COMMITTEE ON
EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
2176 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

November 7, 2022

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services
200 Independence Ave., SW
Washington, DC 20201

Dear Secretary Becerra:

We write in opposition to the Department of Health and Human Services' (HHS or Department) proposed rule titled "Nondiscrimination in Health Programs and Activities."[1] We are concerned that the proposed rule exceeds the Department's authority and supersedes Congress by reinterpreting the statutory definition of "sex" to include "sexual orientation," "gender identity," and "pregnancy termination."[2] These changes would mandate that covered entities, including private health plans, provide gender-affirming procedures, including procedures for children, and abortions. The proposed rule also inappropriately attempts to extend HHS regulatory authority over self-funded health plans.

The Proposed Rule is Harmful Policy

Section 1557 of the *Patient Protection and 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.[3] Section 1557 specifically incorporates by reference the definition of "sex" in Title IX of the *Education Amendments of 1972*. On July 12, the Department of Education published a proposed rule redefining discrimination on the basis of

[1] 87 Fed. Reg. 47,824 (proposed Aug. 4, 2022).
[2] Press Release, HHS Announces Proposed Rule to Strengthen Nondiscrimination in Health Care (July 25, 2022), https://www.hhs.gov/about/news/2022/07/25/hhs-announces-proposed-rule-to-strengthen-nondiscrimination-in-health-care.html.
[3] 42 U.S.C. § 18116(a).

sex to cover discrimination on the basis of "sexual orientation," "gender identity," and "pregnancy or related conditions."[4]

As we wrote previously to the Department of Education, the change to the interpretation of "sex" has nothing to do with protecting individuals from discrimination.[5] Attempts by the Biden administration to redefine "sex" represent another front in Democrats' ongoing culture war, whose casualties already include too many boys and girls who have been permanently harmed by this administration's actions. The Left's blatant and intentional attempts to redefine our sons' and daughters' identities by questioning biology has already done significant harm to our children and society.

We categorically oppose discrimination on the basis of sex. The HHS proposed rule, however, could force some medical professionals to violate their expertise or beliefs on the best care plan for individuals—particularly children—seeking gender transition medical services.[6] Further, this could result in taxpayer funding of children receiving such treatment in states that do not require parental consent for life-changing procedures like gender reassignment surgery. There is still an ongoing debate on the most appropriate way to support and care for children who believe that their gender is distinct from their biological sex. Other countries have taken a more cautious approach to medical interventions such as hormone therapy and puberty blockers.[7]

The Proposed Rule Exceeds HHS' Statutory Authority

The previous administration rightfully interpreted "sex" to mean "biological sex" in its 2020 final rule on nondiscrimination in health programs. The 2020 rule noted that interpreting "sex" to mean "biological sex" was in keeping with the ordinary public meaning of "sex" when Title IX was enacted as it still is, and that Congress had repeatedly declined to broaden the definition of "sex."[8] The proposed rule reverses the previous administration's plain reading of the statute, which was in line with Congressional intent. If Congress wished to define "sex" to include sexual orientation or gender identity, it would have included those terms or included a definition for the term "sex" that includes those terms.

While the HHS proposed rule claims the Supreme Court's decision in *Bostock v. Clayton County* allows it to expand the interpretation of "sex" discrimination to include sexual orientation and

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[4] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390, 41,571 (proposed July 12, 2022).
[5] Letter from Rep. Virginia Foxx et al. to the Hon. Miguel Cardona, Sec'y, Dep't of Educ. (Sept. 12, 2022), https://republicans-edlabor.house.gov/uploadedfiles/house_education_and_labor_committee_title_ix_nprm_comment_letter_final_.pdf.
[6] Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. at 47,918 (prohibiting denial of "gender transition or other gender-affirming care").
[7] *Doubts are growing about therapy for gender-dysphoric children*, ECONOMIST, May 13, 2021, https://www.economist.com/science-and-technology/2021/05/13/doubts-are-growing-about-therapy-for-gender-dysphoric-children.
[8] Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160, 37,178 (June 19, 2020).

gender identity, this reliance is misplaced. The Court's opinion explicitly stated it did not apply beyond Title VII of the *Civil Rights Act of 1964*.[9]

