United States Senate
WASHINGTON, DC 20510

August 13, 2019

The Honorable Alex M. Azar II
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

RE: Comment on Notice of Proposed Rulemaking, RIN 0945-AA11, Nondiscrimination in Health and Health Education Programs or Activities

Dear Secretary Azar:

We write to oppose the Department of Health and Human Services' (HHS or the Department) proposed regulations implementing Section 1557 of the Affordable Care Act (ACA), which was published in the Federal Register on June 14, 2019.[1] Section 1557 of the ACA prohibits discrimination on the basis of race, color, sex (including, but not limited to, discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, and gender identity), national origin, age, disability, and language proficiency. The proposed rule attempts to eliminate protections against discrimination for those who already struggle to access quality, affordable health care services. In advancing policies that not only allow discrimination – but in fact endorse it – HHS is abdicating its responsibility to enhance and protect the health and well-being of all Americans.[2]

The proposed rule would narrow congressional intent with regard to the broad purpose of Section 1557—eliminating discrimination in health care. Congress's intent in passing Section 1557 was clear: the law prohibits discrimination in any health program or activity receiving federal funding. The text of Section 1557 leaves no ambiguity in its goal by incorporating language from federal civil rights statutes, reflecting Congress's clear intent to prohibit both intentional, intersectional and disparate impact discrimination in health care.[3] The protections guaranteed under Section 1557 are central to the ACA's broad goal of expanding access to health care by prohibiting discrimination, by ensuring all patients, regardless of age, sex, or pre-existing condition, no longer face barriers to care.

By deviating from the plain text of Section 1557, the proposed rule blatantly ignores the intent of Congress. Instead of embracing the law's goal of expanding access to care and rooting out discrimination, the proposed rule attempts to narrow protections only to programs and activities that receive direct federal funding or are entities created under Title I of the ACA and administered by HHS, which means private insurers and employer-sponsored health plans sold outside of the Marketplace may be partially or totally exempt and therefore assume they have

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[1] https://www.federalregister.gov/documents/2019/06/14/2019-11512/nondiscrimination-in-health-and-health-education-programs-or-activities
[2] https://www.hhs.gov/about/index.html
[3] http://law.howard.edu/sites/default/files/related-downloads/how_55_3.pdf

license to discriminate. As is abundantly clear from the legislative history of the ACA, the goal of the law was to eliminate discrimination; yet, the proposed rule does the opposite.

1. **The Proposed Rule Attempts to Eliminate Protections for the Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) Community**

The protections guaranteed under Section 1557 are critical to the ACA's goal of expanding access to health care without discrimination on the basis of sex. The proposed rule removes protections against discrimination on the basis of gender identity and sex stereotyping. The preamble to the proposed rule misinterprets the term "sex" to only "use explicitly binary terms such as 'male and female,'"[4] and excludes forms of discrimination that are clearly sex-based. This interpretation effectively encourages discrimination against transgender, gender nonbinary, and gender nonconforming people who face significant barriers to accessing quality, affordable health care.

Many transgender people are often harassed, abused, denied care, or emotionally assaulted during hospital visits or stays. According to the 2015 U.S. Transgender Survey, approximately one-fourth of individuals surveyed reported problems with insurance coverage as a result of their gender identity.[5] Access to care appears to be particularly difficult for transgender patients with a disability; approximately 40 percent of transgender people with disabilities were more likely to have one negative experience with health care providers, compared to 30 percent of transgender people who did not identify as having a disability.[6] Nearly one-quarter of people surveyed did not seek medical treatment out of fear of being mistreated as a transgender person. In another large national LGBT health survey conducted in 2010, 70 percent of those surveyed reported health care providers refusing to touch them; using harsh or abusive language; being physically rough or abusive; or blaming them for their health status.[7] The survey reported that approximately 27 percent of survey respondents were denied health care due to being transgender. Survey respondents also cited inappropriate staff behavior in hospitals, including violations of confidentiality, regardless of the Health Insurance Portability and Accountability Act of 1996 (HIPAA); long waits for care; and inappropriate questions and intrusive exams. These experiences tend to dissuade transgender people from seeking health care.

