

November 17, 2017

Jane E. Norton
Director
Office of Intergovernmental & External Affairs
U.S. Department of Health & Human Services
220 Independence Avenue, SW
Washington, DC 20201

Dear Director Norton:

On behalf of the physician and medical student members of the American Medical Association (AMA), thank you for the opportunity to respond to the request for information (RFI) on Removing Barriers for Religious and Faith-Based Organizations To Participate in HHS Programs and Receive Public Funding.

It is our understanding that the administration may be reevaluating current policy addressing discrimination in health care programs on the basis of sex as outlined in the final rule implementing Section 1557 of the Affordable Care Act (“Section 1557”). We strongly urge the administration to reconsider. Since 2012, the U.S. Office of Civil Rights has interpreted Section 1557 of the Affordable Care Act’s sex discrimination prohibition to extend to claims of discrimination based on gender identity or sex stereotypes and accepted such complaints for investigation. Numerous federal agencies, including the U.S. Department of Justice, U.S. Department of Labor, U.S. Department of Education, and the U.S. Department of Housing and Urban Development, have previously interpreted sex discrimination to include discrimination on the basis of gender identity. Further, the rule’s inclusion of sex stereotyping reflects the Supreme Court’s holding in *Price Waterhouse v. Hopkins* (1989), which stated that discrimination based on stereotypical notions of appropriate behavior, appearance or mannerisms for each gender constitutes sex discrimination. Lower courts, including in the context of Section 1557, have recognized that sex discrimination includes discrimination based on gender identity.¹

Based on longstanding policy, the AMA opposes any discrimination based on an individual’s sex, sexual orientation, gender identity, race, religion, disability, ethnic origin, national origin, or

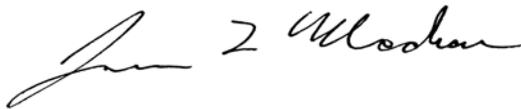
¹ See, e.g., *Rumble v. Fairview Heath Servs.*, Civ. No. 14–cv–2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015) (Section 1557) (order denying motion to dismiss); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir.), cert. denied, 546 U.S. 1003 (2005)(Title VII); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 575 (6th Cir. 2004) (Title VII); *Schroer v. Billington*, 577 F.Supp.2d 293, 304 (D.D.C. 2008) (Title VII).

age. AMA policy also supports public and private health insurance coverage for treatment of gender dysphoria as recommended by the patient's physician. Section 1557's protections assist some of the populations that have been most vulnerable to discrimination, such as lesbian, gay, bisexual, and transgender individuals and those suffering from mental illness, including substance use disorders, and help provide those populations equal access to health care and health coverage. We also note that Section 1557 does not force physicians to violate their medical judgment. Rather, covered entities, including insurers, must "apply the same neutral, nondiscriminatory criteria [used] for other conditions when the coverage determination is related to gender transition."²

In sum, the AMA stands behind Section 1557's gender identity protections and opposes any modifications to the rule that would jeopardize the health and wellbeing of vulnerable populations. We urge the U.S. Department of Health & Human Services (HHS) to seek input from stakeholders about whether informal guidance may help to clarify misunderstandings of the existing rule. If HHS determines that rule changes are necessary, it should undertake the same process used previously to develop the rule, including a formal Notice of Proposed Rulemaking and public comment period.

Thank you for your consideration. We would be happy to meet with you in person to discuss this matter. If you have any questions or concerns, please feel free to contact Laura Hoffman, Assistant Director, Federal Affairs, at laura.hoffman@ama-assn.org or (202)789-7414.

Sincerely,

A handwritten signature in black ink, appearing to read "James L. Madara". The signature is written in a cursive style with a large initial "J" and "M".

James L. Madara, MD

² 81 Fed. Reg. 31435 (May 18, 2016).