



THE PARTNERSHIP FOR MEDICAID

August 13, 2019

Roger Severino
Director, Office for Civil Rights
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Hubert H. Humphrey Building, Room 509F
Washington, D.C. 20201

RE: RIN 0945-AA11: Nondiscrimination in Health and Health Education Programs or Activities

Dear Director Severino:

On behalf of the Partnership for Medicaid—a nonpartisan, nationwide coalition of health care providers, safety-net health plans, counties, and labor—the undersigned organizations appreciate the opportunity to provide stakeholder input on the U.S. Department of Health and Human Services (HHS) Office for Civil Rights’ proposed rule “Nondiscrimination in Health and Health Education Programs or Activities.”

Section 1557 of the Affordable Care Act (ACA) protects individuals from discrimination based on race, color, national origin, sex, age, and disability in certain health programs and activities, including Medicaid. OCR’s proposed rule would almost entirely replace the 2016 Section 1557 regulations by narrowing the definition of sex discrimination, allowing insurers to discriminate against certain medical conditions and people with disabilities, and limiting access to care for individuals with limited English proficiency (LEP). In addition, the proposal would exempt certain federal health programs and health insurers from complying with Section 1557, effectively eliminating these protections for tens of millions of people. Beyond the Section 1557 regulations, the proposed rule would eliminate nondiscrimination protections related to gender identity and sexual orientation from 10 other existing regulations, including those that govern state Medicaid programs, Medicaid managed care organizations, Program of All-Inclusive Care for the Elderly (PACE) organizations, and others.^{1,2,3,4} Many of the most vulnerable beneficiaries of the Medicaid program, including those outlined above, routinely face personal, emotional, and logistical barriers to engaging in consistent care and finding trusted providers. This proposal would exacerbate those barriers to care and jeopardize the patient-provider relationship.⁵

The undersigned organizations fear that this proposed rule would weaken civil rights protections in health care for the most vulnerable among us, including members of the lesbian, gay, bisexual, transgender, and questioning (LGBTQ) community, people with disabilities, and individuals with LEP. As organizations representing the health care safety net, we are particularly concerned about the impact on Medicaid’s more than 70 million beneficiaries. We urge OCR to withdraw this proposal in its entirety.

¹ 42 C.F.R. § 440.262

² 42 C.F.R. § 438.3 (d)(4)

³ 42 C.F.R. § 438.206 (c)(2)

⁴ 42 C.F.R. § § 460.98, 460.112

⁵ Dang BN, Westbrook RA, Njue SM, Giordano TP. Building trust and rapport early in the new doctor-patient relationship: a longitudinal qualitative study. *BMC Med Educ.* 2017 Feb 02; 17(1):32.

LGBTQ individuals

Section 1557 was the first civil rights law to prohibit discrimination in health care based on sex, including discrimination based on sex stereotyping and gender identity. These patient protections are critical for LGBTQ individuals, many of whom, prior to the ACA, were subjected to unnecessary discrimination by insurance companies and health care institutions.^{6,7,8} OCR's proposed rule would eliminate the definition of sex discrimination from the Section 1557 regulation, inviting insurers to once again deny coverage for critical treatments – including gender reassignment surgery. Omitting sex as a protected class from the Section 1557 regulation would put millions of people at significant risk of discrimination. Moreover, this effort by OCR is contrary to many state efforts to protect access to care for LGBTQ individuals. Since the implementation of Section 1557, 18 states have implemented affirmative coverage protocols in their respective Medicaid programs to ensure coverage of medically necessary transition-related care.⁹ This progress and any future progress may be in jeopardy if this rule is finalized as proposed.

People with disabilities

Like LGBTQ individuals, people with disabilities are routinely discriminated against in the provision of health care. Prior to passage of the ACA, insurance companies commonly charged people with disabilities more for their care. In addition, people with disabilities were often subject to coverage denials for certain conditions or health services and were routinely denied coverage altogether. Section 1557 prevented these practices by insurance companies, providers, hospitals, nursing homes, home health agencies, clinical laboratories, and other health care professionals. Under the proposed rule, discriminatory practices in health care could once again become the norm, jeopardizing care for the more than 40 million Americans with a disability, including over 10 million who qualify for Medicaid because of a disability.^{10,11}

Individuals with limited English proficiency

Over 21 percent of the U.S. population, or 66 million people, speak a language other than English at home, with 25 million of them speaking English less than “very well” and are thus considered LEP.^{12,13}

⁶ Kosenko, K., Rintamaki, L., Raney, S., Maness, K. (2013). Transgender patient perceptions of stigma in health care contexts. *Medical Care*, 51(9), 819–822

⁷ Poteat T, German D, Kerrigan D. Managing uncertainty: A grounded theory of stigma in transgender health encounters. *Social Science & Medicine* 2013;84(1), 22–29.

