



November 9, 2015

Eileen Hanrahan
Senior Civil Rights Analyst
Office of Civil Rights
U.S. Department of Health and Human Services
200 Independence Avenue SW.
Washington, DC 20201

RE: RIN Number 0945-AA02

Dear Ms. Hanrahan,

The Citizens' Council for Health Freedom (CCHF), a 501(c)(3) organization, respectfully submits these comments regarding the proposed HHS rule issued on September 8, 2015: "Nondiscrimination in Health Programs and Activities; Proposed Rule."

CCHF opposes the proposed nondiscrimination rule. Despite the subjectivity of the proposed "internal sense of gender" definition -- and no statutory authority to back up the imposition of an unnatural definition of 'sex' and sure-to-be-controversial nondiscrimination prohibitions -- HHS proposes to potentially force physicians to perform or allow questionable, harmful, unethical, medically-unnecessary and permanently disfiguring treatments requested by a transgender individual -- or possibly face lawsuits, penalties, or loss of licensure for refusal. Furthermore, the proposed rule runs counter to deep public opposition welling up around the country and can be expected to have negative impacts on patients, the practice of medicine, ethics, professional integrity, the physician shortage, religious freedom, personal mores, patient safety and health, the freedom of conscience of practitioners and institutions, and health care costs.

In a 2013 HHS Request for Information (RFI), HHS states "Section 1557 [of the Affordable Care Act] is the first Federal civil rights statute that prohibits sex discrimination in health programs and activities of covered entities." The agency then asked the public for personal experiences of "sex discrimination" in health programs or activities. **However, HHS expanded the definition of the word 'sex' beyond the natural definition (birth as a male or female) by including "discrimination on the basis of gender identity, sex stereotyping, or pregnancy" as "sex discrimination."**

In addition, although prohibition against discrimination on the basis of sex in Title IX is mentioned in the RFI as applying “only to education programs and activities,” the proposed HHS nondiscrimination rule appears to not only attempt to use title IX of the education code to implement new nondiscrimination measures in health care, but to also engineer a new definition of ‘sex’ to include gender identity and more. It defines a new “*On the basis of sex*” phrase as:

“discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, or gender identity.”

Exceeding Statutory Authority

The Department, as a federal administrative agency, is constrained by law to enforcing the law as written in statute by Congress. However, in this proposed rule, HHS proposes to create its own law through regulation:

“We propose that discrimination on the basis of sex further includes discrimination on the basis of gender identity.”

The Department is not authorized to “propose.” It must only act within specific federal statutory authority. As evidence of this stretch of legal limits, the Department proposes to use Title IX beyond educational institutions to health care institutions:

Each covered entity must comply with the regulation implementing Title IX, at § 86.31(b)(1) through (8) of this subchapter. Where this paragraph cross- references regulatory provisions that use the term “student,” “employee,” or “applicant,” the terms “individual” shall apply in its place.” (*proposed §92.101 (b)(3)*)

As further evidence, the Department claims regulatory and judicial precedent in defining gender identity in health care programs and activities as sex discrimination. For example, to support the inclusion of “gender identity,” HHS references previous interpretations by the Office of Civil Rights (a federal agency) and “Other Federal agencies,” such as the Office of Personnel Management and the Department of Labor. But these are not Congress or federal statutes.

The proposed rule also claims:

“In addition, courts, including in the context of Section 1557, have recognized that sex discrimination includes discrimination based on gender identity.²¹ We thus propose to formally adopt this well-accepted interpretation of discrimination “on the basis of sex.”

This claim by HHS ignores a few facts that are revealed by investigating footnote #21 in the above

quote. Footnote #21 says: “See, e.g., *Rumble v. Fairview Heath Services*, 2015 WL 1197415 (D. Minn. 2015) (order denying motion to dismiss); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir.), cert. denied, 546 U.S. 1003 (2005); *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004); *Schroer v. Billington*, 577 F. Supp.2d 293 (D.D.C. 2008). But see *Johnston v. University of Pittsburgh*, Civ. Action No. 3:13–213 (W.D.Pa. Mar. 31, 2015) (interpreting Title IX, among other authorities).”

