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August 13, 2019

U.S. Department of Health and Human Services, Office for Civil Rights
Attention: Section 1557 NPRM, RIN 0945-AA11
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue SW
Washington, D.C. 20201

Re: Docket ID: HHS-OCR-2019-0007, RIN 0945-AA11, Comments in Response to Proposed Rulemaking: Nondiscrimination in Health and Health Education Programs or Activities

On behalf of ADL (the "Anti-Defamation League"), we are writing to express our **strong opposition** to the above-referenced proposed rule change and to urge that it be immediately withdrawn. By removing much needed non-discrimination protections from Section 1557 of the Affordable Care Act ("ACA"), and by giving health care providers blanket permission to refuse to provide services based on religious or moral objections, this proposed rule stands to put the health and well-being of millions of vulnerable people at risk without any reasonable justification.

ADL is a leading anti-hate organization founded in 1913 with a dual mission to stop the defamation of the Jewish people and to secure justice and fair treatment to all. In furtherance of this mission, ADL advocates for comprehensive laws and policies that prohibit discrimination on the basis of immutable characteristics, such as sex, sexual orientation, and gender identity. We also firmly believe that freedom of religion enshrined in the First Amendment is meant to be a shield to protect individual religious exercise, rather than a sword that can be used to impose one's beliefs on others. Because the above-referenced proposed rule change will undermine both of these core values, we strongly urge the Department of Health and Human Services ("HHS") and the Center for Medicare and Medicaid Services ("CMS") to withdraw the proposed rule in its entirety, and instead allow existing regulations implementing Section 1557 to remain in place.

Background

Since 2012, HHS has correctly interpreted "discrimination on the basis of sex," as reflected in Section 1557 of the Affordable Care Act ("ACA"), to include discrimination against the LGBTQ community. This interpretation was formalized in 2016, when HHS issued final regulations making clear that sex discrimination in health care includes discrimination on the basis of pregnancy, sex stereotyping, and gender identity.[1]

Because Section 1557 was the first federal civil rights law to broadly prohibit sex discrimination in federally funded health care programs and activities, these regulations were helpful in educating

[1] *Nondiscrimination in Health Programs and Activities*, 81 FR 31375 (May 18, 2016).

consumers and covered entities about how this insidious type of discrimination can manifest. The regulations, for example, helped clarify that if an insurance company provides coverage for a particular type of treatment, that carrier cannot refuse coverage for the same treatment simply because it is requested by someone who is transgender. The regulations also made clear that providers must treat individuals in a manner consistent with their gender identity under the ACA, including in access to health care facilities. Notably, these regulations did not change the underlying text or meaning of Section 1557. They simply clarified the protections that the ACA otherwise guaranteed.

The Proposed Rule Change Will Have a Devastating Impact on the LGBTQ Community

Section 1557 and accompanying regulations have been critical to closing the healthcare gap faced by members of the LGBTQ community, particularly transgender people, since the ACA was first enacted. Unfortunately, the above-referenced proposed rule change seeks to take these critical protections away, including by entirely eliminating Section 1557's regulatory definition of sex discrimination.

By proposing to eliminate protections against discrimination based on gender identity and sex stereotyping, HHS is contradicting over 20 years of federal case law and Supreme Court precedent. While this change will not (and indeed, cannot) impact the longstanding court precedent interpreting gender identity and sex stereotyping discrimination as sex discrimination for purposes of civil rights laws, it will severely weaken the ACA's anti-discrimination protections by sending a confusing and contradictory message to health care providers – that, as a result of the rule change, it is now legally permissible to refuse to care for individuals who are transgender or who do not conform to traditional sex stereotypes. This will result in immediate and devastating health care consequences for a community that already faces startlingly high levels of discrimination when seeking care.

These fears are not speculative. According to a recent survey by the National Center for Transgender Equality ("NCTE"), 33% of transgender respondents reported having negative health care experiences, including 24% who were required to educate their health care provider as to proper standards of care, 8% who were refused transition-related care, 6% who were verbally harassed, and 1% who were sexually assaulted.[2] This pervasive discrimination has deterred many transgender and gender nonconforming patients from seeking the health care they need. That same survey by NCTE, for example, found that 23% of transgender respondents did not see a doctor when they needed to because of fear of being mistreated as a transgender person. Similarly, a 2018 survey by the Center for American Progress found that 14% of LGBTQ respondents who had

[2] NATIONAL CENTER FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 97 (2016), http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf.

previously experienced discrimination in health care avoided seeking necessary medical care, and 17% avoided seeking preventive care in the past year.[3]

By eliminating the inclusive definition of "sex discrimination" from Section 1557's implementing regulations, HHS will only exacerbate these already disturbing trends. This is not only contrary to the intent of the ACA, but also to our core values as a nation.

The Proposed Rule Change Goes Too Far to Protect Religious Liberty at the Expense of Nondiscrimination Protections

In addition to the foregoing, the proposed rule change seeks to impermissibly adopt blanket abortion and religious freedom exemptions for health care providers, which would enable these providers to deny, delay or discourage patients from seeking necessary care due to the provider's own religious beliefs. Not only does this violate the plain language and express purpose of Section 1557, but if implemented, this could allow for religiously-affiliated hospitals and other health care entities to discriminate against patients based on sex, disproportionately harming LGBTQ people, people seeking reproductive health services, including abortion care, and those living at the intersection of these identities. This will place patients further at risk of life-threatening harm, particularly where an individual's access to health care providers is already limited, for example in rural areas, in locations where hospitals are run by religious institutions, or in cases of an emergency. At a time when there is already a proliferation in the number of religiously-affiliated entities that provide health care and related services, yet refuse to provide care based on religious beliefs,[4] the anticipated impact of the proposed rule change on illegal discrimination is particularly concerning.

