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August 13, 2019

Roger Severino
Director
Office for Civil Rights
Department of Health and Human Services
Attention: Section 1557 NPRM
Hubert H. Humphrey Building
200 Independence Avenue SW
Washington, DC 20201

Submitted electronically via http://www.regulations.gov

RE: Non-discrimination in Health and Health Education Programs or Activities (RIN 0945–AA11)

Dear Director Severino:

The Healthcare Association of New York State, on behalf of our member nonprofit and public hospitals, nursing homes, home health agencies and other healthcare providers, writes in response to the Department of Health and Human Services' proposed revisions to its regulations implementing Section 1557 of the Affordable Care Act.

HANYS strongly opposes HHS' proposed revisions. HANYS is committed to ensuring that all individuals have access to quality healthcare and comprehensive coverage. HHS' proposed rule would do the opposite by:

- eliminating the general prohibition against discrimination based on gender identity and specific health insurance coverage protections for transgender individuals;

- allowing covered entities to deny, limit or impose additional cost-sharing requirements for services that are ordinarily or exclusively available to one sex or gender when an individual of a different sex or gender seeks those services;

- severely limiting access to interpretative and translation services for individuals with limited English proficiency;

- limiting the applicability of the existing regulations solely to covered entities that receive federal financial assistance and no longer applying them to health programs and activities that HHS administers under certain provisions of the ACA; and

- allowing certain covered entities to invoke blanket religious objection exemptions.

Finalizing the proposed rule would result in significant harm to patients and substantially limit access to care. HANYS therefore urges HHS to withdraw the proposed regulation.

Eliminating Section 1557's non-discrimination provisions would place vulnerable populations at risk.

The proposed rule would eliminate Section 1557's regulatory definition of sex discrimination, which includes discrimination based on gender identity and sex stereotyping. It would eliminate the definition of gender identity, which includes gender expression and transgender status. It would also remove the specific provisions that require covered entities to treat individuals consistent with their gender identity.

The impact of these proposed changes cannot be underestimated. Delay and avoidance of care due to fear of discrimination compounds the significant health disparities experienced by people who identify as LGBTQ. Studies show that 56% of lesbian, gay and bisexual people and 70% of transgender and gender non-conforming people reported experiencing discrimination by healthcare providers — including refusal of care, harsh language and physical roughness because of their sexual orientation or gender identity.[1] Without the protections guaranteed under Section 1557, LGBTQ patients face the possibility that insurers and other healthcare providers may deny care and treatment, thus placing their health at risk and potentially having adverse consequences for the public health of their communities.

Eliminating Section 1557's provisions prohibiting discrimination in healthcare coverage would also place vulnerable populations at risk.

As a further barrier to accessing necessary care, the proposed changes would authorize covered entities to deny, limit or impose additional cost sharing for services that are ordinarily or exclusively available to one sex or gender when an individual of a different sex or gender seeks those services. For example, a health plan could automatically exclude or limit coverage for health services related to gender transition. Specifically, a health plan would now be able to impose a greater cost-sharing requirement or deny coverage for a hysterectomy that is medically necessary to treat a patient's gender dysphoria, even though the health plan covers hysterectomies in other circumstances and without an increased copayment.

More broadly, implementing this proposed change would undermine the entirety of the ACA's non-discriminatory intent. Currently, covered entities cannot deny, cancel, limit or refuse to issue or renew a health insurance policy, deny or limit coverage of a claim, impose additional cost sharing or other limitations or restrictions on coverage or use discriminatory marketing practices or insurance benefit designs based on race, color, national origin, sex, age or disability. Under New York law, for example, health plans cannot discriminate against individuals based on sexual orientation, gender identity or expression, or transgender status. However, these protections do not extend to Medicare Advantage plans or self-funded group plans under the Employee

[1] https://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf

Retirement Income Security Act of 1974 or the Federal Employees Health Benefits Program. As such, the proposed rule would create an uneven playing field among health plans and discourage an already vulnerable population from accessing vital healthcare services.

The proposed rule would undermine access to care for women and other individuals with reproductive health needs.

The proposed rule would allow healthcare providers and other covered entities to invoke blanket religious objection exemptions from Section 1557's general prohibition on sex discrimination. Such a broad religious exemption would violate the plain language of Section 1557, create confusion, encourage care denials and ultimately threaten the health of patients requiring these services. For example, under the proposed rule a patient in need of an abortion or other healthcare services may be discouraged from seeking necessary care, placing the patient at risk of serious or life-threatening results in emergencies.

The proposed rule would severely limit patient access to interpretative and translation services.

The proposed rule would weaken the standards governing access to language assistance services, including oral interpretation and written translation, for individuals with limited English proficiency.

Specifically, it would eliminate the requirement that covered entities take reasonable measures to provide meaningful access to "each individual with LEP eligible to be served or likely to be encountered" and instead only require access to be provided to "LEP individuals generally." The proposed rule would also eliminate the existing requirement that non-discrimination notices must include the availability of language assistance services and taglines in the top 15 languages spoken by LEP individuals in the state.

Studies have shown that language can be a barrier to quality healthcare.[2] Allowing covered entities to simply focus on LEP individuals in a broad sense, without individualized, targeted efforts, discriminates against patients based on their national origin and will result in adverse health consequences.

Effective communication between a patient and a provider is the touchpoint for every healthcare decision, such as obtaining informed consent, discussing treatment options and reviewing insurance coverage. Every patient presents with different healthcare needs and every patient communicates about those healthcare needs in a different way. Treating all LEP individuals as a homogenous group, rather than as a diverse group of patients, will inevitably deter individuals from accessing critical programs and services and lead to adverse health consequences.

The proposed rule would significantly limit the scope and coverage of the existing regulations.

The proposed rule would narrow the scope of Section 1557's applicability to only covered entities receiving federal financial assistance. Currently, any health program or activity, any part of which receives funding from HHS or is administered by HHS, and all health plans that are offered by insurers that participate in health insurance marketplaces must comply with Section 1557's non-discrimination requirements. Under the proposed rule, however, if an issuer is not principally engaged in the business of providing healthcare, only its Marketplace plans would be subject to

[2] https://onlinelibrary.wiley.com/doi/full/10.1111/j.1525-1497.2005.0174.x

Section 1557's requirements. In addition, the rules would not apply to Medicare Part B or self-funded group health plans under ERISA, or the FEHB Program.

Moreover, under the proposed rule, Section 1557's non-discrimination provisions would no longer apply to programs that obtain funding from other parts of HHS, such as the Centers for Disease Control and Prevention, Health Resources and Services Administration, Substance Abuse and Mental Health Services Administration, or the Indian Health Service. The proposed changes in applicability and scope are contrary to the text of the Section 1557 statute, which applies more broadly to "an entity that operates a health program or activity, any part of which receives Federal financial assistance;" "an entity established under Title I of the ACA that administers a health program or activity;" and "the Department."[3]

The combined impact of these proposed changes would be to significantly reduce the amount and categories of entities required to comply with Section 1557's provisions.

For all the above reasons, HANYS strongly urges HHS to withdraw the rule. If you have questions regarding our comments, please contact Victoria Aufiero, director, behavioral health, at (518) 431-7889 or vaufiero@hanys.org.

Sincerely,

Marie B. Grause

Marie B. Grause, RN, JD
President

[3] https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html; https://www.law.cornell.edu/cfr/text/45/92.4 45 CFR § 92.4