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Via Electronic submission at www.regulations.gov

**Association of
American Medical Colleges**
655 K Street, NW, Suite 100, Washington, DC 20001-2399
T 202 828 0400
aamc.org

Jennifer Moughalian
Acting Assistant Secretary for Financial Resources
Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201

Re: Office of the Assistant Secretary for Financial Resources; Health and Human Service Grants Regulation, Docket No. HHS-OS-2019-0014, RIN 0991-AC16

Dear Ms. Moughalian:

The Association of American Medical Colleges (AAMC) appreciates the opportunity to provide comments on the Department of Health and Human Services (HHS) proposed rule, *Office of the Assistant Secretary for Financial Resources; Health and Human Services Grants Regulation*, 84 Fed. Reg. 63831 (November 19, 2019). This letter also includes comments on the agency's *Notice of Nonenforcement of Health and Human Services Grants Regulations*, 84 Fed. Reg. 63809 (November 19, 2019).

The AAMC is a not-for-profit association representing all 154 accredited U.S. medical schools and 17 accredited Canadian medical schools, nearly 400 major teaching hospitals and health systems, including 51 Department of Veterans Affairs medical centers, and more than 80 academic and scientific societies. Through these institutions and organizations, the AAMC represents more than 173,000 faculty members, 89,000 medical students, 129,000 resident physicians, and more than 60,000 graduate students and postdoctoral researchers in the biomedical sciences.

Our members are key 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 concerns that the proposed changes to and nonenforcement of HHS nondiscrimination provisions under 45 CFR 75 *et seq* may harm patients and their families and exacerbate existing inequities in health and health care in the communities served by our members.

AAMC strongly opposes the removal of the enumeration of groups protected from discrimination in the administration of HHS programs and services for all enumerated groups as this will harm LGBTQ Americans. Further, the AAMC urges HHS to retain the provision that explicitly requires recipients of HHS grants to treat as valid the marriages of same-sex couple, as required by holdings in the Supreme Court.

In our [October 2015](#) and [August 2019](#) letters in response to related notices (RIN 0945-AA02 and RIN 0945-AA11), the AAMC voiced strong support for the HHS proposal to extend nondiscrimination protections to transgender populations. Further, we encouraged HHS to explicitly include lesbian, gay and bisexual individuals in the definition of "sex" proffered in the rule. We voiced this support and

encouragement based, in part, on the endemic inequities in health and health care experienced by those populations in the face of decreased health care access, implicit and explicit bias within the health care system, and pervasive stigma and discrimination.

Ultimately, the May 2016 final rule implementing Section 1557 of the Affordable Care Act was blocked in July 2017, and in the intervening two years not only have those inequities persisted, but for some groups – transgender women of color in particular – the situation has worsened.¹ To ensure that “no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation”, the AAMC urges HHS to withdraw the proposed changes to and nonenforcement of HHS nondiscrimination provisions under 45 CFR 75 et seq.

According to the Centers for Disease Control and Prevention (CDC), the LGBTQ community experiences significant inequities across a wide array of health and health care outcomes, including (but not limited to) tobacco use, depression, and HIV infection for gay and bisexual men; obesity, gynecological cancer, and heart disease for lesbian and bisexual women; and lack of insurance coverage, suicidality, and exposure to violence for transgender persons.

While multiple factors influence the development of these unjust and avoidable differences in health between the LGBTQ population and their heterosexual/cisgender counterparts, stigma, discrimination, and trans/homophobia in health care is a significant contributor.² AAMC’s own research shows that members of the LGB community are more likely than heterosexuals to report they do not feel respected by their health care provider.³ There is no cost benefit to hospitals associated with permitting discrimination.

There is no burden reduction related to sanctioning bias. The only outcomes of greenlighting systematic bigotry in health care will be to increase fear of discrimination, decrease health care access and use for the LGBTQ community, and widen already unconscionable health inequities.

The HHS stated mission is to “enhance and protect the health and well-being of all Americans”. The AAMC encourages HHS to follow through on that promise and reject discrimination in health care

The AAMC strongly objects to the HHS *Notice of Nonenforcement of Health and Human Services Gants Regulations*.

The AAMC asks that HHS withdraw the Notice because it cannot fail to enforce duly promulgated regulations without engaging in notice and comment rulemaking.

¹ A National Epidemic: Fatal Anti-Transgender Violence in America in 2018 <https://www.hrc.org/resources/a-national-epidemic-fatal-anti-transgender-violence-in-america-in-2018> Accessed 8/6/19.

² Health and Care Utilization of Transgender and Gender Nonconforming Youth: A Population-Based Study. G. Nicole Rider, Barbara J. McMorris, Amy L. Gower, Eli Coleman, Marla E. Eisenberg Pediatrics Mar 2018, 141 (3) e20171683; DOI: 10.1542/peds.2017-1683.

³Dill, Michael J. 2014. “Sexual Orientation, Access to Care and Patient-Provider Communications.” AAMC Health Workforce Research Conference. Washington, D.C.

The Secretary states that the department will no longer enforce 45 CFR §75.300 (c) and (d) and several other regulations pending re-promulgation. Of particular concern to the AAMC is the lack of enforcement of the provisions found at 45 CFR §75.300 which (1) state that it is public policy to not discriminate against an individual “based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation” and (2) require that in accordance with two Supreme Court decisions, “all recipients must treat as valid the marriages of same-sex couples.”

The Department cites the Regulatory Flexibility Act (RFA) as the authority for the notice of nonenforcement. The purpose of the RFA is to ensure that consideration is given the impact of significant rules on small businesses. Nowhere in the legislation is the government given the authority to use the RFA to invalidate a notice and comment rulemaking, especially almost 3 years after the rule is finalized and effective. The only opportunity provided by the RFA for a review of an agency action is given to small businesses, but they must request review within one year of the date of the final action⁴.

The provisions that the Secretary no longer wants to enforce were promulgated to ensure that the rights of individuals are protected. Lack of enforcement, which means failure to protect the rights of certain individuals, will substantially affect those individuals. As a report by the Congressional Research Services notes, there is no exemption for notice and comment rulemaking for a change that “substantially affects the rights of those over whom the agency exercises authority.”⁵ Therefore, a decision by the Department not to enforce these protections can only be done through notice and comment rulemaking. The AAMC asks HHS to withdraw the Notice of Nonenforcement immediately because it lacks authority to issue the Notice of Nonenforcement.

The AAMC appreciates the opportunity to comment on ensuring nondiscrimination in health care, and we look forward to working with the HHS on this issue. Please contact me or my colleagues Philip M. Alberti, PhD (palberti@aamc.org) or Ivy Baer, JD (ibaer@aamc.org) with questions about these comments.

Sincerely,



David J. Skorton, MD
President and CEO
Association of American Medical Colleges

⁴ 5 USC Chapter 6, §611(a)(3)

⁵ A Brief Overview of Rulemaking and Judicial Review, Congressional Research Service, 7-5700, R41546, March 27, 2017, <https://fas.org/sgp/crs/misc/R41546.pdf>