ASHA
American
Speech-Language-Hearing
Association

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August 13, 2019

Secretary Alex M. Azar II
Department of Health and Human Services
Office for Civil Rights
Attn: Section 1557 NPRM (RIN 0945-AA11)
Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201

RE: Nondiscrimination in Health and Health Education Programs or Activities Proposed Rule (RIN 0945-AA11)

Dear Secretary Azar:

On behalf of the American Speech-Language-Hearing Association, I write to offer comments on the Nondiscrimination in Health and Health Education Programs or Activities proposed rule.

The American Speech-Language-Hearing Association (ASHA) is the national professional, scientific, and credentialing association for 204,000 members and affiliates who are audiologists; speech-language pathologists; speech, language, and hearing scientists; audiology and speech-language pathology support personnel; and students.

ASHA appreciates the opportunity to share views on several proposed policy changes in interpreting and enforcing the nondiscrimination provision of the Affordable Care Act (ACA). Overall, ASHA supports the work of the Department of Health and Human Services ("the Department") to promote and to protect the health care rights of all Americans. ASHA recognizes that the Department underwent an extensive process to develop regulations for Section 1557, including a Request for Information, proposed rule, and final rule, considering more than 24,875 public comments received for the 2016 rule. However, ASHA is concerned that the current proposed rule unnecessarily reopens the rule and ignores the reasoned process the Department previously undertook.

Therefore, ASHA writes to express opposition to several proposals that could cause harm and roll-back protections to people based on sex, national origin, and/or disability. In this proposed rule, the Department appears to give substantial consideration to the burdens (e.g., economic, regulatory) the current regulation puts on covered entities. ASHA does not disagree that it is important to reduce these burdens, but requests that consideration also be given to the burdens (e.g., access, economic) and impacts on the health and welfare of the patients (and their family/caregivers) who are seeking services. Furthermore, ASHA recommends that the Department should retain strong, clear language prohibiting insurance companies from discriminating on the basis of race, color, national origin, sex, age, or disability in a number of areas, including benefit design, coverage claims, or imposing additional costs.

This letter includes ASHA's comments on the following topics discussed in the Nondiscrimination in Health and Health Education Programs or Activities proposed rule:

- Remove Notice Requirement

- Meaningful Access for Individuals with Limited English Proficiency
- Effective Communication for Individuals with Disabilities
- Discrimination on the Basis of Sex
- Nondiscrimination in Health-Related Insurance and Other Health-Related Coverage

Remove Notice Requirement

In response to feedback from covered entities regarding increased and undue regulatory burden, the Department proposes to remove 45 CFR 92.8, which requires covered entities to provide nondiscrimination notices in English and include taglines in the top 15 languages spoken by individuals with limited English proficiency (LEP) in the state. The notices must also indicate the availability of language assistance services. While ASHA supports efforts to minimize undue financial and/or administrative burdens to audiologists and speech-language pathologists, rather than removing the requirement entirely, ASHA recommends that the Department revise this provision. Instead of requiring covered entities to include the top 15 languages spoken in the state, ASHA recommends exploring less burdensome requirements such as ensuring access to interpretation or translation services for the top 10 languages served by the covered entity. Another viable option is to revise the requirement to ensure language assistance services are based on a percentage of the LEP population.

The notice and taglines inform LEP individuals about how to access language assistance services and encourage those individuals to identify themselves and the languages in which they communicate. The benefits of improved access to and understanding of health care services for LEP individuals cannot be outweighed by cost factors alone. In addition, the Office for Civil Rights already has the responsibility of translating the sample notice, which maximizes efficiency and economies of scale and allows covered entities to receive the benefits of having multi-language notices available without incurring the associated translation costs.

Meaningful Access for Individuals with Limited English Proficiency

Currently, 45 CFR 92.201 requires covered entities to take reasonable steps to provide meaningful access to oral interpretation and/or written translation services, free of charge, to *each* individual with LEP who is eligible to be served or likely to be encountered. In this proposed rule, the Department proposes to relax the standards by replacing “each individual” with a general reference to “LEP individuals.” If finalized, focusing on LEP individuals in general—as opposed to each individual—could result in some individuals not receiving the services they need for meaningful access. ASHA’s Code of Ethics requires its members to assist clients with accessing care and ASHA maintains that providing resources to assist clients to access care is a professional responsibility.

