



August 12, 2019

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:

The California LGBTQ Health and Human Services Network submits these comments in response to the Department of Health and Human Services' ("HHS", "the Department") and the Center for Medicare and Medicaid Services ("CMS") Notice of Proposed Rulemaking ("proposed rule," "NPRM") to express our concerns with the proposed rule entitled "Nondiscrimination in Health and Health Education Programs or Activities," published in the Federal Register on July 14, 2019.

The California LGBT Health and Human Services Network is a statewide coalition of over 60 non-profit providers, community centers, and researchers working collectively to advocate for state level policies and resources that will advance LGBT health. We strive to provide coordinated leadership about LGBT health policy in a proactive, responsive manner that promotes health and wellness as part of the movement for LGBTQ equality.

The proposed rule will threaten LGBT patients' access to health care and coverage

[Reference that the proposed rule will be especially harmful to the # of LGBT people in your state. Include information about state-level data on discrimination against LGBT people—including in health care, if it exists. If it does not exist, highlight some of the health disparities and discrimination that LGBT people face in accessing health care]

California is home to approximately 218,400 transgender people¹ and approximately 5.3% of Californians identify as LGBT². LGBTQ Californians are spread out in every part of the state, and include people of every age, ethnicity, and income level.

Thousands of transgender and gender nonconforming young people are likely to be impacted by the proposed changes to section 1557. A recent study found that 27% of California's youth, ages 12-17, are gender nonconforming³. These youths are more than twice as likely to experience psychological distress than their gender conforming peers. Transgender and gender nonconforming young people already face barriers to accessing appropriate mental health care, such as parental disapproval, lack of access to transportation, or challenges taking time off of school to seek care. We are concerned that the proposed changes will further exacerbate access issues for transgender and gender nonconforming youth.

LGBTQ Californians face a variety of challenges when attempting to access affirming health care. Despite the gains made under the Affordable Care Act, many LGBTQ people still struggle to pay for high cost of health care. This includes LGBTQ older adults, who may not be able to afford Medicare supplements, LGBTQ young adults under the age of 26, who may not have a relationship with their parents, or low-income LGBTQ people who don't qualify for MediCal and can't afford premiums, copays, and deductibles. One of the most common complaints we hear related to health care access is about the lack of affirming and competent providers. This was echoed over and over again during our #Out4MentalHealth town halls last Spring and during our queer and trans photo shoot this Summer.

These challenges are so commonplace that most transgender and gender nonconforming Californians take traveling long distances or waiting for months or years for gender affirming services as a given. One young transman told us that he is lucky and "didn't have any issues with accessing health care," yet mentioned in the next breath, "I have to commute two and half hours from my home to get testosterone. ... Mental health wise, [when] I came out to my last therapist she

¹ Flores, Andrew R., Jody L. Herman, Gary J. Gates, and Taylor N. T. Brown (2016). *How Many Adults Identify as Transgender in the United States?* Los Angeles, CA: Williams Institute. <https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>.

² LGBT Demographic Data Interactive. (January 2019). Los Angeles, CA: The Williams Institute, UCLA School of Law.

³ Wilson BDM, Choi SK, Herman JL, Becker T, Conron KJ. 2017. *Characteristics and Mental Health of Gender Nonconforming Adolescents in California: Findings from the 2015-2016 California Health Interview Survey*. Los Angeles, CA: The Williams Institute and UCLA Center for Health Policy Research.

kicked me out and stopped seeing me.” One of our members reported, ““We have to refer trans youth to Planned Parenthood [in a different city because our local one] doesn't have a doctor in the area [who can provide trans services]. Kaiser and Planned Parenthood are the few places to offer transgender services.”

Unfortunately, these challenges have meant that many LGBTQ people do not access health care. One Trans Californian we talked to told us that after struggling to find an affirming provider and being repeatedly misgendered and called by the wrong name, “I've actually stopped going to doctor offices, general practitioners, hospitals because it's just too much. It's just too much to be putting yourself already vulnerable in the position that you're in those settings.” Another told us, “I gave up on therapy because there's no one that gets my basic identity right, they don't get my pronouns right . . . so it just feels like a lot more labor on my part.” We've also heard from lesbian women who stopped getting routine cervical cancer screenings because their health care providers were unqualified and not LGBTQ affirming; one woman was unfortunately diagnosed with stage 4 cervical cancer, which could have been found earlier had she not avoided the doctor's office. These cases are not unique: according to a UCLA study of LGB Californians, twenty percent of gay men and 21 percent of bisexual men reported delaying seeking health care in the past year, compared to 13 percent of straight men.⁴ Discrimination within these settings is dangerous for LGBTQ people. Not only does it jeopardize the health and well-being of LGBTQ people in the moment – potentially moments of crisis – but by discouraging people from seeking routine preventative medical care, it also makes it more likely that LGBTQ people will die of preventable diseases.

