



Aug. 9, 2019

Roger Severino, Director
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, DC 20201

RE: Nondiscrimination in Health and Health Education Programs or Activities, Section 1557 of the Patient Protection and Affordable Care Act (PPACA), Docket No.: HHS-OCR-2019-0007

Director Severino,

We appreciate the opportunity to provide comments on this proposed regulation concerning changes to Section 1557 nondiscrimination protections of the Patient Protection and Affordable Care Act (PPACA). The Colorado Health Foundation is the state's largest private foundation and the third largest health foundation in the nation. We work closely with partners in the private, public and nonprofit sectors to bring health within reach for all Coloradans, and we do everything with the intent of creating health equity.

We strongly oppose these proposed changes to Section 1557 nondiscrimination protections on the basis that cutting meaningful access to information for limited English proficient (LEP) speakers and changes to how gender identity is defined would undoubtedly keep health out of reach for LEP and lesbian, gay, bisexual, transgender and queer (LGBTQ) Coloradans throughout the state.

Eliminating the civil rights protections for some is a threat to the civil rights of all. Proposed changes to legal notices and language access plans for LEP individuals in the health care setting infringes on the rights and baseline protections of marginalized and underserved communities who often require meaningful accommodations to access federal programs and private health plans. It also creates unfair and unnecessary barriers to accessing primary and mental health care services for themselves and their families, which we know total between 300,000 to 400,000 Coloradans with limited English proficiency.¹

Section 1557 of the PPACA also prohibits discrimination based on race, color, national origin, sex, age and disability in health programs and activities supported by federal funding. As noted

¹ https://www.lep.gov/maps/2015/national/US_state_LEP_count.ACS_5yr.2015.pdf

by the Kaiser Family Foundation², Section 1557 is the first federal civil rights law to prohibit discrimination in health care based on sex. We support and commend such protections for all Americans, regardless of sex or gender identity, within health care settings and urge the Administration to defend and strengthen these protections rather than dismantling them.

On June 14, 2019, the Department of Health and Human Services' Office of Civil Rights (HHS OCR) formally published a proposed rule to amend the regulations under Section 1557 of the PPACA in ways that would remove protections for vulnerable persons.³ Among other provisions, the Department proposes to repeal the current definition of sex discrimination – defined as “discrimination on the basis of pregnancy termination, sex stereotyping, and gender identity.” Gender identity, under current rules, is defined as one’s internal sense of being “male, female, neither, or a combination of male and female” and thus provides broad protections for all persons.⁴ In this draft rule, HHS proposes to use the Department of Justice’s interpretation of “sex” – “defined to mean biologically male or female.” The agency also proposes removing sexual orientation and gender identity as prohibited bases for discrimination in several existing HHS regulations, including those addressing marketing and benefit design for Qualified Health Plans, as well as broker assistance and direct enrollment.

The Foundation opposes these proposed changes because we support protections against discrimination for all LGBTQ people. Protecting people from discrimination, including people who are gay or transgender—is about treating others as we want to be treated. We believe that promoting fair treatment of LGBTQ people is foundational to our core value of equity, and is essential to supporting the overall health of LGBTQ people and their families. HHS’ proposed rule risks keeping needed health care services out of reach for LGBTQ people.

In seeking stakeholder comments, OCR indicates it “lacks the data necessary to estimate the number of individuals who currently benefit from covered entities’ policies governing discrimination on the basis of gender identity who would no longer receive those benefits as a consequence of the rule—notwithstanding that nothing in the rule precludes covered entities from continuing such policies voluntarily.” OCR also seeks “comments and documentation of cases where, despite the preliminary injunction barring OCR from enforcing the provisions,⁵

² <https://www.kff.org/disparities-policy/issue-brief/hhss-proposed-changes-to-non-discrimination-regulations-under-aca-section-1557/>

³ See: text of the proposed rule as released on May 24, 2019: <https://www.hhs.gov/sites/default/files/1557-nprm-hhs.pdf>; and a Fact Sheet: <https://www.hhs.gov/sites/default/files/factsheet-section-1557.pdf>

⁴ <https://www.hhs.gov/sites/default/files/factsheet-section-1557.pdf>

⁵ On December 31, 2016, the U.S. District Court for the Northern District of Texas issued an opinion in *Franciscan Alliance, Inc. et al. v. Burwell*, preliminarily enjoining nationwide HHS’s attempt to prohibit discrimination on the basis of gender identity and termination of pregnancy as sex discrimination. Consequently, HHS has not had the legal authority to implement the provisions on gender identity and termination of pregnancy.

persons would not have received treatments or procedures related to gender identity or termination of pregnancy, but for the Final Regulation's gender identity and termination of pregnancy provisions." In several recent surveys of transgender and gender non-conforming individuals, respondents report experiencing significant barriers to access, such as:

- 75% of transgender Coloradans report fear that provider staff will treat them differently as a barrier to the health care they need, and 1 in 3 report consultations with providers who refuse to provide care for LGBTQ people⁶
- 24% report postponing medical care when sick due to discrimination⁷
- 19% report that doctors have refused to provide them care because of their transgender status⁸
- 28% report facing harassment in medical settings and 2% report facing violence in a doctor's office⁹
- 31% of transgender Americans lack regular access to health care¹⁰

Surveys also indicate that among transgender respondents and their experience with health coverage¹¹:

- 17% had an insurer refuse to change their name and/or gender in their insurance record when requested
- 13% reported that they were denied coverage for services often considered to be gender-specific, including routine sexual or reproductive health screenings
- 55% of respondents who sought transition-related surgery coverage were denied
- 25% of those who sought coverage for hormones were denied

Among Medicare beneficiaries who are transgender, data show a high prevalence of mental health conditions¹² including:

- Depression has affected 81.8% of those under the age of 65;¹³

⁶ https://one-colorado.org/wp-content/uploads/2019/05/Closing_The_Gap_2018-LGBTQ-Health-Assessment_FINAL_5.17.19.pdf

⁷ <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>

⁸ Ibid.

⁹ Ibid.

¹⁰ <https://www.npr.org/documents/2017/nov/npr-discrimination-lgbtq-final.pdf>

¹¹ <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>

¹² <https://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health?topicid=25>

¹³ <https://www.cms.gov/About-CMS/Agency-Information/OMH/Downloads/Identifying-the-Transgender-Population-in-the-Medicare-Program.pdf>

- Other mental health conditions, such as post-traumatic stress disorder, anxiety disorders and major depressive disorders, also affect a disproportionately large proportion of the population

These data illustrate the ways in which many LGBTQ people encounter unacceptable barriers when they seek health care services, and we firmly believe that removing PPACA protections will exacerbate the existing challenges they face. The Foundation wholeheartedly supports maintaining strong and comprehensive discrimination protections afforded to all individuals, regardless of sex or gender identity, as a result of Section 1557 of the PPACA. Protections such as these help advance health and health equity in our communities, including for LGBTQ people and their families.

In addition, the Foundation supports protections in Section 1557 of the PPACA that provide meaningful access to information for LEP individuals and families, enabling them to attain access to the health care providers and services they need to live healthy lives. Without these protections in place, we put hundreds of thousands of LEP Coloradans at risk of navigating a health care system ripe with barriers to basic information and access.

Thank you for the opportunity to provide input to this proposed rule change. If you have any questions about our comments, or seek clarification, please contact Jin Alexander Tsuchiya, public policy officer at the Colorado Health Foundation, at jtsuchiya@coloradohealth.org, or (303) 953-3667.

Sincerely,



Kyle Legleiter
Senior Director of Policy and Advocacy
The Colorado Health Foundation