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February 18, 2020

Shannon Royce

Director

U.S. Department of Health and Human Services

Center for Faith and Opportunity Initiatives

200 Independence Avenue SW

Washington, DC 20201

VIA ELECTRONIC SUBMISSION

Re: RIN 0991-AC13 Department of Health and Human Services (HHS): Ensuring Equal Treatment of Faith-Based Organizations

Dear Director Royce:

The Medicare Rights Center (Medicare Rights) is pleased to submit comments in response to the proposed rule, **Ensuring Equal Treatment of Faith-Based Organizations**. Medicare Rights is a national, nonprofit organization that works to ensure access to affordable health care for older adults and people with disabilities through counseling and advocacy, educational programs, and public policy initiatives. Each year, Medicare Rights provides services and resources to nearly three million people with Medicare, family caregivers, and professionals.

This proposed rule would remove the requirement that faith-based health and social service providers receiving federal funds inform clients about services they do not provide for religious reasons and refer them to alternative providers. HHS also appears to suggest additional bases on which these grantees could refuse to provide care.

Medicare Rights strongly opposes this proposed rule and urges HHS to withdraw it in its entirety. We are very concerned the outlined changes would create significant hardships for

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those we serve by stripping current law protections designed to promote nondiscrimination in HHS programs.

HHS-administered services and supports are among the most important sponsored and funded by the federal government. All older adults and people with disabilities, no matter their gender identities, sexual orientations, sexes, or religions must have access to the programs and providers they need to remain independent, healthy, and active.

Efforts to re-introduce discrimination into this programming would disproportionately harm underserved communities. This includes LGBTQ older adults, many of whom already face pronounced social isolation, high rates of poverty, and a lack of culturally competent care. Moreover, they experience discrimination and fear of discrimination in accessing services, often leading to or deepening significant health and economic disparities.¹ The proposed rule could exacerbate these challenges, create new barriers to care, and reverse the progress our society has made towards equity.

Notice of Nondiscrimination Protections

Current rules require faith-based or religious organizations that provide social services and receive federal funding to give clients written notice that they retain the right to nondiscrimination based on religion, that participation in religious activities is voluntary and provided separately from federally-funded activities, and that they can report a violation of these rights.² These protections underscore that religiously-affiliated providers may not limit federally-funded services to adherents, or require participation in religious activities as a condition of receiving health care or other services.

Eliminating the notice requirements, as proposed, would not eliminate these protections. But it would make it more difficult for clients to know about and exercise their rights. As a result, some people could be deterred from seeking or obtaining care.

This cause-and-effect, and therefore the importance of these notifications, is well-documented. A President's Advisory Council on Faith-Based and Neighborhood Partnerships found that

¹ See, e.g., The National Gay and Lesbian Task Force, "No Golden Years at the End of the Rainbow: How a Lifetime of Discrimination Compounds Economic and Health Disparities for LGBT Older Adults" (August 2013), <https://nwnetwork.squarespace.com/s/2013-TF-No-Golden-Years.pdf>; Fredriksen-Goldsen, et al., "The Aging And Health Report: Disparities And Resilience Among Lesbian, Gay, Bisexual, And Transgender Older Adults" (November 2011), www.lgbtagingcenter.org/resources/resource.cfm?r=419; Shabab Ahmed Mirza & Caitlin Rooney, "Discrimination Prevents LGBTQ People from Accessing Health Care," Ctr. for American Progress, (Jan. 18, 2018), https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/?link_id=2&can_id=d90c309ac9b5a0fa50d294d0b1cdf0b2&source=email-rx-for-discrimination&email_referrer=&email_subject=rx-for-discrimination; Justice in Aging et al., "LGBT Older Adults In Long-Term Care Facilities: Stories from the Field" (updated June 2015), www.justiceinaging.org/customers.tigertech.net/wp-content/uploads/2015/06/Stories-from-theField.pdf; National Center for Transgender Equality, "Report from the 2015 U.S. Transgender Survey" (December 2016), <http://www.ustranssurvey.org/>; Center for American Progress, "Discrimination Prevents LGBTQ People from Accessing Health Care" (January 18, 2018), <https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/>; "Healthy People 2020, Lesbian, Gay, Bisexual, and Transgender Health," U.S. Dept. Health & Human Serv., <https://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health>.

