CALIFORNIA WOMEN'S LAW CENTER

August 13, 2019

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

Submitted online via http://regulations.gov

RE: Comments on Proposed Regulations Titled "Nondiscrimination in Health and Health Education Programs or Activities" Docket ID No. HHS-OCR-2019-0007 [RIN: 0945-AA11]

The California Women's Law Center (CWLC) appreciates the opportunity to submit comments on the proposed regulations titled "Nondiscrimination in Health and Health Education Programs or Activities" issued by the United States Department of Health and Human Services (HHS) and published in the Federal Register on June 14, 2019 (proposed regulations).

CWLC is a statewide nonprofit law and policy center dedicated to breaking down barriers and advancing the potential of women and girls through impact litigation, advocacy and education. For 30 years, CWLC has been fighting against gender discrimination in all forms, including against lesbian, gay, bisexual, transgender and gender non-confirming individuals. CWLC has also prioritized ensuring equal reproductive opportunities are afforded to all people in California. CWLC fights to ensure all Californians have access to the health care opportunities they need to lead healthy and productive lives regardless of their income levels, race or residence.

CWLC strongly opposes the proposed regulations, which if implemented, would significantly impede access to reproductive health services, particularly for women and girls in rural areas. In addition, CWLC recognizes that discrimination based on sex necessarily includes discrimination based on gender identity and sex stereotypes. If enacted, the proposed regulations would remove important protections for transgender and gender non-conforming individuals in California.

CWLC strongly opposes the proposed changes to section 1557 of the Affordable Care Act

Section 1557 is the nondiscrimination provision of the Affordable Care Act. 42 U.S.C. § 18116. It prohibits health programs receiving federal financial assistance from discriminating on certain protected grounds in their provision of health care. It

also applies to health programs and activities administered by the executive branch and health plans sold through the Affordable Care Act Marketplaces.

Section 1557 protects patients from discrimination based on race, color, national origin, sex, age and disability. *Id.* It incorporates the protections of Title VI of the Civil Rights Act of 1975 and Section 504 of the Rehabilitation Act of 1973, and specifically includes the enforcement mechanisms those laws provide, including a private right of enforcement action. It is the first federal law to ban sex discrimination in health care, and applies to any entity that is "principally" engaged in providing or administering health services or health insurance coverage. 45 C.F.R. § 92.4.

The proposed regulations will harm people seeking health care in California by undermining access to abortion and limiting patients' reproductive health care options, especially in rural areas.

The proposed regulations will allow health care providers and other covered entities to invoke blanket exemptions from the regulations' general prohibition on sex discrimination based on abortion and religious objections. Proposed regulations, § 92.6(b). The proposed regulations incorporate provisions from Title IX that exempt entities from complying with the prohibition against sex discrimination if doing so (1) involves providing or paying for abortion or (2) would be inconsistent with the organization's religious tenets. *Id.*; 20 U.S.C. §§ 1681, 1688. The proposed regulations also exempt entities from complying with the anti-discrimination provisions if doing so would violate a specific list of existing, as well as any future, federal abortion and religious exemption laws. Proposed regulations, § 92.6(b).

If enacted, the proposed regulations will harm people in need of abortion or family planning services that are denied because of a provider's religious beliefs. This will result in either a complete lack of care for these patients or at best, a substantial delay in care, and could lead to serious or life-threatening results.

The existing regulations already provide an exemption from Section 1557's prohibition of discrimination on the basis of sex if compliance would violate existing federal abortion and religious exemption laws. 45 C.F.R. § 92.2 (b)(2) (providing that "[i]nsofar as the application of any requirement under this part would violate applicable Federal statutory protections for religious freedom and conscience, such application shall not be required").

But the proposed regulations' blanket religious exemption is unprecedented, unnecessary and will harm patients seeking care. When the current Section 1557 regulations were finalized in 2016, HHS considered and ultimately rejected incorporating Title IX's blanket religious exemption because of the stark differences between educational institutions—the focus of Title IX—and health care entities. 81 Fed. Reg. at 31380. For example, an individual does not have the same latitude in choosing a health care provider as they do choosing a school, especially in rural areas or locations where hospitals are run by religious institutions, or in emergency situations.

Women in California's rural areas tend to be minorities, under 30, and subsisting at 100 to 200 percent below the poverty line. These women will be particularly harmed by the proposed regulations. Rural counties in California have the highest teenage birth rates in the state and rural teenagers are often forced to travel much farther than their urban counterparts to access health care services. Forcing low-income residents of rural communities to travel long distances for care—which may be the only option they have left if they are denied care under a blanket religious exemption—is more than merely

inconvenient. It can also require patients to take unpaid time off work and can pose serious challenges if the patient has other children who need care. Many cannot afford these additional costs to access medically necessary and beneficial care, leading to worse health outcomes.

