



August 12, 2019

**Re: Opposition to HHS-OCR-2019-0007, “Nondiscrimination in Health and Health Education Programs or Activities” (RIN 0945-AA11)**

Submitted electronically to:

<https://www.regulations.gov/document?D=HHS-OCR-2019-0007-0001>

Dear Secretary Azar,

We, the undersigned, represent Connecticut’s health care consumers, physicians, and state health policy personnel. Our organizations work every day to advance health care policy and practice that meets the needs of Connecticut residents. We are the leaders of the Connecticut State Medical Society, the Office of the Healthcare Advocate, and the Office of Health Strategy. We write to you with one voice in strong and emphatic opposition to the Department of Health and Human Services’ proposed rule, “Nondiscrimination in Health and Health Education Programs or Activities”, HHS-OCR-2019-0007 (RIN 0945-AA11) (the “proposed rule”).

### **About Our Organizations**

The Connecticut State Medical Society is one of the oldest medical societies in the United States, founded in 1792 and serving more than 6,000 Connecticut physicians and physicians in training. The mission of CSMS is to be the voice of all Connecticut physicians; to lead physicians in advocacy; to promote the profession of medicine; to improve the quality of care; and to safeguard the health of patients. Visit [www.CSMS.org](http://www.CSMS.org) for more information.

The Connecticut Office of the Healthcare Advocate is an independent state agency with a healthcare consumer-focused mission: assuring consumers have access to medically necessary healthcare; educating consumers about their rights and responsibilities under health plans; directly assisting and representing consumers in disputes with their health insurance carriers, such as in preparing appeals of claim denials; and informing legislators and regulators regarding problems that consumers are facing in accessing healthcare or health coverage, and proposing solutions to those problems.

The Connecticut Office of Health Strategy is a state agency that is commissioned to implement comprehensive, data driven strategies that promote equal access to high quality health care, control costs and ensure better health for the people of Connecticut.

### **Opposition to Proposed Rule**

The Department's proposed rule will institutionalize discrimination in health care, health insurance, and health education. It will hurt Connecticut's LGBTQ+ and other health insurance consumers by repealing the regulation that today bans discrimination on the basis of gender identity or gender stereotyping and sexual orientation. It will roll back longstanding civil rights protections for residents with limited English proficiency. In brief, we are concerned the proposed rule, if implemented, will do the following:

- Change the definition of discrimination on the basis of sex to exclude discrimination against LGBTQ+ consumers;
- Substantially reduce the scope of entities covered by the requirements of the anti-discrimination rule;
- Exceed current and well-established legal balancing tests between religious practice and conscience protections and consumer rights;
- Remove requirements to provide language access to individuals with limited English proficiency;

- Remove the grievance process for individuals alleging discrimination in health programs and activities
- Allow for discriminatory plan designs

These changes will harm consumers in Connecticut and around the country, especially women, members of the LGBTQ+ community, and members of other marginalized groups, by making it harder for them to receive the coverage and care that they require. It will re-institutionalize discrimination against our fellow citizens. We urge you to leave the current rule in place rather than implementing the proposed rule.

We also urge the administration to reject changes to ensure access to care for individuals with disabilities. By signaling its intent to change rules that ensure access for individuals who experience significant barriers to care, the administration sends troubling signals to millions of Americans that their civil rights are in jeopardy.

**HHS should not redefine sex-based discrimination to exclude discrimination against LGBTQ+ consumers.**

The current regulation, promulgated under Section 1557 of the Affordable Care Act, conforms to a strong current of Federal case law that discrimination on the basis of sex under Title VII and Title IX includes discrimination on the basis of gender identity and sex stereotyping. It also conforms to Connecticut law which explicitly prohibits discrimination on the basis of sexual orientation and gender identity or expression, and which requires health insurers to include coverage of medically necessary services for the LGBTQ+ community. The proposed regulation pre-supposes the outcome of litigation. Instead of waiting for the outcome of such litigation, HHS inserts its briefing position into regulation, thereby substantially and narrowly redefining the U.S. Code and reversing nondiscrimination protections for tens of millions of Americans.

By contrast, the proposed rule excludes LGBTQ+ consumers from federal anti-discrimination protections. This will create uncertainty and give safe harbor to providers

to delay or refuse needed services and supports, and will allow some insurers to discriminate against LGBTQ+ consumers by charging higher premiums and excluding necessary services from coverage. This runs counter to state laws, and will increase disparity of experience across states, as only those residents of states with state law protections will have the benefit of equal treatment and recourse for lack of such equal treatment. The rule also runs counter to the United States Supreme Court's recognition of same-sex marriage and the rights and privileges associated with marriage. In the absence of clear Federal anti-discrimination protections, such as exist in the current regulation, such discrimination will result in adverse health outcomes and higher costs, including potentially higher costs to publicly funded health programs such as Medicaid.

**HHS should not reduce the scope of entities covered by Section 1557 regulations.**

Under the current regulation, companies that provide health insurance coverage and other covered entities must also conform to the Section 1557 prohibitions against discrimination. The proposed rule would reduce the application of Section 1557 to only those health programs and activities that receive federal funding. For example, under the current regulation, if an insurer participates in the Marketplace, all health plans offered by that issuer are subject to Section 1557. The proposed rule would limit the application of Section 1557 protections only to such an insurer's Marketplace plans: plans sold off-exchange would not be covered.

