

September 26, 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

RE: RIN-0945-AA17

Re: Nondiscrimination in Health Programs and Activities

Dear Secretary Becerra:

On behalf of the 40,000 members of the American College of Emergency Physicians (ACEP), we wish to comment on the “Nondiscrimination in Health Programs and Activities” proposed rule, as it affects our practice of emergency medicine and the patients we serve.

As background, Section 1557 of the Affordable Care Act (ACA) prohibits discrimination on the basis of race, color, national origin, sex, age, or disability under any health program or activity that receives federal financial assistance. In 2016, the U.S. Department of Health and Human Services (HHS) finalized a regulation that defined “on the basis of sex” to include sex stereotyping, gender identity, and termination of pregnancy. However, in 2020, HHS removed gender identity and sexual orientation from the Section 1557 regulation. This proposed rule, among other modifications to non-discrimination policies, proposes to revert back to the 2016 definition of “on the basis of sex,” effectively rescinding the 2020 policy.

ACEP supports the rescission of the 2020 regulation. In 2019, ACEP and the Emergency Medicine Residents’ Association (EMRA) issued a [statement](#) opposing the initial proposal to revise the regulation. ACEP stated that we strongly believe that discrimination in any form should be prohibited in health care. Both by law¹ and by oath, emergency physicians must care for all patients seeking emergency medical treatment. Denial of emergency care or delay in providing emergency services on the basis of race, religion, sexual orientation, gender identity, ethnic background, social status, type of illness, or ability to pay, is unethical under our Code of Ethics as emergency physicians.²

WASHINGTON, DC OFFICE

901 New York Ave, NW
Suite 515E
Washington DC 20001-4432

202-728-0610
800-320-0610
www.acep.org

BOARD OF DIRECTORS

Gillian R. Schmitz, MD, FACEP
President
Christopher S. Kang, MD, FACEP
President-Elect
Alison J. Haddock, MD, FACEP
Chair of the Board
Aisha T. Terry, MD, MPH, FACEP
Vice President
Jeffrey M. Goodloe, MD, FACEP
Secretary-Treasurer
Mark S. Rosenberg, DO, MBA, FACEP
Immediate Past President
L. Anthony Cirillo, MD, FACEP
John T. Finnell, MD, MSc, FACEP
Gabor D. Kelen, MD, FACEP
Rami R. Khoury, MD, FACEP
Heidi C. Knowles, MD, FACEP
James L. Shoemaker, Jr., MD, FACEP
Ryan A. Stanton, MD, FACEP
Arvind Venkat, MD, FACEP

COUNCIL OFFICERS

Kelly Gray-Eurom, MD, MMM, FACEP
Speaker
Melissa W. Costello, MD, FACEP
Vice Speaker

EXECUTIVE DIRECTOR

Susan E. Sedory, MA, CAE

¹ 42 U.S. Code § 1395dd - [Examination and treatment for emergency medical conditions and women in labor.](#)

² ACEP Code of Ethics for Emergency Physicians; Approved Jan 2017; <https://www.acep.org/patient-care/policy-statements/code-of-ethics-for-emergency-physicians/>.

We also expressed concerns in our [official response](#) to the 2020 regulation, when it was proposed in 2019, that the modifications the U.S. Department of Health and Human Services (HHS) were planning to make represented a direct conflict to the federally mandated provision of emergency services. The Emergency Medical Treatment and Labor Act (EMTALA) requires clinicians to screen and stabilize every patient who comes to the emergency department (ED). Such patients have every right to expect the best possible care and to receive the most appropriate treatment and information about their condition. Patients with life-threatening injuries or illnesses may not have time to wait to be referred to another physician or other health care professional to treat them if the present provider has a moral or religious objection. Likewise, EDs operate on tight budgets and do not have the staffing capacity to be able to have additional personnel on hand 24 hours a day, seven days a week to respond to different types of emergencies that might arise involving patients with different backgrounds including sexual orientations and gender identities. The previous rule implied that to meet EMTALA requirements, an ED must have anticipated treating transgender patients, surveyed its employees to ascertain who might object treating such a patient, and staffed accordingly. This would be an impossible task that jeopardizes the ability to provide care, both for standard emergency department readiness and for emergency preparedness. EDs serve as the safety net in many communities, providing a place where those who are most vulnerable and those in need of the most immediate attention can receive care. By not addressing the rights and needs of *all* patients undergoing an emergency, the legal obligations of emergency physicians, and the budget and staffing constraints that EDs face, the 2020 rule undermined the critical role that EDs play across the country.

In all, we strongly believe that discrimination in any form should be prohibited in health care, and therefore we encourage HHS to finalize the rule as proposed. The 2020 policy did not reflect nor allow for our moral and legal duty as emergency physicians to treat everyone who comes through the doors of the ED.

We appreciate the opportunity to offer our support for the proposed provisions. If you have any questions, please contact Jeffrey Davis, ACEP's Director of Regulatory and External Affairs, at jdavis@acep.org.

Sincerely,



Gillian R. Schmitz, MD, FACEP
ACEP President