The Proposed Rule Change Impermissibly Attempts to Eliminate Language Access Protections

The proposed rule change would also remove language access protections for the 25 million people in the U.S. with Limited English proficiency ("LEP")[5] by proposing to roll back requirements for

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[3] CENTER FOR AMERICAN PROGRESS, DISCRIMINATION PREVENTS LGBTQ PEOPLE FROM ACCESSING HEALTH CARE (Jan. 18, 2018), *available at* https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/.

[4] *See, e.g.*, Lois Uttley, et al., *Miscarriage of Medicine: the Growth of Catholic Hospitals and the Threat to Reproductive Health Care*, Am. Civil Liberties Union & Merger Watch (2013), https://www.aclu.org/files/assets/growth-of-catholic-hospitals-2013.pdf.

[5] U.S. Census Bureau, *2017 American Community Survey 1-Year Estimates: Table S1603 Characteristics of People by Language Spoken at Home*, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_17_1YR_S1603&prodType=table (last visited Aug. 12, 2019); U.S. Census Bureau, *2017 American Community Survey 1-Year Estimates: Table S1601 Language Spoken at Home*, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_17_1YR_S1601&prodType=table (last visited Aug. 12, 2019).

the inclusion of taglines on significant documents and remote interpreting standards, and by proposing to eliminate recommendations that entities develop language access plans.

For LEP individuals, language differences often compound existing barriers to access and receiving appropriate care. LEP often makes it difficult for many to navigate an already complicated health care system, especially when it comes to medical or insurance terminology. Moreover, these barriers are often compounded by discrimination based on national origin, immigration status, race, ethnicity, sexual orientation, and gender/gender identity.

Without the regulatory requirements outlined in the current regulations, people with LEP could face additional challenges in access to culturally and linguistically appropriate care, including information about accessing services and health insurance. In particular, discussions about sexual and reproductive care can be sensitive and raise issues of privacy and confidentiality. It is critical that individuals have access to adequate language services, in a private and confidential setting, allowing for information about and access to sexual and reproductive health care to be available in a culturally and linguistically competent manner.

The Proposed Rule Change is Contrary to Existing Legal Precedent Regarding the Meaning of Sex Discrimination in Civil Rights Laws

HHS has stated that its proposed rule change is necessary to "address legal concerns" following the issuance of a preliminary injunction in *Franciscan Alliance v. Azar*. That injunction, however, only prevents HHS from enforcing existing regulations with respect to gender identity and sex stereotyping discrimination; it does not prevent private individuals from bringing claims alleging Section 1557 violations, nor does it require HHS to make any regulatory changes, like the changes proposed here. It also has yet to be challenged on appeal.

Apart from the injunction issued in *Franciscan Alliance*, private litigation to enforce Section 1557 has continued, and federal courts have consistently concluded that the ACA protects against discrimination based on gender identity.[6] These decisions have relied on the language of Section 1557 itself, not merely the implementing regulations. As a result, and contrary to HHS's suggestion, existing precedent overwhelmingly supports an interpretation of the ACA that prohibits discrimination on the basis of pregnancy, sex stereotyping, and gender identity, and HHS's proposed rule change will not alter this existing precedent.

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[6] *See, e.g., Flack v. Wis. Dep't of Health Servs.*, Civ. No. 18-309, 2018 WL 3574875, at *12-13 (W.D. Wis. July 25, 2018); *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 953 (D. Minn. 2018); *Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1098-1100 (S.D. Cal. 2017); *Rumble v. Fairview Health Servs.*, Civ. No. 14-2037, 2017 WL 401940, at *3 (D. Minn. Jan. 30, 2017).

HHS's proposed rule change will not alter existing law that prohibits discrimination on the basis of gender identity and sex stereotyping under the ACA. Instead, it will simply cause widespread confusion and limit access to justice to those plaintiffs who have the financial resources to fight back.[7] This is ultimately a loss for patients, health care providers, and our legal system at large.

We urge HHS to immediately withdraw its proposed rule change, and instead dedicate its efforts to advancing policies that reflect our nation's core values and treat members of the LGBTQ community, as well as those whose health care needs have historically been ignored, neglected, and dismissed, with the dignity and respect they deserve.

Sincerely,

Erika Moritsugu
Vice President, Government Relations and Community Engagement
Anti-Defamation League

[7] The proposed rule change would have an even greater impact on people who live in the 28 states that lack legal protections from gender identity discrimination in public accommodations, such as health care facilities. Based on Williams Institute research, more than 780,000 transgender people—705,000 transgender adults and 78,000 transgender youth—live in those states. *See, e.g.*, UCLA SCHOOL OF LAW WILLIAMS INSTITUTE, LGBT PEOPLE IN THE U.S. NOT PROTECTED BY STATE NONDISCRIMINATION STATUTES (Mar. 2019), available at https://williamsinstitute.law.ucla.edu/wp-content/uploads/Equality-Act-April-2019.pdf; UCLA School of Law Williams Institute, *HHS Aims to Roll Back Non-Discrimination Protections for More than 1.5 Million Transgender People* (Apr. 28, 2019), https://williamsinstitute.law.ucla.edu/press/hhs-rules-conscience-and-1557/.