



August 12, 2019

The Honorable Alex M. Azar II
Secretary
U.S. Department of Health and Human Services
200 Independence Ave SE
Washington, DC 20201

Re: Nondiscrimination in Health and Health Education Programs or Activities [HHS-OCR-2019-0007] [RIN 0945-AA11]

Dear Secretary Azar:

Thank you for the opportunity to comment on the proposed rule, *Nondiscrimination in Health and Health Education Programs or Activities*, issued on May 24, 2019. The proposed rule offers substantial revisions to “Nondiscrimination in Health Programs and Activities,” a Final Rule issued in 2016 (2016 Rule) implementing Section 1557 of the Patient Protection and Affordable Care Act (ACA).¹ These revisions would conceal, reduce, or eliminate protections against discrimination for several classes of individuals, and would allow previously covered entities to engage in discriminatory activity. As a result of such discrimination, many consumers stand to lose access to vital health care services. Therefore, we respectfully request that you withdraw this proposed rule.

I. Discrimination on the Basis of Sex

The U.S. Department of Health and Human Services (HHS) proposes to repeal Section 1557’s regulatory definition of discrimination “on the basis of sex.” The 2016 Rule defined “on the basis of sex” to include discrimination based on “pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, and gender identity.”² At a minimum, removing this definition is likely to increase confusion and raise questions for covered entities and consumers.³ In reality, it is likely to result in reduced access to health care services and discrimination against individuals based on sex stereotyping, sexual orientation, gender identity, pregnancy, and recovery and medical conditions stemming from child birth. Members of the lesbian, gay, bisexual, transgender, and queer (LGBTQ) community already experience discrimination when seeking health care services,⁴ and repealing the regulatory definition of discrimination on the basis of sex will likely increase incidences of discrimination

¹ Nondiscrimination in Health Programs and Activities, 81 Fed. Reg., 31375, (May 18, 2016) (codified at 45 C.F.R. pt. 92), available at <https://www.federalregister.gov/documents/2016/05/18/2016-11458/nondiscrimination-in-health-programs-and-activities>.

² Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. at 31387, available at <https://www.federalregister.gov/documents/2016/05/18/2016-11458/nondiscrimination-in-health-programs-and-activities>.

³ Katie Keith, *HHS Proposes to Strip Gender Identity, Language Access Protection from ACA Anti-Discrimination Rule*, HEALTH AFFAIRS BLOG (May 25, 2019), <https://www.healthaffairs.org/doi/10.1377/hblog20190525.831858/full/>.

⁴ *Id.*

against members of this community. In fact, recent data from a national survey illustrates how LGBTQ individuals experience discrimination in health care settings, how that discrimination discourages them from seeking care, and how they may have trouble seeking alternative services if they are turned away by a health care provider.⁵ Notably, eight percent of lesbian, gay, bisexual, and queer individuals have reported that a health care provider has refused to see them as a patient because of their actual or perceived sexual orientation.⁶ Additionally, 29 percent of transgender individuals have reported that a health care provider refused to see them as a patient because of their actual or perceived gender identity.⁷ This type of unwarranted discrimination has very real impacts on an individual's health, as 14 percent of people who experienced discrimination on the basis of gender identity or sexual orientation avoided or postponed medically necessary care because of the discrimination they experienced.⁸

The existing definition of sex discrimination is based on federal court rulings that recognize sex-based discrimination as including sex stereotyping.⁹ Furthermore, the Supreme Court is scheduled to hear cases next term about whether sex-based discrimination includes discrimination based on gender identity and sexual orientation.¹⁰ Confusion could be heightened if HHS finalizes this proposed rule, only to amend it again after the Supreme Court issues a ruling that establishes an inclusive definition of sex-based discrimination that conflicts with the agency's interpretation of the law. Moreover, HHS should strive to avoid unnecessary and costly litigation, which the agency's inconsistent interpretation of the law invites. If HHS chooses not to withdraw this proposed rule, it should not be finalized until the Supreme Court issues final rulings in these cases.

