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September 15, 2025

VIA ELECTRONIC SUBMISSION

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS–1832–P
P.O. Box 8016
Baltimore, MD 21244–8016

Re: Medicare and Medicaid Programs: Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems; Quality Reporting Programs; Overall Hospital Quality Star Ratings; and Hospital Price Transparency, 90 Fed. Reg. 33476 (July 17, 2025)

Do No Harm, Inc., and Defending Education submit this comment in support of CMS’s proposed rule concerning accreditors’ standards that require residency and fellowship institutions to adopt racially discriminatory “diversity, equity, and inclusion” programs as a condition for accreditation and federal funds.

Do No Harm is a nonprofit organization with over 30,000 members, including physicians, nurses, medical students, patients, and policymakers. Do No Harm is committed to ensuring that the practice of medicine is driven by scientific evidence rather than ideology and that professional opportunities are allocated based on merit rather than race, gender, or some other immutable characteristic. *See About Us*, Do No Harm, bit.ly/4imToqX. To that end, Do No Harm opposes the spread of so-called “DEI” policies and transgender ideology in the medical profession. The association engages policymakers to encourage legislation and regulations that limit such practices

and, when necessary, files lawsuits against universities, employers, and others whose DEI practices violate antidiscrimination laws. *See, e.g., Federal Policy*, Do No Harm, bit.ly/4i16XwF; *Do No Harm Supports the EDUCATE Act*, Do No Harm (Mar. 19, 2024), bit.ly/43iASfa; *Rep. Crenshaw Introduces Bill Banning Medicaid Funding for Child Sex Change Interventions*, Do No Harm (Jan. 24, 2025), bit.ly/43eNpQS; *Litigation*, Do No Harm, bit.ly/3XpN3D6.

Defending Education is a nationwide, nonpartisan membership organization working to ensure schools at all levels are free from activists imposing harmful agendas. *See* Defending Education, *About Us: Who We Are*, bit.ly/3VHZSr9. Defending Education accomplishes its mission through building networks and coalitions, engaging in investigative reporting, filing civil rights complaints, and bringing litigation. Defending Education’s goal is to restore the reestablishment of a quality, non-political education for all students—from kindergarten through graduate school.

Both Do No Harm and Defending Education seek to ensure that the public, courts, and federal agencies have a proper understanding of these issues. These organizations support CMS’s effort to prohibit accreditors of residency and fellowship programs from “requir[ing]” or “otherwise encourag[ing] institutions to put in place” “diversity, equity, and inclusion programs that encourage lawful discrimination on the basis of race or other violations of Federal law.” CMS, *Fact Sheets: Calendar Year 2026 Hospital Outpatient Prospective Payment System (OPPS) and Ambulatory Surgical Center Proposed Rule (CMS-1834-P)* (July 15, 2025), perma.cc/82S8-DFZZ. Do No Harm and Defending Education similarly support CMS’s proposal to allow the Secretary to certify other organizations as accreditors to increase the potential for competition in the accreditation space and improve the quality of the accreditation process. *See id.*

I. For years, ACGME has required residency and fellowship programs to engage in race discrimination as a condition for accreditation and federal funds.

On April 23, 2025, President Trump signed Executive Order 14279. In that order, President Trump recognized that “[s]ome accreditors make the adoption of unlawfully discriminatory practices a formal standard of accreditation, and therefore a condition of accessing Federal aid.” Exec. Order 14279, §1.

One of the examples cited in the Executive Order is the Accreditation Council for Graduate Medical Education. *See id.* ACGME is currently *the sole* accreditor for residency and fellowship programs for MDs and DOs in the United States. *See id.*; *see*

also Am. Osteopathic Ass’n, *AOA, ACGME and AACOM usher in new era of single accreditation for graduate medical education* (June 30, 2020), perma.cc/S2SG-9PMU (“the ACGME serves as the nation’s sole accreditor for both osteopathic (DO) and allopathic (MD) residencies and fellowships.”). ACGME’s reach is vast. It accredits more than 13,393 residency and fellowship programs across 146 specialties and subspecialties, with 162,644 residents and fellows in training in 2025 alone. See Subcomm. on Admin. State, Regulatory Reform & Antitrust, *The MATCH Monopoly: Evaluating the Medical Match Residency Antitrust Exemption*, H. Judiciary Comm. (May 14, 2025) (Statement of ACGME), perma.cc/W5RM-NU7R.

