



**Association of
American Medical Colleges**
655 K Street, N.W., Suite 100, Washington, D.C. 20001-2399
T 202 828 0400
www.aamc.org

Submitted via www.regulations.gov

October 3, 2022

Melanie Fontes Rainer
Director
Office for Civil Rights
U.S. Department of Health and Human Services
Attention: 1157 NPRM (RIN 0945-AA17)
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue SW
Washington, DC 20201

RE: Nondiscrimination in Health Programs and Activities [RIN 0945-AA17]

Dear Director Fontes Rainer:

The Association of American Medical Colleges (AAMC) appreciates the opportunity to respond to the Department of Health and Human Services (HHS or the Department) Office for Civil Rights (OCR) Request for Information entitled “Nondiscrimination in Health Programs and Activities,” 87 *Fed. Reg* 47824 (August 4, 2022) related to nondiscrimination protections.

The AAMC (Association of American Medical Colleges) is a nonprofit association dedicated to improving the health of people everywhere through medical education, health care, medical research, and community collaborations. Its members comprise all 156 accredited U.S. medical schools; 14 accredited Canadian medical schools; approximately 400 teaching hospitals and health systems, including Department of Veterans Affairs medical centers; and nearly 80 academic societies. Through these institutions and organizations, the AAMC leads and serves America’s medical schools and teaching hospitals and the millions of individuals across academic medicine, including more than 191,000 full-time faculty members, 95,000 medical students, 149,000 resident physicians, and 60,000 graduate students and postdoctoral researchers in the biomedical sciences. Following a 2022 merger, the Alliance of Academic Health Centers and the Alliance of Academic Health Centers International broadened the AAMC’s U.S. membership and expanded its reach to international academic health centers. Learn more at aamc.org.

The [AAMC Center for Health Justice](#) sparks community-centered, multisectoral research, collaboration, and action to make the case for policies and practices that ensure all communities have an equal opportunity to thrive. Giving every community an equitable chance at being healthy means looking beyond medical care alone. There are persistent political, economic, racial, and social injustices that have a disproportionate impact on the health of communities that have been and continue to be marginalized. Addressing these injustices requires coordinated and collaborative efforts across multiple sectors, from education and transportation to urban planning and environmental health. Achieving health equity requires digging up the common roots of these injustices — racism, classism, sexism, etc. — and making sure our policies are oriented toward an equitable opportunity for health for all.

The AAMC strongly supports HHS’s efforts to reinstate, expand, and clarify nondiscrimination protections to better align regulations with Section 1557 of the Affordable Care Act and reflect recent developments in civil rights case law. We agree that the proposed changes are vital to achieve broader goals of eliminating discrimination in health care that contributes to inequities in health status and

outcomes for communities of color, individuals with disabilities, women, lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI+) individuals, individuals with limited English proficiency, and older adults and children.¹ In addition, we believe that this rulemaking is necessary to address confusion in compliance and enforcement from prior rulemaking.

Our members are essential health care providers to their communities and are strongly committed to treating all patients and families with respect and providing the highest quality, most equitable care. The comments below reflect our support for ensuring nondiscrimination protections and civil rights laws are implemented to address and eliminate inequities in health and health care in the communities served by our members. Ultimately, the AAMC and our members believe that everyone should be able to get the health care they need without fear of discrimination or mistreatment.

Discrimination Prohibited (§ 92.101)

The AAMC strongly supports the proposal to restate the core objective of Section 1557 to generally prohibit discrimination “on the basis of race, color, national origin, sex, age, or disability against any individual seeking to participate in or receive benefits of [a] covered entity’s health program or activity.”² Furthermore, we support consistency with Federal case law and civil rights enforcement, as cited by HHS, that such protections prohibit discrimination based upon a person’s actual or perceived race, color, national origin, sex, age, or disability.

The AAMC appreciates and strongly supports HHS’ proposed clarification that “on the basis of sex” includes discrimination on the basis of sex stereotypes, sex characteristics including intersex traits, pregnancy or related conditions, sexual orientation, and gender identity. We believe this is a critical step to affirm health care access for pregnant people and LGBTQI+ people, especially for transgender, nonbinary, and intersex people.^{3, 4} As HHS notes, health inequity tied to discrimination related to sex is well-documented.⁵ The AAMC Center for Health Justice conducted a poll earlier this year to better understand birthing people’s experiences and found that people who are Black, Hispanic, younger, with lower income, or LGBTQ+ were more likely to feel that their care was affected by experiences of bias or discrimination.⁶ Going further, a large share of LGBTQ+ birthing people reported experiencing complications following childbirth.⁷ Furthermore, LGBTQI+ people in particular face widespread discrimination in health care settings, and this discrimination acts as a barrier to seeking and accessing basic and life-saving health care services, including preventive care, check-ups, and emergency care.⁸

¹ 87 Fed. Reg. 47824, at 47831.

