



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF THE GOVERNOR

August 13, 2019

U.S. Department of Health and Human Services
Office for Civil Rights
Attention: Section 1557 NPRM, RIN 0945-AA11
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue SW
Washington, D.C. 20201

To the Office for Civil Rights:

The Department of Health and Human Services' (HHS) recently proposed rule (Nondiscrimination in Health and Health Education Programs or Activities (Docket No. HHS-OCR-2019-0007, RIN 0945-AA11, 84 Fed. Reg. 27846-27895, June 14, 2019) (Proposed Rule) would strip protections from discrimination under the Patient Protection and Affordable Care Act (ACA) for individuals who are transgender or who do not conform to traditional sex stereotypes. This Proposed Rule is contrary to law and, further, threatens the health and well-being of some of Pennsylvania's most vulnerable citizens through not affording equal access to health care on the basis of gender, gender identity or sexual orientation.

The Proposed Rule is not consistent with federal law, including § 1557 of the ACA and the civil rights laws referenced in § 1557. Those civil rights laws, prohibiting discrimination "on the basis of sex" or "because of ... sex", have been interpreted by courts to encompass gender identity within the definition of "sex" for purposes of non-discrimination requirements. *See, e.g.,* https://www.eeoc.gov/eeoc/newsroom/wysk/lgbt_examples_decisions.cfm. Moreover, HHS' Office of Civil Rights has itself publicly recognized that § 1557 prohibits discrimination based on sexual orientation or gender identity. For example:

- Letter from Leon Rodriguez, Director, Department of Health and Human Services Office of Civil Rights, to Maya Rupert, Esq., Federal Policy Director, National Center for Lesbian Rights (July 12, 2012), *available at* <https://perma.cc/RB8V-ACZU> (letter advising that "OCR enforces Section 1557" and explaining that "Section 1557's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and [OCR] will accept such complaints for investigation. Section 1557 also prohibits sexual harassment and discrimination regardless of the actual or perceived sexual orientation or gender identity of the individuals involved.").
- Voluntary Resolution Agreement, Transaction Number 12-147291, *available at* <http://www.hhs.gov/sites/default/files/ocr/civilrights/activities/agreements/TBHC/vra.pdf> (July 14, 2015 agreement with a hospital, resolving a claim by a transgender individual who alleged discrimination on the basis of sex in the assignment of patient rooms).

- Bulletin, Department of Health and Human Services Office of Civil Rights, The Brooklyn Hospital Center Implements Non-Discriminatory Practices to Ensure Equal Care for Transgender Patients (July 14, 2015), *available at* <http://www.hhs.gov/sites/default/files/ocr/civilrights/activities/agreements/TBHC/statement.pdf>;
- *Rumble v. Fairview Health Services*, No. 14-cv-2037, 2015 U.S. Dist. LEXIS 31591 (D. Minn. March 16, 2015) (noting plaintiff’s 2013 complaint to OCR and OCR’s ongoing investigation and referencing an OCR Bulletin that “details two investigations” regarding alleged sex discrimination for sex stereotyping pursuant to §1557).

Pennsylvania calls on HHS to continue its enforcement of §1557 consistent with these prior enforcement efforts, and consistent with the civil rights laws referenced in §1557.

Exacerbating Health Disparities

The Proposed Rule would remove gender identity and sex stereotyping from the definition of prohibited sex-based discrimination, all but eliminating nondiscrimination protections for individuals who are transgender or who do not conform to traditional sex stereotypes. This change could allow for health care providers to deny access and refuse to serve LGBTQ individuals who already experience disparities in health outcomes, such as higher rates of depression and suicide attempts, higher risk of HIV/AIDS, higher use of tobacco and drugs, and higher risk of breast cancer.ⁱ In fact, HHS itself cited the range of research declaring these health disparities in 2016 during the final rule implementing Section 1557. Such a drastic turnaround as outlined in the current Proposed Rule, merely suggests a political stunt, not an evidence-based approach to public health.

