

August 13, 2019

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

RE: Nondiscrimination in Health and Health Education Programs or Activities Proposed Rule (HHS-OCR-2019-0007)

We are submitting public comment on behalf of the Fenway Institute at Fenway Health, a federally qualified health center in Boston, MA that serves 32,000 patients each year. We are joined in this comment by Senator Patricia Jehlen and Representative Ruth Balser, Co-chairs of the Massachusetts Special Legislative Commission on LGBT Aging. Leaders from three major research and teaching hospitals that provide care to LGBT patients—Beth Israel Deaconess Medical Center, Boston Medical Center, and Massachusetts General Hospital—are also signing this comment, as are several local LGBT organizations. We write to strongly oppose the proposed rule titled, “Nondiscrimination in Health and Health Education Programs or Activities Proposed Rule (HHS-OCR-2019-0007).”

This proposed rule would reverse the 2016 final rule implementing Section 1557, the nondiscrimination provision of the Affordable Care Act (ACA). The 2016 Section 1557 rule explicitly prohibits gender identity discrimination, including discrimination against intersex and non-binary people, in health care facilities and programs receiving federal funding.<sup>1</sup> The 2016 Section 1557 rule also prohibits discriminatory coverage exclusions for transgender people in health insurance plans, expanding access to medically necessary gender affirmation services for transgender people. Sexual orientation discrimination that takes the form of sex stereotyping is also prohibited by the 2016 rule. This could include, for example, denying fertility treatment to a lesbian couple based on the stereotypical belief that women should only be in relationships with men, or that every child should be raised by a mother and a father. In the final 2016 rule, the Office of Civil Rights at the Department of Health and Human Services stated:

OCR concludes that Section 1557’s prohibition of discrimination on the basis of sex includes, at a minimum, sex discrimination related to an individual’s sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes. Accordingly, OCR will evaluate complaints alleging sex discrimination related to an individual’s sexual orientation to determine whether they can be addressed under Section 1557.<sup>2</sup>

The nondiscrimination provisions in the 2016 Section 1557 rule are necessary in order to reduce LGBT health disparities and expand health care access for LGBT people. LGBT people face

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<sup>1</sup> U.S. Department of Health and Human Services. Nondiscrimination in health programs and activities. *Federal Register*. May 18, 2016. Vol. 81, No. 96, Page 31387. <https://www.federalregister.gov/articles/2016/05/18/2016-11458/nondiscrimination-in-healthprograms-and-activities>

<sup>2</sup> Ibid. Pages 31389-31390.

widespread discrimination in health care, such as being verbally or physically harassed or being denied treatment altogether.<sup>3</sup> This discrimination acts as a barrier to seeking necessary routine, preventive care as well as emergency care. For example, the 2015 U.S. Transgender Survey of nearly 28,000 transgender people found that in the last year, 33% of respondents had experienced anti-transgender discrimination in health care, and 23% of respondents chose to forego necessary health care due to fear of discrimination.<sup>4</sup> A 2018 survey by the Center for American Progress found that 14% of LGBT respondents who had previously experienced discrimination in health care avoided seeking necessary medical care, and 17% avoided seeking preventive care in the past year.<sup>5</sup> This is why The Joint Commission has required SOGI nondiscrimination policies as a prerequisite to accreditation for health care programs since 2011. The Section 1557 final rule is necessary to address discrimination in health care, which in turn helps to reduce LGBT health disparities.

If finalized, the proposed rule would also revise several other important health care regulations that explicitly prohibit both sexual orientation and gender identity (SOGI) discrimination, including:

- Regulations governing the health insurance exchanges, including 34 federally facilitated exchanges and 17 state exchanges;
- Regulations governing Qualified Health Plans;
- Medicaid regulations, including language that explicitly prohibits sexual orientation and gender identity discrimination in Medicaid enrollment (42 CFR § 438.3(d)(4)) and availability of services (42 CFR § 438.206), and language highlighting the importance of access and cultural considerations that calls on states to care for LGBT patients and others in a culturally competent manner (42 CFR § 440.262);
- Regulations governing the access to services provided by the Program of All-Inclusive Care for the Elderly (PACE) (42 CFR § 460.98)

The proposed removal of SOGI nondiscrimination provisions from these regulations governing Medicaid enrollment and services, state and federal health insurance exchanges, insurance coverage, Qualified Health Plans, and PACE Program would hurt LGBT people who have disproportionately benefited from many of these programs. LGBT elders experience high rates of social isolation,<sup>6</sup> and many LGBT elders have experienced discrimination in accessing health, aging, and disability services.<sup>7</sup> Rescinding nondiscrimination provisions from the PACE program

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<sup>3</sup> Lambda Legal. (2010.) *When Health Care Isn't Caring: Lambda Legal's Survey of Discrimination against LGBT People and People with HIV*. New York: Lambda Legal.

