

March 2, 2023

Secretary Xavier Becerra
Department of Health and Human Services
Hubert H. Humphrey Building, Room 509F
200 Independence Ave SW
Washington, DC 20201

Submitted electronically at www.regulations.gov

Re: Safeguarding the Rights of Conscience as Protected by Federal Statutes [RIN 0945-AA18]

Dear Secretary Becerra:

The American Nurses Association (ANA) is pleased to respond to the notice of proposed rulemaking on updates to provider conscience protections in federal statutes. As mentioned in our comments on the 2018 Proposed Rule, nurses and all health care providers have the right to make care decisions guided by their own moral and ethical considerations – but a patient should never be left without access to critical and quality care. The 2019 Final Rule ignored grave ethical concerns raised by ANA, many other provider associations, and patient advocates. It removed the balance required under the applicable statutes, one of the core reasons many courts nullified the rule. The enforcement provisions far exceeded scope, authority, and resources. If it had been implemented, the 2019 Final Rule would have denied health care access across the country, especially for the most vulnerable communities.

The Department's approach in the current proposed rule provides much needed clarity and balance. ANA agrees with the Department's proposal to partially rescind the 2019 Final Rule while retaining the scope of statutes, some enforcement provisions, and substituting a voluntary notice provision.

ANA therefore supports the Department's 2023 proposed rule but urges the following:

1. The Department must ensure an exhaustive and good faith effort is made to connect patients with care when there is a conscience objection.
2. The Department must create transparent processes to ensure the Office for Civil Rights robustly enforces Section 1557 of the Affordable Care Act when reviewing conscience objection complaints.

- 1. The Department must ensure an exhaustive and good faith effort is made to connect patients with care when there is a conscience objection.**

Retaining the scope of statutes covered in the 2019 Final Rule is important to ensure all federal conscience protections follow one clear and transparent Office for Civil Rights (OCR) process. In the final rule, the Department must ensure patient needs are not neglected. Nursing care centers around

compassion, dignity, and the right to self-determination for patients.¹ The Code of Ethics for Nurses explains that the right to self-determination of health care requires a patient is “given accurate, complete, and understandable information” and that nurses “provide referrals to other resources as indicated, identify options, and address problems in the decision-making process.”² Nurses are not required to support or participate in a care decision that compromises their personal moral integrity. However, if a nurse asserts a conscience-based objection, they “are obliged to provide for patient safety, to avoid patient abandonment, and to withdraw only when assured that nursing care is available to the patient.”³ For consistency with ethical nursing values, the final rule must establish a clear enforceable process that ensures an exhaustive and good faith effort is made to connect the patient with compassionate, timely, and quality care.

Discrimination in health care remains pervasive, especially in sexual and reproductive health care access. The impact of the Supreme Court overturning the constitutional right to abortion care in *Dobbs v. Jackson Women’s Health Organization* continues to unfold. Restricting access to quality comprehensive reproductive health care, including abortion care, impacts the well-being of individuals, families, and entire communities.⁴ Many needing abortion care will not be able to overcome the financial, legal, and logistical barriers now in place post-*Dobbs*.⁵ Members of communities of color and people with disabilities are particularly at risk as they already face numerous barriers to comprehensive reproductive health care. As access to abortion care continues to narrow, it is crucial that conscience-based refusals of care follow procedures that ensure the patient is safe and alternative care is arranged.⁶

Information and referrals must be easily accessible to patients regardless of conscience objections. Delays in care carry heavy consequences, especially for services like abortion care, which have an expedited timeline. If both the individual provider and the health care entity hold a conscience objection, the Department must facilitate alternate ways to connect patients with care. ANA encourages partnering with nurses as leaders of health education and care coordination, along with state agencies, payors, and community stakeholders to ensure a conscience objection never denies someone the services they need.

¹ American Nurses Association. *Provision 1.4 The Right to Self-Determination*. Code of Ethics for Nurses with Interpretive Statements. 2015. Available at: <https://www.nursingworld.org/practice-policy/nursing-excellence/ethics/code-of-ethics-for-nurses/coe-view-only/>.

² *Id.*

³ American Nurses Association. *Provision 5.4 Preservation of Integrity*. Code of Ethics for Nurses with Interpretive Statements. 2015. Available at: <https://www.nursingworld.org/practice-policy/nursing-excellence/ethics/code-of-ethics-for-nurses/coe-view-only/>.

⁴ American College of Nurse-Midwives. *Statement: ACNM Condemns SCOTUS Decision, Dobbs v. Jackson Women’s Health Organization*. June 24, 2022. Available at: <https://www.midwife.org/statement-acnm-condemns-scotus-decision-dobbs-v.-jackson-women-s-health-organization>.

⁵ Laura Valle Gutierrez. *The Dobbs Decision’s Cost to Women and Families*. The Century Foundation. August 18, 2022. Available at: <https://tcf.org/content/commentary/the-dobbs-decisions-cost-to-women-and-families/>.