In addition to disparities in health outcomes, research shows LGBTQ individuals face challenges in accessing quality healthcare. In a study published by the Center for American Progress, 31 percent of transgender people said that it would be very difficult or impossible to get the health care they need at another hospital if they were turned away from settings where they currently receive care.ⁱⁱ Moreover, a study from the National Center of Transgender Equality shows the majority of transgender individuals have faced discrimination and/or violence in healthcare settings.ⁱⁱⁱ For these patients, being turned away by a medical provider is not just an inconvenience; it often means being denied care entirely with nowhere else to go.

To combat these existing inequities and health disparities, the Pennsylvania Department of Health (DOH) uses HHS funding for numerous public health initiatives and programs for the LGBTQ community. These include funding LGBTQ youth services programs; providing breast cancer screenings, diagnostics, referrals to treatment, for eligible clients, including transgender clients; tailoring tobacco control and prevention materials to the LGBTQ community and more. The Proposed Rule would threaten these efforts to support the LGBTQ community through this crucial public health programming.

Of particular concern among an already vulnerable population are older individuals. Nationally, Pennsylvania is among the top six states with the highest senior populations. SAGE, an advocacy and service provider for LGBTQ seniors, noted there are upwards of 52,000 LGBTQ adults age 65 and older currently living in Pennsylvania. According to a resource published in 2016 by SAGE^{iv}:

“It is estimated that there are 3 million adults over the age of 65 who identify as lesbian, gay or bisexual. By 2030 those estimates are expected to double. And while no precise data exists on the number of transgender older people nationwide, we estimate that there are hundreds of thousands of older adults who are transgender—and many more who will age as transgender people over the next few decades and beyond.”

Last year, Pennsylvania Department of Aging (PDA) held its inaugural LGBTQ Aging Summit, where LGBTQ older adults highlighted barriers they experience when interacting with healthcare providers. These barriers include: 1. Fear of discrimination, abuse, or neglect; 2. Lack of inclusive services; 3. Social isolation; 4. Prejudice or stigma exhibited by providers; among others. Non-discrimination protections add an important layer of protections for transgender, non-binary, or other older adults to feel empowered to share critical health information with their healthcare providers without fear of reprisal. If the Trump Administration removes these protections, the number of LGBTQ older Pennsylvanians that self-isolate, delay needed care, or withhold information from providers may significantly increase due to the amplified fear of revealing their gender identities. This would lead to decreased quality of life and increased health care costs, as LGBTQ adults who delay seeking preventive services develop chronic or debilitating conditions and only access health care in emergent situations.

Additionally, many transgender older adults living in rural areas could potentially be refused care due to their gender identities or at the very least, see their choices in willing providers decrease due to discriminatory practices. As more transgender individuals age, more will be placed into these harmful situations, absent any non-discrimination protections. All of these situations would not only lead to higher acuity in the physical health of transgender older adults but could also lead to decline in mental health.

Research has shown that evidence-based preventive services can save lives and improve health by identifying illnesses earlier, managing them more effectively, and treating them before they develop into more complicated, debilitating conditions. Enabling individuals’ access to routine preventive care allows them to live a life of higher quality by potentially avoiding catastrophic and expensive complications. LGBTQ, transgender, and non-binary older adults must continue to be afforded non-discrimination protections. Older adults across Pennsylvania, regardless of their gender identities, deserve to be treated with dignity and respect when interacting with health care providers.

Further exacerbating these above issues, the Proposed Rule’s removal of language requiring state Medicaid programs, including Medicaid managed care entities, to promote access and services provided in a culturally competent manner to all beneficiaries regardless of “gender, sexual orientation or gender identity” narrows the scope of when culturally competent services are required. By removing the requirement for services to be provided consistent with a patient’s

gender, sexual orientation, or gender identity, HHS is permitting services to be provided in a manner that may be ineffective or inappropriate for some MA beneficiaries. Ineffective or inappropriate service provisions in the Medicaid program may be inconsistent with the Social Security Act requirements that Medicaid services be provided with “efficiency, economy, and quality of care”.

Ending non-discrimination requirements for health services allows for medical professionals to deny vital, life-saving services and could result in health care that is ineffective or inappropriate for LGBTQ and other vulnerable individuals. This can act as a deterrent to individuals from seeking services and supports discrimination and promotes a culture of unacceptance in the health care system and society at large.

