



August 15, 2016

Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
Room 445-G, Hubert H. Humphrey Building  
200 Independence Avenue SW  
Washington, DC 20201

ATTN: CMS-3295-P

AMERICAN CIVIL  
LIBERTIES UNION  
WASHINGTON  
LEGISLATIVE OFFICE  
915 15th STREET, NW, 6<sup>TH</sup> FL  
WASHINGTON, DC 20005  
T/202.544.1681  
F/202.546.0738  
[WWW.ACLU.ORG](http://WWW.ACLU.ORG)

KARIN JOHANSON  
DIRECTOR

NATIONAL OFFICE  
125 BROAD STREET, 18<sup>TH</sup> FL.  
NEW YORK, NY 10004-2400  
T/212.549.2500

OFFICERS AND DIRECTORS  
SUSAN N. HERMAN  
PRESIDENT

ANTHONY D. ROMERO  
EXECUTIVE DIRECTOR

ROBERT REMAR  
TREASURER

**RE: Medicare and Medicaid Programs; Hospital and Critical Access  
Hospital (CAH) Changes to Promote Innovation, Flexibility, and  
Improvement in Patient Care, Proposed Rule**

The American Civil Liberties Union (ACLU)<sup>1</sup> writes in response to the Notice of Proposed Rulemaking on Medicare and Medicaid Programs; Hospital and Critical Access Hospital (CAH) Changes to Promote Innovation, Flexibility, and Improvement in Patient Care. Among other aspects, this proposed rule rightly seeks to protect LGBT people and women from discriminatory treatment by healthcare providers in hospitals and CAHs participating in the Medicare and Medicaid programs.

We applaud the Department of Health and Human Services (HHS) for explicitly recognizing in this rulemaking that discrimination based on gender identity is sex discrimination, and for prohibiting discrimination based on sexual orientation. We also applaud HHS for ensuring that these nondiscrimination protections will apply to every participating hospital and CAH, regardless of its religious affiliation. This helps to guarantee patients the ability to access care free from discrimination, including in areas where hospitals have merged with or are run by religious institutions.

However, in some key areas the proposed rule should have greater parity with the final rule implementing Section 1557 of the Affordable Care Act (ACA)<sup>2</sup> and other federal regulations. Specifically, the proposed rule does not explicitly state that discrimination based on a person's sexual orientation *also* constitutes sex discrimination when it is based on a sex stereotype. The proposed rule also

---

<sup>1</sup> For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, gender identity, sexual orientation, disability, or national origin.

<sup>2</sup> U.S. Dept. of Health and Human Services, Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31367 (final rule May 18, 2016) (to be codified at 45 C.F.R. pt. 92).

does not explicitly state that sex discrimination includes discrimination based on pregnancy or related conditions. These omissions are contrary to Section 1557, and other federal anti-discrimination protections. Lastly, contrary to Section 1557, the proposed regulations lack a private enforcement mechanism.

Accordingly, we have two primary recommendations. First, we recommend that, at a minimum, the proposed rule be amended to explicitly state that discrimination based on sex necessarily encompasses discrimination based on one's sexual orientation when based on a sex stereotype. Second, we recommend that the rule explicitly state that sex discrimination includes discrimination based on pregnancy or related conditions.

### **Protecting Against Discrimination Based on Gender Identity**

The proposed rule would explicitly require hospitals and CAHs that are part of Medicare and Medicaid programs to not discriminate on the basis of sex, including gender identity, under the authority of Section 1557 of the ACA. Furthermore, these hospitals and CAHs would be required to establish written policies prohibiting such discrimination, and would be required to inform patients (in a language the patient can understand) of their right to be free from discrimination and how to file a complaint if they experience discrimination. These protections would help ensure that transgender and gender non-conforming individuals are protected as they seek out medical care. Indeed, as the rulemaking explains, “even the fear of discriminatory behavior[] by healthcare providers remains an issue and can create barriers to care and create adverse outcomes for patients.” By requiring nondiscrimination policies, and ensuring that those policies and opportunities for redress are provided to patients, this rulemaking can help mitigate those fears.

This proposed rule also rightly follows what other federal agencies, including HHS, and courts have recognized: discrimination based on gender identity constitutes discrimination based on sex. In 2012, for instance, the Equal Employment Opportunity Commission (EEOC) held that “intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination based on sex and such discrimination therefore violates Title VII.”<sup>3</sup> The Attorney General affirmed this interpretation in a 2014 memorandum.<sup>4</sup> The Department of Labor has taken the same position in internal guidance and regulations,<sup>5</sup> as has the Office of Personnel Management in its regulations.<sup>6</sup> Similarly, the Department of Education and the Department of Justice have clarified on multiple occasions that, under Title IX, “discrimination based on gender identity, including transgender status, is discrimination based on sex.”<sup>7</sup> The

---

<sup>3</sup> Macy v. Holder, EEOC Doc. 0120120821, 2012 WL 1435995, at \*12 (EEOC Apr. 20, 2012).