As *Minnesota Law Review* (3/31/15) reveals, in *Rumble v. Fairview*, **the Court relied upon the U.S. Department of Health and Human Services, a federal agency, for interpretation of Section 1557 in Obamacare, not the federal statute itself:**

“In terms of statutory interpretation tools, Section 1557 leaves much to be desired. Without case law interpreting Section 1557 or any formal agency regulations, the court **relied upon an opinion letter** from the Director of the U.S. Department of Health and Human Services’ Office of Civil Rights, Leon Rodriguez. The letter states that Section 1557 “extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity and femininity.”[15] Affording the letter strong *Skidmore* deference, the court concluded that Section 1557 protects individuals from discrimination on the basis of gender identity.[16]” [emphasis added]

In *Barnes v. City of Cincinnati*, according to Employment Discrimination Law: Cases and Materials, a book written by Arthur B. Smith, Jr. Charles B. Craver, and Ronald Turner, the Court “relied upon the reasoning of *Smith v. Salem*, which found a cause of action under Title VII (employment discrimination law). The *Schroer v. Billington* case also came under Title VII. However, the proposed nondiscrimination rule does not claim Title VII as a base of authority for rulemaking.¹

Finally, HHS asserts that the Department is empowered to add gender identity to its proposed “on the basis of sex” definition because of the decision in *Johnston v. University of Pittsburgh* (March 31, 2015).² **However, the court states in various sections as follows:**

“[T]his case presents one central question: whether a university, receiving federal funds, engages in unlawful discrimination, in violation of the United States Constitution and federal and state statutes, when it prohibits a transgender male student from using sex-segregated

¹ Section 1557 of the ACA provides that an individual shall not, on the grounds prohibited under Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. 2000d *et seq.* (race, color, national origin), Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. 1681 *et seq.* (sex), the Age Discrimination Act of 1975 (Age Act), 42 U.S.C. 6101 *et seq.* (age), or Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794 (disability), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any health program or activity, any part of which is receiving Federal financial assistance, or under any program or activity that is administered by an Executive Agency or any entity established under Title I of the Act or its amendments. Section 1557 states that the enforcement mechanisms provided for and available under Title VI, Title IX, Section 504, or the Age Act shall apply for purposes of addressing violations of Section 1557.

² <http://law.justia.com/cases/federal/district-courts/pennsylvania/pawdce/3:2013cv00213/212325/43/>

restrooms and locker rooms designated for men on a university campus. **The simple answer is no.** ... [emphasis added]

“Pending before the Court in this matter is Defendants’ motion to dismiss (ECF No. 9) the second amended complaint (ECF No. 7) pursuant to Federal Rule of Civil Procedure 12(b)(6). Thus, the issue this Court must decide is whether Plaintiff has stated a cognizable claim of discrimination on the basis of sex under the Fourteenth Amendment to the United States Constitution and Title IX of the Education Amendments. The Court finds that Plaintiff has **failed to allege a plausible claim for relief as a matter of law**. Accordingly, and for the reasons explained below, the Court will GRANT Defendants’ motion to dismiss.” ... [emphasis added]

“Plaintiff has failed to state a plausible claim for relief for discrimination or retaliation under either the Equal Protection Clause or Title IX.”²² [emphasis added]

Noting the statutory constraints imposed by Congress, the U.S. District Court for the Western District of Pennsylvania states in footnote 22 above in *Johnston v. University of Pittsburgh, et al*:

“The Court recognizes the changing perceptions in society concerning transgender individuals. “However, the function of this Court is...to construe the law in accordance with proper statutory construction and judicial precedent. The Court is constrained by the framework of the remedial statute enacted by Congress...” *Oiler v. Winn-Dixie Louisiana, Inc.*, No. 00-cv-3114, 2002 WL 31098541, at *6 (E.D. La. September 16, 2002).”