<sup>4</sup> James SE, Herman JL, Rankin S, Keisling M, Mottet L, Anafi M. (2016). *The Report of the 2015 U.S. Transgender Survey*. Washington, DC: National Center for Transgender Equality.

<sup>5</sup> Mirza S and Rooney C. (2018). *Discrimination Prevents LGBTQ People from Accessing Health Care*. Center for American Progress.

<sup>6</sup> Fredriksen-Goldsen K, Kim H, Barkan S, Muraco A, Hoy-Ellis C. (2013). Health disparities among lesbian, gay, and bisexual older adults: Results from a population-based study. *American Journal of Public Health*, 103(10), 1802–1809. doi:10.2105/AJPH.2012.301110

<sup>7</sup> Fredriksen-Goldsen K, Kim H, Emler C, Muraco A, Erosheva E, Hoy-Ellis C, Petry H. (2011). *The aging and health report: Disparities and resilience among lesbian, gay, bisexual, and transgender older adults*. Seattle, WA: Institute for Multigenerational Health.

will likely make many LGBT elders more fearful of discrimination in accessing elder services. This will likely exacerbate social isolation among LGBT older adults.

Medicaid is a critical program that expands health care access to LGBT people because of high prevalence of poverty among LGBT communities, especially among people of color and transgender people. A 2016 report by the Center for American Progress found that in 2014, Medicaid covered a significant portion (39%) of LGBT adults with incomes of 139% of the federal poverty level or less, and the uninsurance rate among low- and middle-income LGBT adults was much lower in Medicaid expansion states (18%) compared to non-expansion states (34%).<sup>8</sup> Currently, Medicaid also explicitly covers transgender health care in 18 states and Washington D.C.<sup>9</sup> Removing nondiscrimination provisions from regulations governing Medicaid enrollment and services, insurance exchanges, and Qualified Health Plans would undermine progress that has been made in expanding insurance coverage and access to care for LGBT people.

The proposed rule argues that the revisions to the 2016 Section 1557 rule are necessary due to a lawsuit that blocked the implementation of the rule. However, the other health care regulations that would be stripped of explicit SOGI nondiscrimination provisions never had those provisions challenged or blocked by lawsuits. Instead, the rule argues that these crucial nondiscrimination provisions must be removed from the other health care regulations simply for the sake of “conformity” with the revised Section 1557 rule. This is a specious argument.

Overall, the proposed rule would be harmful to the health and wellbeing of LGBT people. It threatens to undermine the progress that has been made over the past decade to address and reduce anti-LGBT discrimination in health care. The removal of nondiscrimination provisions from the Section 1557 rule and regulations governing Medicaid and other health insurance and elder service programs would disproportionately hurt transgender people as well as LGBT elders, disabled LGBT people, LGBT people of color, and low-income LGBT people. This would also undermine the federal government’s current efforts to reduce new HIV infections by 75% in 5 years and by at least 90% in 10 years.<sup>10</sup> Some 66% of HIV diagnoses in 2017 were among gay and bisexual men,<sup>11</sup> and reversing nondiscrimination protections in health care could reduce access to health care, including prevention and screening for HIV and other sexually transmitted infections. The proposed rule contradicts numerous rulings by federal courts and the Equal Employment Opportunity Commission that have found that federal prohibitions on sex discrimination prohibit discrimination based on sexual orientation and gender identity.<sup>12</sup>

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<sup>8</sup> Baker K, McGovern A, Gruberg S, and Cray A. (2016). *The Medicaid Program and LGBT Communities: Overview and Policy Recommendations*. Center for American Progress. Available online at:

<https://cdn.americanprogress.org/wp-content/uploads/2016/08/08125221/2LGBTMedicaidExpansion-brief.pdf>

<sup>9</sup> Movement Advancement Project. (2019). *Healthcare Laws and Policies: Medicaid Coverage for Transition-Related Care*. Available online at: <https://www.lgbtmap.org/img/maps/citations-medicaid.pdf>

<sup>10</sup> U.S. Department of Health and Human Services. *Ending the HIV Epidemic: A Plan for America*. Available online at: <https://files.hiv.gov/s3fs-public/ending-the-hiv-epidemic-flyer.pdf>

<sup>11</sup> Centers for Disease Control and Prevention. (January 2019). *HIV in the United States and Dependent Areas*. Available online at: <https://www.cdc.gov/hiv/pdf/statistics/overview/cdc-hiv-us-ataglance.pdf>

<sup>12</sup> U.S. Equal Employment Opportunity Commission (updated 2017). *Examples of court decisions supporting coverage of LGBT-related discrimination under Title VII*.

[https://www.eeoc.gov/eeoc/newsroom/wysk/lgbt\\_examples\\_decisions.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/lgbt_examples_decisions.cfm)

Removing these nondiscrimination provisions runs counter to the mission of the HHS to ensure the health and wellbeing of all Americans, including LGBT Americans. We strongly urge you to reject this proposed rule.

Sincerely,

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Fenway Health

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