NEW YORK STATE OF OPPORTUNITY. | Department of Financial Services

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Alex M. Azar II
Secretary
U.S. Department of Health and Human Services
Office of Civil Rights
Hubert H. Humphrey Building
Room 509F
200 Independence Avenue SW
Washington, DC 20201
Attn: Section 1557 NPRM
RIN 0945-AA11

Re: Comments on the "Nondiscrimination in Health and Health Education Programs or Activities" Proposed Rule

Dear Secretary Azar:

The New York Department of Financial Services (DFS) submits the following comments on the proposed rule "Nondiscrimination in Health and Health Education Programs or Activities" (45 C.F.R. § 92) (Proposed Rule) by the Department of Health and Human Services (HHS). As set forth below, the Proposed Rule is a direct attack on individuals who have historically faced discrimination and will make it more challenging for all individuals to understand their legal rights and responsibilities within the health care and health insurance system. The Proposed Rule seeks to weaken crucial consumer protections provided in the Affordable Care Act's (ACA) nondiscrimination provision. DFS urges HHS to retract the Proposed Rule.

Specifically, the Proposed Rule has a chilling impact on the right of all individuals to access health care by significantly narrowing the applicability of the protections of Section 1557 of the ACA. The Proposed Rule removes gender identity and sex stereotyping from the definition of sex discrimination in an attempt to reduce the scope of protections for individuals who have historically faced discrimination. But the Proposed Rule does not stop there, proposing to eliminate additional nondiscrimination protections based on sexual orientation and gender identity from a host of other provisions overseen by the Centers for Medicare and Medicaid Services (CMS). These proposed "conforming amendments" are entirely unrelated to Section 1557. Further, the Proposed Rule harms a significant number of individuals by eliminating notice provisions to address discrimination, reducing health care access to those with limited English proficiency (LEP), discriminating against those with HIV/AIDS and other serious medical conditions, and reducing access to abortion services.

New York will not stand idly by while HHS attempts to violate any individual's dignity or the right to access safe and effective health care. New York has taken decisive action to ensure that New Yorkers

are not subject to abusive insurance practices. We will not tolerate any attempt to infringe on the rights of individuals, especially those protected by state and federal statute, to access to quality health care services. A new state law proposed by Governor Cuomo prohibits discrimination based on sexual orientation, gender identity or expression, or transgender status. Issuers are prohibited from refusing to issue any insurance policy or contract, or cancel or decline to renew such policy or contract, because of the sex or marital status of the applicant or policyholder. Sex includes sexual orientation, gender identity or expression, and transgender status. In addition, issuers of health insurance policies are also prohibited from discriminating based on sex, sexual orientation, gender identity or expression, transgender status, marital status, or based on pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, child birth or related medical conditions in relation to the premiums charged; rebates or discounts; requiring acceptance of any sum less than the full value of such policy; or in the payments of commissions to insurance agents or brokers. DFS has issued Circular Letters advising issuers that they must cover all medically treatment for gender dysphoria; cover infertility treatment regardless of sexual orientation or marital status; cover PrEP for the prevention of HIV infection; and that issuers may not deny claims because the gender of the individual does not match the gender of someone to whom those services are typically provided. Further, DFS has taken regulatory action to ensure that New Yorkers have access to medically necessary abortions at no cost-sharing.

Preserving these protections is a crucial component of the ACA's success in New York. Since the ACA was enacted in 2014, New York has cut the uninsured rate in half from 10% to 5%, and premiums in the individual market have remained more than 55% lower after adjusting for inflation and before the application of federal tax credits.

The Proposed Rule is Openly Hostile Towards Women and Undermines Access to Legal Abortions

Discrimination based on sex, including pregnancy, childbirth, false pregnancy, termination of pregnancy, or the recovery from such conditions, and childbirth or related medical conditions is prohibited by Section 1557. This prohibition was explicitly included in the definition of sex discrimination in final regulations to implement Section 1557 in 2016.[1] In the Proposed Rule, HHS proposes to eliminate the definition of discrimination "based on sex" altogether.

As proposed, HHS would eliminate clear, explicit protections for women who experience discrimination related to pregnancy and childbirth. Such disparate treatment of women may lead to severe health consequences where a health care provider relies on the Proposed Rule to deny an abortion or other health care services that violate the provider's religious beliefs. In cases where access to care is limited (such as rural areas), this could result in a serious or life-threatening condition.

The Proposed Rule Attempts to Undermine Access to Care Through Broad Religious Exemptions

Section 1557 unambiguously prohibits discrimination based on sex and incorporates protections from Title IX. In implementing Section 1557 in regulations in 2016, HHS did not explicitly incorporate Title IX's religious exemption but includes a provision such that the 1557 rule does not apply if its application "would violate applicable Federal statutory protections for religious freedom and conscience."[2]

[1] 45 C.F.R. § 92.4.
[2] 45 C.F.R. § 92.2(b)(2).