Moreover, the proposed rule also seeks to remove "sexual orientation" and "gender identity" protections from numerous Centers for Medicare and Medicaid Services (CMS) rules that are unrelated to Section 1557 and some of which predate the ACA, going beyond the scope of a rule intended to implement Section 1557.[8] These CMS rules cover: non-interference with federal law and non-discrimination standards; federally-facilitated exchange standards of conduct; marketing by health insurance issuers; non-discrimination in qualified health plans (QHP); refraining from misleading or coercive behavior in QHPs; non-discrimination provisions for programs of all-

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[4] https://www.federalregister.gov/documents/2019/06/14/2019-11512/nondiscrimination-in-health-and-health-education-programs-or-activities

[5] https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf

[6] https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf

[7] https://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report_when-health-care-isnt-caring_1.pdf

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

inclusive care for the elderly (PACE); specific rights for participants in a PACE organization; enrollment non-discrimination for CMS contracts; availability of services under CMS contracts; and additional CMS access and cultural considerations. The Department offers no explanation for packaging these proposed rule changes together, except for the proposed rule's objective to undermine protections for LGBTQ patients.

Despite the significant barriers to care faced by the LGBTQ community, the Department's proposal could embolden insurers and health care providers to discriminate on the basis of sexual orientation and gender identity, contrary to Congressional intent. The proposed regulation would allow health care providers and insurers to make health care decisions based on personal beliefs rather than the best interests of patients. Congress designed the ACA to expand—not limit—access to comprehensive health care. And given the structural barriers that exist for those who are transgender, it is unconscionable that the Department would take proactive steps to undermine and limit existing protections under the law.

2. **The Proposed Rule Erodes Protections for Reproductive Rights**

The proposed rule attempts to undermine protections for reproductive health. Section 1557 protects against discrimination based on pregnancy, childbirth, and related medical conditions, including termination of pregnancy and miscarriage management. In passing Section 1557, Congress intended to prohibit discrimination against a patient because of their medical history or medical needs, including, for example, that they have had an abortion or are seeking miscarriage management care. While the Department acknowledges this protection, it does not clarify whether it will enforce this protection. In refusing to do so, the Department could open the door to discrimination that will leave women with limited options when it comes to selecting a health care provider, particularly in rural or underserved areas. The Department should clarify that it will fully enforce protections for reproductive rights, as Congress intended.

3. **The Proposed Rule Unlawfully Attempts to Incorporate Exemptions from Other Laws that Contradict the Plain Language of Section 1557**

The Department proposes to incorporate both the Danforth Amendment and a religious exemption from Title IX into Section 1557. The text of the law is clear: Section 1557 incorporates the grounds for discrimination from Title IX, but does not incorporate the statutory text itself. By impermissibly incorporating exemptions from Title IX, the proposed rule could lead to greater denials of care. First, the proposed rule's unlawful incorporation of the Danforth Amendment is yet another attack by the Trump Administration on abortion access and contradicts the plain language of the statute. Second, not only is the proposed incorporation of an overly broad religious exemption inconsistent with the plain language of the law, but it is also particularly inappropriate in the context of a rule intended to expand access to health care. For example, a provider could claim a religious exemption in order to discriminate against an unmarried woman seeking reproductive health care, even though such discrimination would violate Section 1557's prohibition against discrimination based on sex stereotyping. An insurance company could try to claim the religious exemption to avoid covering health services, such as certain fertility treatments and transition related care. The proposed rule attempts to

expand refusals of care based on providers' personal beliefs, which is unlawful and contrary to congressional intent to protect against discrimination in health care.

4. **The Proposed Rule Attempts to Undermine Protections for People Whose Primary Language is not English and for People with Disabilities**

The Department is proposing to eliminate the requirement that covered entities provide notice to applicants, beneficiaries, enrollees, and the public about the protections of Section 1557 and how to enforce their rights. It also proposes to eliminate requirements to inform people with limited English proficiency (LEP) about the availability of language assistance services and provide taglines while minimizing the potential costs to patients.[9] The proposed rule will also exacerbate barriers to care for people with disabilities. The proposed rule seeks to rescind provisions related to the prohibitions on benefit design discrimination and changes the standards for accessibility, which would leave people without access as well as without accessible information about how to enforce their rights.

The Department has not provided any clear or specific arguments refuting the evidence and claims citied in the 2016 rule around the benefits of language and disability assistance services. The Department claims that repealing the multi-language notice and tagline requirements and provisions on benefit design and accessibility contained in the 2016 final rule would have "negligible" impact. This determination conflicts with the detailed findings in the 2016 rule regarding the critical benefits of the notice and tagline requirements for each state.[10] The HHS Office for Civil Rights (OCR) found including notice and tagline requirements "maximizes efficiency and economies of scale by enabling covered entities to receive the benefits of having multi-language taglines available without incurring the associated translation costs."[11] The 2016 rule also noted that making the notices available "provides flexibility while minimizing burden" and "helps provide greater access for beneficiaries and consumers." Without citing any support for their claims or refuting the evidence provided in the 2016 regulation, the Department now states the benefits of repealing these provisions "far outweigh any costs or burdens."