ASHA supports maintaining the current interpretation of 45 CFR 92.201 that focuses on each LEP individual. However, instead of the Department adopting an overly prescriptive approach or standard, ASHA recommends that the Department—through sub-regulatory guidance—communicate to providers their flexibility in meeting such a requirement as long as there is documentation provided to individuals about how to acquire the needed interpreter services. Examples of such documentation include adopting more robust provider network adequacy requirements that emphasize 1) languages spoken by covered entities and 2) expanding policies that promote access to and engagement in telehealth services to minimize the linguistic challenges faced by LEP individuals.

Video Remote Interpreting Services
The Department proposes to repeal the technical and training requirements (45 CFR 92.201(f)) for the use of video remote interpreting services for LEP individuals because foreign language speakers can, in many circumstances, rely solely on a clear audio transmission for effective communication. In addition, given that equipment and training costs for more sophisticated video remote interpreting technology can be more expensive than audio, the Department states that additional video standards may not justify the costs, particularly with respect to small providers. The current definition requires video that is high quality, real-time, full-motion, large, sharply delineated, and does not transmit blurry or grainy images.

ASHA does not support repealing the current definition of video remote interpreting services for LEP individuals. Audiologists and speech-language pathologists have expertise serving individuals who are experiencing difficulties in communicating effectively. These individuals often rely on redundancies and alternatives to compensate for any parts of communication that they may be missing. Individuals who are limited English proficient and have a communication disorder need even more information provided in as many ways as possible to allow them to receive messages completely. Nonverbal language is an important component to any language. In order to accurately diagnose social communication disorders, there needs to be assessments and interpretations of nonverbal language communication and skills. This would also apply to brain injuries, including stroke. In these situations, it is challenging for the interpreter to know what is going on in the session when they cannot see any materials/activities, and it is challenging for the client to divide attention between the tasks in person, and the language input via the phone.

Research in early language development indicates that as infants and toddlers develop language, nonverbal communication plays an important role.[1],[2],[3] An interpreter who cannot see what a young child is doing, cannot fully interpret what the child is communicating. This would also be the case for adults interacting through shared cues, eye contact, frequency of glances, blink rate, gestures, facial expressions, postures, etc. In addition, for individuals with any amount of attention deficit, it would be difficult to maintain focus and attention (much less process language) with only audio input. Relying solely on audio interpretation could significantly decrease the potential for individuals to express or receive messages clearly. In health care settings, this can result in compliance issues, and in LEP individuals' abilities to follow instructions, which could lead to life threatening consequences.

Effective Communication for Individuals with Disabilities

The Department seeks comment on whether to exempt entities with less than 15 employees from the requirement to provide appropriate auxiliary aids and services to people with impaired sensory, manual, or speaking skills, where necessary to afford an equal opportunity to benefit from the health program or activity, as permitted under Section 504 of the Rehabilitation Act.[4] ASHA understands that small practice audiologists and speech-language pathologists do not have the same resources as larger practices and that exemptions–in some instances–are most appropriate. However, ASHA does not agree that there should be exemptions when it relates to effective communication. The inability to effectively communicate and miscommunications can have significant adverse effects on an individual's access to, participation in, compliance with, and decision-making in health care. The ability to effectively communicate includes the individual patient as well as the patient's family/caregivers. ASHA's Code of Ethics states that individuals shall honor their responsibility to hold paramount the welfare of persons they serve

professionally and ASHA's vision is to make effective communication, a human right, accessible and achievable for all.

ASHA appreciates the consideration given to the economic burden that may be placed on small practices. However, there are programs that provide tax benefits and funding for the provision of reasonable accommodations, which can significantly reduce burdens that covered entities may face.[5, 6]

Discrimination on the Basis of Sex

Currently, the regulation defines sex discrimination to include discrimination on the basis of gender identity and sex stereotyping (45 CFR 92.4). The Department proposes to repeal this definition and to also eliminate the definition of gender identity, which includes gender expression and transgender status. In addition, the Department proposes to remove specific provisions that require covered entities to treat individuals consistent with their gender identity (45 CFR 92.206 and 92.207(b)(3)).

By proposing to eliminate protections against discrimination based on transgender status and sex stereotyping, the Department is contradicting over 20 years of federal case law and clear Supreme Court precedent.[7] As noted, ASHA opposes proposed changes to roll back other, long-standing rules that prohibit discrimination on the basis of gender identity and sexual orientation.[8] These changes are outside of the Office for Civil Rights' jurisdiction and are unrelated to Section 1557 of the ACA. It is not appropriate for these rulemakings to be combined nor is it appropriate the Department to characterize them as "conforming amendments" without offering any legal, policy, or cost-benefit analysis for them and its impact on various CMS programs. In particular, the Department offers no analysis of the impact these regulations have had during the years—in some cases over a decade—that they have been in effect or the impact of changing them now.