ACGME’s status as the sole accreditor for residency and fellowship programs in the nation also makes it the sole gatekeeper for federal funds. CMS uses Medicare money to pay teaching hospitals for direct graduate medical education (i.e., training in a nonpatient setting) and for indirect medical education (i.e., training obtained through patient care). See CMS, *Direct Graduate Medical Education (DGME)* (last visited Sept. 15, 2025), perma.cc/8TM8-3LMG; CMS, *Indirect Medical Education (IME)* (last visited Sept. 15, 2025), perma.cc/3ZG3-F2SF. But to receive Medicare funds, the teaching hospital must have its residency or fellowship program accredited by ACGME. As ACGME explains on its website, “[r]esidency programs that are not accredited by the ACGME do not receive Medicare funding from CMS for Direct Graduate Medical Education (DGME) and Indirect Medical Education (IME).” ACGME, *FAQs* (last visited Sept. 15, 2025), perma.cc/BXP6-UNMG.

For years, ACGME used its sole-accreditor status to require and otherwise encourage, as a condition of accreditation, residency and fellowship programs to engage in unlawful race discrimination. ACGME’s institutional requirements stated: “The Sponsoring Institution ... **must** engage in practices that focus on ongoing, mission-driven, **systematic recruitment and retention of a diverse inclusive workforce** of residents/fellow, faculty members, senior administrative staff members, and other relevant members of its GME community.” ACGME, Institutional Requirement III.B.8 (July 1, 2022), perma.cc/TQ75-274A (emphasis added).

In addition, ACGME’s common program requirements similarly stated: “The program ... **must** engage in practices that focus on mission-driven, ongoing, **systematic recruitment and retention** of a diverse inclusive workforce of residents, fellows (if present), faculty members, senior administrative GME staff members, and other

relevant members of its academic community.” ACGME, Common Program Requirement I.C (July 1, 2023), perma.cc/9TCW-V4EE. ACGME explained in “Background and Intent” for that requirement that it was “expected that the Sponsoring Institution has, and programs implement, policies and procedures related to recruitment and retention of ***individuals underrepresented in medicine and medical leadership*** in accordance with the Sponsoring Institution’s mission and aims.” *Id.* (emphasis added). Whites and Asians are not considered underrepresented in medicine. *See, e.g.,* AAMC, *FACTS Glossary*, perma.cc/2989-3625. In sum, ACGME’s accreditation standards required hospitals to systematically recruit and retain non-white and non-Asian residents, fellows, and employees.

ACGME’s accreditation standard, if adopted by hospitals, would have caused those hospitals to violate numerous provisions of federal law.

- Under Title VII, it is unlawful for an employer to “fail or refuse to hire ... any individual, or otherwise ... discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual’s race [or] color.” 42 U.S.C. §2000e-2(a)(1). Title VII also prohibits employers from “limit[ing], segregat[ing], or classfy[ing] his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect status as an employee” because of “race” or “color.” *Id.* §2000e-2(a)(2).
- 42 U.S.C. §1981 prohibits race discrimination in contracting by declaring that “[a]ll persons ... shall have the same right ... to make and enforce contracts ... as is enjoyed by white citizens.” Residencies and fellowship programs likely involve contracts that fall under §1981’s reach.
- Title VI prohibits race discrimination by federal-funds recipients, like the teaching hospitals that accept Medicare funds. *See* 42 U.S.C. §2000d. “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” *Id.* And because the primary purpose of CMS’s funding for teaching hospitals likely is to enable the employment of the residents and fellows, Title VI would apply in addition to Title VII. *See id.* §2000d-3.

- Section 1557 of the Affordable Care Act states that “an individual shall not, on the ground prohibited under title VI ..., be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance.” *Id.* §18116(a). Hospitals are without question a health program or activity. *See, e.g.*, 45 C.F.R. §92.4.

None of this is news to ACGME. It conceded earlier this year that its DEI requirements created “significant concerns” from its constituents that the hospitals would not be able to comply with those requirements “in light of state and federal laws.” Do No Harm, *The ACGME Caves, Suspends Enforcement of Diversity Requirements for Accreditation* (May 12, 2025), perma.cc/HVB9-GQ8M.

