



March 6, 2023

Xavier Becerra
Secretary
Department of Health and Human Services
200 Independence Avenue, SW
Washington, D.C. 20201

Melanie Fontes Rainer
Director, Office of Civil Rights
Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Re: RIN: 0945-AA18 – Safeguarding the Right of Conscience as Protected by Federal Statutes
88 Fed. Reg. 820 (January 5, 2023)

Dear Secretary Becerra and Director Fontes Rainer:

The American Cancer Society Cancer Action Network (ACS CAN) appreciates the opportunity to comment on the Conscience and Religious Nondiscrimination proposed rule. ACS CAN makes cancer a top priority for policymakers at every level of government. ACS CAN empowers volunteers across the country to make their voices heard to influence evidence-based public policy change that improves the lives of people with cancer and their families. We believe everyone should have a fair and just opportunity to prevent, detect, treat, and survive cancer. Since 2001, as the American Cancer Society's nonprofit, nonpartisan advocacy affiliate, ACS CAN has successfully advocated for billions of dollars in cancer research funding, expanded access to quality affordable health care, and advanced proven tobacco control measures. ACS CAN is more determined than ever to end cancer as we know it, for everyone.

Every person regardless of their race, color, national origin, gender identity, sexual orientation, age or disability deserves to be given equal access to timely, quality, comprehensive health care without discrimination. ACS CAN believes these proposed regulations will help to reduce discrimination in health care and welcomes this proposed rule as a positive step toward improved access for all patients. Cancer is a disease that affects everyone, but does not affect everyone equally. Discriminatory practices in health care contribute to health disparities and must be addressed. ACS CAN applauds the Department of Health and Human Services ("HHS" or "the Department") and the Office of Civil Rights ("OCR") for proposing to restore the longstanding process for the handling of conscience complaints and for providing additional safeguards to protect against conscience and religious discrimination. HHS and OCR seek comment on whether to rescind the 2019 Conscience Rule¹ in whole or in part. Since the promulgation of the 2019 Conscience Rule, the current Administration has expressed a commitment to advancing health equity.² ACS CAN supports the Administration's commitment to enhancing health equity for all Americans. We urge HHS and OCR to adopt a wholesale review of the 2019 Conscience Rule. We are concerned that the 2019 rule may limit access to patient care and could result in individuals being denied access to services due to discrimination, with vulnerable populations being particularly affected, such as the LGBTQ+ community and those who are pregnant.

Individuals in the LGBTQ+ community face serious challenges and barriers to health care resulting in a higher cancer burden. For example, gay and bisexual men have a higher risk for anal cancer (particularly if they are

¹ HHS. Protecting Statutory Conscience Rights in Health Care: Delegations of Authority. Final Rule. 84 Fed. Reg. 23170 (May 21, 2019) (2019 Conscience Rule).

² See Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government. Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 25, 2021).

HIV+) and lesbian and bisexual women may have an increased risk of breast, cervical, and ovarian cancers.³ However, approximately 30% of LGBTQ+ adults do not seek healthcare services or lack a regular healthcare provider compared to 10% of age-matched heterosexuals.⁴ Many LGBTQ+ people also have negative experiences with health care providers. In a study among medical students, 46% expressed explicit bias and over 80% expressed some implicit bias against LGBTQ+ people.⁵

For those who are pregnant, up to 1 in 1,000 each year receive a cancer diagnosis. We know timely cancer treatment improves a person's chances of survivorship. The 2019 Final Rule allows for providers to refuse cancer treatment or reproductive services for pregnant patients due to religious or moral objections. As such, we are concerned about potential threats to a pregnant individual's ability to receive rapid cancer treatment. Every patient should be able to increase their likelihood to survive cancer by having the option to start cancer therapy immediately, regardless of pregnancy status.⁶ Access to care disruptions must be addressed as some cancer patients report less satisfaction and more challenges with their cancer care.⁷

ACS CAN also appreciates the Administration's commitment to improving health plan network adequacy standards to ensure that plans contract with a sufficient number and type of providers to meet the needs of their enrollees. As HHS works to promulgate regulations regarding the handling of conscience complaints, the Department should also make clear that health plans are obligated to meet certain network adequacy requirements. To the extent that providers and facilities express a conscience and/or religious objection to providing care to certain individuals or performing certain covered services, those providers and facilities should not be included in the calculation of a health plan's network for purposes of a network adequacy determination. For example, if a provider or group of providers in a given area objects to treating a member of the LGBTQ+ population, those individuals have an impediment to accessing their contracted health care services because the plan's network has failed to provide them with a provider who can meet their needs; therefore, it is imperative that other providers are available for care.

ACS CAN appreciates the opportunity to provide feedback and offers comments on the following specific proposal:

Voluntary Notice of Federal conscience and nondiscrimination laws. (§ 88.3)

HHS and OCR propose to amend the requirements related to the voluntary notice of federal conscience and non-discrimination laws. It encourages entities subject to the federal healthcare provider statutes to post a model notice on their website, in a physical location in their establishment where notices are customarily posted, in a personnel manual or handbook, in employment applications, and in student handbooks for training or study. This notice should be large enough to be read easily and should not be altered, defaced, removed or

³ Ceres M, Quinn GP, Loscalzo M, Rice D. Cancer screening considerations and cancer screening uptake for lesbian, gay, bisexual, and transgender persons. *Seminars in Oncology Nursing*. 2018;34(1):37-51.