<sup>4</sup> Memorandum from Att’y Gen. Eric Holder to U.S. Att’ys Heads of Dept. Components, Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Dec. 15, 2014), *available at* <https://www.justice.gov/file/188671/download>.

<sup>5</sup> U.S. Dep’t of Labor, Discrimination on the Basis of Sex, 81 Fed. Reg. 39108 (final rule June 16, 2016)(to be codified at 41 C.F.R. pt. 60-20); Office of Federal Contract Compliance Programs (OFCCP) Dir. 2015-1, Handling individual and systemic sexual orientation and gender identity discrimination complaints (Apr. 16, 2015); OFCCP Dir. 2014-02, Gender Identity and Sex Discrimination (Aug. 19, 2014).

<sup>6</sup> See 5 C.F.R. §§ 300.102-300.103, 335.103, 410.302, 537.105.

<sup>7</sup> Br. for U.S. as Amicus Curiae Supporting Plaintiff-Appellant and Urging Reversal, G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., No. 15-2056, 2015 WL 6585237 (4th Cir. Oct. 28, 2015); Statement of the United States at 12, Tooley v. Van Buren Pub. Sch., No. 2:14-cv-13466 (E.D. Mich. Feb. 20, 2015), ECF No. 60; *see also* Guidance Letter from Dep’t of Justice and Dep’t of Education on Transgender and Gender Nonconforming Students (May 13, 2016) *available at*

Department of Housing and Urban Development has similarly concluded that the Fair Housing Act covers claims based on sex stereotypes and gender identity.<sup>8</sup>

The proposed rule would bring clarity to hospitals and conform to the recognition of other federal agencies and the courts that discrimination based on gender identity necessarily constitutes sex discrimination. We commend HHS for taking this important step in protecting transgender and gender non-conforming individuals from discrimination as they seek medical care.

### **Protecting Against Discrimination Based on Sexual Orientation**

The proposed rule takes a critical step in preventing individuals from receiving inadequate care based on their sexual orientation. It recognizes that such discrimination is “inconsistent with the health and safety of patients,” and it requires hospitals and CAHs to inform patients of their rights and opportunity for redress. While we applaud this approach to preventing discrimination, the proposed rule should be further expanded by, at a minimum, recognizing that sexual orientation discrimination is sex discrimination when it is based on a sex stereotype, and by stating clearly that the question of whether discrimination on the basis of an individual’s sexual orientation status alone is a form of sex discrimination is not being resolved in this rule (as the proposed rule appears to do). The final rule—as the Section 1557 rule does—should make clear that the law on this issue is continuing to develop, and the rule will be enforced consistent with those developments. Finally, we urge the final rule to make clear that additional guidance on this subject may be issued as appropriate given developments in the law.

These changes to the proposed rule would be consistent with the final rule implementing Section 1557, which clarified that this formulation represents the *current* state of the law, and that it may need to change based on additional legal developments. Other recent regulations from HHS and regulations from the Office of Federal Contract Compliance Programs (OFCCP)<sup>9</sup> have also recognized the same.

Discrimination because of sexual orientation involves impermissible sex-role stereotyping. For example, the Seventh Circuit held that a plaintiff stated a valid claim of sex discrimination under Title VII when he was harassed by co-workers by being called a “fag” and a “queer” because “a homophobic epithet like ‘fag,’ for example, may be as much of a disparagement of a man’s perceived effeminate qualities as it is of his perceived sexual orientation.”<sup>10</sup> Federal district courts likewise have begun to recognize that discrimination against lesbians and gay men is a form of sex stereotyping precisely because being gay (or being in a relationship with a person of the same sex) is inconsistent with traditional gender norms, at times without requiring

---

<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

<sup>8</sup> U.S. Dep’t of Hous. and Urban Dev. v. Toone, Charge of Discrimination, FHEO Nos. 06-12-1130-8, 06-121363-8 (Off. Hr’gs. and Appeals Aug. 15, 2013),

<http://portal.hud.gov/hudportal/documents/huddoc?id=13HUDVTOONE.PDF>; Memorandum from John Trasviña, Assistant Sec. for Fair Housing and Equal Opportunity, to FHEO Regional Directors, Assessing Complaints that Involve Sexual Orientation, Gender Identity, and Gender Expression (June 2010), *available at* <http://www.fairhousing.com/include/media/pdf/hud-sexual-orientation.pdf>.