To justify this proposed rule, HHS cites the preliminary injunction issued in *Franciscan Alliance v. Azar*.¹¹ This injunction prevents HHS from enforcing Section 1557 to the extent that it protects individuals from discrimination based on gender identity or termination of pregnancy towards the plaintiffs in the case.¹² The agency's reliance on a trial court's interpretation of the law is erroneous, as other courts that have considered this issue have found that discrimination on the basis of sex does include protections based on gender identity and termination of pregnancy. This includes a 2018 decision from the U.S. District Court for the Western District of Wisconsin, which held that the transgender exclusions used in the state's employee health plan and Medicaid plan

⁵ Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care*, CTR. FOR AM. PROGRESS (Jan. 18, 2018), <https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/>.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/newsroom/wysk/lgbt_examples_decisions.cfm?renderforprint=1.

¹⁰ Bill Chappell, *Supreme Court Will Hear Cases on LGBT Discrimination Protections for Employees*, N.P.R., (Apr. 22, 2019), <https://www.npr.org/2019/04/22/716010002/supreme-court-will-hear-cases-on-lgbtq-discrimination-protections-for-employees>.

¹¹ *Franciscan Alliance, Inc. v. Burwell*, 227 F.Supp.3d 660 (N.D. Tex. 2016) (order granting preliminary injunction), available at <http://files.eqcf.org/wp-content/uploads/2018/09/207-Opinion-and-Order-MSJs.pdf>.

¹² *Franciscan Alliance, Inc.*, 227 F.Supp.3d at 695, available at <http://files.eqcf.org/wp-content/uploads/2018/09/207-Opinion-and-Order-MSJs.pdf>.

violated Section 1557,¹³ and a 2018 decision from the U.S. District Court for the District of Minnesota, which held that an employer's health plan violated Section 1557 for including transgender exclusions.¹⁴

Additionally, HHS can appeal the lower court's ruling to allow a higher court to review the issue. To protect individuals from discrimination, we ask HHS to withdraw this proposed rule and appeal any final judgment issued by the District Court, to the extent that it would eliminate protections for individuals based on gender identity and termination of pregnancy. The agency's current course of action signals to the American people that protecting the possibility of cost savings is more important than protecting access to medically necessary care for disadvantaged populations.

While HHS proposes to eliminate the nondiscrimination protections found in the 2016 Rule for individuals based on sex, federal law will still prohibit discrimination against people based on their gender.¹⁵ However, rolling back the Section 1557 regulation will create an environment that encourages discrimination against people based on their gender while HHS chooses not to enforce the law to protect these individuals. This creates a dangerous environment for patients of all genders and gender identities and is contrary to the purpose of Section 1557. Instead of protecting individuals against discrimination, HHS is encouraging such discrimination. We urge you to reverse course.

II. Language Access Requirements

HHS proposes to "repeal the requirements on covered entities to mail beneficiaries, enrollees, and others, notices concerning non-discrimination and the availability of language assistance services (in 15 languages) with every 'significant' publication and communication larger than a postcard."¹⁶ The 2016 Rule requires covered entities to provide notice that they do not discriminate on the bases prohibited by Section 1557, that appropriate aids and services, such as qualified interpreters and language assistance (e.g., translated documents) are available without any charge and in a timely manner, and how to contact the Office of Civil Rights (OCR) to file a complaint.¹⁷ Covered entities are required to post this notification at their facilities and on their websites and include it in publications and communications sent to or targeted at enrollees, applicants, and members of the public.

HHS proposes to remove these requirements altogether. However, as HHS acknowledges, doing so will likely lead to low health care utilization among individuals with low English

¹³ *Boyden v. Conlin*, 341 F.Supp.3d 979 (W.D. Wis. 2018), available at <http://files.eqcf.org/wp-content/uploads/2018/09/207-Opinion-and-Order-MSJs.pdf>.

¹⁴ *Tovar v. Essentia Health*, 342 F.Supp.3d 947 (D. Minn. 2018), available at <https://affordablecareactlitigation.files.wordpress.com/2018/09/tovar-order.pdf>.

¹⁵ *Trump Administration Plan to Roll Back Health Care Nondiscrimination Regulation: Frequently Asked Questions*, NAT'L. CTR. TRANSGENDER EQUALITY, <https://transequality.org/HCRL-FAQ>.