The proposed rule appears to walk boldly away from construing the law in accordance with proper statutory construction. In addition, although HHS is using *Price Waterhouse v. Hopkins* to broaden interpretation of the word ‘sex,’ this is not settled the issue. The Price Waterhouse decision is indeed troubling to legal scholars, as attorneys Mr. Michael Starr and Ms. Amy L. Strause discuss in “Sex Stereotyping in Employment: Can the Center Hold?”:³

Courts and commentators have concluded from the *Price Waterhouse* plurality that gender stereotyping is, in and of itself, a form of sex discrimination actionable under Title VII. But that idea and the implications for employment discrimination law that flow from it are inconsistent with judicially settled principles of what sex discrimination in employment means. Those long-accepted understandings were not, as some say, “eviscerated” by *Price Waterhouse*.³ Rather, it is the increasingly vogue view of the impermissibility of sex stereotyping under Title VII that must be reconsidered.”

³ http://m.hoganlovells.com/files/Publication/86d10e2a-c96f-4fc4-812f-07dcd00c82c2/Presentation/PublicationAttachment/abfb7e3a-238e-4af7-adad-1154910cb0ac/Starr_Strauss%20article.pdf

Courts have similarly rejected claims brought under Title VII for discrimination on the basis of one's being a transsexual. In those cases, courts have held that transsexuals are not disadvantaged at work because of their "sex," that is, because they were women and not men, or because they were men and not women.

Dangers for Medical Ethics, Patients, and Doctors

To force doctors, nurses, hospitals and others to treat individuals according to their chosen gender identity of the day, the month, the year or the decade places practitioners and others in medical, ethical, and moral dilemmas, and violates freedom of conscience and professional integrity requirements. It may also pose health, medical and safety issues for patients. And it mandates that the medicine move away from objective male and female physiology and toward subjective "internal sense of gender" for medical decision-making. **This is antithetical to good patient care.**

Under "Discriminatory actions prohibited," the proposed rule states:

"A covered entity shall not, in providing or administering health-related insurance or other health-related coverage:

- (1) Deny, cancel, limit, or refuse to issue or renew a health insurance plan or policy, or other health coverage, or deny or limit coverage of a claim, or impose additional cost sharing or other limitations or restrictions, on the basis of an enrollee's or prospective enrollee's race, color, national origin, sex, age, or disability;
- (2) Employ marketing practices or benefit designs that discriminate on the basis of race, color, national origin, sex, age, or disability in a health-related insurance plan or policy, or other health-related coverage;
- (3) Deny or limit coverage, deny a claim, or impose additional cost sharing or other limitations or restrictions, on any health services that are ordinarily or exclusively available to individuals of one sex, based on the fact that an individual's sex assigned at birth, gender identity, or gender otherwise recorded by the plan or issuer is different from the one to which such health services are ordinarily or exclusively available;
- (4) Categorically or automatically exclude from coverage, or limit coverage for, all health services related to gender transition; or
- (5) Otherwise deny or limit coverage, or deny a claim, for specific health services related to gender transition if such denial or limitation results in discrimination against a transgender individual."

Under the proposed rule, an individual would be entitled to their own determination of maleness or femaleness, regardless of their physiology, their DNA, their production of hormones, or their unique male or female chromosomal structure. The administration proposes to require individuals, institutions, and others to accept and act upon the chosen “gender identity” of an individual, even if that identity were to change days, months or years later. The proposed rule states:

Section 92.206 proposes that covered entities be required to provide individuals equal access to their health programs or activities without discrimination on the basis of sex [under the Department’s created definition] and proposes that covered entities treat individuals consistent with their gender identity. This provision applies to all health programs and activities, and prohibits, among other forms of adverse treatment, the denial of access to facilities administered by the covered entity.

