



August 13, 2019

VIA ELECTRONIC SUBMISSION

Secretary Alex Azar
U.S. Department of Health and Human Services
Herbert H. Humphrey Building, Room 509F
200 Independence Avenue SW
Washington, DC 20201

RE: Docket ID HHS-OCR-2019-0007, RIN 0945-AA11, Nondiscrimination in Health and Health Education Programs or Activities

Dear Secretary Azar:

On behalf of the more than 170,000 members and supporters of the American Association of University Women (AAUW), I submit these comments in response to the Department of Health and Human Services' ("HHS" or "the Department") and the Center for Medicare and Medicaid Services' ("CMS") Notice of Proposed Rulemaking ("proposed rule" or "NPRM") entitled "Nondiscrimination in Health and Health Education Programs or Activities."¹ AAUW strongly opposes the NPRM's proposed elimination or rollback of critical protections guaranteed by Section 1557 of the Affordable Care Act ("ACA") and the 2016 Nondiscrimination in Health Programs and Activities final rule ("2016 final rule").

AAUW is the nation's leading voice promoting equity and education for women and girls. Since our founding in 1881, AAUW members have examined and taken positions on the fundamental issues of the day — educational, social, economic, and political. AAUW believes that everyone is entitled to high-quality, affordable, and accessible health care, and opposes all forms of discrimination.² Health care security is intrinsically tied to economic security, and this relationship is particularly true for women who earn less than men on average³ and are therefore less able to afford insurance or care.

The NPRM undermines our civil rights and would create additional barriers for people to access necessary health care free some discrimination. We urge the agencies to rescind the NPRM in its entirety.

Section 1557 of the ACA protects individuals from discrimination in certain health programs and activities.⁴ This includes protecting individuals on the basis of race, color, national origin, sex,

¹ Department of Health and Human Services, "Nondiscrimination in Health and Health Education Programs or Activities," 84 Fed. Reg. 27846 (June 14, 2019).

² AAUW, 2019–21 AAUW Public Policy Priorities (2019), <https://www.aauw.org/resource/principles-and-priorities/>.

³ Kevin Miller and Deborah J. Vagins, "The Simple Truth about the Gender Pay Gap" (American Association of University Women, Fall 2018), <https://www.aauw.org/research/the-simple-truth-about-the-gender-pay-gap/>

⁴ 42 USC 18116.

(including gender identity, sexual orientation, and sex stereotypes; and pregnancy, childbirth, and related medical conditions), age, and disability. Section 1557 also protects against intersectional discrimination, or discrimination based on multiple protected characteristics, by allowing people to file all complaints of such discrimination in one place. The current rule, or 2016 final rule, makes clear that discrimination is prohibited on the basis of sex, which includes discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping and gender identity.⁵ The 2016 final rule also protects from discrimination individuals who have Limited English Proficiency (“LEP”) and individuals with disabilities or chronic conditions.

While Section 1557 remains the law, the NPRM proposes to change the way in which the law is implemented through regulations, contrary to the statute’s plain language. As a result, many people who are particularly vulnerable to discrimination, including lesbian, gay, bisexual, transgender, and queer (LGBTQ) people, people who need reproductive health care including abortion, women of color, people living with disabilities or chronic conditions, and people who have Limited English Proficiency could face barriers when accessing health care, which could lead to worse health outcomes.

Specifically, the NPRM limits the scope of Section 1557, narrows the definition of sex discrimination, amends unrelated regulations to exclude sexual orientation and gender identity protections, and limits notice and enforcement requirements and remedies. For these reasons and in order to reflect the ACA’s clear intent and its overriding purpose of eliminating discrimination in health care and increasing access to health care, the proposed rule should not be finalized and should instead be rescinded.

