



National Association of County & City Health Officials

The National Connection for Local Public Health

August 13, 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:

On behalf of the National Association of County and City Health Officials (NACCHO) and the nearly 3,000 local health departments across the United States that we represent, I write to provide comments in response to the Department of Health and Human Services' (HHS) and the Center for Medicare and Medicaid Services' (CMS) Notice of Proposed Rulemaking. We are concerned that the proposed rule entitled "Nondiscrimination in Health and Health Education Programs or Activities," published in the Federal Register on July 14, 2019, would exacerbate health disparities. While the scope of protection under the Health Care Rights Law is clear, without unambiguous implementation of regulations and strong enforcement, illegal discrimination is likely to increase, limiting health care access and harming the public's health.¹

Local health departments work every day in their communities to prevent disease, promote wellness, and protect health. They convene community partnerships and facilitate important conversations with diverse stakeholders on how to create the conditions in which all people can be healthy. NACCHO and local health departments are partners with HHS and agencies like the Centers for Disease Control and Prevention (CDC) to enhance the health of all individuals in the United States.

NACCHO and our members recognize the value of and are committed to expanding health care access to all who need it. Unfortunately, the proposed rule would do the opposite. The proposed rule would change the Health Care Rights Law (Section 1557 of the Affordable Care Act) that prohibits discrimination based on race, color, national origin, sex, age, and disability in health programs and activities receiving federal financial assistance. By narrowing civil rights protections under the Health Care Rights Law, the proposed rule would limit health care access for limited English proficient populations, transgender people, women, and individuals with disabilities and chronic conditions. These are some of society's most vulnerable people who already face healthcare challenges and need protection from discrimination. The proposed rule would change those protections against discrimination for a host of reasons, including gender, sexual orientation, pregnancy, and national origin and language needs.

¹MaryBeth Musumeci et al., *HHS's Proposed Changes to Non-discrimination Regulations under ACA Section 1557*, Kaiser Family Foundation (Jul. 1, 2019), Retrieved August 8, 2019 from <https://www.kff.org/disparities-policy/issue-brief/hhss-proposed-changes-to-non-discrimination-regulations-under-aca-section-1557/>.



As the first broad prohibition against sex-based discrimination in healthcare, Section 1557 is crucial to ending both sex-based and gender-based discrimination in the healthcare industry.² Sex and gender discrimination in health care has a disproportionate impact on women of color, LGBTQ people, and individuals living at the intersections of multiple identities—resulting in them paying more for healthcare, receiving improper diagnoses at higher rates, being provided less effective treatments, and sometimes being denied care altogether. The proposed rule would disproportionately impact LGBTQ people, and especially transgender, nonbinary, and gender nonconforming people, who already face unique barriers to accessing care, such as high uninsured rates, discrimination and harassment. Under the proposed rule, those barriers would only increase.

Protections are also needed against discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth, or related conditions. Although HHS acknowledges in the preamble to this proposed rule that Title IX prohibits discrimination based on pregnancy, including termination of pregnancy, it does not state whether HHS would enforce those protections.

Discrimination based on national origin, which encompasses discrimination based on language, creates unequal access to health care. Over twenty-five million Americans are limited English proficient (LEP).³ An estimated 19 million LEP adults are insured.⁴ Language assistance, including “taglines” notifying LEP persons of available services in the top 15 languages spoken by LEP individuals, is necessary for them to access federally funded programs and activities in the healthcare system. The proposed changes, including narrowing the scope of who is subject to the Health Care Rights Law, eliminating a private right of action and repealing the notice, taglines and language access plans threaten the civil rights of LEP persons. Without the notice, members of the public will have limited means of knowing that language services and auxiliary aids and services are available, how to request them, what to do if they face discrimination, and their right to file a complaint. Taglines are well-supported by existing federal and state regulations, guidance and practice.⁵ In the absence of translated documents, taglines are necessary “to ensure that individuals are aware of their protections under the law, and are grounded in OCR’s experience that failures of communication based on the absence of auxiliary aids and services and language assistance services raise particularly significant compliance concerns under Section 1557, as well as Section 504 and Title VI.”⁶

The proposed rule also impermissibly seeks to limit the enforcement mechanisms available under the Health Care Rights Law for patients who have experienced discrimination, including 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. 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 the Health Care Rights Law. Ultimately, the proposed rule will make it harder for those who are discriminated against to access meaningful health care and to enforce their rights. While the Health Care Rights Law would

² MaryBeth Musumeci et al., *HHS’s Proposed Changes to Non-discrimination Regulations under ACA Section 1557*, Kaiser Family Foundation (Jul. 1, 2019), Retrieved August 8, 2019 from <https://www.kff.org/disparities-policy/issue-brief/hhss-proposed-changes-to-non-discrimination-regulations-under-aca-section-1557/>.

³ Asian & Pacific Islander American Health Forum Analysis of 2017 American Community Survey Data.

⁴ Asian & Pacific Islander American Health Forum Analysis of 2017 American Community Survey Public Use Microdata Sample Files.

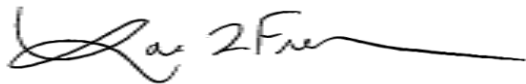
⁵ See Title VI Coordination Regulations, 29 C.F.R. § 42.405(d)(1); Marketplace and QHP issuer requirements, 45 C.F.R. § 155.205(c)(2)(iii); Medicaid Managed care plans, 42 C.F.R. § 438.10(d)(3); DOL WIOA Nondiscrimination requirements, 29 C.F.R. § 38.9(g)(3); USDA SNAP Bilingual Requirements, 7 C.F.R. § 272.4(b); and the 2003 HHS LEP Guidance.

⁶ Nondiscrimination in Health Programs and Activities Proposed Rule, RIN 0945-AA02, September 8, 2015. Retrieved August 8, 2019 from <https://www.govinfo.gov/content/pkg/FR-2015-09-08/pdf/2015-22043.pdf>.

still be intact, this proposed rule attempts to change the administrative implementation in ways that are contrary to the law's plain language.

The Section 1557 2016 final rule made clear that the Health Care Rights Law protects from these discriminations, however the proposed new rule attempts to roll back those same protections, which would have devastating effects on vulnerable populations and lead to access barriers. Therefore NACCHO calls on HHS reject the proposed rule and maintain strong health protections for all. NACCHO and local health departments are prepared to work with your Department to improve and protect health across our nation. Please contact Adriane Casalotti, MPH, MSW, NACCHO Chief of Government and Public Affairs, with any questions at acasalotti@naccho.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Lori Tremmel Freeman". The signature is fluid and cursive, with a long horizontal line extending to the right.

Lori Tremmel Freeman, MBA
Chief Executive Officer