

September 28, 2022

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

Submitted electronically to www.regulations.gov

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

Dear Secretary Becerra:

The American Nurses Association (ANA) appreciates the opportunity to provide comment on the proposed update to Section 1557 of the Affordable Care Act (ACA) pertaining to nondiscrimination in health programs and activities. Section 1557 bars discrimination in health care against persons based on race, color, sex, national origin, age and disability and provides for enforcement of these protections. This proposed rule builds on previous rulemaking, as the Department of Health and Human Services (HHS) is authorized by Section 1557 to further refine its meaning through regulations. ANA continues to hold that the protections offered by Section 1557 are vital to the nation's health care system to ensure all patients have meaningful access to care, especially for those who otherwise face discriminatory barriers. While progress has been made, discrimination in health care settings remains a grave and widespread problem and contributes to a wide range of health inequities and disparities.

ANA applauds HHS for this rulemaking, which restores and strengthens protections against discrimination in the health care system. The proposed rule largely reverses limitations on scope and power of enforcement that was imposed in 2020 rulemaking.¹ ANA strongly believes that the 2020 rulemaking was misguided and irresponsible and is pleased to see HHS recognize that through this proposed rule. As the agency works to finalize the proposed rule, we urge the agency to consider the following:

- 1) HHS must finalize provisions that protect against discrimination in health care;**
- 2) provide support and resources for compliance training and patient education efforts;**
and
- 3) work closely with nurses while implementing provisions relating to sex discrimination.**

¹ Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed.Reg. 37160 (June 19,2020)

ANA is the premier organization representing the interests of the nation's over 4.3 million registered nurses (RNs), through its state and constituent member associations, organizational affiliates, and individual members. ANA advances the nursing profession by fostering high standards of nursing practice, promoting a safe and ethical work environment, bolstering the health and wellness of nurses, and advocating on health care issues that affect nurses and the public. ANA members also include the four advanced practice registered nurse roles (APRNs): nurse practitioners (NPs), clinical nurse specialists (CNSs), certified nurse-midwives (CNMs), and certified registered nurse anesthetists (CRNAs). RNs serve in multiple direct care, care coordination, and administration leadership roles, across the full spectrum of health care settings. RNs provide and coordinate patient care, educate patients and the public about various health conditions including essential self-care, and provide advice and emotional support to patients and their family members.

1) HHS must finalize provisions, without delay, that protect against discrimination in health care programs and activities.

In the above-captioned rule, HHS is proposing several provisions that would reinstate safeguards that protect against discrimination in covered health care programs and activities as outlined in Section 1557 of the ACA. These proposed provisions include reinstating the scope of Section 1557, clarifies application to health insurance issuers receiving federal financial assistance, prohibits discrimination in clinical algorithms used to support decision-making, and that nondiscrimination provisions are applicable to services offered through telehealth technologies. HHS is right to propose these provisions and ANA urges the agency to finalize this proposed rule.

ANA is an informed and active stakeholder in the implementation of health care policy. ANA sees the proposed rule rectifying what we saw as the 2020 rulemaking instituting a fundamental change in direction that is antithetical to our principles of health system transformation, namely universal access to health care coverage for all citizens and residents. We are pleased that HHS would return key definitions and protection mechanisms that make Section 1557 meaningful to all, especially to people who otherwise face discriminatory barriers to care. This is acutely important as nurses and the health care delivery system focus on achieving health equity and identify approaches to overcome health disparities.

We believe that existing regulations for Section 1557 and other HHS programs fulfill the intent of Congress to protect people from discrimination in health care that denies them access. Section 1557 should be implemented in a manner that promotes access for those who are subject to discrimination. **As such, HHS must finalize proposed Section 1557 provisions that protect against discrimination in health care programs and activities. We urge HHS to act expeditiously on this rulemaking.**

2) HHS must provide support and resources to covered entities to ensure consistency in fulfilling language assistance, training, procedural, and notice requirements.

