



Department of Health & Human Services
Office for Civil Rights
Hubert H. Humphrey Building Room 509F
200 Independence Avenue, SW
Washington, D.C. 20201

October 3, 2022

RE: Docket ID HHS-OS-2022-0012-0001, RIN 0945-AA17, Nondiscrimination in Health Programs and Activities

Dear Sir or Madam:

The National Religious Broadcasters (NRB) respectfully submits the following comments on the proposed rule, published in 87 Fed. Reg. 47824 (Aug. 4, 2022), on nondiscrimination in health programs and activities.

NRB is a non-profit, membership association that represents the interests of Christian broadcasters and faith-based organizations throughout the nation. Our membership includes many Christian ministries and religious nonprofits who rely on essential protections under the law to fulfill their charitable purposes and faith-based missions.

As an association of Christian communicators who uphold the sanctity of life, we applaud the Department's efforts to ensure that all Americans have access to health care and health coverage. We object to language in the proposed regulations that can be read to violate, supersede, or preempt professional and evidence-based clinical judgments by requiring the provision and coverage of medically ineffective or harmful procedures.

One of the most notable features of the Department's proposed regulation is the requirement that any covered entity capable of performing gender transition treatments must provide these services, including those healthcare providers who find such treatments and procedures "not clinically appropriate." In Section 92.206 of the rule, the Department explicitly states that providers who view gender transitioning treatments as harmful in all cases must provide these services nonetheless or be in violation of the updated nondiscrimination provisions.ⁱ The language in Section 92.206 reads as follows:

"A provider's view that no gender transition or other gender-affirming care can ever be beneficial for such individuals (or its compliance with a state or local law that reflects a similar judgment) is not a sufficient basis for a judgment that a health service is not clinically appropriate."ⁱⁱ

Here, HHS departs from regulating healthcare to regulating the conscience itself, proposing that a provider who believes gender transitions are never clinically appropriate—for religious reasons or otherwise—would be disqualified from federal programs if the provider acts according to that view. Declining to perform or cover forms of treatment that a provider finds harmful or ineffective in all cases is not a form of discrimination. Further, the proposal that some healthcare providers should perform procedures they consider clinically inappropriate, including those that surgically alter the body, cause sterilization, or stunt sexual development—even if they are prohibited by state or local law—is unacceptable from an ethical perspective and may be unworkable from a legal perspective. Analysis by Vorys Sater Seymour and Pease LLP on [lexology.com](https://www.lexology.com) notes that “This sets up a situation where a plan could be forced to choose between violating state law or violating this interpretation of Section 1557.”ⁱⁱⁱ Additionally, with regard to the efficacy and long-term effects of sex change procedures, the United States Conference of Catholic Bishops (USCCB) has pointed out in a separate filing that “it is unquestionably poor regulatory policy for the federal government to require the performance or coverage of a procedure in any circumstance where the provision of that procedure itself would subject a health professional to a malpractice claim.”^{iv}

The USCCB has also astutely noted that “many health providers, insurers, and plan sponsors, especially those with a religious affiliation, provide evidence-based health services and coverage *because of* their underlying religious and moral views about the dignity and sanctity of human life” (emphasis added).^v We concur with this view and note that to disparage and even disqualify these underlying religious and moral views is at odds with the goals of the Department to ensure access to care for everyone.

The Department has claimed that the rule “refines and strengthens the process for raising conscience and religious freedom objections” while removing Title IX exceptions, including a religious exemption, from Section 1557.^{vi} Alternatively, in section 92.302, the Office for Civil Rights suggests a process by which healthcare entities can express “their views that the application of a specific provision or provisions of this part to them would violate federal conscience or federal freedom laws, so that the Department may, as appropriate, make a determination that recipients are exempt from, or entitled to a modification of the application of, a provision or provisions of this part.”^{vii} Under this scheme, your agency invites healthcare entities to simply *express* whether their lawful conscience rights would be violated, with no exemption or even a response guaranteed.

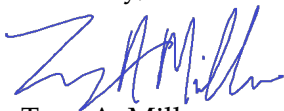
The Department’s pledge that “While not incorporating the Title IX religious exception, the Department is fully committed to respecting conscience and religious freedom laws when applying this rule” holds little credibility with groups who have gone toe-to-toe with the Department on religious freedom issues.^{viii}

- USCCB responded, “Assurances that HHS will honor religious freedom laws offer little comfort when HHS is actively fighting court rulings that declared HHS violated religious freedom laws the last time they tried to impose such a mandate,”^{ix} referring to *Franciscan Alliance Inc v. Becerra*, 5th U.S. Circuit Court of Appeals.^x
- Luke Goodrich, vice president and senior counsel at the Becket Fund for Religious Liberty, commented that religious healthcare providers and medical professionals want to claim protections under the Religious Freedom Restoration Act (RFRA), not rely on the “grace of an agency that’s been threatening them nonstop for years on end.”^{xi}

We believe HHS should exclude from the regulations language that would compel health care providers or insurance issuers to violate their religious beliefs, moral convictions, or professional judgments by providing or covering treatments they consider harmful, ineffective, or unsupported by medical evidence. In particular, we strenuously urge HHS to strike the aforementioned Section 92.206 language which both seeks to regulate the relationship between a “provider’s view” and his professional judgment and preempt unspecified “state or local law.” We also urge HHS to incorporate the Title IX religious exemption by reference. We support the Department’s proposal to apply the regulation only to health programs and activities, and its proposed inclusion of notices for non-English speakers.

We thank you for your attention to sound regulatory policymaking and the preservation of First Amendment freedoms and rights of conscience in this matter.

Sincerely,



Troy A. Miller
President & CEO

ⁱ <https://www.dailysignal.com/2022/07/25/new-hhs-rule-could-force-insurers-to-pay-for-childrens-sex-changes/>

ⁱⁱ <https://www.regulations.gov/document/HHS-OS-2022-0012-0001>

ⁱⁱⁱ <https://www.lexology.com/library/detail.aspx?g=1eff0623-9835-4775-b618-9e0cbffad69c>

^{iv} <https://www.regulations.gov/comment/HHS-OS-2022-0012-11934>

^v <https://www.regulations.gov/comment/HHS-OS-2022-0012-11934>

^{vi} <https://www.hhs.gov/about/news/2022/07/25/hhs-announces-proposed-rule-to-strengthen-nondiscrimination-in-health-care.html>

^{vii} <https://www.regulations.gov/document/HHS-OS-2022-0012-0001>

^{viii} <https://www.federalregister.gov/d/2022-16217/p-375>

^{ix} <https://cruxnow.com/church-in-the-usa/2022/07/bishops-hhs-proposals-are-violation-of-religious-freedom-and-bad-medicine>

^x <https://www.reuters.com/legal/government/5th-circuit-hear-christian-groups-case-over-aca-antidiscrimination-rule-2022-08-04/>

^{xi} <https://news.bloomberglaw.com/health-law-and-business/religious-exemptions-hold-key-to-lgbtq-health-bias-shields-fate>