Currently, Section 1557 and the California Insurance Gender Nondiscrimination Act protect LGBTQ people from discrimination by health insurance companies. While LGBTQ Californians still face myriad other challenges – such as finding competent, affirming providers, affording the high cost of health care, navigating complicated health care systems – they do not have to worry about their insurance company denying basic health care coverage. The proposed changes threaten to cause confusion for insurers, health care providers, and consumers about what is covered. We are taking steps to address all of these other issues and the proposed changes would set us back in our efforts to ensure quality, affordable health care to all LGBTQ Californians. Nondiscrimination protections like the ones in the Health Care Rights Law (Section 1557) do not prevent the use of professional medical judgment – they simply ensure that patients can access the same care provided to

⁴ Wolstein J, Charles SA, Babey SH, Diamant AL. 2018. Disparities in Health Care Access and Health Among Lesbians, Gay Men, and Bisexuals in California. Los Angeles, Calif.: UCLA Center for Health Policy Research.

other patients, no matter who they are. These protections are fundamental for LGBT patients to be able to access the care that they need.

The 2016 implementing rule is sound, has been crucial for LGBT patients to be able to access the care that they need, and promotes equal access to medically necessary health services.

The California LGBTQ Health and Human Services Network participated in the lengthy and very thorough process that led to the 2016 Section 1557. The rule was developed over the course of six years of study and following two comment periods, with over 25,000 comments from stakeholders, which were overwhelmingly supportive of inclusion of protections against discrimination based on sex stereotyping and gender identity. HHS engaged stakeholders through listening sessions, participation in conferences, and other outreach prior to taking regulatory action.

The proposed rule to eliminate explicit protections against discrimination based on transgender status and sex stereotyping, contradicts over 20 years of federal case law⁵ and clear Supreme Court precedent.⁶ The overwhelming majority of courts that have been presented with the question of whether federally sex discrimination laws such as Section 1557 specifically cover anti-transgender discrimination have firmly ruled that they do.⁷

⁵ See, e.g., *Rumble v. Fairview Health Servs.*, No. 14–cv–2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015); *Flack v. Wis. Dep’t of Health Servs.*, No. 3:18-cv-00309-wmc (W.D. Wis. July 25, 2018); *Cruz v. Zucker*, 195 F.Supp.3d 554 (S.D.N.Y. 2016); *Prescott v. Rady Children’s Hosp.-San Diego*, 265 F.Supp.3d 1090 (S.D. Cal. Sept. 27, 2017); *Tovar v. Essentia Health*, No. 16-cv-00100-DWF-LIB (D. Minn. September 20, 2018); *Boyden v. Conlin*, No. 17-cv-264-WMC, 2018 (W.D. Wis. September 18, 2018); *Whitaker v. Kenosha Unified School District*, No. 16-3522 (7th Cir. 2017) (Title IX and Equal Protection Clause); *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217 (6th Cir. 2016) (Title IX and Equal Protection Clause); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (Equal Protection Clause); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (Title VII of the 1964 Civil Rights Act); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (Title VII); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (Equal Credit Opportunity Act); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (Gender Motivated Violence Act); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (Title VII); *Grimm v. Gloucester County School Board*, No. 4:15-cv-54 (E.D. Va. May 22, 2018); *M.A.B. v. Board of Education of Talbot County*, 286 F. Supp. 3d 704 (D. Md. March 12, 2018).

⁶ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)

⁷ 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 of the Affordable Care Act); *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).

The California LGBTQ Health and Human Services Network organization is also opposed to the proposed changes to roll back other, long-standing rules that prohibit discrimination on the basis of gender identity and sexual orientation.⁸ These changes are outside of the Office for Civil Rights' jurisdiction and are unrelated to Section 1557 of the ACA.

It is not appropriate for these rulemakings to be combined, and it is arbitrary and capricious for HHS to characterize them as “conforming amendments” without offering any legal, policy or cost-benefit analysis about them and their impacts on various CMS programs. In particular, HHS offers no analysis of the impact these regulations have had during the years—in some cases over a decade—that they have been in effect or the impact of changing them now. This is in direct contradiction to the process that led to the 2016 Section 1557 rule, which was focused, specific, and included vast evidence from case law, expert testimonies, and public comments.

Section 1557 of the Affordable Care Act and the 2016 implementing rule provided many LGBTQ people with meaningful health care options where they previously had few or none at all, have helped address the pervasive discrimination LGBTQ people often face in health care and coverage, and have made it possible for many transgender and non-transgender people alike to access essential care. The implementing rule complemented the implementation of the Insurance Gender Nondiscrimination Act in California, and provided clarity about the intent of federal nondiscrimination protections. This rule has made it easier for LGBTQ people to access health care in California and has been a crucial building block in our work to eliminate LGBTQ health disparities and ensure that all Californians have access to quality, affordable, and affirming health care.