⁶ American Nurses Association. *Position Statement: Sexual and Reproductive Health*. March 7, 2022. Available at: <https://www.nursingworld.org/~4957d2/globalassets/practiceandpolicy/nursing-excellence/ana-position-statements/social-causes-and-health-care/srh-position-statement-approved-03072022.pdf>.

2. The Department must create transparent processes to ensure the Office for Civil Rights robustly enforces Section 1557 of the Affordable Care Act when reviewing conscience objection complaints.

ANA applauds the Department's recent rulemaking restoring the protections of Section 1557 of the Affordable Care Act (ACA). As the Supreme Court held in *Bostock v. Clayton County*, discrimination based on gender-identity or sexual orientation is sex discrimination.⁷ Section 1557's clear prohibition of sex discrimination in health care is important because despite advances in addressing health equity, discrimination remains pervasive for many communities, including Lesbian, Gay, Bisexual, Transgender, Queer or Questioning, and Intersex (LGBTQI+) communities. Recent years have seen a dramatic rise in laws attacking gender-affirming care, further entrenching the existing numerous barriers to quality health care for transgender and gender-expansive people. More than one in five LGBTQI+ adults reported postponing or avoiding medical care last year due to disrespect or discrimination from a provider.⁸ ANA firmly rejects these laws and policies as they violate the human rights and dignity of these communities and the main tenants of nursing care.⁹

Discrimination does not belong in health care and has no place in nursing practice.¹⁰ The professional Code of Ethics for Nurses clearly rejects discrimination based on a patient's individual attributes. It states, "Conscience-based refusals to participate exclude personal preference, prejudice, bias, convenience, or arbitrariness."¹¹ ANA urges the Department to address in the final rule how OCR will ensure robust enforcement of Section 1557 protections while simultaneously holding the responsibilities of investigating provider conscience complaints. Transparent checks and balances in the investigation process are necessary for clarity and ensuring the Department is combatting all forms of discrimination in health care.

Nurses are dedicated advocates for their patients, committed to practicing ethical care to advance equitable health care access. The primacy of the patient in nursing practice requires that no patient be left without the care they need and deserve. ANA urges the Department to quickly finalize this rulemaking with the addition of processes to ensure high-quality, timely care coordination and full enforcement of Section 1557 so no patient is denied care due to discrimination.

⁷ *Bostock v. Clayton County*, 590 US ___ (2020).

⁸ Center for American Progress. *Discrimination and Barriers to Well-Being: The State of the LGBTQI+ Community in 2022*. January 12, 2023. Available at: <https://www.americanprogress.org/article/discrimination-and-barriers-to-well-being-the-state-of-the-lgbtqi-community-in-2022/>.

⁹ American Nurses Association. *American Nurses Association Opposes Restrictions on Transgender Healthcare and Criminalizing Gender-Affirming Care*. October 26, 2022. Available at: <https://www.nursingworld.org/news/news-releases/2022-news-releases/american-nurses-association-opposes-restrictions-on-transgender-healthcare-and-criminalizing-gender-affirming-care/>.

¹⁰ American Nurses Association. *Position Statement: The Nurse's Role in Addressing Discrimination: Protecting and Promoting Inclusive Strategies in Practice Settings, Policy, and Advocacy*. 2018. Available at: <https://www.nursingworld.org/~4ab207/globalassets/practiceandpolicy/nursing-excellence/ana-position-statements/social-causes-and-health-care/the-nurses-role-in-addressing-discrimination.pdf>.

¹¹ American Nurses Association. *Provision 5.4 Preservation of Integrity*. Code of Ethics for Nurses with Interpretive Statements. 2015. Available at: <https://www.nursingworld.org/practice-policy/nursing-excellence/ethics/code-of-ethics-for-nurses/coe-view-only/>.

ANA is the premier organization representing the interests of the nation's 4.4 million registered nurses (RNs) through its state and constituent member associations, organizational affiliates, and the individual members. ANA advances the nursing profession by fostering high standards of nursing practice, promoting a safe and ethical work environment, bolstering the health and wellness of nurses, and advocating on health care issues that affect nurses and the public. RNs serve in multiple direct care, care coordination, and administration leadership roles, across the full spectrum of health care settings. RNs provide and coordinate patient care, educate patients and the public about various health conditions including essential self-care, and provide advice and emotional support to patients and their family members. ANA members also include the four APRN roles: nurse practitioner, certified nurse midwife, clinical nurse specialist, and certified registered nurse anesthetist. ANA is dedicated to partnering with health care consumers to improve practice, policies, delivery models, outcomes, and access across the health care continuum.

Thank you for the opportunity to comment on this important proposed rule. If you have any questions, please contact Tim Nanof, Vice President, Policy and Government Affairs, at tim.nanof@ana.org or (301) 628-5166.

Sincerely,



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cc: Jennifer Mensik Kennedy, PhD, RN, NEA-BC, FAAN, ANA President
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