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October 3, 2022

Melanie Fontes Rainer
Acting Director
Office for Civil Rights
Department of Health and Human Services
200 Independence Avenue, SW
Room 509F, HHH Building
Washington, D.C. 20201

Submitted via federalregister.gov

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

Dear Director Fontes Rainer:

First Focus on Children appreciates the opportunity to comment on the Department of Health and Human Services' Office for Civil Rights (OCR) proposed rule, Nondiscrimination in Health Programs and Activities (hereinafter "2022 Proposed Rule").

First Focus on Children is a bipartisan advocacy organization that is dedicated to making children and families a priority in federal policy. As an organization that works to ensure children get access to health care they are legally entitled to, we strongly support the 2022 Proposed Rule which strengthens civil rights protections for federal health programs, especially for individuals who are limited English proficient (LEP), LGBTQ, people with disabilities and chronic conditions, and people, including adolescents, who need reproductive health services. Such protections will ensure even more children and their families receive care.

Section 1557 prohibits discrimination on the basis of race, color, national origin, sex, age, and disability. We strongly support the proposed rule provisions which seeks to restore regulations recognizing Section 1557's applicability to federal health programs like Medicaid and Medicare, the ACA's state and federal Marketplaces and the plans sold through them, as well as other commercial health plans if the insurer receives any form of federal financial assistance. The rule further clarifies that § 1557 applies to short term, limited duration plans and expected benefits if the issuer receives federal financial assistance.

Protections for Limited English Proficiency Individuals

We strongly support the provisions related to language access for individuals with limited English proficiency (LEP). Language access is essential to ensuring effective communication between individuals and the health care system, without which children with parents and/or relatives with LEP may not enroll in programs for which they or their children are eligible for, may not receive timely or comprehensive healthcare, and may not know their rights to free, timely and competent language services.

When parents and/or relatives have limited English proficiency, children oftentimes are asked to interpret medical information for which they do not have the vocabulary or content knowledge.¹ Therefore, we strongly support the provisions of this rule related to meaningful access for LEP individuals, specifically the clarification in the 2022 Proposed Rule related to the restricted use of certain persons to interpret or facilitate communication. The prior regulations recognized that an LEP individual cannot be required to provide their own interpreter, and that a minor can only be used to interpret in an emergency and that an adult accompanying an adult should not act as an interpreter without the person's consent or in an emergency. The 2022 Proposed Rule adds an expectation that in an emergency situation, the reliance of an accompanying adult or minor should be "a temporary measure". We support this addition.

We recommend that OCR add a requirement that a "companion" of an LEP individual who needs language services must also be provided meaningful access including access to qualified interpreters and translated materials. The 2022 Proposed Rule requires covered entities to take appropriate steps to ensure effective communication for companions of individuals with disabilities. We believe the same should be afforded to LEP individuals, particularly LEP parents/guardians of English-speaking minors/incapacitated adults and also family members, friends or associates of LEP individuals who are appropriate persons with whom a covered entity should communicate. This could include individuals who participate in decision-making with the LEP individual or need to understand the information for caregiving and other related reasons.

Discrimination on the basis of national origin, which encompasses discrimination on the basis of language, creates unequal access to health care, health outcomes, life, liberty, and the pursuit of happiness. Language access in health care is just as critical now as when the Civil Rights Act was originally passed in 1964. Over twenty-five million individuals in the United States are LEP.² An estimated 19 million LEP adults are insured.³ Language assistance is necessary for LEP persons, including children and their parents, to access federally funded programs and activities in the healthcare system. Therefore, we strongly support the 2022 Proposed Rule provisions that strengthen language access for LEP individuals and their families.

LGBTQ Protections

According to the National Institutes of Health, LGBTQ youth are at a higher risk for substance use, sexually transmitted diseases (STDs), cancers, cardiovascular diseases, obesity, bullying, isolation, rejection, anxiety, depression, and suicide.⁴ Unfortunately, many LGBTQ individuals and children of LGBTQ parents have long faced pervasive and well-documented discrimination in health care and coverage.⁵

For trans youth, being limited or denied access to transgender health care can have dire results. According to a recent study published by the American Academy of Pediatrics, more than 50 percent of transgender male adolescents have attempted suicide. Similarly, 41.8 percent of adolescents who do not identify as exclusively male or female have attempted suicide, followed by nearly 30 percent of transgender female adolescents.⁶ This is a population that needs health care and civil rights protections, and we strongly support the

¹ Jauregui, Anthony. "Kids Interpreting Medical Information to Parents," NPR, 19 May 2019. <https://www.npr.org/templates/story/story.php?storyId=5418069>

² Asian & Pacific Islander American Health Forum Analysis of 2017 American Community Survey Data.