I. The Proposed Rule Would Limit the Scope of Section 1557

Section 1557, as made clear in the 2016 final rule, applies to all health programs and activities that receive federal financial assistance from the Department, all health programs and activities administered by the Department, and state-based marketplaces.⁶ The 2016 final rule defines health programs and activities to include all operations of an entity receiving federal financial assistance that is principally engaged in the provision or administration of health-related services or health-related insurance coverage. The NPRM attempts to reduce the number of health insurance plans that are covered by Section 1557 and narrows the application of Section 1557’s protections. The NPRM does this by providing exemptions to issuers who are not principally engaged in the business of providing health care and by limiting the application of Section 1557 to only qualified health plans offered on an exchange. In addition, the NRPM narrows the application of Section 1557 to only the portion of a health care program or activity that received federal financial assistance.

These changes would have particular implications for women, who have long been the subject of discrimination in health care.⁷ Despite the historic achievements of the ACA, women are still more

⁵ Department of Health and Human Services, “Nondiscrimination in Health Programs and Activities,” 81 Fed. Reg. 31387 (May 18, 2016), *codified at* 45 CFR § 92.

⁶ 81 Fed. Reg. 31441.

⁷ Prior to the ACA, women were charged more for health care on the basis of sex and were continually denied health insurance coverage for services that only ciswomen, transgender, and gender non-conforming patients need. *See Turning to Fairness*, Nat’l Women’s L. Ctr. 1, 3-4 (2012), https://nwlc.org/wp-content/uploads/2015/08/nwlc_2012_turningtofairness_report.pdf.

likely to forego care because of cost,⁸ and women – particularly Black women – are far more likely to be harassed by a provider.⁹ These barriers mean women are more likely not to receive routine and preventive care than men. Women need access to clear protection from discrimination in all health programs and activities. In addition, short-term plans would be specifically impacted by the changes in the NPRM, and thus issuers would be emboldened to discriminate against women by refusing to cover reproductive health services, such as maternity, contraceptive care or fertility care and coverage, or deny coverage altogether for other conditions unique to women, like breast or cervical cancer. Removing tools for women to fight this discrimination, as the NPRM proposes to do, would decrease their access to quality health care.

II. The Proposed Rule Would Narrow the Definition of Sex Discrimination

Sex discrimination takes many forms and has the potential to occur at every step in the health care system—from obtaining insurance coverage to receiving proper diagnosis and treatment from a provider. When discrimination occurs, it has serious adverse impacts on people’s lives, causing them to pay more for health care and to risk receiving quality care. Sex discrimination in health care has a disproportionate impact on women of color, LGBTQ people, and individuals living at the intersections of multiple identities. This can result in their paying more for health care, receiving improper diagnoses at higher rates, being provided less effective treatments, and sometimes being denied care altogether. As the first broad prohibition against sex-based discrimination in health care, Section 1557 is crucial to ending gender-based discrimination in the health care industry. The NPRM walks back important protections against sex discrimination in health care by narrowing the definition to exclude or limit its application to gender identity, sex stereotyping, and pregnancy, including termination of pregnancy. In addition, the NRPM introduces an inappropriate religious exemption to Section 1557.

a. Sex discrimination based on gender identity

The 2016 final rule clarified that Section 1557’s prohibition on sex discrimination includes a prohibition of discrimination on the basis of gender identity, including transgender, nonbinary and gender nonconforming status. This means that health care providers cannot refuse to treat someone because of their gender identity. The NPRM attempts to eliminate references to ACA’s protections against discrimination on the basis of gender identity.

Transgender, nonbinary, and gender nonconforming people already experience high rates of discrimination and harassment in health care. According to the 2015 U.S. Transgender Survey, 33 percent had at least one negative experience in a health care setting relating to their gender identity in the past year.¹⁰ And, according to a 2018 study from the Center for American Progress, 23 percent had a provider intentionally misgender or use the wrong name for them, 21 percent had a provider use harsh or abusive language when treating them,¹¹ and 29 percent experienced unwanted physical contact, such as fondling, sexual assault, or rape, from a provider.¹² Section 1557’s current protections

⁸ See Shartzter, et al., Health Reform Monitoring Survey, Urban Inst. Health Policy Ctr. (Jan. 2015), <http://hrms.urban.org/briefs/Health-Care-Costs-Are-a-Barrier-to-Care-for-Many-Women.html>.

