

September 28, 2022

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Re: HHS-OS-2022-0012, Nondiscrimination in Health Programs and Activities [RIN 0945-AA17]

Dear Secretary Becerra:

On behalf of our nearly 5,000 member hospitals, health systems and other health care organizations, and our clinician partners — including more than 270,000 affiliated physicians, 2 million nurses and other caregivers — and the 43,000 health care leaders who belong to our professional membership groups, the American Hospital Association (AHA) appreciates the opportunity to comment on the Department of Health and Human Services' (HHS) proposed rule to reinstate the regulatory protections against discrimination in covered health care programs and activities contained in Section 1557 of the Affordable Care Act (ACA). Section 1557 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, or under any program or activity that is administered by an executive agency or by an entity established under title I of the ACA (e.g., Health Insurance Marketplaces).

After the Department issued its second Section 1557 rule in June 2020, the AHA comments stated: "Hospitals and health systems value every individual we have the privilege of serving, regardless of race, religion, national origin, sexual orientation or gender identity. That is why we urged the administration to not move forward with changes to non-discrimination protections. We are deeply disappointed that this rule weakens important protections for patients and could limit coverage. Treating all with dignity and respect will continue to guide us in everything we do."

Those principles apply to this proposed rule. A cornerstone of hospitals' and health systems' missions is a commitment to diversity, inclusion and health equity so that they can provide care, within their capabilities, to those in need. Federal and state laws, as well as specific codes of ethics for health professionals, reinforce this mission of



ensuring that all patients have appropriate access to necessary care. Those include the Emergency Medical Treatment and Labor Act, Medicare Conditions of Participation and state licensure requirements.

ASSISTING PATIENTS WITH LIMITED ENGLISH PROFICIENCY

The AHA supports the proposed regulations' emphasis on ensuring that those who are less proficient in English know that they can access translation services to aid in their care. We are concerned, however, that the proposal to reinstate the blanket mandate to provide translations in 15 different languages, regardless of the languages spoken in the communities served, requires a great deal of resources for services that may not be required in every community. Because such a large commitment of resources could be difficult for some hospitals, particularly in the current financial environment in which hospitals are operating, we suggest a change to replace that blanket mandate with a more flexible standard permitting a precise focus on languages spoken in the particular communities served. This change would enable the many hospitals, especially in rural areas, that serve communities in which many fewer languages are spoken, to more effectively devote their resources to translation services that are most meaningful for the patients they serve.

In addition, as we have suggested in previous comments, developing a universally recognized icon to convey that translation services are available would be helpful. Posting that symbol in various locations around the hospital and on the hospital's website could communicate quickly and effectively that translation services will be made available to the individual. We urge HHS to develop and seek international recognition of such an icon. In the meantime, hospitals and health systems will continue to alert their communities that translation services are available through existing methods.

USE OF CLINICAL ALGORITHMS TO SUPPORT DECISION-MAKING IN COVERED HEALTH PROGRAMS AND ACTIVITIES

As the proposed rule suggests, "the intent of proposed § 92.210 is not to prohibit or hinder the use of clinical algorithms." This is for good reason, which the Department correctly acknowledges: "[T]he use of algorithms that rely upon race and ethnicity-conscious variables may be appropriate and justified under certain circumstances. The Department also notes that the use of clinical algorithms may result in discriminatory outcomes when variables are used as a proxy for a protected basis and may also result from correlations between a variable and a protected basis." Given the cutting-edge nature of algorithms and the nuanced role they may play in the provision of medicine, it is vital that non-discriminatory and beneficial uses of such algorithms not be over-deterred.

The Honorable Xavier Becerra
September 28, 2022
Page 3 of 3

For example, statistics show that Black men in our country are more likely to experience earlier morbidity and mortality from prostate cancer.¹ Moreover, according to that report, the disparity is likely attributable to less access to early detection through prostate-specific antigen (PSA) testing. That test is a simple blood test that measures the presence of PSA circulating in an individual's bloodstream and is usually the first step in detecting and thus treating prostate cancer.

We urge HHS to consider this and other similar examples and ensure that the final rule supports the appropriate use of race and/or other characteristics in clinical decision-making. In this rapidly developing area of medicine and technology, there is every likelihood that the benefits of algorithms will be increasingly important to support early detection and appropriate treatment of debilitating or even fatal health conditions. To that end, if HHS chooses to adopt the flexible "overly rely" standard proposed in this rule, we urge it to bear in mind the risks of over-deterrence when *enforcing* Section 1557.

The AHA reiterates that our core value of providing service to all will continue to guide care for our patients and our commitment to treat all in the community with dignity and respect. We appreciate your consideration of these issues. Please contact me if you have any questions or feel free to have a member of your team contact me at mhatton@aha.org.

Sincerely,

/s/

Melinda Reid Hatton
General Counsel, Secretary

¹ American Cancer Society. Cancer Facts & Figures for African American/Black People 2022-2024. Atlanta: American Cancer Society, 2022. <https://www.cancer.org/content/dam/cancer-org/research/cancer-facts-and-statistics/cancer-facts-and-figures-for-african-americans/2022-2024-cff-aa.pdf>