This proposed approach is **consistent with the principle** that discrimination on the basis of sex includes discrimination on the basis of gender identity and that failure to treat individuals in accordance with their gender identity may constitute **prohibited discrimination**. It is also consistent with recent guidance issued and enforcement actions taken by the U.S. Department of Education, the U.S. Department of Justice, and the Equal Employment Opportunity Commission.

In short, HHS has conjured up its own “principle,” used “guidance” from three regulatory agencies as “authority” and called such actions “prohibited discrimination.”

The schizophrenic nature of the proposed rule is particularly obvious when the rule that lets those that choose an identity opposite to their physiology have it both ways. It requires clinicians and hospitals to care for a patient not only according to their chosen and gender identity of the moment, but also according to their male or female physiology:

The limited exception to the requirement that covered entities treat individuals consistent with their gender identity is that a covered entity may not deny or limit health services that are ordinarily or exclusively available to individuals of one gender based on the fact that the individual’s sex assigned at birth, gender identity, or gender otherwise recorded in a medical record or by a health insurance plan is different from the one to which such health services are ordinarily or exclusively available. The exception applies only in limited circumstances.

For example, a covered entity may not deny an individual treatment for ovarian cancer where the individual could benefit medically from the treatment, based on the individual’s identification as a transgender male. [emphasis added]

Government-Endorsed Social Engineering

The reason there is no “Title IX for Health Care,” and never has been, is because health care is often sex-specific, in the true and natural meaning of the term ‘sex.’ The individual’s sex [female or male] often determines treatments, preventive care options, medication dosages, susceptibility to certain cancers and conditions, and more.

The proposed rule repeatedly uses the some iteration of the phrase, “individual’s sex assigned at birth.” Although one might wonder who HHS thinks did the “assigning,” it has long been clear to the public, to mothers worldwide and to clinicians everywhere, -- and has been for millennia -- that babies are conceived and born either male or female.

The proposed rule aims to use the health care setting to impose on American society and the practice of medicine an unnatural, subjective definition of the word ‘sex.’

For example: if the rule is finalized as written, individuals who claim to be female, though anatomically and structurally male, would be “female” under the law except when they aren’t, such as when they need treatment for testicular cancer, a cancer only men can get, or when they change their mind and decide that they’ll be male for awhile or forever.

The proposed rule states:

“A covered entity shall provide individuals equal access to its health programs or activities without discrimination on the basis of sex, and shall treat individuals consistent with their gender identity, except that any health services that are ordinarily or exclusively available to individuals of one gender may not be denied or limited based on the fact that an individual’s sex assigned at birth, gender identity, or gender otherwise recorded in a medical record is different from the one to which such health services are ordinarily or exclusively available.”

Subsequently, the rule defines “gender identity” as:

“an individual’s internal sense of gender, which may be different from an individual’s sex assigned at birth. The way an individual expresses gender identity is frequently called ‘gender expression,’ and may or may not conform to social stereotypes associated with a particular gender. Gender may be expressed through, for example, dress, grooming, mannerisms, speech patterns, and social interactions. For purposes of this part, an individual has a transgender identity when the individual’s gender identity is different from the sex assigned to that person at birth; an individual with a transgender identity is referred to in this part as a transgender individual.”

Sex Reassignment Surgery

A person's "internal sense" is subjective and subject to vacillation. While the rule does not propose to require that individuals whose claimed "internal sense of gender" is other than their actual sex have gender reassignment surgery, HHS claims that "basic nondiscrimination principles" will be used to evaluate denial of transition-related care and that "an explicit, categorical (or automatic) exclusion of coverage for all health services related to gender transition is **unlawful on its face...**" [emphasis added]

Again, HHS is stretching beyond statutory authority in claiming a law where there isn't one. Such "basic nondiscrimination principles" do not constitute a federal law.