The Proposed Rule attempts to create a broad religious exemption[3] that is consistent with a separate HHS rule that has already been challenged in court by a coalition of 23 states and municipalities led by New York Attorney General Letitia James and advocates for LGBT health and women's health. Such a broad religious exemption is contrary to the purpose of Section 1557 and violates the plain language of the statute. We are deeply concerned that this religious exemption will create confusion, encourage discrimination and care denials, and threaten the health of patients who have a right to health insurance and health care free from discrimination.

The Proposed Rule Limits the Types of Insurance that Must Comply with Section 1557's Nondiscrimination Protections

Section 1557 regulations currently apply to all entities that administer health programs and activities that are overseen by HHS or receive federal financial assistance administrated by HHS (collectively called Covered Entities).[4] This includes all health insurance issuers that offer coverage through an exchange, accept Advanced Premium Tax Credits, offer Medicare Advantage Plans, offer Medicaid managed care coverage, etc. The 2016 implementing regulations for Section 1557 applied the rule's protections to the entire Covered Entity, including all lines of business and in the issuer's role as a third-party administrator for self-funded plans. Courts have affirmed this interpretation by concluding that Section 1557 does, in fact, apply to issuers that receive federal financial assistance and act as third-party administrators.[5] This helped create a level playing field for issuers, encouraged self-funded plans to comply with Section 1557, and ensured that insurance companies were not unfairly accepting federal money for part of its business while continuing to discriminate based on sex in other parts of its business.

The Proposed Rule attempts to limit the applicability of Section 1557 to only the portion of a Covered Entity's business that receives federal funding. Under the Proposed Rule, health insurance issuers would not be required to comply with Section 1557 for lines of business that do not receive federal assistance (e.g., large group coverage, stop loss coverage, third-party administrative services). We are concerned that the Proposed Rule would encourage issuers to discriminate against individuals in any lines of business that do not directly receive federal funding. Limiting the applicability of Section 1557 to specific lines of business is abhorrent and completely contrary to intention of the ACA's nondiscrimination provisions.

The Proposed Rule Undermines Statutory Protections for LGBT Individuals

Section 1557 protects LGBT people by prohibiting discrimination based on sex, sex stereotyping, and gender identity. This interpretation has been confirmed by courts across the country.[6] In the preamble

[3] 84 FR 27865 (§ 92.6 would explicitly identify and incorporate protections from specific religious freedom, conscience, and nondiscrimination statutes—42 U.S.C. 18113 (Section 1553 of the Patient Protection and Affordable Care Act); 42 U.S.C. 2000bb *et seq.* (the Religious Freedom Restoration Act, which applies to "all Federal law . . . unless such law explicitly excludes such application"); 42 U.S.C. 238n (the Coats-Snowe Amendment); 42 U.S.C. 300a-7 (the Church Amendments); the Weldon Amendment (*e.g.*, Consolidated Appropriations Act of 2019, Pub. L. 115-245, Div. B, sec. 506(d) (Sept. 28, 2018)); and related conscience provisions in appropriations law (*e.g.*, Consolidated Appropriations Act of 2019, Pub. L. 115-245, Div. B. sec. 506) (Sept. 28, 2018)).)

[4] 45 C.F.R. § 92.2(a), 92.4

[5] *See, e.g., Tovar v. Essentia Health*, 342 F. Supp. 3d 947 (D. Minn. 2018); *Boyden v. Conlin*, 341 F. Supp. 3d 979 (W.D. Wis. 2018).

[6] *See, e.g., Rumble v. Fairview Health Servs.*, No. 14–cv–2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015) (holding that discrimination against hospital patient based on his transgender status constitutes sex discrimination under Section 1557); *Flack v. Wis. Dep't of Health Servs.*, No. 3:18-cv-00309-wmc (W.D. Wis. July 25, 2018) (holding that a Medicaid program's refusal to cover treatments related to gender transition is "text-book discrimination based on sex" in violation of the Affordable Care Act and the Equal Protection Clause of the Constitution); *Cruz v. Zucker*, 195 F.Supp.3d 554 (S.D.N.Y. 2016) (holding exclusion invalid under the Medicaid Act and the Affordable Care Act); *Prescott v. Rady Children's Hosp.-San Diego*, 265 F.Supp.3d 1090 (S.D. Cal. Sept. 27, 2017) (holding that discrimination against transgender patients violates the Affordable Care Act); *Tovar v. Essentia Health*, No. 16-cv-00100-DWF-LIB (D. Minn. September 20, 2018) (holding that Section 1557 of the Affordable Care Act prohibits discrimination on the basis of gender identity); *Boyden v. Conlin*, No. 17-cv-264-WMC, 2018 (W.D. Wis. September 18, 2018) (holding that a state employee health plan refusal to cover transition-related care constitutes sex discrimination in violation of Title VII, Section 1557 of the ACA, and the Equal Protection Clause).

to its Proposed Rule, HHS failed to grapple with these cases, preferring instead to rely heavily on a nationwide preliminary injunction issued against the 2016 rule. That injunction has not been appealed by the Trump administration, nor have advocates been allowed to intervene in the case to otherwise defend the 2016 regulation or appeal the decision to the Fifth Circuit Court of Appeals.

