August 12, 2019

To: Department of Health and Human Services – Re: Section 1557 Comment Period

The public comment period for the Affordable Care Act opened with a summary statement by the Department of Health and Human Services (HHS) reiterating its commitment "to ensuring the civil rights of **all** individuals who access or seek to access health programs or activities of covered entities under Section 1557 of the Patient Protection and Affordable Care Act." [Emphasis added].

I write this letter in my role as the Associate Vice President for the University of Virginia's Office for Equal Opportunity and Civil Rights (EOCR). EOCR's mission is to ensure equal opportunity and protect the civil rights of all University community members (in the Academic Division and Health System) through proactive outreach, education, and effective response and resolution to protect the civil rights of **all** community members. A key role EOCR fulfills is to give meaning to the University's Notice of Non-Discrimination and Equal Opportunity Statement and related policies and procedures, which prohibit discrimination and harassment on the basis of, and retaliation related to, certain protected characteristics. Those characteristics include gender identity (and sexual orientation), national or ethnic origin, and disability, which is why I am compelled to submit this letter during HHS' public comment period in support of continued equal access for **all** to critical health care services under the Affordable Care Act.

In submitting this letter, I am joined by the undersigned University of Virginia Medical Center faculty and representatives and the Serpentine Society Board of Directors, a network of LGBTQ+ alumni of the University of Virginia.

Gender Identity

It is understood that part of the impetus for the proposed change to Section 1557 to remove "gender identity" as being protected as a form of discrimination on the basis of sex is based on a desire to align with recent court cases (including *Franciscan Alley*) and recent positions taken by the U.S. Department of Justice and the U.S. Department of Education with respect to the application of Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, to gender identity, respectively.

Specifically, HHS has stated in the proposed rule:

> The Department proposes to repeal the novel definition of "sex" in the Section 1557 regulation in order to make the Department's regulations implementing Title IX through the Section 1557 Regulation more consistent with the Title IX regulations of other Federal agencies. The Department further believes this proposed rule avoids different interpretations of the same statute by multiple agencies, and promotes consistent expectations and enforcement.

While consistency is important, the desire for consistency overlooks the unique importance that health care programs and services afford individuals. The proposed rule makes much about changing the 1557 regulation to cut costs and avoid confusion for covered entities. However, our institution, as one that purportedly would benefit from both those interests, writes to make clear our position that the interest

of providing access to health care without regard to gender identity is what matters most. While we certainly can always do more (not less) than what the Federal government requires, the Federal government plays a critical role in driving equality and access, especially for the population of transgender, non-binary, and gender nonconforming members of our communities who are the most vulnerable to discrimination, harassment, and bias, and whose health and well-being suffer as a result.

Further, it is not necessary for HHS to change its regulations with respect to its definitions that apply to sex and gender identity; the Federal district court in *Franciscan Alliance* has enjoined HHS from enforcing nondiscrimination on the basis of gender identity but did not require it to act to change its regulation. HHS, itself, acknowledges in its comments that this issue may be decided by the U.S. Supreme Court very soon. As such, any action by HHS is premature and unnecessary at this time – more importantly, taking action now is likely to deny vital services to numerous transgender, non-binary, and gender nonconforming individuals and to do them harm. *See, e.g.,* Advocate article, *New Trump Health Care Rule Will Harm 15 Million Trans People*.

We write to urge HHS to take no action in this regard to change its current position.

Language Diversity

In the area of language diversity, the proposed rule changes are driven clearly by cost. HHS notes that the notice and tag lines that Section 1557 currently requires for translations far outweigh in financial cost the benefits those requirements are having for Limited English Proficient (LEP) individuals. The cost burden, including from an environmental perspective when dealing with significant paper publications, is understood and valid. However, ensuring access to services to dominant language groups in the United States and in one's communities must be the priority. As such, we urge HHS to carefully consider modifications to the existing regulatory requirements that lessen the cost and environmental burden while still ensuring language access. HHS notes in its proposed rule that there is not significant information to support an increase in services to LEP individuals as a result of the implementation of the notice and tag line requirements. However, as those requirements only have been in effect for a few years, we posit that time period is insufficient to reach a definitive and sweeping conclusion that they were not beneficial to increasing access that would justify eliminating the requirements in their entirety. One middle ground may be, as noted by HHS in the reference to Spanish, to reduce the number of languages required for the notice (i.e., currently 15) or, alternatively, to allow providers to identify what the top 3-5 languages are in their communities that would continue to require the notice and tag requirements or similar communication methods.

Disability

One question posed by the proposed rule is whether HHS's Section 504 Regulations at 45 CFR Part 85 should be amended to address effective communication, accessibility standards for buildings or facilities, accessibility of electronic information technology, and the requirement to make reasonable modifications for otherwise qualified individuals with disabilities under any program or activity receiving Federal financial assistance from HHS.

EOCR strongly supports the inclusion of the aforementioned information to specifically address and provide clear guidance on vital access issues for individuals with disabilities, as well as to be consistent with Section 504 enforcement in other areas, such as matters handled by the U.S. Department of Education, Office for Civil Rights pursuant to the Section 504 Regulations at 45 CFR Part 104 and the Americans with Disabilities Act of 1991, as amended.

Thank you for your anticipated thoughtful consideration of the above comments.

Respectfully submitted,

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