² *Id.* at 47857-58

³ See [AAMC Comments to the 2015 Proposed Rule](#) (October 2015), urging HHS to expressly extend protections against discrimination to lesbian, gay and bisexual populations

⁴ See [AAMC Comments to the 2019 Proposed Rule](#) (August 2019), reiterating the AAMC’s encouragement that HHS explicitly include lesbian, gay and bisexual individuals in the definition of “sex” for Section 1557 nondiscrimination protection and urging HHS withdraw the 2019 proposed changes.

⁵ 87 Fed. Reg. 47824, at 47833-35.

⁶ Logan Burdette et. al., AAMC Center for Health Justice, [From Pregnancy to Policy](#) (May 2022)

⁷ Carla S. Alvarado, PhD, MPH et al., AAMC Center for Health Justice, [Polling Spotlight: Understanding the Experiences of LGBTQ+ Birthing People](#) (June 2022).

⁸ See Center for American Progress, [The State of the LGBTQ Community in 2020: A National Public Opinion Study](#) (October 2020), finding that 15% of LGBTQ respondents overall, and 28% of transgender respondents, reported postponing or avoiding need medical treatment due to discrimination.

Equal Program Access on the Basis of Sex (§ 92.206)

The AAMC supports the proposed additional clarifications to ensure equal access to health programs and activities without discrimination on the basis of sex. We agree with the Department that additional regulatory clarity specific to sex discrimination in health programs and activities is prudent. These additional clarifications pertain to (1) a general prohibition on the denial or limitation of services to an individual based on the individual's sex assigned at birth, gender identity, or gender otherwise recorded, (2) prohibition of covered entities' denial or limitation of 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, (3) prohibition of sex-specific health programs or activities that subjects any individual to more than *de minimus* harm, and (4) prohibition of denial or limitation of gender affirming care if the denial is based on the patient's sex assigned at birth, gender identity, or gender otherwise recorded. The AAMC believes that the proposed protections are supported by decades of peer-reviewed research showing that access to inclusive health care for LGBTQI+ people and access to gender affirming care, is essential for living healthy and happy lives.^{9, 10}

Nondiscrimination in Health Insurance Coverage and Other Health-Related Coverage (§ 92.207)

The AAMC strongly supports proposals to prohibit discrimination in health insurance coverage. We support the Department's proposal to reinstate the provision from the 2016 Rule to prohibit discrimination on the basis of race, color, national origin, sex, age, or disability in the provision or administration of health insurance coverage and other health-related coverage. We also support the proposal to apply this provision to all federally funded health plans, including the Department's administration of its own health-related coverage programs. HHS proposes to apply this provision inclusive of all an issuer's health programs and activities including short-term limited duration insurance and to an issuer's or other entity's operations related to third party administrative services to ensure all individuals have the protections Congress intended when it enacted the Affordable Care Act. We support this inclusive and broad approach to prohibiting discrimination in health insurance coverage.

HHS should finalize the proposals that ensure covered entities, when providing or administering health-related services or coverage, do not discriminate on the basis of race, color, national origin, sex, age, or disability. This includes denying, canceling, limiting, or refusing to issue or renew a health insurance plan or policy; denying or limiting coverage of a claim; or imposing additional cost sharing to LGBTQI+ individuals. We also believe it is important that the covered entity does not engage in marketing practices or benefit designs that discriminate against such individuals.

Prohibition on Sex Discrimination Related to Marital, Parental, or Family Status (§ 92.208)

The AAMC supports the proposal to expressly prohibit discrimination on the basis of sex with respect to an individual's marital, parental, or family status, similar to the Department's Title IX regulation. The proposed provision would prohibit a covered entity from considering an individual's sex

⁹ See Diana M. Tordoff, et. al, JAMA Pediatrics, [Mental Health Outcomes in Transgender and Nonbinary Youths Receiving Gender-Affirming Care](#) (February 2022), finding that receipt of gender-affirming care among young people was associated with 60% lower odds of depression and 73% lower odds of suicidality over a 12 month follow-up.