² 45 C.F.R. § 87.3(i).

without proper notice, clients might not be aware of their religious liberty rights, “[t]hus, a notice requirement of those rights to program beneficiaries is essential and should be provided at the outset of the person’s participation in the federally funded program.”³ Providing such notice at the outset can avoid miscommunication or confusion that could otherwise interfere with the provision of care.

As recommended, the existing notification requirement protects the rights of beneficiaries and helps them confidently access services offered by religiously-affiliated providers without fear of discrimination or proselytization. These benefits outweigh any that would be gained under the proposed rule, which HHS does not immediately identify. The agency admits the current requirement is not overly burdensome or expensive, noting that compliance costs no more than \$100 per organization per year.⁴ In contrast, eliminating it would cause serious risk for beneficiaries, up to and including preventing them from accessing services altogether. As the need for the notification remains, so must the notice itself.

Referral Rights

The nondiscrimination protections also require a reasonable effort from faith-based organizations to make referrals to alternative providers in certain circumstances, including if a beneficiary or prospective beneficiary objects to the religious character of the organization.⁵

This referral requirement is intended to facilitate access to care in a way that considers both provider and beneficiary rights. However, in the proposed rule, HHS claims it is nevertheless overly burdensome for grantees and must be removed.⁶ If finalized as written, religiously-affiliated organizations would not only be allowed to refuse to provide a service to a beneficiary, but also to refuse to tell the beneficiary where they could obtain care or how to find an alternative provider. This would fundamentally upend the current rule’s balance of religious liberty rights and significantly undermine beneficiary access to care.

While all beneficiaries would be at risk, those in underserved communities who are already experiencing access challenges would be especially impacted. For example, people with disabilities and older adults who live in areas with limited provider networks face unique obstacles to affordable care that this proposed rule would only aggravate. Similarly, people with disabilities who identify as LGBTQ and/or belong to a historically disadvantaged racial or ethnic group often face specific and overwhelming hardships—many are more likely than their peers to encounter service refusals, but less likely to receive reasonable accommodations.

³ President’s Advisory Council on Faith-Based and Neighborhood Partnerships, *A New Era of Partnerships: Report of Recommendations to the President* (2010), <https://obamawhitehouse.archives.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf>.

⁴ 85 Fed. Reg. 2974, 2984.

⁵ 45 C.F.R. § 87.3(i)(iv).

⁶ 85 Fed. Reg. 2974, 2977.

Troublingly, HHS fails to justify the need for this harmful proposal. The agency concedes that any provider savings would be insignificant,⁷ and that there is no record of organizations being forced to make such referrals. These admissions indicate that the current rule's burdens on grantees—which HHS claims the proposed rule is needed to reduce—are extraordinarily limited.⁸ But a failsafe is not unimportant because it is unused. If a car's airbags are never engaged, that is a good thing; but once needed, the lack of airbags is catastrophic. This puts the balance of risks clearly in favor of maintaining the referral requirement.

Religious Refusals

The proposed rule appears to expand or add new religious exemptions for faith-based providers by modifying program requirements to allow for exemptions or “appropriate religious accommodations.”⁹ This language suggests an intent to establish new mechanisms for providers to sidestep program and grant requirements.

Creating additional opportunities for grantees to refuse care would lead to more instances of grantees refusing care. Traditionally marginalized groups would bear the brunt of this change, and LGBTQ people in particular would likely be impacted. Many LGBTQ individuals continue to face significant discrimination on the basis of sexual orientation and/or gender identity that affects their access to physical and mental health care services.¹⁰ According to the 2015 U.S. Transgender Survey, 23% of respondents did not see a health care provider because of fears of mistreatment or discrimination.¹¹ In another recent study, 56% of LGBTQ people reported experiencing discrimination from health care providers—including refusals of care, harsh language, and physical abuse.¹²

To ensure that all individuals have access to needed services, HHS grantees must not be allowed to flout established medical guidelines; bypass standards of care, discriminate against clients or potential clients; or deny medically accurate, evidence-based treatment.