Moreover, ACGME’s accreditation standard would have had the effect of causing CMS—and the taxpayers—to subsidize (and require) race discrimination. The federal government’s reliance on an accreditor, who in turn requires hospitals to racially discriminate, to decide whether to pay those hospitals raises serious equal-protection concerns. *Cf. Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 178-79 (1972) (“Even though the [state] Liquor Control Board regulation in question is neutral in terms, the result of its application in a case where the constitution and bylaws of a [private] club required racial discrimination would be to invoke the sanctions of the State to enforce a concededly discriminatory private rule.”).

CMS’s proposed rule is necessary to prevent accreditors from causing or inducing hospitals—and CMS—from engaging unlawful race discrimination. This is so even though ACGME purported to “suspend” the enforcement of the problematic accreditation standards after President Trump’s executive order. *See* Do No Harm, *The ACGME Caves, Suspends Enforcement of Diversity Requirements for Accreditation*, *supra*. An enduring rule is necessary to ensure that ACGME doesn’t unilaterally un-suspend its standards or adopt some other standards that promote discrimination.

II. To prevent any possible circumvention, CMS should consider Do No Harm and Defending Education’s proposed additional language.

Do No Harm and Defending Education propose additional language for inclusion in the final rule. The proposed additional language would prevent any possible circumvention by accreditors through word play.

Do No Harm has closely investigated institutions that have merely rebranded their DEI programs with some different labels in order to circumvent legislative efforts to ban DEI from those institutions. *See Do No Harm, Zombie DEI: When Ideology Circumvents State Legislation – and Comes Back to Life Again and Again* (May 28, 2025), perma.cc/Q3EJ-MHEN. Defending Education has similarly investigated and found various institutions that have circumvented scrutiny by rebranding their DEI programs with different labels. *See Defending Educ., University DEI: Status Quo and Rebrands* (Apr. 16, 2025), perma.cc/D9Z9-BCSR.

To prevent any attempts by accreditors like ACGME to circumvent the proposed rule's reach by simply engaging in word play, Do No Harm and Defending Education encourage CMS to consider adding the following language (in bold and underlined) to §412.105.

- (A) Is approved by one of the national organizations listed in § 415.152 of this chapter, provided that the national organization does not use accreditation criteria that **either** promote or emphasize diversity, equity, inclusion, or awareness based on race, color, sex, sexual orientation or **gender** identity, national origin, or any other characteristic which serves as a proxy to achieve the same ends **or would cause the hospitals to violate, or reasonably cause the hospitals to believe that they would violate, federal civil rights laws if adopted by the hospitals.**
- (C) Is approved by the Accreditation Council for Graduate Medical Education (ACGME), or other organization designated by the Secretary, as a fellowship program in geriatric medicine, provided that the Council or other organization does not use accreditation criteria that **either** promote or emphasize diversity, equity, inclusion, or awareness based on race, color, sex, sexual orientation or **gender** identity, national origin, or any other characteristic which serves as a proxy to achieve the same ends **or would cause the hospitals to violate, or reasonably cause the hospitals to believe that they would violate, federal civil rights laws if adopted by the hospitals.**

- (E) Is a program that would be accredited except for the accrediting agency's reliance upon an accreditation standard that requires an entity to promote or emphasize diversity, equity, inclusion, or awareness based on race, color, sex, sexual orientation or **gender** identity, national origin, or any other characteristic which serves as a proxy to achieve the same ends **or would cause the hospitals to violate, or reasonably cause the hospitals to believe that they would violate, federal civil rights laws if adopted by the hospitals.**

The proposed addition would prevent accreditors from engaging in word play to circumvent the proposed rule's reach. And the proposed addition likely would withstand First Amendment challenges by simply incorporating federal civil rights laws into the rule. *See, e.g., Nat'l Urban League v. Trump*, 783 F. Supp. 3d 61, 104-05 (D.D.C. 2025) (Kelly, J.) (“[T]he government does not violate the First Amendment by incorporating preexisting federal law into an executive order and declining to detail hypothetical examples of things that might violate the law.”); Op. at 7, *Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump*, No. 25-1189 (4th Cir. Mar. 14, 2025) (Harris, J., concurring) (agreeing to stay an injunction against a presidential executive order because the order's provisions “apply only to conduct that violates existing federal anti-discrimination law”).

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For these reasons, Do No Harm and Defending Education support the proposed rule and encourages CMS to consider adopting the additional language that we propose. If you have any questions or require further information, please feel free to contact us at kristina@donoharmmedicine.org or nicole.neily@defendinged.org.

Thank you for your attention to this important matter.

Sincerely,



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