<sup>9</sup> See U.S. Dept. of Labor, *supra* note 5.

<sup>10</sup> Doe ex rel. Doe v. City of Belleville, Ill., 119 F.3d 563, 593 & n.27 (7th Cir. 1997), *vacated on other grounds*, 523 U.S. 1001 (1998).

additional evidence of gender nonconformity.<sup>11</sup>

Furthermore, discrimination because of sexual orientation is sex discrimination under the plain meaning of the term sex, because sexual orientation turns on one's sex in relation to the sex of one's partner. Consideration of a person's sexual orientation therefore necessarily involves consideration of that person's sex, as the EEOC rightly concluded last year.<sup>12</sup> Numerous federal courts have reached the same conclusion in cases seeking the freedom to marry for lesbians and gay men and in a challenge to the Defense of Marriage Act.<sup>13</sup> These decisions have held that the Equal Protection Clause forbids marriage bans for same-sex couples and the denial of federal benefits for individuals who are married to same-sex partners because such discrimination classifies on the basis of sex because "[o]nly women may marry men, and only men may marry women."<sup>14</sup> This reasoning applies with equal force to Title IX.<sup>15</sup>

We commend HHS for acting to prevent discrimination against lesbians, gay men, and bisexual people, and urge that the final rule be strengthened further to clarify that such discrimination can constitute sex discrimination.

---

<sup>11</sup> See, e.g., *Isaacs v. Felder Servs., LLC*, No. 2:13cv693-MHT, 2016 WL 6560655, at \*4 (M.D. Ala. Oct. 29, 2015) ("To the extent that sexual orientation discrimination occurs not because of the targeted individual's romantic or sexual attraction to or involvement with people of the same sex, but rather based on her or his perceived deviations from 'heterosexually defined gender norms,' this, too, is sex discrimination, of the gender-stereotyping variety."); *Videckis v. Pepperdine Univ.*, 100 F. Supp. 3d 927, 936 (C.D. Cal. 2015) ("[A] policy that female basketball players could only be in relationships with males inherently would seem to discriminate on the basis of gender."); *Hall v. BNSF Ry. Co.*, No. C13-2160, 2014 WL 4719007, at \*3 (W.D. Wash. Sept. 22, 2014) (denying motion to dismiss where plaintiff alleged that "he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males"); *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (denying motion to dismiss where "Plaintiff has alleged that he is 'a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles . . . .'"); *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012) (finding genuine issue of material fact under sex stereotyping theory where plaintiff failed to conform by taking his same-sex spouse's surname after marriage); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (finding genuine issue of material fact under sex stereotyping theory where plaintiff failed to conform by being attracted to and dating other women and not only men); see also *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) ("Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women.").

<sup>12</sup> EEOC Doc. 0120133080, 2015 WL 4397641, at \*5 (EEOC July 15, 2015).

<sup>13</sup> See *Latta v. Otter*, 771 F.3d 456, 480 (9th Cir. 2014) (Berzon, J., concurring); *Jernigan v. Crane*, 64 F. Supp. 3d 1260, 1286-87 (E.D. Ark. 2014), *aff'd on other grounds*, 796 F.3d 976 (8th Cir. 2015); *Rosenbrahn v. Daugaard*, 61 F. Supp. 3d 845, 859-60 (D.S.D. 2014), *aff'd on other grounds*, 799 F.3d 918 (8th Cir. 2015); *Lawson v. Kelly*, 58 F. Supp. 3d 923, 934 (W.D. Mo. 2014); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1206 (D. Utah 2013), *aff'd on other grounds*, 755 F.3d 1193 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010), *appeal dismissed sub nom.*, *Perry v. Brown*, 725 F.3d 1140 (9th Cir. 2013); *cf.* *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 982 n.4 (N.D. Cal. 2012) ("Ms. Golinski is prohibited from marrying Ms. Cunningham, a woman, because Ms. Golinski is a woman. If Ms. Golinski were a man, DOMA would not serve to withhold benefits from her. Thus, DOMA operates to restrict Ms. Golinski's access to federal benefits because of her sex."), *initial hearing en banc denied*, 680 F.3d 1104 (9th Cir. 2012) and *appeal dismissed*, 724 F.3d 1048 (9th Cir. 2013).

<sup>14</sup> *Latta*, 771 F.3d at 480 (Berzon, J., concurring).

<sup>15</sup> See *Videckis*, 100 F. Supp. 3d at 936.