While ASHA recognizes that gender identity and gender expression are not explicitly referenced in statute, ASHA maintains that they are covered by the term sex as supported by established case law.[9] ASHA does not support the repeal of the current definitions of sex or gender identity. In addition, ASHA opposes removal of transition-related care coverage protections or requirements for the provider to determine the individual's gender. ASHA's Code of Ethics states in part that individuals shall not discriminate in the delivery of professional services or in the conduct of research and scholarly activities on the basis of sex, gender identity/gender expression, or sexual orientation. Nondiscrimination protections must remain for these individuals as well.

Nondiscrimination in Health-Related Insurance and Other Health-Related Coverage

The current prohibition on discrimination in health-related insurance and other health-related coverage under Section 1557 (45 CFR 92.207), and particularly benefit design, is critically important for ensuring access to medically necessary and appropriate care to all individuals. These protections are especially important for people with disabilities and those with serious or chronic conditions. ASHA opposes any efforts to repeal this section of the current regulation.

Habilitative and Rehabilitative Services and Devices

Discriminatory benefit design often emerges in the area of habilitative and rehabilitative services and devices. Within this category, people with disabilities and/or chronic conditions experience discrimination on the basis of age, disability, and the type or severity of their disability.

Habilitation and Developmental Disability
Habilitation refers to services or devices that help people gain skills or functioning that they have never had. Rehabilitation refers to services or devices that help people regain skills or functioning that they have lost due to illness or injury. People with developmental disabilities are routinely denied coverage for habilitative services, such as speech therapy, needed to gain skills or improve functioning while an identical service is provided to individuals who would require rehabilitative care to restore functioning. ASHA is opposed to blanket service exclusions and these should be considered "unlawful on its face". The result of the proposed repeal of the health-related insurance and other health-related coverage provisions could be systematic denials of habilitation coverage for people with developmental disabilities that ASHA views as prohibited discrimination on the basis of disability (28 CFR 35 and 42 USC 18022(b)(4)(B)).

Voice Treatment
As mentioned, ASHA supports coverage protections for transgender individuals and access to gender transition. ASHA members provide vital speech-language pathology services to individuals who want to ensure their voice reflects their gender identity.[10] Unfortunately, health plans inconsistently cover voice treatment for transgender individuals, even when they identify it consistently as a key health service related to their transition.[11] According to the Report of the 2015 U.S. Transgender Survey, voice treatment is the second most common reported medical intervention, behind hair removal, for transgender individuals assigned male at birth.[12] Ensuring voice treatment for all individuals in need of voice treatment—including transgender individuals—is a positive outcome.

Hearing Aids
Age limits are often applied on coverage for hearing aids. Several essential health benefit (EHB) benchmark plans offer no coverage at all or limit coverage to children only. Failure to cover hearing aids discriminates against a specific segment of people with hearing loss. In addition, coverage of hearing aids for children only and not for adults potentially violates the ACA prohibition against discrimination in plan design based on age.

ASHA does not support the Department's proposal to delete regulations that prohibit discrimination on the basis of association with a protected class (45 CFR 92.209). ASHA is particularly concerned about eliminating this right because the courts have upheld such a right for exactly the types of patients ASHA members treat.[13] Elimination of the prohibition against discrimination based on an individual's association or relationship will create uncertainty and confusion regarding the responsibilities of providers and the rights of persons who experience discrimination. Further inconsistencies with other regulatory requirements that entities are subject to, including the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, would be problematic as well.

In closing, ASHA reiterates its opposition to the provisions outlined above because they are either contrary to the law or legal precedent and would have a negative impact on the ability of

individuals treated by audiologists and speech-language pathologists to access medically necessary care. ASHA appreciates the opportunity to provide comments on this proposed rule. If you or your staff have any questions, please contact Daneen G. Sekoni, MHSA, ASHA's director of health care policy, health care reform, at, dsekoni@asha.org.

