

United States Senate

May 22, 2020

The Honorable Alex Azar
Secretary
Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Secretary Azar,

We write to express our deep concern about the Department of Health and Human Services' (HHS or the Department) intent to finalize the proposed rule (RIN 0945-AA11) implementing Section 1557 of the Affordable Care Act (ACA). Section 1557 prohibits discrimination on the basis of race, color, national origin, 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), age, disability, and language proficiency in any health care program or facility that receives federal funding. The misguided changes in the proposed rule would gravely undermine health care anti-discrimination protections for LGBTQIA+ people, women, people with limited English proficiency, people with disabilities, and others, including those who face multiple forms of discrimination. While these policy changes would be harmful at any time, finalizing this proposed rule during the 2019 novel coronavirus (COVID-19) pandemic will reduce vulnerable communities' access to health care services in the middle of a global health emergency. The Department should be focused on helping people obtain the health care they need, not on helping others discriminate against patients and deny them that care. We strongly urge you to reconsider this proposed rule.

In 2019, HHS undertook a harmful and unlawful rewrite of the implementing regulations for Section 1557 of the ACA. HHS recently submitted the final rule for review by the Office of Management and Budget, indicating HHS may have immediate plans to publish the rule. Specifically, the proposed rule hinders the administrative enforcement of protections against discrimination on the basis of sexual orientation and gender identity. The proposed rule would unlawfully incorporate an exemption to the ACA's protection against sex discrimination, targeting patients who will need abortion care. The proposed rule would also reduce patients' access to critical health care information in their primary language, weaken requirements for accommodations for people with disabilities, deprive patients of notice of their right to file a grievance, create confusion around appropriate legal standards and available remedies for claims involving intersectional discrimination, and could purport to exempt many health care programs from the law altogether.

The proposed policy changes would falsely suggest to health care providers and insurers that they can refuse to care for LGBTQIA+ patients – including testing and treatment for COVID-19

– based on who they are. The LGBTQIA+ community already experiences severe discrimination in health care, and finalizing this rule as proposed would heighten existing barriers to care during a public health emergency. According to one study, eight percent of lesbian, gay, and bisexual adults and 29 percent of transgender adults report a health care provider had refused them service due to their actual or perceived sexual orientation or gender identity.¹ Another study found that 28 percent of transgender or gender nonconforming people had postponed medical care due to discrimination and disrespect.² The sudden uptick in at-home deaths in COVID-19 hot spots indicates how dangerous it can be for people with severe cases of COVID-19 to delay seeking care.³ If HHS finalizes this proposed rule, members of the LGBTQIA+ community suffering from COVID-19 – especially people who are transgender, gender nonbinary, and gender nonconforming – may face significant barriers to timely care.

In addition to existing barriers to care, this proposed rule would be especially harmful for the LGBTQIA+ community given the health disparities it already faces and the additional risks created by the COVID-19 pandemic. One study found that members of the LGBTQIA+ community report more chronic conditions and are more likely to rate their health as poor compared to heterosexual individuals.⁴ HIV/AIDS disproportionately impacts members of the LGBTQIA+ community, especially those from communities of color.⁵ Additionally, LGBTQIA+ adults are more likely to live in poverty⁶ and are over twice as likely to be uninsured compared to other adults.⁷ All of these factors pose risks for members of the LGBTQIA+ community during this public health emergency.

The proposed rule has wide-ranging and harmful implications beyond the efforts to undercut protections against discrimination based on gender identity and sexual orientation. The proposed rule attempts to create broad religious exemptions and unlawfully incorporates the Danforth Amendment and the religious exemption from Title IX of the Education Amendments of 1972. Additionally, the Department refused to clarify in the proposed rule whether it would enforce protections against discrimination because someone is miscarrying a pregnancy or seeking care after having an abortion. This could embolden providers to turn away patients who have had abortions, who are pregnant and unmarried, or who are seeking miscarriage management care. Without administrative enforcement of these protections, women with limited options for health care, particularly those who already face barriers to care, including Black women, indigenous

¹ <https://www.americanprogress.org/issues/lgbtq-rights/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/>

² <https://www.thetaskforce.org/new-report-reveals-rampant-discrimination-against-transgender-people-by-health-providers-high-hiv-rates-and-widespread-lack-of-access-to-necessary-care-2/>

³ <https://www.propublica.org/article/theres-been-a-spike-in-people-dying-at-home-in-several-cities-that-suggests-coronavirus-deaths-are-higher-than-reported>

⁴ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3895416/>

⁵ <https://www.cdc.gov/hiv/statistics/overview/ataglance.html>

⁶ <https://williamsinstitute.law.ucla.edu/wp-content/uploads/National-LGBT-Poverty-Oct-2019.pdf>

⁷ <https://www.americanprogress.org/issues/lgbtq-rights/news/2017/03/22/428970/repealing-affordable-care-act-bad-medicine-lgbt-communities/>

women, and other communities of color, as well as those who live in rural or underserved areas, could face additional barriers to accessing health care.