³ Asian & Pacific Islander American Health Forum Analysis of 2017 American Community Survey Public Use Microdata Sample Files.

⁴ Hafeez, Hudaisa, Zeshan, Muhammad, Tahir, Muhammad A, Jahan, Nusrat, and Naveed, Sadiq. "Health Care Disparities Among Lesbian, Gay, Bisexual, and Transgender Youth: A Literature Review," U.S. National Library of Medicine; National Institutes of Health. 20 April 2017. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5478215/>

⁵ National Academies of Sciences, Engineering, and Medicine. 2020. Understanding the Well-Being of LGBTQI+ Populations. Washington, DC: The National Academies Press. <https://doi.org/10.17226/25877>.

⁶ Toomey, Syvertsen, and Shramko. "Transgender Adolescent Suicide Behavior," U.S. National Library of Medicine; National Institute of Health, 14 October 2018. <https://www.ncbi.nlm.nih.gov/pubmed/30206149>

restoration of 1557's application to all health programs or activities receiving federal funding through or administered by HHS or a Title I entity.

We strongly support the inclusion of Section 92.206, Equal Program Access of the Basis of Sex. This section will help to address the myriad forms of harmful discrimination and it importantly clarifies that while providers may exercise clinical judgment when determining if a particular service is appropriate for an individual patient, they may not refuse gender-affirming care based on a personal belief that such care is never clinically appropriate. We suggest strengthening the language pertaining to providers complying with a state or local law as a justification for denying gender-affirming care to state unequivocally that section 1557, as federal law, preempts any such state or local law restricting access to this care.

We also suggest that the language in section 92.101(a)(2) 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.⁷ It is therefore preferable to enumerate both in the regulatory text.

We are also pleased that this NPRM restores explicit protections against discrimination on the basis of association. This is consistent with longstanding interpretations of other antidiscrimination laws, which cover discrimination based on an individual's own characteristics or those of someone with whom they are associated or with whom they have relationship, such as a child with LGBTQ parents. As noted in the NPRM preamble, certain protected populations, including LGBTQ people, are particularly susceptible to discrimination based on association. A child with LGBTQ parents or guardians could be subjected to discrimination based on their parent/guardian's sexual orientation or gender identity, whereas that child might not be similarly mistreated if they did not have LGBTQ parents/guardians. It is important that the final rule make clear that this kind of associational discrimination is within the ambit of the rule's protections.

Reproductive Health Services

Original regulations made clear that sex discrimination under Section 1557 includes discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related conditions.⁸ Preventing health care entities that receive federal funding from refusing care to patients, including adolescents, who have had a pregnancy termination or accessed other comprehensive reproductive health care services will improve access to care, thus First Focus on Children strongly supports this proposed rule.

Abortion is a critical part of the spectrum of reproductive health care. In the fallout of the Dobbs decision, individuals, especially people of color, people with low incomes, immigrants, adolescents, young victims of sexual assault, people with disabilities, and LGBTQI+ individuals are facing numerous logistical and legal barriers to accessing care with an increased threat of arrest and prosecution as states seek to criminalize abortion care. In the wake of Dobbs, it is critical that abortion care is clearly and consistently included with “pregnancy or related conditions” throughout the final rule.

Thus, we encourage HHS to strengthen its approach to defining sex discrimination related to pregnancy or related conditions at § 92.101(a)(2) and throughout the regulatory text. In the preamble, HHS notes that although it does not propose restoring the 2016 language that the 2020 rule eliminated, the protections still

⁷ See, e.g., “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).

⁸ 45 CFR §92.4

apply because of the underlying Title IX regulations. We agree that the Title IX definition applies but given the pervasive nature of discrimination related to termination of pregnancy, particularly post-Dobbs, we urge HHS to specifically include termination of pregnancy in this definition. Additionally, HHS does not define sex discrimination consistently in the proposed rule: it notes that sex discrimination includes “pregnancy or related conditions” at § 92.101(a)(2), but only “pregnancy” under § 92.101 and § 92.10. We urge HHS to be consistent throughout the final rule.

Conclusion

We commend HHS for taking the important step of undoing the harmful 2020 Final Regulations and strengthening the nondiscrimination provisions of the ACA to ensure health equity for children.

Thank you for the opportunity to submit comments on the proposed rule, and please contact Olivia Gomez (oliviag@firstfocus.org) with any questions.

Respectfully submitted,

A handwritten signature in blue ink that reads "Bruce Lesley". The signature is written in a cursive, slightly slanted style.

Bruce Lesley
President, First Focus on Children