⁴ Quinn GP, Sanchez JA, Sutton SK, et al., Cancer and lesbian, gay, bisexual, transgender/transsexual, and queer/questioning (LGBTQ) populations. *CA: A Cancer Journal for Clinicians*. 2015;65(5):384-400.

⁵ Burke SE, Dovidio JF, Przedworski JM, et al., Do contact and empathy mitigate bias against gay and lesbian people among heterosexual first-year medical students? A report from Medical Student CHANGES. *Journal of Association of American Medical Colleges*. 2015;90(5):645-651.

⁶ Hepner A, et al.. Cancer During Pregnancy: The Oncologist Overview. *World J Oncol*. 2019 Feb;10(1):28-34. doi: 10.14740/wjon1177. Epub 2019 Feb 26. PMID: 30834049; PMCID: PMC6396773.

⁷ "Female Cancer Patients Report Less Satisfaction, More challenges with Cancer Care."

<https://www.fightcancer.org/releases/survey-female-cancer-patients-report-less-satisfaction-more-challenges-cancer-care>.

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covered by other materials.

ACS CAN has a long history of working at the state and federal levels to ensure that individuals who may not yet have cancer, those who are in active treatment, and cancer survivors have access to the providers (including physicians and facilities) they need. We note that this proposal will allow covered entities to notify OCR of its belief that it is exempt from certain provisions under federal conscience and religious freedom laws. We offer suggestions to strengthen the notice requirement:

Scope of Services: To the extent that a covered entity receives a conscience exemption, we urge HHS and OCR to require the provider disclose not only the existence of the exemption, but its scope i.e. how the exemption will change the services said provider will or will not provide moving forward. Covered entities should provide notice of any changes to the scope of services they will continue to offer or will no longer offer after being granted a conscience exemption in clear language and in a timely manner so that patients can make informed choices as whether to change providers.

Language accessibility: We note that in HHS' proposed rule implementing Section 1557 of the Affordable Care Act,⁸ the Department required covered entities to provide a notice of availability of language assistance services and auxiliary aids free of charge and the Section 1557 notice was to be provided in at least the 15 languages most commonly spoken by individuals with limited English proficiency in the relevant state. We urge the Department to require that notices related to conscience exceptions also be required to comply with the Section 1557 language access and auxiliary aids and services requirements. Issues related to health care are often confusing to individuals, particularly individuals for whom English is not their native tongue. Individuals who are denied care as a result of a conscience objection by their provider are particularly vulnerable and should be provided information in a language and manner that best meets their needs in order to better understand their options for seeking care with a provider who does not share the conscience objection.

Notice of alternative providers: The proposed rule suggests that "where possible, and where the recipient does not have a conscience-based objection to doing so, the notice should include information about alternative providers that may offer patients services the recipient does not provide for reasons of the conscience."⁹ We strongly urge HHS and OCR to amend this requirement to remove the option of the recipient of the exemption to provide alternative providers, i.e. it should be mandatory that recipients of the exemption provide adequate and readily available information on alternative providers. If an individual is seeking care from a provider and has been denied that care because the provider has a conscience objection, the patient is in a particularly vulnerable position and needs immediate access and information for a provider who will provide them the care they need (and for which the health plan has been obligated to provide).

We urge HHS and OCR to require that the notice provided by the recipient of the exemption must provide either (1) information on alternative providers who can provide the requested service OR (2) a dedicated toll-free number for each plan to which the recipient of the exemption has contracted so that individuals who have been denied care can find alternative providers. Information on alternative providers should include not only the name and contact information of the alternative provider, but should also include the networks with which the provider contracts. This will ensure that an individual who has been denied care because their provider has received a conscience exemption can more easily find a provider who will meet their needs. With respect to the toll-free number for the health plans which have providers who have received exemption contracts, these health plans should record the number of enrollees who have been denied care and have sought alternative providers. Health plans should be required to keep a record of providers who have received an exemption and

⁸ HHS and OCR. Nondiscrimination in Health Programs and Activities Proposed Rule. 87 Fed. Reg. 47824 (Aug. 4, 2022) (§92.11 proposed).

⁹ 45 C.F.R. § 88.3(d) (proposed).

take this information into account (and report it to the relevant state and federal entities) for purposes of determining the adequacy of its network.

CONCLUSION

Thank you for the opportunity to comment on the Conscience and Religious Nondiscrimination proposed rule. If you have any questions, please feel free to contact me or have your staff contact Gladys Arias, Principal, Health Equity Policy Analysis & Legislative Support at Gladys.Arias@cancer.org and/or Anna Schwamlein Howard, Policy Principal, Access and Quality of Care at Anna.Howard@cancer.org.

Sincerely,

A handwritten signature in black ink that reads "Lisa A. Lacasse". The signature is written in a cursive, flowing style.

Lisa A. Lacasse, MBA
President
American Cancer Society Cancer Action Network