¹⁶ Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27846, 27849 (June 14, 2019), (to be codified at 42 C.F.R. pts. 438, 440, 460 and 45 C.F.R. 86, 92, 147, 155, 156), available at <https://www.federalregister.gov/documents/2019/06/14/2019-11512/nondiscrimination-in-health-and-health-education-programs-or-activities>.

¹⁷ Keith, *supra* note 3.

proficiency (LEP) because they are unaware of available translation services.¹⁸ They will also be unaware of their right to file a complaint with OCR, thereby emboldening covered entities to engage in activities that could be discriminatory out of confidence that they will not be held responsible.

HHS anticipates that roughly \$3.16 billion will be saved over five years by eliminating the notice and tagline requirements. While the proposed rule could reduce administrative costs to a degree, eliminating the notice and tagline requirements altogether goes too far. This approach may save some money, but it comes at the expense of critical nondiscrimination protections, which is unethical and harmful. Instead of completely removing the notice and tagline requirements, HHS could simply require notice at facilities and on websites to achieve a comparable cost-savings. We urge HHS to consider an alternative solution such as this approach that would achieve administrative savings while still informing patients about their rights.

III. Enforcement Structure

HHS proposes to remove the single standard for enforcing claims under Section 1557. Additionally, the proposed rule would eliminate the provision that allows for a private cause of action under Section 1557. This decision is inconsistent with the Minnesota District Court finding in *Rumble v. Fairview Health Services* that Section 1557 provides a new, health-specific, anti-discrimination cause of action subject to a single standard, regardless of the plaintiff's protected class status.¹⁹

HHS also proposes to delegate full enforcement authority to the Director of OCR, which includes handling complaints, conducting compliance reviews, initiating investigations, and making referrals to the DOJ, among other responsibilities. Investing full enforcement authority in the Director of OCR creates the risk that the law will not be enforced fairly, or worse, not enforced at all. We urge HHS to reverse this proposal to ensure that complaints submitted to OCR are handled properly.

IV. Scope of the Rule

HHS proposes to limit the scope of Section 1557 on health insurance companies as covered entities. Currently, if a health insurer receives any federal financial assistance, then all health plans offered by that insurer must comply with Section 1557.²⁰ Yet, under the proposed rule, Section 1557 would only apply to health insurer's operations or products that have received federal financial support. Additionally, while Section 1557 currently applies to health plans offered by employers,²¹ the proposed rule would exclude employer-sponsored plans from the scope of Section 1557.

¹⁸ Nondiscrimination in Health and Health Education Programs or Activities, *supra* note 16 at 27882, available at <https://www.federalregister.gov/documents/2019/06/14/2019-11512/nondiscrimination-in-health-and-health-education-programs-or-activities>.

¹⁹ *Rumble v. Fairview Health Servs.*, No. 14-CV-2037, 2015 WL 1197415, at *10 (D. Minn. Mar. 16, 2015); Keith, *supra* note 3.

²⁰ Keith, *supra* note 3.

²¹ Benjamin J. Conley & Joy Sellstrom, *Issue 101: Final ACA Nondiscrimination Rules Under 1557 Now Effective*, SEYFARTH SHAW LLP (July 25, 2016), <https://www.seyfarth.com/publications/HCRMA072516>.

This change would drastically reduce the number of plans that must comply with the Section 1557 prohibitions on discrimination.²² Having different nondiscrimination rules for different types of plans is likely to create confusion among health care consumers because the government will be providing less certainty that health plans cannot discriminate against them in one or more ways. To protect consumers and to ensure fairness, HHS should maintain the broad scope of Section 1557's nondiscrimination provisions.

V. Conclusion

Thank you again for providing us with an opportunity to comment on this proposed rule. If you have any questions or comments, you can reach me at jwylam@aimedalliance.org or 202-559-0380.

Sincerely,

A handwritten signature in black ink that reads "John Wylam". The signature is written in a cursive style with a large, sweeping initial "J".

John Wylam
Staff Attorney

²² Keith, *supra* note 3.