In 2017, the California Department of Managed Health Care fined over Health Net \$200,000 for not covering transition-related health care for its transgender enrollees⁹. This fine and others like it, is an example of how California is implementing nondiscrimination protections to ensure that transgender Californians have equal access to health care. With California's existing laws and state actions implementing gender nondiscrimination protections, this proposed rule will cause confusion for providers and patients about people's rights under

⁸ These are: 45 CFR 155.120(c)(1)(ii) and 155.220(j)(2), 45 CFR 147.104(e), 45 CFR 156.200(e) and 156.1230(b)(3), 42 CFR 460.98(b)(3) and 460.112(a), 42 CFR 438.3(d)(4), 438.206(c)(2), and 440.262.

⁹ Shinkman, Ron. “Health Net Fined Over \$200,000 For Gaps In Health Care for Transgender Policy Holders.” *California Health Report*: September 1, 2017.

state and federal law, and how it could dissuade people from seeking care despite the state-level protections remaining clearly in place.

However, California's protections do not cover the approximately 6 million people in self-insured plans. These Californians rely on federal protections and you can discuss how this proposed rule will be particularly harmful for LGBT people in these plans, who may have to seek legal action to be able to exercise their rights. You can reiterate how this rule will cause confusion among providers and patients about their rights, promote discrimination and dissuade people from seeking care when they need it.

The proposed rule will impede health care access for people with HIV/AIDS and other serious or chronic conditions.

Section 1557 and the 2016 implementing regulations prohibit health insurance companies from discriminating through marketing practices and benefit design. These protections are especially important for people with HIV/AIDS or other serious/chronic condition. The proposed rule seeks to exempt most health insurance plans from Section 1557's nondiscrimination protections and eliminate the regulation prohibiting discriminatory benefit design and marketing, which could result in health insurers excluding benefits or designing their prescription drug formularies in a way that limits access to medically necessary care for those living with HIV and other chronic conditions.

We have an opportunity to end HIV/AIDS, with thoughtful public health and health care industry collaboration. The introduction of new prevention drugs, our expanded understanding of the effectiveness of treatment as prevention, and the fact that people living with HIV have access to full health care benefits through the Affordable Care Act all help to put us on track to end the epidemic. However, the proposed rule threatens to undue progress at both the federal and state levels.

The proposed rule will make it much harder for people to understand their legal rights and will disproportionately harm LGBT people who are limited English proficient (LEP), or who need access to reproductive care.

The proposed rule will make it more challenging for LGBT patients—including LGBT, people who are also limited English proficient (LEP) or have LEP family members—to understand their health care rights under federal law. Many individuals may not

know about their rights, how to request language services, or how to file a complaint if they face discrimination. By eliminating tagline requirements and notice standards, the proposed rule will undermine access to health care, health insurance, and legal redress for vulnerable communities.

The proposed rule threatens access to reproductive health care. By attempting to eliminate protections against discrimination on the basis of termination of pregnancy, the proposed rule seeks to allow health care providers to discriminate against individuals who have had an abortion and could result in patients being denied critical care including miscarriage management. In addition, by narrowing the scope of covered entities, the proposed rule would allow more insurance plans to refuse to cover reproductive health services, such as pregnancy care or fertility coverage. LGBTQ people, including transgender, nonbinary, and gender nonconforming people, need access to reproductive health care and coverage, including abortion, contraception, pregnancy care, and fertility services, free from discrimination.

The proposed rule attempts to unlawfully incorporate a broad religious exemption to 1557's protections against discrimination on the basis of sex. The Department's attempts to add a religious exemption are contrary to the express purpose of Section 1557 and violate the plain language of the statute. Adding a religious exemption opens the door for discrimination and emboldens health care providers to deny patients care, threatening the health and well-being of LGBTQ patients and patients seeking reproductive health care.

The proposed rule tramples on California's efforts to protect patients' health and safety, including through the California Insurance Gender Nondiscrimination Act, and other rules that have made it clear that all people the right to access coverage for medically necessary care regardless of their gender identity or gender expression. By claiming to allow individuals and institutions to refuse care to patients based on the providers' religious or moral beliefs in such a sweeping way, the proposed rule creates conflicts with hundreds of state and local nondiscrimination laws around the country that apply to health care.

Conclusion

The proposed changes pose a significant threat to the health and well-being of LGBTQ Californians and for that and all of the reasons stated above, the California LGBTQ Health and Human Services Network opposes the changes to Section 1557

outlined in the proposed rule. We urge the Administration to withdraw the proposed rule. We stand by the 2016 Section 1557 implemented rule and encourage the administration vigorously implement and enforce the full suite of protections outlined, which are the result of a long and thorough stakeholder process. If you have questions about anything in this document, please don't hesitate to reach out to me at (916) 205-4699 or awallner@health-access.org.

Sincerely,



Amanda McAllister-Wallner
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