⁹ See *Discrimination in America: Experiences and Views of American Women*, NPR & Harvard T.H. Chan Sch. of Pub. Health (Dec. 2017), <https://cdn1.sph.harvard.edu/wp-content/uploads/sites/21/2017/12/NPR-RWJF-HSPH-Discrimination-Women-Final-Report.pdf>.

¹⁰ S.E. James, et al., Nat’l Ctr. for Transgender Equality, Report Of The 2015 U.S. Transgender Survey 96-97 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

¹¹ 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/>.

¹² *Id.*

are critical to ensuring transgender, nonbinary, and gender nonconforming people have access to health care.

In addition, prior to the 2016 final rule, many insurers did not cover gender-affirming care. However, as a result of Section 1557 and the 2016 final rule, many insurers removed categorical coverage exclusions harming transgender people and began to cover gender-affirming services,¹³ increasing access to care. The proposed rule could allow insurers to refuse to cover gender-affirming care.

b. Sex discrimination based on sex stereotyping and gender nonconformity

The 2016 final rule reiterated that sex stereotyping is a prohibited form of discrimination reflecting the Supreme Court decision, *Price Waterhouse v. Hopkins*.¹⁴ The NPRM ignores this precedent. This could result in patients being denied access to care if they do not conform with traditional stereotypes about their sex. Lesbian, gay, bisexual, and queer people already experience discrimination in health care. For example, in a nationally representative survey, LGBTQ respondents who had visited a doctor or health care provider in the year before the survey indicated that they had experienced such things as having a provider refuse to recognize their family, including a child or a same-sex spouse/partner (7 percent),¹⁵ or having a provider use harsh or abusive language when treating them (9 percent).¹⁶ Discrimination based on sex stereotypes can also affect anyone who does not conform to traditional, societal expectations of their sex. This means that the NPRM could allow a health care provider to refuse to provide maternity or contraceptive care to an unmarried woman.

In addition, Section 1557 and the 2016 final rule also prohibit covered entities from denying, limiting, or imposing additional cost-sharing for services based on sex or gender. If implemented, the proposed rule would eliminate the regulations that specifically address cost-sharing, adding confusion about whether covered entities may impose additional financial burdens on transgender, nonbinary, and gender nonconforming individuals.

c. Sex discrimination based on pregnancy, including termination of pregnancy

The 2016 final rule made clear that sex discrimination under Section 1557 includes discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery from, childbirth or related conditions.¹⁷ The NPRM attempts to roll back these protections. The NPRM proposes to delete the 2016 final rule's clarification that the ban on sex discrimination includes all pregnancy-related care. In doing so, the Department illegally attempts to eliminate in the regulation the express protections that apply to someone who has had an abortion or has experienced a miscarriage or ectopic pregnancy and needs care for those conditions. Although HHS acknowledges in the preamble to the NPRM that the prohibition against sex discrimination includes termination of pregnancy, it refuses to state whether the Department would enforce those protections. While it is clear that Section 1557's implementing regulations include protection from discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery from, childbirth or related conditions, unambiguous implementing regulations and enforcement are necessary to prevent illegal discrimination.

¹³ OUT2Enroll, *Summary of Findings: 2019 Marketplace Plan Compliance with Section 1557*, <https://out2enroll.org/out2enroll/wp-content/uploads/2018/11/Report-on-Trans-Exclusions-in-2019-Marketplace-Plans.pdf>.

¹⁴ 490 U.S. 228 (1989).

¹⁵ 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/>.

¹⁶ *Id.*

¹⁷ 81 Fed. Reg. 31387

The proposed rule also seeks to unlawfully incorporate Title IX’s Danforth Amendment,¹⁸ which is an exception to Title IX that carves out abortion care and coverage from the law’s nondiscrimination requirements and applies in the education context. Congress did not include the Title IX exceptions, including the Danforth Amendment, in Section 1557. The Department should not, either explicitly or by reference, include or incorporate Title IX’s exceptions here. Doing so would contribute to a system where people who are pregnant may not be able to access the care they need.