In many rural communities, there are very few options for quality reproductive health care. *See, e.g.*, American College of Obstetricians and Gynecologists, Committee Opinion No. 586: Health Disparities in Rural Women 2 (Feb. 2014, reaffirmed 2018), https://tinyurl.com/yyqfynk3 [hereinafter ACOG] (noting that "[o]bstetric and gynecological health services, including family planning, are limited in many nonmetropolitan areas"); Susan F. Wood et al., Community Health Centers and Family Planning in an Era of Policy Uncertainty (Mar. 2018), http://tinyurl.com/y6hen4h8, at 14 (reporting that existing community health care centers in rural areas cannot absorb a significant number of new patients). Only 46 percent of agencies providing publicly funded family planning services report being located in mostly rural locations. ACOG, *supra*, at 2. In a 2018 study of community health centers, 40 percent of rural and suburban centers reported that referral to a freestanding family planning clinic was not an option because there was no such clinic in their community. Wood et al., *supra*, at 14. The United States is also suffering from a nationwide shortage of physicians that is particularly pronounced in rural areas. Bureau of Health Workforce, Health Resources and Services Administration, Designated Health Professional Shortage Areas Statistics 2 (June 30, 2019), https://tinyurl.com/y59fns4t. The harm caused by the proposed regulations' blanket abortion and religious exemptions would be amplified by the lack of physicians in rural areas.

The proposed regulations' removal of gender identity and sex stereotyping from the definition of prohibited sex-based discrimination will harm transgender individuals and those who do not conform to traditional sex stereotypes.

Currently, section 1557's regulations reflect well-settled law acknowledging that discrimination on the basis of sex includes discrimination based on gender identity and sex stereotyping, and protects transgender individuals and gender non-conforming people. The proposed regulations expressly limit section 1557's "sex discrimination" protections to those based on a binary, biological difference between males and females defined at birth. The proposed regulations would also eliminate the definition of gender identity which includes gender expression and transgender status. They would also remove specific provisions that require treatment consistent with a patient's gender identity.

The proposed regulations' narrowing of the applicability of section 1557's protections will harm transgender and gender non-conforming individuals. For example, a health care provider could refuse to treat a patient for a cold or a broken arm based on the patient's gender identity or refuse to accept a transgender individual in favor of a person who is not transgender when accepting new patients. 81 *Fed. Reg.* at 31455. The resulting inability to access needed health care services could exacerbate health disparities experienced by LGBTQ people, such as higher rates of depression and suicide attempts, higher risk of HIV/AIDS, higher use of tobacco and drugs, and higher risk of breast cancer. *Id.* at 31460 (citing Kellan E, Baker, Center for American Progress, Open Doors for All, Sexual Orientation and Gender Identity Protections in Health Care (Apr. 30, 2015), https://www.americanprogress.org/issues/lgbt/report/2015/04/30/112169/open-doors-for-all/.)

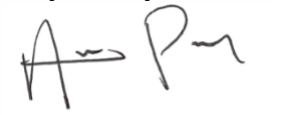
In addition, well-settled case law confirms that discrimination on the basis of sex necessarily includes discrimination based on sex stereotyping and gender identity, including discrimination against transgender individuals. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989); *EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc.* (6th Cir. 2018) 884 F.3d 560 (holding that termination of employee on the basis of transitioning or transgender status violates Title VII of the 1964 Civil Rights Act); *Whitaker*

v. Kenosha Unified School District (7th Cir. 2017) 858 F.3d 1034 (holding that discrimination against transgender students constitutes sex discrimination under Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the U.S. Constitution); *Dodds v. U.S. Dept. of Education* (6th Cir. 2016) 845 F.3d 217 (holding that discrimination against transgender students likely constitutes sex discrimination under Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the U.S. Constitution); *Glenn v. Brumby* (11th Cir. 2011) 663 F.3d 1312 (holding that termination of employee based on her gender transition, transgender status and unsubstantiated "bathroom concerns" constitutes sex-based discrimination in violation of the Equal Protection Clause of the U.S. Constitution); *Barnes v. City of Cincinnati* (6th Cir. 2005) 401 F.3d 729 (holding that termination of employee based on her gender transition constitutes sex-based discrimination under Title VII of the 1964 Civil Rights Act); *Smith v. City of Salem* (6th Cir. 2004) 378 F.3d 566 (holding that termination of employee based on her gender transition constitutes sex-based discrimination under Title VII); *Rosa v. Park West Bank & Trust Co.* (1st Cir. 2000) 214 F.3d 213 (holding that refusal to serve transgender customer constitutes sex-based discrimination under the Equal Credit Opportunity Act); *Schwenk v. Hartford* (9th Cir. 2000) 204 F.3d 1187 (holding that the Gender Motivated Violence Act (GMVA) applied to targeting of a transgender person).

For all these reasons, the California Women's Law Center respectfully requests that HHS withdraw the proposed regulations from consideration.

Respectfully submitted,

Amy C. Poyer



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