Citing many of these early cases and other courts that have similarly found that Title IX sex discrimination protections include gender identity and sex stereotyping, HHS included explicit general nondiscrimination protections for LGBT individuals and explicit specific nondiscrimination protections for transgender individuals in its 2016 implementing regulations. The 2016 rule, for instance, bans transgender-specific health insurance exclusions and prohibits limits or restrictions on health services provided to transgender persons that are ordinarily or exclusively available to one sex or gender when those services are sought by an individual of a different sex or gender.[7]

The Proposed Rule would eliminate these explicit protections. As noted above, HHS proposes to go a step further by making what it refers to as "conforming amendments" to eliminate references to sexual orientation and gender identity in a wide array of nondiscrimination protections under the jurisdiction of CMS that are unrelated to, and independent from, Section 1557.

New York has long been a leader in ensuring that all consumers, including LGBT consumers, are protected from discrimination and treated fairly. We have implemented many of these protections based on state law because we believe that LGBT people should have equal access to the same health insurance and care as every other insured American. These protections have had a negligible fiscal and regulatory impact, and we have been able to successfully resolve the consumer complaints that we have received.

These changes are unnecessary, inconsistent with federal law and decades of judicial decisions, and will generate significant confusion for LGBT people, regulators, and issuers alike. Undoing the rule and its explicit nondiscrimination requirements will impose an additional regulatory burden on DFS to ensure that these protections have not been rolled back, could result in an uneven playing field among issuers, and will discourage an already vulnerable population from accessing vital health care services. In the preamble to the Proposed Rule, HHS acknowledges that many entities will rollback their nondiscrimination policies. This is likely to lead to additional oversight by DFS and spur litigation nationwide as consumers facing discrimination turn to the legal system for help, instead of HHS' Office for Civil Rights.

The Proposed Rule Impedes Access to Health Care for Individuals with LEP

All entities covered under Section 1557 are currently required to take reasonable steps to provide meaningful access to all individuals with LEP who are eligible to be served or likely to be encountered.[8] This includes translation services, the addition of taglines on significant documents, access to interpreters, posted notices informing individuals of the availability of language access services, and other aides and services for people with disabilities.[9] The Proposed Rule would entirely eliminate the requirements for taglines and posted notices and the recommendations that entities covered by Section 1557 develop and maintain language access plans for the needs of individuals with LEP.

Language barriers may have a profoundly negative impact on an individual's ability to access health care and understand options and opportunities available to them. The changes in the Proposed Rule, if finalized, will make it far more challenging for all consumers, but especially those with LEP, to understand

[7] 45 C.F.R. § 92.4
[8] 45 C.F.R. § 92.201 – 92.204
[9] *Id*

their health care rights under federal law. By eliminating taglines and posted notices, HHS will leave consumers without a clear way to seek legal redress, request language services, or file a complaint if they face discrimination.

We are also deeply troubled that HHS seems to be proposing these changes to generate financial savings for the insurance industry while eliminating core, explicit nondiscrimination protection for vulnerable populations and making it more challenging for consumers nationwide to understand their rights. HHS gives little justification, other than for financial savings for issuers, for why it is proposing to entirely eliminate taglines and posted notices.

The Proposed Rule Harms People with Disabilities and Serious Medical Conditions

Sections 1557 prohibits discrimination in the issuance, cost-sharing, plan design, and marketing of health insurance. This prevents entities covered under Section 1557 from denying, limiting, canceling or refusing to issue a health insurance policy, denying coverage of a health insurance claim, adding additional cost-sharing or other restrictions on coverage, and from using discriminatory benefit designs and marketing practices based on race, color, sex, age, national origin, and disability. For example, the Section 1557 implementing regulations expressly forbid certain plan benefit designs and marketing practices such as putting all drugs used to treat a particular condition in the highest cost tier (e.g., those drugs used to combat HIV/AIDS) because of the discriminatory impact on those individuals suffering from HIV/AIDS.[10]

The Proposed Rule inexcusably removes this safeguard against discriminatory practices with no justification for doing so. As proposed, HHS appears ready to permit such questionable practices as health insurers pursuing marketing campaigns designed to discourage certain individuals with disabilities and serious medical conditions from enrolling in certain health plans. To the extent that HHS finalizes the Proposed Rule and abdicates its statutory role in safeguarding the civil rights of all people, we expect to see more litigation as individuals turn to the courts to redress valid health care and health insurance discrimination that should remain explicitly prohibited under Section 1557.

Conclusion

DFS strongly urges HHS to reconsider adopting this unreasonable and discriminatory Proposed Rule. All individuals, regardless of race, color, national origin, sex, age, or disability must have access to safe health care services to ensure their health and well-being. The federal government must protect all individuals, and implementation of federal civil rights laws should recognize the needs of those who have historically faced discrimination. Health care is a right, not a privilege. New York will continue to uphold the rule of law and resist all efforts to sabotage access to health care for all individuals. The Proposed Rule impermissibly attempts to curtail the provision of necessary health care and medical services to the ones who need it the most. The Proposed Rule should not be adopted.

We appreciate HHS's consideration of these comments.

Very truly yours,

Linda A Lacewell

Linda A. Lacewell
Superintendent of Financial Services

[10] 45 C.F.R. § 92.207(b)