The Department proposes to:

"... bar a covered entity from denying or limiting coverage, or denying a claim for coverage, for specific health services related to gender transition where such a denial or limitation results in discrimination against a transgender individual. In evaluating whether it is discriminatory to deny or limit a request for coverage of a particular service for an individual seeking the service as part of transition-related care, OCR will start by inquiring whether and to what extent coverage is available when the same service is not related to gender transition.

If, for example, a health plan or State Medicaid agency denies a claim for coverage of a hysterectomy that a patient's provider says is medically necessary to treat gender dysphoria, OCR will evaluate the extent of the plan's coverage of hysterectomies under other circumstances. OCR will also carefully scrutinize whether the covered entity's explanation for the denial or limitation of coverage for transition-related care is legitimate and not a pretext for discrimination.

Would HHS thus consider a woman's hysterectomy to become a "male" to be given equal insurance coverage as a hysterectomy to cure a woman's cancer? The rule does not provide the cost of this unfunded mandate. And will physicians decide to shut down his or her OB/GYN practice down to avoid prosecution for failing to do the sex-change operation they cannot medically or morally stomach, and thus extend the surgical wait times of women endangered by cancer?

This rule is HHS trying to practice both medicine without a license and law without a statute.

These medical services, some of which are quite permanent (e.g. mastectomy; hysterectomy; penectomies) would likely be considered cosmetic surgery under the new definition given to

transgendered individuals in the revised Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5).

When the diagnosis of "Gender identity Disorder" was removed from the DSM-5 in 2013, it was replaced with "Gender Dysphoria," which is a **"temporary mental state that only some transgender people might possess,"** according to the *Associated Press* talking in 2012 with Dana Beyer, M.D. who helped the Washington Psychiatric Society make recommendations for the DSM-5 chapter on "Sexual and Gender Identity Disorders." The *AP* also explained the impact of the change on access to medical services:

"[A] diagnosis of Transsexualism or Gender Identity Disorder has been used by doctors, mental health professionals and a growing number of health insurers to justify access to hormones or surgery for patients who decide to physically transition to a new sex."⁴

The *Associated Press* further reports:

- "[L]awyers who specialize in representing transgender clients have found themselves in the uncomfortable position of arguing that Gender Identity Disorder needs to stay in the [DSM] manual in some form..."
- "Let's say someone born a woman walks into my surgical office and say, 'I would like my breasts removed.' What's the diagnosis?" [NY Psychiatrist Jack] Drescher said. "The procedure is a mastectomy, but if there is no diagnosis, it is cosmetic surgery and your insurance won't pay for it."
- "Having a diagnosis is extremely useful in legal advocacy," says Shannon Minter, legal director of the National Center for Lesbian Rights, "We rely on it even in employment discrimination cases to explain to courts that a person is not just making some superficial choice...that this is a very deep-seated condition recognized by the medical community."

Thus, it appears HHS is using this proposed nondiscrimination rule to create full access to sex-reassignment surgery for any reason, despite or because the DSM-5 removed "gender identity disorder" from the list of conditions considered a disorder in need of medical or psychological treatment. Yet the physiological reality of men and women should be considered, as has been discussed by psychiatrist Paul McHugh, M.D.:

At the heart of the problem is confusion over the nature of the transgendered. "Sex change" is biologically impossible. People who undergo sex-reassignment surgery do not change from men to women or vice versa. Rather, they become feminized men or masculinized women.⁵

⁴ "Transgender advocates seek new diagnostic terms," Lisa Leff, *Associated Press* (Wisconsin Gazette), July 23, 2012: <http://www.wisconsinjournal.com/breaking-news/transgender-advocates-look-for-new-diagnostic-terms.html>

Given this reality, how far would this proposed rule reach? Would declared “females” be given access to all treatments available to physiological females including treatments, medications (even if the treatments and medications could endanger the patient)? Would such declared “females” or declared “males” also be given access to sex-segregated bathrooms, despite the angst, discomfort and opposition of the biological females or biological males? Would girls and boys who decide they are “boys” and “girls” be allowed to receive not only all the services available to the other sex, but sex change operations to transform these little girls and little boys into the little “boys” and little “girls” they want to be? What happens when they change their mind? And who will pay for it?

