

August 13, 2019

Mr. Roger Severino
Director, Office for Civil Rights
U.S. Department of Health and Human Services
200 Independence Ave. SW
Washington, DC 20201

Re: Nondiscrimination in Health and Health Education Programs and Activities (Section 1557 NPRM), RIN 0945-AA11

Dear Mr. Severino:

On behalf of the Endocrine Society, we appreciate the opportunity to provide comments on the proposed revisions to the non-discrimination provisions set forth in Section 1557 of the Affordable Care Act (ACA). Founded in 1916, the Endocrine Society represents approximately 18,000 physicians and scientists engaged in the treatment and research of endocrine disorders, such as diabetes, hypertension, infertility, obesity, osteoporosis, and thyroid disease. In 2013, the American Psychiatric Association removed “Gender Identity Disorder” to underscore the concept that a transgender identity, in and of itself, was no longer considered to be pathological. Many of our members care for transgender individuals, providing expert care across the range of transgender medical interventions including hormone therapy and surgeries. As established in our position statement on transgender health¹, we strongly support access to the full spectrum of medical care for transgender individuals and urge the Office for Civil Rights (OCR) to withdraw this proposed rule.

The proposed rule is focused on, among other things, the 2016 implementing regulation for Section 1557 of the ACA that defined “on the basis of sex” to include discrimination based on pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, and gender identity. The rule proposes to eliminate specific nondiscrimination protections based on sex and gender identity. **We oppose the proposed rule.** If finalized, this rule will threaten women and transgender individuals’ access to care and health insurance, create confusion among providers and patients about their rights and obligations, and promote discrimination against vulnerable populations that already struggle to access health care.

¹ Endocrine Society. Transgender Health. September 2017 <https://www.endocrine.org/advocacy/priorities-and-positions/transgender-health>



Impact on access to care

Even with existing protections for transgender individuals that are meant to shield them from discrimination in the health care system, access to appropriately trained healthcare professionals can be challenging. There is a lack of formal education on gender dysphoria/gender incongruence among clinicians trained in the United States, making it difficult to find physicians with expertise in the transition process. Furthermore, they face barriers in accessing standard preventive services for their sex assigned at birth (i.e., prostate cancer screening for a transgender woman) from physicians who have had minimal experience caring for transgender individuals.

Removing these nondiscrimination protections will make it easier for providers to deny care to transgender individuals for any health care service, not just those related to their gender transition, and will discourage transgender individuals from seeking care or reporting when they have been a victim of discrimination. Furthermore, covered entities will no longer be required to treat a patient consistent with their gender identity and the rule will allow differential coverage or cost-sharing for services that are associated with their gender assigned at birth (denying medical treatment for ovarian cancer in a transgender male).

Studies have indicated that 70% of transgender individuals have experienced maltreatment by medical providers, including harassment and violence.² Transgender individuals who have been denied care show an increased likelihood of committing suicide and self-harm.³ Making it harder to access health care services could further impact the health disparities and mental health issues that are experienced by transgender individuals. It is critical that transgender individuals can access appropriate treatment and care to ensure their health and well-being without the fear of discrimination or harassment.

Impact on insurance coverage and benefit design

The proposed rule interprets a covered entity much more narrowly than the 2016 implementing rule. Under current regulation, Section 1557 applies to all health programs and activities that receive federal financial assistance through the Department of Health and Human Services (HHS). As a result, all health plans offered by an insurer that participates in the Marketplace are subject to section 1557. This proposed rule will apply Section 1557 to only the specific program or activity that is principally engaged in providing health care and receives federal funding. This means that an insurance provider that is not principally engaged in providing health care will only have to apply Section 1557 regulations to its Marketplace plans (which receive federal funding). Furthermore, the proposed rule also eliminates the entire regulation that prohibits discrimination in insurance issuance, coverage, cost-sharing, marketing and benefit design.

² Davidge-Pitts, C., et al. Transgender Health in Endocrinology: Current Status of Endocrinology Fellowship Program and Practicing Clinicians. *J Clin Endocrinol Metab.* (2017) 102(4):1286-1290.

³ *ibid.*



Treatment for gender dysphoria/gender incongruence is considered elective by insurance companies, and many plans fail to provide coverage for physician-prescribed treatment. The 2016 implementing regulation changed that by prohibiting health insurance companies from discriminating through marketing practices or benefit design. As a result, insurers may not categorically exclude health care services related to gender transition or subject a policyholder to additional benefit limitations because they are transgender. A study looked at the response of insurers in the state individual markets and found that many insurers now include affirmative coverage language for transition-related services as a result of the 2016 Section 1557 implementing rule. By eliminating protections based on gender identity and limiting the scope of covered entities, this proposed rule will once again allow health insurers to use discriminatory benefit design, potentially resulting in more insurers reverting back to plans that do not provide coverage for transition-related care that is based on evidence-based standards of care.

Eliminating these protections from health insurance issuance, coverage, cost-sharing, marketing and benefit design will also allow plans to selectively cover services for a man and not a woman, place all or most medications for treatment of a specific disease on the plan's highest cost formulary tier, or applying age limits to treatment that has been proven to be effective at all ages. While this proposed rule will not impact essential health benefits, it will once again allow insurance providers to discriminate against someone solely because of their age, sexual orientation, gender and/or gender identity.

Expanded religious exemptions

The proposed rule applies Title IX's religious exemption to Section 1557's prohibition on sex discrimination. If implemented, this could allow religiously-affiliated hospitals and other health care entities to discriminate against patients based on sex, disproportionately harming transgender people and people seeking reproductive health services. This could impact a broad range of health care services, including birth control, sterilization, certain fertility treatments, abortion, gender-affirming care, and end of life care.

In our comments on the Statutory Conscience Rights in Health Care proposed rule (March 2018), we expressed concern that the expanded religious exemption would impact the right of every person to access comprehensive care that is affordable and easily accessible. As mentioned above, transgender individuals already face challenges finding physicians who have the experience to care for transgender individuals. Furthermore, there are residents of many rural and underserved communities that may have access to only one health care provider. According to a 2018 study of transgender individuals, 31 percent said if they were turned away, it would be very difficult or not possible to find the same type of service at a different hospital, and 30 percent said it would be



very difficult or not possible to find the same type of service at a different clinic.⁴ We are concerned that this proposed rule would make it even more difficult to access transition-related care, obtain contraception or other reproductive planning, or treat a medical condition, and may result in the individual forgoing necessary health care, ultimately at a higher cost to both the individual and the healthcare system.

Nondiscrimination protections like the ones in Section 1557 do not prevent health care providers from using their medical judgement in the care of transgender individuals or women, they simply guarantee that these patients can access the same care provided to other patients, no matter who they are. The protections are fundamental for these vulnerable populations to be able to access the care that they need.

Thank you for considering our comments. We strongly believe that transgender individuals and women should have affordable access to the full continuum of care without the fear of discrimination and urge you not to finalize this rule. If we can be of further assistance, please contact Stephanie Kutler, Director, Advocacy & Policy, at skutler@endocrine.org.

Sincerely,

E. Dale Abel, MB.BS., D.Phil. (M.D., Ph.D.)
President, Endocrine Society

⁴ Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care*, Ctr. for Am. Progress (Jan. 18, 2018) <https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/>.