A federal court has previously ruled that attempts to make these changes to the interpretation of "sex" are outside the Department's authority. In *Franciscan Alliance, Inc. v. Burwell*, the court ruled that the May 2016 Obama administration Section 1557 regulations interpreting "sex" discrimination to include discrimination because of "gender identity" and "termination of pregnancy" contradicted existing law and exceeded statutory authority.[10] With respect to gender identity, the court noted, "If Congress had intended to enact a new, different, or expansive definition of prohibited sex discrimination in Section 1557, it knew how to do so and would not have chosen to explicitly incorporate its meaning from Title IX [of the *Education Amendments Act of 1972*]."[11]

With respect to abortion, the *Franciscan Alliance* court also ruled the 2016 regulation exceeded statutory authority because Section 1557 incorporates Title IX's exemptions related to abortion and religious entities. By failing to include these statutory exemptions, the 2016 rule contradicted the underlying statute.[12] The HHS proposed rule similarly explicitly refuses to incorporate the Title IX abortion and religions exemptions and is therefore contrary to the underlying statute.[13]

The Proposed Rule Inappropriately Regulates ERISA Plans

We strongly oppose the Department's attempts to apply the proposed rule to "[a]ll of the operations of any entity principally engaged in the provision" of health insurance coverage if any part of the entity receives federal financial assistance from the Department.[14] This would mean that if a third-party health plan administrator (TPA) receives federal funding in addition to contracting with an employer plan governed by the *Employee Retirement Income Security Act* (ERISA), then the employer plan will be subject to Section 1557 restrictions even if it is self-funded. Under current law, self-funded plans are not subject to Section 1557 and are regulated by the Department of Labor (DOL). Congress did not apply Section 1557 protections to all entities engaging in health programs or activities, but rather only to entities receiving federal funds. We believe it is inappropriate and contrary to statutory law for HHS to use Section 1557 as a means to regulate ERISA plans overseen by DOL.

Expanding the scope of the ACA's nondiscrimination language to ERISA plans will create confusion about the applicability of the proposed rule. This will waste taxpayer dollars and force self-insured plans who contract with TPAs to cover abortion and transgender health care services in an effort to avoid costly and time-consuming investigations. The Department estimates the cost of its proposed rule to be $560 million over five years,[15] and we anticipate that significant

[9] 140 S. Ct. 1731, 1753 (2020).
[10] Franciscan Alliance, Inc. v. Burwell, 227 F. Supp. 3d 660, 670 (N.D. Tex. 2016).
[11] *Id.* at 688.
[12] *Id.* at 689-691.
[13] Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. at 47,840.
[14] *Id.* at 47,912.
[15] *Id.* at 47,899.

resources will go into investigating whether a self-insured plan and its TPA are a "covered entity." The National Association of Health Underwriters urged HHS to provide more clarity regarding application of the proposed rule:

> [T]o increase regulatory compliance and mitigate compliance costs for employer group plan sponsors, any final rule should provide clearer delineation and direct examples of instances when and how this regulation will apply to different types of group health benefit plans.[16]

The threat of costly and time-consuming investigations will create a litigious environment for small businesses and TPAs even where the Department has no jurisdiction.

Moreover, employer-sponsored health plans are already required to comply with ERISA non-discrimination requirements,[17] the ACA's prohibition on preexisting conditions exclusion,[18]and Title VII of the *Civil Rights Act of 1964*'s prohibition of discrimination in health coverage because of an employee's sex.[19] Subjecting ERISA plans and TPAs to the Section 1557 requirements is duplicative, costly, burdensome for employers, and outside of the scope of the Department's jurisdiction.

Conclusion

The proposed rule is harmful policy, bad law, and inappropriately attempts to regulate self-funded health plans, and we therefore urge you to withdraw it. Thank you for your consideration of our views.

Sincerely,

Virginia Foxx
Ranking Member

Rick Allen
Ranking Member
Subcommittee on Health, Employment, Labor, and Pensions

[16] Letter from Janet Stokes Trautwein, Exec. Vice President & CEO, Nat'l Ass'n of Health Underwriters, to the Hon. Xavier Becerra, Sec'y, HHS (Oct. 1, 2022), http://nahu.org/media/7574/nahu-1557-draft-final.pdf.
[17] ERISA § 702, 29 U.S.C. § 1182 (prohibiting discrimination because of health status, medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability, or disability).
[18] 42 U.S.C. § 300gg–3.
[19] 42 U.S.C. § 2000e-2(a).