Justification for Proposed Changes

As noted throughout, HHS fails to provide an adequate explanation for proposing this rule. The current nondiscrimination regulations were designed to protect beneficiary and grantee rights;

⁷ 85 Fed. Reg. 2974, 2984.

⁸ 85 Fed. Reg. 2974, 2977.

⁹ 85 Fed. Reg. 2974, 2986 (to be codified at 45 C.F.R. pt. 87.3(e)).

¹⁰ HUMAN RIGHTS WATCH, *All We Want is Equality: Religious Exemptions and Discrimination Against LGBT People in the United States*, (Feb. 19, 2018), <https://www.hrw.org/report/2018/02/19/all-we-want-equality/religious-exemptions-and-discrimination-against-lgbt-people>; see also Ning Hsieh & Matt Ruther, *Despite Increased Insurance Coverage, Nonwhite Sexual Minorities Still Experience Disparities In Access To Care*, 36 HEALTH AFFAIRS 1786, 1786–1794 (2017). In fact, the Department's Healthy People 2020 initiative itself expressly recognizes, “LGBT individuals face health disparities linked to societal stigma, discrimination, and denial of their civil and human rights.” *Healthy People 2020, Lesbian, Gay, Bisexual, and Transgender Health*, U.S. DEPT. HEALTH & HUMAN SERV., <https://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health>.

¹¹ NAT'L CTR. FOR TRANSGENDER EQUALITY, *The Report of the 2015 U.S. Transgender Survey* 5 (2016),

<https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [hereinafter *2015 U.S. Transgender Survey*].

¹² LAMBDA LEGAL, *When Health Care Isn't Caring: Lambda Legal's Survey of Discrimination Against LGBT People and People with HIV* 5 (2010), http://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf.

were promulgated in a transparent and collaborative manner, consistent with federal requirements;¹³ and adhere to existing law, namely the Religious Freedom and Restoration Act and U.S. Constitution.¹⁴

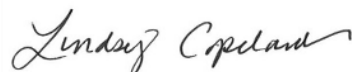
In addition to having no problems in their goals or construction, the rules continue to be effective. HHS agrees the notice and referral burdens are minimal for grantees. That the agency claims the low rates at which clients seek alternative providers renders those protections both burdensome and trifling is a remarkable contradiction, but it is not a convincing justification.

Conclusion

Beneficiaries of HHS programs must have the information they need to make optimal choices about their health and well-being, as well as meaningful access to those services. Accordingly, we support maintaining the provision of written notices that inform, and reassure, beneficiaries about their rights and the ways they can access care through other providers. Similarly, we oppose allowing faith-based providers to ignore grant requirements on the basis of religious exemptions. Religiously-affiliated organizations play an important role, but their administrative simplicity must not come at the expense of beneficiary rights and access to care. We strongly urge HHS to withdraw this proposed rule, which threatens both.

Thank you again for the opportunity to comment on these proposals. For additional information, please contact Lindsey Copeland, Federal Policy Director at LCopeland@medicarerights.org or 202-637-0961 and Julie Carter, Senior Federal Policy Associate at JCarter@medicarerights.org or 202-637-0962.

Sincerely,



Lindsey Copeland
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¹³ The current regulations are based upon recommendations from the President's Advisory Council on Faith-Based and Neighborhood Partnerships: *A New Era of Partnerships: Report of Recommendations to the President*, <https://obamawhitehouse.archives.gov/sites/default/files/docs/ofbnp-council-final-report.pdf>; *Implementation of Executive Order 13559 Updating Participation in Department of Health and Human Services Programs by Faith-Based or Religious Organizations and Providing for Equal Treatment of Department of Health and Human Services Program Participants*, 80 Fed. Reg. 47271 (proposed August 6, 2015) (to be codified at 45 C.F.R. pts. 87, 1050); *Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations*, 81 Fed. Reg. 19355, 193556 (April 4, 2016) (codified at 45 C.F.R. pts. 87, 1050).

¹⁴ 81 Fed. Reg. 19365.