d. Religious Exemption

The 2016 final rule did not include any religious exemption. That is because the inclusion of a religious exemption, either explicitly or by reference, is contrary to the statutory language in Section 1557, which does not include any exceptions. The NPRM attempts to impermissibly apply Title IX’s religious exemption to Section 1557’s prohibition on sex discrimination. By including a religious exemption Section 1557’s regulations, health care providers, such as companies, hospitals, doctors, or nurses, and in particular at religiously-affiliated entities that provide health care and related services,¹⁹ could limit patient access to care. For example, this could impact a broad range of health care services, including birth control, sterilization, certain fertility treatments, abortion, gender-affirming care, and end of life care. The Department’s attempt to incorporate a religious exemption violates the plain language of the statute and is contrary to the express purpose of Section 1557, which is to ensure broad and comprehensive protections against discrimination in healthcare access.

III. The Proposed Rule Would Amend Unrelated Regulations to Exclude Sexual Orientation and Gender Identity Protections

The NPRM attempts to erase references to gender identity and sexual orientation in other HHS health care regulations. If implemented, the NPRM would eliminate express prohibitions on discrimination based on gender identity and sexual orientation from regulations that govern a range of health care programs, including private insurance and education programs. As a result, many people could see discrimination in a range of health care programs beyond those impacted by Section 1557. This includes insurance issuers who could be allowed to employ discriminatory marketing practices and benefit design. Or issuers who could inquire about an applicant’s sexual orientation or gender identity and use that information for underwriting or determining insurability.²⁰ In addition, under the proposed rule, states and exchanges could discriminate against LGBTQ people in eligibility determinations, enrollment periods, and more. Similarly, agents and brokers who assist with enrollment in marketplace plans could discriminate against LGBTQ people. Under the proposed rule, Programs of All-Inclusive Care for the Elderly (“PACE”) organizations, which serve people ages 55 and over, could discriminate against LGBTQ people.²¹ And, under the proposed rule, Medicaid managed care entities and state Medicaid programs could be emboldened to discriminate against LGBTQ beneficiaries in enrollment. These changes would reduce access to health care for communities across the country.

¹⁸ 84 Fed. Reg. 27864.

¹⁹ 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>.

²⁰ MaryBeth Musumeci et al., *HHS’s Proposed Changes to Non-discrimination Regulations under ACA Section 1557*, Kaiser Family Foundation (Jul. 1, 2019), <https://www.kff.org/disparities-policy/issue-brief/hhss-proposed-changes-to-non-discrimination-regulations-under-aca-section-1557/>.

²¹ *Id.*

IV. The Proposed Rule Would Limit Notice and Enforcement Requirements and Remedies

The proposed rule also impermissibly seeks to limit the enforcement mechanisms available under Section 1557 for patients who have experienced discrimination. It does this by attempting to eliminate notice and grievance procedure requirements, private rights of action, opportunities for money damages, and by claiming that the remedies and enforcement mechanisms for each protected characteristic (race, color, national origin, age, disability or sex) are different and limited to those available under their referenced statute.

As a result, the proposed rule would create a confusing mix of legal standards and available remedies under a single law, and could limit claims of intersectional discrimination, going against the text and intent of Section 1557. Ultimately, the proposed rule will make it harder for those who are discriminated against to access meaningful health care and to enforce their rights.

V. Conclusion

This proposed rule could harm women by making it more difficult for them to access health care and allowing sex discrimination in that care. These changes would disproportionately impact our most underserved populations who already struggle to access health care, including people seeking reproductive health care, including abortion, LGBTQ individuals, individuals with LEP, including immigrants, those living with disabilities, and people of color. Moreover, this rule would make it harder for people to take action when they experience compounding levels of discrimination at the intersection of these identities. The proposed rule is harmful and contravenes the plain language of Section 1557, specifically, and the ACA broadly.

For the reasons detailed above, HHS and CMS should rescind the NPRM in its entirety. Thank you for the opportunity to submit comments on the proposed rule. Please do not hesitate to contact me at 202/785-7720 or Anne Hedgepeth, Director of Federal Policy at 202/785-7724, if you have any questions.

Sincerely,



Deborah J. Vagins
Senior Vice President, Public Policy and Research