Regulatory Concerns and Health Access

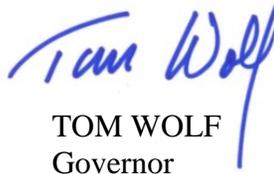
The Proposed Rule also has the potential to create a regulatory dilemma for state regulators and health insurers regarding network adequacy requirements. DOH has a statutory and regulatory requirement to ensure that members in managed care plans and preferred provider organizations have access to adequate provider networks for physical and behavioral health services. However, the proposed revisions do not appear to require advance notice from providers identifying which populations they will refuse to treat, or under what circumstances, so that assessment of network adequacy would become nearly impossible for state regulators and the health insurers offering the product. As you know, for a health plan to be certified as a qualified health plan, it must have an adequate network (see 45 C.F.R. §155.1050). From the member’s perspective, it is entirely possible that members of certain populations may not know of a provider’s decision to not treat them until they arrive for the appointment and are turned away.

Given the health disparities experienced by the LGBTQ community, more should be done to bolster protections and improve health outcomes and access to care for LGBTQ individuals, not less. Pennsylvania is dedicated to ensuring that all consumers have access to robust and affordable coverage regardless of one’s gender identity or sexual orientation. One of the most effective ways to meet the needs of the Pennsylvanians we serve is by ensuring that Pennsylvania’s health insurance markets provide robust and affordable options to *all consumers*. The Pennsylvania Insurance Department (PID) is charged with overseeing Pennsylvania’s insurance markets, and the insurance consumer is the Department’s utmost priority. To that effect, in 2016, PID issued Notice 2016-05 (Notice 2016-05, 46 Pa. B. 2251, April 30, 2016), which is consistent with the laws regarding nondiscrimination, particularly as they relate to gender identity. Those laws include the state Unfair Insurance Practices Act and other state laws and federal laws that prohibit discrimination generally among individuals of the same class, including § 1557 of the ACA and the civil rights laws referenced in § 1557. Despite the release of the Proposed Rule, the position expressed in Notice 2016-05 has not changed. It is the policy of the Commonwealth to treat all residents of this Commonwealth with dignity and respect, regardless of race, gender, creed, color, sexual orientation or gender identity or expression, and discrimination on any grounds should be prohibited. Therefore, PID will continue to expect that, with respect to health insurance policy forms under the PID’s jurisdiction:

- A policy will not contain any discriminatory terms, conditions or benefit provisions contrary to State and Federal laws.
- A policy affirmatively will include nondiscriminatory terms, conditions and benefit provisions consistent with State and Federal laws.
- A policy will not exclude services based on gender identity and will not contain a categorical exclusion of coverage for all health services related to gender transition.
- A policy will affirmatively provide that medically necessary covered services will be available to a policyholder regardless of their gender identity.

Pennsylvania remains committed to protecting the rights of all individuals, including Pennsylvania's most vulnerable populations, and strongly urges the Federal government to do the same. Therefore, we recommend that the Federal government not finalize the rule as proposed. On the contrary, we strongly urge the HHS Office of Civil Rights to recognize that § 1557 of the ACA includes protections against discrimination and decline to finalize the Proposed Rule.

Sincerely,



TOM WOLF
Governor

ⁱ US Department of Health and Human Services (2016), 81 *Fed. Reg.* at 31460, accessed:

<https://www.federalregister.gov/documents/2016/05/18/2016-11458/nondiscrimination-in-health-programs-and-activities>

ⁱⁱ Shabab Ahmed Mirza & Caitlin Rooney (2016), Discrimination Prevents LGBTQ People from Accessing Health Care,

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

ⁱⁱⁱ James, S. E., & Herman, J. (2017), *The Report of the 2015 US Transgender Survey*, National Center for Transgender Equality.

^{iv} Inclusive Questions for Older Adults, National Resource Center on LGBT Aging, sage,

https://www.lgbtagingcenter.org/resources/pdfs/Sage_CollDataGuidebook2016.pdf