HHS is proposing to require covered entities provide notices of nondiscrimination and availability of language assistance services and other services to patients, especially those with limited English proficiency (LEP). The agency also is proposing that covered entities have in place policies and procedures that support compliance with Section 1557 and train staff accordingly. ANA supports these proposed requirements and the goal of creating consistent procedural requirements for covered entities.

However, ANA is concerned that not all covered entities have the resources and staff support to ensure compliance with these requirements. We urge HHS to provide guidance, templates, and other resources to ensure some level of uniformity in the policy, procedure, and notice requirements—in plain language. This allows fulfillment of the requirements across covered entities, removing potential confusion for patients as they navigate between entities. Further, many covered entities are experiencing workforce challenges that may limit their ability to devote the necessary staff time to come into compliance with the proposed requirements.

To mitigate this, we urge HHS to provide support to covered entities to appropriately complete and institute the policies and procedures and the necessary staff training. By providing this, HHS can ensure consistency and fulfillment of the compliance training and patient education requirements in the above-captioned proposed rule. **As such, ANA urges HHS to provide support and resources with notice, training, and other procedural requirements to guarantee consistency in compliance with Section 1557 across covered entities.**

3) HHS should work closely with nurses while implementing Section 1557 provisions relating to discrimination on the basis of sex.

HHS is proposing to ensure equal access to health care programs on the basis of sex and prohibit discrimination based on marital, family, and parental (including termination of pregnancy) status—along with gender identity and sexual orientation. ANA holds that these protections are vital and urges the agency to finalize these provisions. At the same time, ANA encourages HHS to utilize nurses and their expertise to ensure compliance with these important protections. ANA and its members strongly believe that discrimination has no place in nursing practice, education, or research. It has no place in health care and nurses strongly believe that all patients be treated equally, respectfully, and with civility.²

This is especially important to safeguard access for people who often face unique barriers to care, including LGQTQ+ individuals. For these individuals, sex discrimination may take specific form in health care, such as coverage limitations and encounters with providers who deny them care based on their gender identity or sex-stereotyped characteristics. ANA is in the process of issuing a statement on gender affirming care, which communicates the association's strong

² The Nurse's Role in Addressing Discrimination: Protecting and Promoting Inclusive Strategies in Practice Settings, Policy, and Advocacy. American Nurses Association. 2018.
<https://www.nursingworld.org/~4ab207/globalassets/practiceandpolicy/nursing-excellence/ana-position-statements/social-causes-and-health-care/the-nurses-role-in-addressing-discrimination.pdf>. Accessed September 2022.

position against policies that restrict or criminalize care to this vulnerable patient population.³ Without these protections, providers and payers can deny care to transgender persons and to other LGBTQ+ patients based on sex-stereotyping.

This crucial work complements ANA's focus on educating nurses on their biases and prejudices for indications of discriminatory actions. ANA stands ready to work with HHS to build on this work to ensure that covered entities have the right resources and support to educate staff on combatting sex discrimination in the provision of health care services. **As such, ANA urges HHS to work closely with nurses to support covered entities coming into compliance with Section 1557 sex discrimination provisions.**

ANA appreciates the opportunity to submit these comments and looks forward to continued engagement with CMS. Please contact Ingrida Lusic, Vice President, Policy and Government Affairs, at (301) 628-5081 or Ingrid.Lusic@ana.org, with any questions.

Sincerely,



Debbie Hatmaker, PhD, RN, FAAN
Chief Nursing Officer/EVP

cc: Ernest Grant, PhD, RN, FAAN, ANA President
Loressa Cole, DNP, MBA, RN, NEA-BC, FAAN, ANA Chief Executive Officer

³ American Nurses Association. American Nurses Association Opposes Restrictions on Transgender Healthcare and Criminalizing Gender-Affirming Care. 2022. Unpublished Statement.