The Department also now claims there is a time "burden for developing a language access plan." Language access plans are useful tools in determining the steps covered entities should take in providing services for patients. If fewer entities develop these plans, health care providers will be less prepared to serve LEP patients. Instead of considering and balancing the needs of the LEP community, the proposed rule seeks to eliminate the important assurances LEP persons need to

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[9] As stated in the 2016 rule, "The key to providing meaningful access for LEP person is to ensure that the recipient/covered entity and LEP person can communicate effectively. The steps taken by a covered entity must ensure that the LEP person is given adequate information, is able to understand the services and benefits available, and is able to receive those for which he or she is eligible." https://www.govinfo.gov/content/pkg/FR-2016-05-18/pdf/2016-11458.pdf

[10] Most commenters disfavoring a national methodology recommended that the languages in which covered entities must post taglines should be the top 15 languages spoken State-wide by individuals with limited English proficiency. Commenters explained that the State-wide threshold would be more attuned to the diversity of languages spoken by individuals with limited English proficiency in each State and would align with Federal regulations governing the Marketplaces and qualified health plan insurers. https://www.govinfo.gov/content/pkg/FR-2016-05-18/pdf/2016-11458.pdf

[11] https://www.govinfo.gov/content/pkg/FR-2016-05-18/pdf/2016-11458.pdf

access and manage their own health care. The Department's costs-benefit analysis relies exclusively on the business cost and does not measure the harm imposed on patients who experience discrimination on the basis of their language, national origin, and disability. Claiming the repeal of such assurances will save money undervalues the lives of LEP patients and people with disabilities and unfairly punishes those in need of health care services.

5. **The Proposed Rule Impermissibly Attempts to Narrow the Enforcement Mechanism and Remedies Available Under Section 1557**

Contrary to the plain language of Section 1557, the Department illegally proposes limiting enforcement mechanisms and remedies under the law. The text of Section 1557 provides that "enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection." The law is clear that the various mechanisms available under each of these statutes apply to any violation under Section 1557. The proposed rule's attempt to narrow the enforcement mechanisms contradicts Congress's clear intention. Similarly, the proposed rule seeks to roll back remedies available to an individual discriminated against under Section 1557. By purporting to limit the monetary damages an individual can claim if discriminated against, this proposal is yet another way that the Trump Administration attempts to make easier – or less costly – to discriminate.

6. **The Proposed Rule Inappropriately Questions the Supremacy of Federal Nondiscrimination Laws**

We are also deeply concerned that the proposed rule appears to question Congress's role in prohibiting discrimination. The proposed rule says that Title IX and Section 1557 must "be exercised with respect to State sovereignty." The Supreme Court has been clear – Congress has the authority to prohibit discrimination in commercial activity. The Department should clarify that the civil rights and anti-discrimination laws passed by Congress are the law of the land, preempting State efforts to the contrary.[12]

The federal government has the responsibility to expand access to health care and not undermine protections that could harm those who need health care services. We urge you to withdraw the proposed Section 1557 rule and protect the rights of all individuals who seek access to health care.

[12] Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)

Sincerely,

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Tammy Baldwin
United States Senator

Richard Blumenthal
United States Senator

Mazie K. Hirono
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Sherrod Brown
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Sheldon Whitehouse
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Jack Reed
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Robert Menendez
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Tammy Duckworth
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Elizabeth Warren
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Tina Smith
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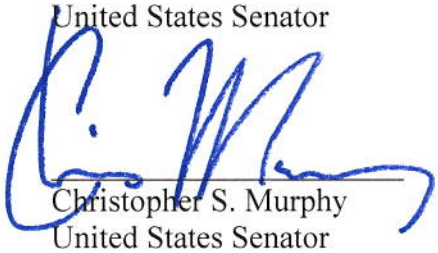
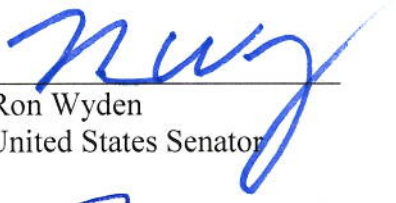


Christopher S. Murphy
United States Senator



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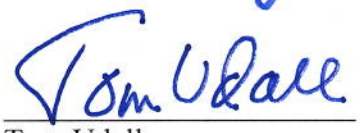
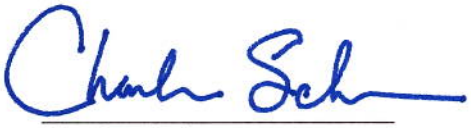


Tom Udall
United States Senator



Charles Schumer
United States Senator

Martin Heinrich
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