence is often considered elective by insurance companies, which leave transgender individuals without coverage for physician-prescribed treatment. Finally, many transgender individuals cannot access standard preventive services related to their sex assigned at birth (i.e., prostate cancer screening for a transgender woman) due to insurance coverage limits. In our position statement on transgender health, we make policy recommendations that would address these issues and improve transgender individuals' access to care. Our comments below focus on provisions in the proposed rule that we believe align with our position statement and will improve health outcomes for the transgender population, and we urge that these provisions be finalized as proposed.

**Impact on Access to Care**

If finalized, the proposed rule will codify protections against discrimination on the basis of sex to include discrimination on the basis of sexual orientation and gender identity. The rule specifies that covered entities could not:

- Deny or limit health services based on individual's sex assigned at birth, gender identity, or gender otherwise recorded;



- Deny or limit a health care professional's ability to provide health services on the basis of a patient's sex assigned at birth, gender identity, or gender otherwise recorded;
- Apply a policy or practice that treats individuals differently or separates them on the basis of sex in a manner that subjects them to more than *de minimis* harm; and
- Deny or limit access to gender transition or gender affirming care that it would otherwise provide to someone else based on the sex assigned at birth, gender identity, or gender otherwise recorded.

The Endocrine Society supports this expansion of Section 1557 nondiscrimination protections, which restores the protections based on sexual orientation and gender identity and specifically protects gender transition and gender affirming care. We applaud HHS for articulating a clear and expansive explanation of discrimination on the basis of sex; however, we suggest that the language throughout the rule be amended to explicitly include transgender status. While the terms “gender identity” and “transgender status” are often used interchangeably, there have been instances in which those seeking to permit discrimination against transgender people have justified it by pressing distinctions between the two concepts.<sup>1</sup> It is therefore preferable to specify both in the regulatory text. We believe that clarifying and codifying protections for transgender individuals will make it easier for them to access the appropriate treatment and care needed to ensure their health and well-being. Additionally, we support the changes that ensure that providers inquiries about a patient's medical history, health status, or physical traits when providing care be limited to their relationship to the underlying condition and not asked in a manner that is hostile or disregards patient privacy.

Discrimination is one of the largest barriers that transgender individuals face when accessing health care. Studies indicate that 70% of transgender individuals have experienced maltreatment by medical providers, including harassment and violence,<sup>2</sup> and 28% of transgender individuals have postponed necessary medical care when sick or injured due to previous discrimination by healthcare providers.<sup>3</sup> The lack of competence among providers makes it harder for transgender individuals to access quality care, which contributes to poorer health outcomes among this population. Nondiscrimination protections for transgender individuals will ensure that they can seek medical care without fear of harassment, as well as report when they have been a victim of discrimination.

#### Impact on Insurance Coverage and Benefit Design

Under the proposed rule, the definition of a covered entity will expand to include every health program or activity that receives federal financial assistance and all health programs within HHS (including the Indian Health Service, Centers for Medicare & Medicaid Services, and the National Institutes of Health). Consequently, all health plans offered by an insurer that participates in the Marketplace will be subject to Section 1557. Additionally, all providers who participate in Medicare and Medicaid, which would meet the federal financial assistance requirement, will be subject to these provisions if finalized. The

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<sup>1</sup> “Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs,” Proposed Rule, 85 Fed Reg 44811 (July 24, 2020).

<sup>2</sup> Davidge-Pitts, C., et al. Transgender Health in Endocrinology: Current Status of Endocrinology Fellowship Program and Practicing Clinicians. *J Clin Endocrinol Metab.* (2017) 102(4):1286-1290.

<sup>3</sup> Grant, Jaime M., Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, and Mara Keisling. *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey.* Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011.



Endocrine Society supports expanding the definition of covered entity and believes that the provisions in Section 1557 will have the most impact when applied to the broadest range of federal health programs and activities possible.

If finalized, the proposed rule will prohibit discrimination in insurance issuance, coverage, cost-sharing, marketing and benefit design. This provision will ensure that transgender individuals can access preventive services and medical care that aligns with their gender identity and their sex assigned at birth. It is well known that preventive medical care reduces risk for diseases, disabilities, and death. In vulnerable communities, access to preventive services can help reduce health disparities. As previously mentioned, transgender individuals are at higher risk for numerous health problems, and we believe that improving their access to the full spectrum of preventive care will improve their health outcomes. Additionally, the proposed rule will prohibit covered entities from having or implementing a categorial coverage exclusion or limitation for all health services related to gender-affirming care. Currently, treatment for gender dysphoria/gender incongruence is often considered elective by insurance companies and many plans will not cover it. We support this provision because gender affirming care is both medically necessary and lifesaving.<sup>4</sup> Transgender individuals who have been denied care have an increased likelihood of dying by suicide and engaging in self-harm.<sup>5</sup> Prohibiting insurers from categorically excluding gender affirming care will improve mental health outcomes in transgender individuals.

#### Omission of Title IX's Religious Exemption

In this proposed rule, HHS reverses the 2020 regulation by omitting the Title IX's religious exemption. The Endocrine Society applauds HHS for omitting this exemption, which is harmful and has no place in a health care nondiscrimination rule. Including the Title IX religious exemption would exceed HHS's authority, as the ACA referenced Title IX only to identify the ground of discrimination it addresses (on the basis of sex) and its enforcement mechanisms, not to incorporate Title IX more broadly. Title IX's extremely broad religious exemption would allow health care providers to deny essential health care services based on disapproval of a particular group or for other non-medical reasons. This provision is particularly pernicious when applied to transgender individuals and puts their health and wellbeing at risk. Particularly for urgent or emergent care, a patient often has no ability to choose a particular provider in order to avoid a provider or institution that withholds care based on religious doctrine, even if the patient is aware of such restrictions, which is not typically the case. Moreover, there are already numerous federal laws that allow health care providers to invoke a conscience objection to providing certain kinds of care, making an additional religious exemption unnecessary. The case-by-case approach proposed in this rule is far preferable to the sweeping Title IX exemption, which does not allow the Department to consider the potential harm of granting an exemption.

The American health care system has not met the health needs of transgender individuals; however, the proposed rule has robust provisions that will improve and protect their access to care. The Endocrine Society supports implementing nondiscrimination protections based on sexual orientation and gender

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<sup>4</sup> Endocrine Society. Transgender Health. September 2017 <https://www.endocrine.org/advocacy/priorities-andpositions/transgender-health>

<sup>5</sup> Davidge-Pitts C, Nippoldt TB, Danoff A, Radziejewski L, Natt N. Transgender Health in Endocrinology: Current Status of Endocrinology Fellowship Programs and Practicing Clinicians. *J Clin Endocrinol Metab.* Apr 1 2017;102(4):1286-1290. doi:10.1210/jc.2016-3007



identity, broadening the definition of a covered entity, and prohibiting discrimination in insurance issuance, coverage, cost-sharing, marketing and benefit design. Ultimately, we believe this rule will decrease health disparities in and improve health outcomes for transgender individuals.

Thank you for considering our comments. If we can be of further assistance, please contact Judith Gertzog, Manager, Health Policy and Advocacy at [jgertzog@endocrine.org](mailto:jgertzog@endocrine.org).

Sincerely,

A handwritten signature in black ink that reads "Ursula Kaiser".

Ursula Kaiser, MD  
President  
Endocrine Society