⁸ Lambda Legal. When health care isn't caring: Lambda Legal's survey of discrimination against LGBT people and people with HIV. New York, NY: Lambda Legal. 2010.

⁹ Movement Advancement Project. Healthcare laws and policies: Medicaid coverage for transition-related care. June 25, 2019. Available at: <http://www.lgbtmap.org/img/maps/citations-medicaid.pdf>

¹⁰ U.S. Census Bureau. 2017 American Community Survey 1-year estimates: Table S1810 disability characteristics. Available at:

https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_1YR_S1810&prodType=table

¹¹ Medicaid and CHIP Payment and Access Commission. People with disabilities. Available at: <https://www.macpac.gov/subtopic/people-with-disabilities/>

¹² U.S. Census Bureau. 2017 American Community Survey 1-year estimates: Table S1603 characteristics of people by language spoken at home. Available at: https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_17_1YR_S1603&prodType=table

Adults and children with limited English proficiency are more likely to be uninsured than those who are English proficient. Over 50 percent of these individuals are enrolled in Medicaid, demonstrating Medicaid's critical role for individuals with LEP.¹⁴ Under this proposed rule, people with LEP could face additional challenges in access to culturally and linguistically appropriate care, including information about accessing services and health insurance. The Partnership urges HHS to employ the most effective means possible to ensure that people with LEP are made aware of their health benefits and rights. We are concerned that by proposing to eliminate language access plans and other critical protections for LEP individuals seeking care without articulating other, workable solutions, OCR is discouraging entities from taking steps to accommodate the needs of people with LEP. This change would make health care access inaccessible for many marginalized or linguistically isolated communities. English language proficiency should not determine whether people have access to care or the quality of a person's care.

Conforming amendments

In the proposed rule, OCR seeks to implement conforming amendments which would eliminate nondiscrimination protections related to gender identity and sexual orientation from 10 other existing regulations, including those that govern state Medicaid programs, Medicaid managed care organizations, PACE organizations, and others.^{15,16,17,18} Under such conforming amendments, some Medicaid managed care entities and state Medicaid programs may be emboldened to discriminate against LGBTQ beneficiaries in enrollment. Similarly, PACE programs may discourage older LGBTQ individuals from accessing benefits to which they are entitled. As organization's representing the health care safety net, we object to OCR's proposed conforming amendments as they could limit access to care in the Medicaid program and are outside the scope of this rule.

The Partnership for Medicaid urges OCR to withdraw this proposed rule in its entirety. If finalized, Medicaid's most vulnerable beneficiaries will be exposed to unnecessary harm. If you have any questions regarding our comments, please contact Shelby King at the American Academy of Family Physicians, First Co-Chair of the Partnership for Medicaid, at 202-655-4902 or sking@aafp.org.

Sincerely,

American Academy of Family Physicians
American Academy of Pediatrics
American College of Obstetricians and Gynecologists
American Dental Education Association
America's Essential Hospitals
Association for Community Affiliated Plans
Association of Clinicians for the Underserved
Easterseals

¹³ U.S. Census Bureau. 2017 American Community Survey 1-year estimates: Table S1601 language spoken at home. https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_17_1YR_S1601&prodType=table

¹⁴ Ibid.

¹⁵ 42 C.F.R. § 440.262

¹⁶ 42 C.F.R. § 438.3 (d)(4)

¹⁷ 42 C.F.R. § 438.206 (c)(2)

¹⁸ 42 C.F.R. § § 460.98, 460.112

The Jewish Federations of North America
National Association of Community Health Centers
National Association of Pediatric Nurse Practitioners
National Council for Behavioral Health
National Health Care for the Homeless Council
National Hispanic Medical Association