The proposed rule seeks to weaken requirements that health care providers take reasonable steps to provide access for patients with limited English proficiency, such as including taglines on written documents and posting notices about the availability of interpreters.⁸ The proposed rule also sought comments on several proposals to weaken protections for people with disabilities. For example, HHS requested comments on a proposal to exempt small entities from a requirement to provide auxiliary aids and services to people with disabilities. As a result, patients with limited English proficiency and patients with disabilities could be erroneously denied equal opportunity to access information about their own health and health care decisions.

Patients deserve to know their rights and to receive services without discrimination, both during the COVID-19 public health emergency and at all other times. However, this proposed rule seeks to significantly reduce the number of insurance plans and federal health programs that must comply with the ACA's anti-discrimination provisions. The proposed rule also would eliminate the requirement that health care providers notify patients of their right to receive services without discrimination and the process for filing a grievance if they do face discrimination. Anti-discrimination protections are not meaningful if patients do not know their rights.

Undermining health care anti-discrimination protections at any time is cruel, but to do so now will have deadly consequences for some of the populations that are most vulnerable during this pandemic. Congress designed Section 1557 of the ACA to expand—not reduce—access to comprehensive health care for all people. By moving away from the express intent of Congress, these policy changes will cause real harm to our most vulnerable patients. We urge you to abandon this effort and instead focus on ensuring all Americans can access the health care they need during the COVID-19 public health emergency. Thank you for your consideration of this urgent matter.

Sincerely,

/s/ Robert Menendez
Robert Menendez
United State Senator

/s/ Patty Murray
Patty Murray
United States Senator

/s/ Tammy Baldwin
Tammy Baldwin
United State Senator

/s/ Sherrod Brown
Sherrod Brown
United States Senator

⁸ <https://www.healthaffairs.org/doi/10.1377/hblog20190809.457959/full/>

/s/ Richard Blumenthal
Richard Blumenthal
United State Senator

/s/ Kamala D. Harris
Kamala D. Harris
United States Senator

/s/ Edward J. Markey
Edward J. Markey
United State Senator

/s/ Tammy Duckworth
Tammy Duckworth
United States Senator

/s/ Jeffrey A. Merkley
Jeffrey A. Merkley
United State Senator

/s/ Tim Kaine
Tim Kaine
United States Senator

/s/ Bernard Sanders
Bernard Sanders
United State Senator

/s/ Michael F. Bennet
Michael F. Bennet
United States Senator

/s/ Jack Reed
Jack Reed
United State Senator

/s/ Margaret Wood Hassan
Margaret Wood Hassan
United States Senator

/s/ Christopher S. Murphy
Christopher S. Murphy
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/s/ Tina Smith
Tina Smith
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/s/ Amy Klobuchar
Amy Klobuchar
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/s/ Kirsten Gillibrand
Kirsten Gillibrand
United States Senator

/s/ Elizabeth Warren
Elizabeth Warren
United State Senator

/s/ Cory A. Booker
Cory A. Booker
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/s/ Catherine Cortez Masto
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United State Senator

/s/ Mazie K. Hirono
Mazie K. Hirono
United States Senator

/s/ Sheldon Whitehouse
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/s/ Benjamin L. Cardin
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United States Senator

/s/ Gary C. Peters
Gary C. Peters
United State Senator

/s/ Patrick Leahy
Patrick Leahy
United States Senator

/s/ Jacky Rosen
Jacky Rosen
United State Senator

/s/ Christopher A. Coons
Christopher A. Coons
United States Senator

/s/ Richard J. Durbin
Richard J. Durbin
United State Senator

/s/ Ron Wyden
Ron Wyden
United States Senator

/s/ Robert P. Casey, Jr.
Robert P. Casey, Jr.
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