The concerns, dangers and public opposition is palpable, particularly related to giving men who claim they’re “women” access to spaces saved for (and safe for) biological women:

- Recently the people of Houston, Texas voted 61-39 (with 66% of precincts reporting) to keep transgendered people using the bathroom assigned to someone of their biological sex.
- Likewise, a Fayetteville, Arkansas ordinance to give declared “women” (men) access to women’s bathrooms, and vice versa, was defeated in 2014.
- In Toronto, in March 2014, according to the Toronto Sun: “A sexual predator who falsely claimed to be ‘transgender’ [woman named Jessica] and preyed on women at two Toronto shelters was jailed ‘indefinitely’ on Wednesday.”⁶

CCHF is not convinced that 92.207(d) is sufficient protection from the string of lawsuits, penalties and regulatory investigations sure to come for those health care institutions, health plan corporations, and clinicians that refuse to provide access to sex-specific spaces, sex-specific treatments or sex-reassignment treatment and surgery for individuals that claim a sex other than their own:

“Nothing in this section is intended to determine, or restrict a covered entity from determining, whether a particular health service is medically necessary or otherwise meets applicable coverage requirements in any individual case.” (92.207(d))

Americans can thus expect an onslaught of lawsuits against doctors and hospitals that refuse for medical, moral, religious, ethical, or patient safety and health reasons.

HHS’ proposed social engineering scheme will have a negative impact on patients, medicine, ethics, professional integrity, the physician shortage, religious freedom, personal mores, patient safety and health, and the freedom of conscience of practitioners and institutions. It will also increase costs.

⁵ <http://www.wsj.com/articles/paul-mchugh-transgender-surgery-isnt-the-solution-1402615120>

⁶ <http://www.torontosun.com/2014/02/26/predator-who-claimed-to-be-transgender-declared-dangerous-offender>

High Costs

Not only is the proposed rule based on a faulty premise, a stretching of the law, and new proposed unnatural definitions of natural words, but it will also be a financial detriment to the field of medicine and the cost of health insurance. For example, the proposed rule declares:

“[T]he Office of Personnel Management issued a letter on June 23, 2015, to health insurance carriers participating in the Federal Employees Health Benefits Program indicating that “no [such] carrier may have a general exclusion of services, drugs or supplies related to gender transition or ‘sex transformations. ... Based on these principles, an explicit, categorical (or automatic) **exclusion of coverage for all health services related to gender transition is unlawful.**” [emphasis added]

Simply put, this one example show that higher taxes for Americans and higher premiums for the insured can be expected. In addition, the rule specifies training for health care professionals at the cost of \$383 million. The estimated procedural and policy changes will cost nearly \$50 million. Annual enforcement costs are also expected to reach \$122 million. Perhaps the most significant impact will be seen in the realm of complaints and lawsuits. The rule estimates new discrimination complaints to amount to **\$119 million per year**. These complaints are expected to escalate in the coming years. Consequently, this HHS expects a **\$1 billion cost** over the health care industry for just the first two years.

The impact on already unaffordable health insurance premiums, resulting from a variety of mandates under the Affordable Care Act, could also be significant.

Despite the subjectivity of the proposed “internal sense of gender” definition -- and no statutory authority to back up the imposition of an unnatural definition of ‘sex’ and sure-to-be-controversial nondiscrimination prohibitions – HHS proposes to potentially force physicians to perform or allow questionable, harmful, unethical, medically-unnecessary and permanently disfiguring treatments requested by a transgender individual – or possibly face lawsuits, penalties, or loss of licensure for refusal.

Therefore, we respectfully oppose the proposed “Nondiscrimination in Health Programs and Activities” rule.

Sincerely,

Twila Brase, RN, PHN
President and Co-Founder
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