¹⁰ See Jaime Swan et. al, Journal of Gay & Lesbian Mental Health, [Mental health and quality of life outcomes of gender-affirming surgery: A systematic literature review](#) (February 2022), finding through a review of 53 studies an indication of reduced rates of suicide attempts, anxiety, depression, and symptoms of gender dysphoria along with higher levels of life satisfaction after gender-affirming surgery.

when applying any rule concerning an individual's current, perceived, potential, or past marital, parental, or family status and is based on OCR experience with Section 1557 enforcement.¹¹ HHS asks whether to also include a provision to specifically address discrimination on the basis of pregnancy-related conditions. HHS believes it could be beneficial to expressly address pregnancy-related sex-based discrimination in order to ensure nondiscriminatory access to care. The AAMC believes that everyone should be able to access comprehensive health care, including reproductive health care, and we are concerned about the impact that the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* may have on coverage and care.¹² Considering the impacts of this changing landscape for access to reproductive health care, we agree with the Department that a provision expressly prohibiting discrimination on the basis of pregnancy-related conditions as a form of sex-based discrimination is prudent.

Nondiscrimination in the Delivery of Health Programs and Activities Through Telehealth Services (§ 92.211)

The AAMC supports the proposal creating an affirmative duty for covered entities to not discriminate in the delivery of telehealth services and to ensure such services are accessible to people with limited English proficiency and individuals with disabilities. The AAMC strongly supports the expansion of telehealth, in part for its ability to expand access to care. As such, we agree that it is prudent to expressly extend nondiscrimination protections to health care services and programs provided via telehealth.

Notification of Views Regarding Application of Federal Conscience and Religious Freedom Laws (§ 92.302)

The AAMC appreciates the Department's efforts to outline a framework for evaluating claims under various federal religious freedom and conscience laws during OCR investigations. We agree that the proposed approach allows OCR to maintain its important role in the proper application of Federal conscience and religious freedom protections as part of its enforcement of Section 1557. The AAMC supports having a clear process for raising concerns with OCR so that it can determine whether an exemption or modification to the application of a certain provision is appropriate under the corresponding Federal conscience or religious freedom law. We have previously commented to HHS that in the context of conscience and individual rights, careful balance must be preserved to adequately protect the health and rights of the patient.¹³ We believe this proposed provision helps achieve such a balance.

Notice of Nondiscrimination (§ 92.10) and Notice of Availability of Language Assistance Services and Auxiliary Aids and Services (§ 92.11)

The AAMC supports proposals to reinstate and expand requirements that covered entities provide notices about and ensure access to nondiscrimination rights and language assistance services for individuals with limited English proficiency and auxiliary aids and services for individuals with disabilities. We opposed the repeal of the non-discrimination notice and tagline requirements under the 2019 proposed rulemaking out of concern that it would impede access to critical language assistance

¹¹ 87 Fed. Reg. 47824, at 47878.

¹² [AAMC Statement on Supreme Court Decision in *Dobbs v. Jackson Women's Health Organization*](#) (June 2022)

¹³ [AAMC Comments to HHS OCR Regarding Conscience Rights Proposed Rulemaking](#) (March 2018)

services for millions of limited English proficiency individuals. We noted that such impediments would contribute to and exacerbate existing inequities related to health care access and utilization.¹⁴

Medicare-Specific Interpretations and Centers for Medicare & Medicaid Services (CMS) Amendments

The AAMC supports Department proposals to promote consistency across HHS programs regarding policies and requirements that prohibit discrimination, including proposals for CMS to amend regulations to apply these protections to all its programs, including fee-for-service and managed care programs.

Conclusion

The AAMC thanks HHS for the opportunity to provide comments. We strongly support proposals to reinforce and expand nondiscrimination protections to support fairness and equality in health care for everyone. Please contact me, or my colleagues Philip M. Alberti, Ph.D. (palberti@aamc.org) and Phoebe Ramsey, J.D. (pramsey@aamc.org) with any questions about these comments.

Sincerely,

Rosha C. McCoy MD

Rosha Champion McCoy, M.D.
Acting Chief Health Care Officer

cc: David Skorton, M.D., President and CEO, AAMC

¹⁴ *Supra*, note 4