Sincerely,

Shari B. Robertson, PhD, CCC-SLP
2019 ASHA President

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[1] Rowe, M.L., Özçalişkan, Ş., & Goldin-Meadow, S. (2008). *Learning words by hand: Gesture's role in predicting vocabulary development. First Language,* 28, (2), 182- 199.
[2] Iverson, J. M., & Goldin-Meadow, S. (2005). *Gesture Paves the Way for Language Development. Psychological Science*, 16,(5), 367-371.
[3] Goodwyn, S., Acredolo, L., & Brown, C. (2000*). Impact of symbolic gesturing on early language development. Journal of Nonverbal Behavior.* 24, 81-103.
[4] National Archives Federal Register. (2019. Nondiscrimination in Health and Health Education Programs or Activities. Retrieved from 84 FR 27867. Retrieved from https://www.federalregister.gov/documents/2019/06/14/2019-11512/nondiscrimination-in-health-and-health-education-programs-or-activities.
[5] U.S. Department of Justice. American with Disabilities Act Update: A Primer for Small Business. (2010). Retrieved from https://www.ada.gov/regs2010/smallbusiness/smallbusprimer2010.htm.
[6] Internal Revenue Service. (n.d.). *Form 8826, Disabled Access Credit*. Retrieved from https://www.irs.gov/forms-pubs/about-form-8826.
[7] *See, e.g., Rumble v. Fairview Health Servs.*, No. 14–cv–2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015); *Flack v. Wis. Dep't of Health Servs.*, No. 3:18-cv-00309-wmc (W.D. Wis. July 25, 2018); *Cruz v. Zucker*, 195 F.Supp.3d 554 (S.D.N.Y. 2016); *Prescott v. Rady Children's Hosp.-San Diego*, 265 F.Supp.3d 1090 (S.D. Cal. Sept. 27, 2017); *Tovar v. Essentia Health*, No. 16-cv-00100-DWF-LIB (D. Minn. September 20, 2018); *Boyden v. Conlin,* No. 17-cv-264-WMC, 2018 (W.D. Wis. September 18, 2018); *Whitaker v. Kenosha Unified School District*, No. 16-3522 (7th Cir. 2017) (Title IX and Equal Protection Clause); *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217 (6th Cir. 2016) (Title IX and Equal Protection Clause); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (Equal Protection Clause); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (Title VII of the 1964 Civil Rights Act); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (Title VII); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (Equal Credit Opportunity Act); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (Gender Motivated Violence Act); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (Title VII); Grimm v. Gloucester County School Board, No. 4:15-cv-54 (E.D. Va. May 22, 2018); M.A.B. v. Board of Education of Talbot County, 286 F. Supp. 3d 704 (D. Md. March 12, 2018).
[8] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)
[9] *See, e.g., Rumble v. Fairview Health Servs.*, No. 14–cv–2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015) (holding that discrimination against hospital patient based on his transgender status constitutes sex discrimination under Section 1557 of the Affordable Care Act); *Flack v. Wis. Dep't of Health Servs.*, No. 3:18-cv-00309-wmc (W.D. Wis. July 25, 2018) (holding that a Medicaid program's refusal to cover treatments related to gender transition is "text-book discrimination based on sex" in violation of the Affordable Care Act and the Equal Protection Clause of the Constitution); *Cruz v. Zucker*, 195 F.Supp.3d 554 (S.D.N.Y. 2016) (holding exclusion invalid under the Medicaid Act and the Affordable Care Act); *Prescott v. Rady Children's Hosp.-San Diego*, 265 F.Supp.3d 1090 (S.D. Cal. Sept. 27, 2017) (holding that discrimination against transgender patients violates the Affordable Care Act); *Tovar v. Essentia Health*, No. 16-cv-00100-DWF-LIB (D. Minn. September 20, 2018) (holding that Section 1557 of the Affordable Care Act prohibits discrimination on the basis of gender identity); *Boyden v. Conlin,* No. 17-cv-264-WMC, 2018 (W.D. Wis. September 18, 2018) (holding that a state employee health plan refusal to cover transition-related care constitutes sex discrimination in violation of Title VII, Section 1557 of the ACA, and the Equal Protection Clause).
[10] The American Speech-Language-Hearing Association. (n.d.). *Providing Transgender Voice Services*. Retrieved from https://www.asha.org/Practice/multicultural/Providing-Transgender-Transsexual-Voice-Services/.
[11] Tina Babajanians. (2019, February 1). Giving Voice to Gender Expression. *The ASHA Leader*). See https://leader.pubs.asha.org/doi/10.1044/leader.FTR2.24022019.54.

[12] National Center for Transgender Equality. (2015). *U.S. Transgender Survey.* Retrieved from http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf [PDF].

[13] Falls v. Prince George's Hosp. Ctr., No. Civ. A 97–1545, 1999 WL 33485550 at * 11 (D. Md. Mar. 16, 1999) (holding that parent had an associational discrimination claim under Section 504 when hospital required hearing parent to act as interpreter for child who was deaf). Cf. Questions and Answers About the Americans with Disabilities Act's Association Provision.