### **Protecting Against Discrimination Based on Sex and Pregnancy**

We also applaud the HHS proposal to establish explicit requirements that prohibit hospitals from discriminating on the basis of sex, as required by Section 1557. As HHS knows well, Section 1557 prohibits discrimination “on the basis of sex,” to include but not limited to discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, and gender identity.<sup>16</sup> It is important that HHS is seeking to ensure that the Conditions of Participation (“CoPs”) are aligned with 1557, given the sex discrimination that occurs in hospitals.

To be aligned with Section 1557, we strongly urge HHS to ensure that the regulation’s definition of “on the basis of sex” includes discrimination on the basis of “pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions.” In addition to 1557’s explicit prohibition on pregnancy discrimination, Title IX<sup>17</sup> and other civil rights statutes such as Title VII<sup>18</sup> define sex discrimination to include pregnancy discrimination. These laws prohibit discrimination based on pregnancy itself, as well as pregnancy-related conditions.<sup>19</sup>

We have heard from numerous women who have been discriminated against by hospitals.<sup>20</sup> These women have endured physical and emotional pain after being denied care from hospitals based on the religious rules that govern Catholic hospitals. These rules, the Ethical and Religious Directives for Catholic Health Care, prohibit doctors from providing abortion, even in the context of miscarriage, and even when the woman’s health or life is in jeopardy. One woman who was harmed by these rules is Tamesha Means. Ms. Means rushed to the hospital when she began to miscarry when she was 18 weeks pregnant. She was bleeding, in pain, and was developing an infection. But instead of providing Ms. Means with the appropriate care or information, they turned her away three times over the course of two days. Only when she began to deliver the fetus while being discharged did the hospital finally attend to her.

The Ethical and Religious Directives also prohibit doctors from performing tubal sterilization at the time of child delivery, the safest and most effective time for a woman to have a tubal ligation. Jessica Mann experienced this first hand when she was pregnant with her third child. She suffers from brain tumors, and her doctor strongly advised her to have a tubal ligation at the time she delivered her baby because a subsequent pregnancy could threaten her life. Her doctor sought permission from the Catholic hospital to provide the tubal ligation at the time of Ms. Mann’s delivery, but was denied. Ms. Mann had to scramble to find an alternate provider in the final

---

<sup>16</sup> See U.S. Dept. of Health and Human Services, *supra* note 2.

<sup>17</sup> 34 C.F.R. § 106.40(b)(1) (2012). See also *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779, 784 (3d Cir. 1990); *Hogan v. Ogden*, No. CV-06-5078-EFS, 2008 WL 2954245, at \*13 (E.D. Wash. July 30, 2008); *Chipman v. Grant County Sch. Dist.*, 30 F. Supp. 2d 975, 977-78 (E.D. Ky. 1998); *Hall v. Lee Coll.*, 932 F. Supp. 1027, 1033 n.1 (E.D. Tenn. 1996); *Cazares v. Barber*, No. CIV-90-0128-TUC-ACM, slip op. (D. Ariz. May 31, 1990); *Wort v. Vierling*, No. 82-3169, slip op. (C.D. Ill. Sept. 4, 1984), *aff’d*, 778 F.2d 1233 (7th Cir. 1985).

<sup>18</sup> 42 U.S.C. § 2000e(k) (2012).

<sup>19</sup> See, e.g., 42 U.S.C. § 2000e(k) (2012); see also 29 C.F.R. pt. 1604 app.; *Newport News Shipbuilding & Dry Dock v. EEOC*, 462 U.S. 669 (1983).

<sup>20</sup> See JULIA KAYE ET. AL., AMERICAN CIVIL LIBERTIES UNION, HEALTH CARE DENIED: PATIENTS AND PHYSICIANS SPEAK OUT ABOUT CATHOLIC HOSPITALS AND THE THREAT TO WOMEN’S LIVES (May 2016), [https://www.aclu.org/sites/default/files/field\\_document/healthcaredenied.pdf](https://www.aclu.org/sites/default/files/field_document/healthcaredenied.pdf).

weeks of her pregnancy. Simply put, when hospitals turn away women in need of emergency care, or in the context of pregnancy related care, that is sex discrimination.

HHS should affirm in the final rule that all hospitals, regardless of their religious affiliation, must provide women full information and care in emergency situations by explicitly stating that sex discrimination includes discrimination based on pregnancy or related conditions.

**Conclusion**

Thank you for considering our recommendations. If you have any questions, please contact Ian Thompson, legislative representative, at (202) 715-0837 or [ithompson@aclu.org](mailto:ithompson@aclu.org).

Sincerely,

A handwritten signature in cursive script, appearing to read "Karin Johanson".

Karin Johanson  
Director, Washington Legislative Office

A handwritten signature in cursive script, appearing to read "Ian S. Thompson".

Ian S. Thompson  
Legislative Representative