This will mean that insurers can again impose categorical exclusions of transition-related care; can limit coverage of transition-related care beyond the extent of the limits of other coverage; can deny coverage for care typically associated with one gender; and can refuse to enroll, cancel coverage, or impose higher rates on an enrollee because they are transgender. While Connecticut law currently includes protections against such actions, the Employee Retirement Income Security Act of 1974 generally preempts state regulation of self-funded health plans. Connecticut residents who switch jobs or otherwise change coverage from a fully insured plan to a self-funded plan with no protections could face

threats to continuity of care, and for instance could suddenly find that an uncompleted course of treatment covered under their old plan is denied under the new plan. If the proposed rule is promulgated and federal funding associated with coverage is jeopardized, many more Connecticut residents may lose these protections despite the state's mandate.

**HHS should not make conforming amendments to other HHS programs, and should not limit Section 1557 protections to programs under the ACA.**

HHS has proposed to extend these changes in scope by making what it calls “limited conforming amendments” to the regulations of programs outside of Title 1 of the ACA. The regulations proposed to be amended in this way include those governing state Medicaid programs, Medicaid managed care, PACE, group and individual health insurance issuers, Marketplaces, qualified health plan issuers, enrollment assisters and brokers, and educational programs that receive federal funding. The proposed regulation would eliminate the established definition of sex discrimination from all of these programs. We strongly oppose this change and object to OCR exceeding its authority to regulate programs outside of its regulatory purview.

The proposed rule also limits Section 1557 protections to programs that HHS administers through Title 1 of the ACA. Currently, Section 1557 protections have been applied to additional HHS programs such as other programs administered by CMS, the Health Resources and Services Administration, the Centers for Disease Control and Prevention, the Indian Health Service, and the Substance Abuse and Mental Health Services Administration. This means that HHS will not apply Section 1557 protections to a host of programs that affect millions of Americans every day and at critical moments in their lives. We strongly oppose this change.

**HHS should not weaken existing health care protections for women (including transwomen) and nonbinary individuals.**

In addition to the changes to the definition of sex-based discrimination discussed above, the proposed rule ignores the existence of current, longstanding federal (and state) exemptions for bona fide religious beliefs in favor of allowing employers, insurers, and providers priority over the treatment of women and nonbinary people. In the absence of the current federal protections, adverse outcomes including poor maternal outcomes and poor health outcomes, are likely to increase.

**HHS should not weaken the language access requirements currently in place.**

The proposed rule weakens existing health care access for people with Limited English Proficiency (LEP), exposing them to communication barriers and other forms of unequal treatment that are likely to delay or prevent necessary medical care.

Eliminating the requirement to provide language access to individuals with limited English proficiency will likely chill people from seeking care entirely, and compromise the effectiveness of the treatment that they do receive. According to HHS' Agency for Health Care Research and Quality:

*Research suggests that adverse events affect LEP patients more frequently, are often caused by communication problems, and are more likely to result in serious harm compared to those that affect English-speaking patients. Effective provider-patient communication is vital, especially in areas as critical as medication reconciliation, hospital discharge, informed consent, and surgical care (pre-, peri-, and post-op), to name a few. In fact, these communication-sensitive processes don't just put patients with LEP at risk. Patients with limited health literacy, those who may be affected by disabilities, and those who are subject to other vulnerabilities face an increased risk of misunderstanding and, in turn, medical errors.<sup>1</sup>*

All of the above adverse outcomes are likely to increase, in the absence of the current federal requirement to provide effective language supports. While HHS characterizes this decrease as negligible, we disagree: the Migration Policy Institute has tabulated data from the U.S. Census Bureau's American Community Survey showing that

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<sup>1</sup> <https://www.ahrq.gov/sites/default/files/publications/files/lepguide.pdf>

8.37% of Connecticut residents, and 8.62% of US residents, have limited English proficiency.<sup>2</sup> A policy that may affect the health access of one consumer in twelve is not negligible.

**HHS should not narrow the definition of discrimination on the basis of disability, nor narrow the scope of the prohibition against such discrimination.**

In the notice of proposed rulemaking, HHS also seeks comment on whether it should narrow the scope of some regulations prohibiting discrimination on the basis of disability. Specifically, it seeks comment on whether entities with fewer than 15 employees should be exempt from the requirement to provide auxiliary aids and services to ensure effective communication with people with disabilities; whether all covered entities should be subject to the architectural standards applicable to public buildings; and whether the provision requiring covered entities to make reasonable modifications in policies, practices, and procedures to avoid disability-based discrimination should be revised to include an exemption for undue hardship, in addition to the existing fundamental alteration exemption. These changes would limit and reduce equal access to health care for disabled people who already experience higher levels of health disparities and discrimination.

It is inarguable that without health none of the three fundamental and unalienable rights embodied within the Declaration of Independence of United States are possible. A natural length of life, the liberty to live it fully and the possibility of genuine happiness are all curtailed and weakened when health is not present. We owe it to our country's founders to respect the wish and expectation that the Declaration of Independence contains every protection possible to ensure these three rights apply in equal measure to all members of our society. The Department of Health and Human Service's proposed rule, "Nondiscrimination in Health Education Programs or Activities", HSS-OCR-2019-

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<sup>2</sup> Migration Policy Institute tabulations from the U.S. Census Bureau's pooled 2009-2013 American Community Survey, Table B16001 "Language Spoken at Home by Ability to Speak English for the Population 5 Years and Over," available through the U.S. Census Bureau's American FactFinder.

0007 (RIN 0945-AA11) by depriving certain segments of our population equal access to healthcare denies them these fundamental rights. For these reasons we oppose this proposed rule and urge the Department to leave in place the current regulation that protects all patients.

Regards,

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