



August 9, 2019

Secretary Alex Azar
Department of Health and Human Services
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue, SW
Washington, D.C. 20201

Re: Section 1557 NPRM, RIN 0945-AA11, “Nondiscrimination in Health and Health Education Programs or Activities”

Dear Secretary Azar:

GLBTQ Legal Advocates & Defenders (GLAD) is a New England-wide public interest legal organization. Through strategic litigation, public policy advocacy, and education GLAD works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. Since our founding in 1978, we have heard from and represented scores of LGBT people and people living with HIV who have been profoundly harmed by discrimination in access to healthcare by hospitals, healthcare providers, and insurers. In addition to litigation, GLAD advocates for sound public health policies that will end the HIV epidemic as well as comprehensive reforms to eliminate health disparities experienced by LGBT people, which include higher rates of depression, suicide attempts, substance abuse, HIV/AIDS, and breast cancer.

GLAD strongly opposes the above-referenced proposed regulation (hereinafter, the “Proposed Regulation”) that would eliminate existing critical protections for LGBT people, especially transgender people, and people living with HIV. Our nation has a long and shameful history of discrimination on the basis of an individual’s sexual orientation or gender identity, including in healthcare. While lesbian, gay, and bisexual people have frequently been refused medical care based on the view that their sexual orientation is pathological or immoral, transgender people have been subjected to particularly pernicious discrimination across all sectors of the healthcare industry. For many years, healthcare providers and insurers refused to recognize gender dysphoria as a valid medical condition and improperly categorized medically necessary treatment, including hormone therapy and gender affirming surgeries, as cosmetic or experimental. This shocking lack of access to medical care resulted in profound debilitation and suffering.

Today, there is a consensus in the medical community that gender dysphoria is a legitimate medical condition that requires appropriate treatment. The standards of care for its treatment are well-established and endorsed by authoritative professional organizations. See World Prof. Ass'n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* (7th edition, 2011); Am. Med. Ass'n House of Delegates, *Removing Financial Barriers to Care for Transgender People* (2008); Am. Psychiatric Ass'n, *Position Statement on Access to Care for Transgender and Gender Diverse Individuals* (2008). Nonetheless, discrimination based on deeply entrenched myths, fears, and stereotypes persists.

In 2016, the Department of Health and Human Services (HHS) enacted a regulation implementing the nondiscrimination protections in Section 1557 of the Affordable Care Act (ACA) (hereinafter, "the 2016 Regulation"). 45 C.F.R. § 92 (2019). The 2016 Regulation, among other things, defined the ACA's prohibition on sex discrimination¹ to include gender identity, transgender status, and sex stereotyping; required healthcare entities to treat individuals consistent with their gender identity; prohibited insurance exclusions of gender affirming care; prohibited insurers from imposing limits on health services for transgender persons for services regularly offered to non-transgender persons; and imposed restrictions on cost-sharing and discriminatory plan benefit designs. 45 C.F.R. §§ 92.4, 92.206, 92.207(b)(3)-(5) (2019).

HHS now proposes to eliminate these critical, and indeed lifesaving, regulatory provisions. The Proposed Regulation is contrary to established medical standards and legal precedents. It has no purpose other than to stigmatize and harm vulnerable populations, including LGBT people and people with HIV, who continue to face intolerable barriers to healthcare.

Although the repeal of the 2016 Regulation would impede access to healthcare in a wide range of areas (e.g., reproductive health), GLAD focuses its comments here on four points:

(1) The removal of the definition of sex is unwarranted and contrary to the language of the ACA. The elimination of this definition and the other provisions prohibiting discrimination against transgender people will create confusion and misinformation about the rights of transgender people to nondiscrimination in healthcare at both the federal and state levels.

(2) Section 1557 and its implementing regulation have been critical to the significant improvements in access to healthcare for transgender people. Nevertheless, GLAD's cases and calls to its GLAD Answers legal information hotline demonstrate that

¹ Section 1557 of the ACA incorporated protections by reference from existing civil rights laws, including Title IX of the Education Amendments Act of 1964, which prohibits sex discrimination in federally funded education programs and activities. See 42 U.S.C. § 18116.

discrimination against transgender people in healthcare persists. The repeal of the nondiscrimination provisions in the Proposed Regulation will exacerbate this problem.

(3) The Proposed regulation's loosening of translation requirements for LEP (Limited English Proficiency) individuals will impair access to healthcare for the most vulnerable and lead to increased healthcare discrimination based on national origin.

(4) The Proposed Regulation will make it easier for insurers to erect unacceptable barriers to the HIV medications that not only have transformed HIV into a manageable disease, but also prevent transmission to others. This is in direct contradiction to HHS's purported goal of ending the HIV epidemic.

1. The Repeal of the Definition of Sex is Unwarranted, Contrary to the ACA's Text, and Will Result in Confusion and Misinformation About Nondiscrimination Obligations.

The prohibition of sex discrimination incorporated by Congress from Title IX into the text of the ACA plainly includes discrimination due to gender identity or transgender status. One recent court decision interpreting Section 1557 of the ACA explained why this conclusion is “[f]acially” correct. *See Flack v. Wis. Dept. of Health Servs.*, 328 F. Supp. 3d 931, 946 (W.D. Wis. 2018) (enjoining Wisconsin Medicaid's exclusion of gender affirming care). Addressing the sex discrimination inherent in the exclusion of gender affirming surgery, the Court reasoned that:

[I]f a natal female were born without a vagina, she could have surgery to create one, which would be covered by Wisconsin Medicaid if deemed medically necessary. However, a natal male suffering from gender dysphoria would be denied the same medically necessary procedure because of her sex. Likewise, if a natal male were in a car accident and required a phalloplasty, that surgery would be covered if deemed medically necessary. However, a natal female seeking that same medically necessary procedure for gender dysphoria would be denied because of his sex.

Id. at 948. The Court concluded that the plaintiffs have “been denied coverage because of their natal sex, which would appear to be a straightforward case of sex discrimination.” *Id.* at 948.

In fact, the determination that sex discrimination under Title IX and Section 1557 of the ACA includes discrimination on the basis of gender identity and transgender status has been near-universal among the courts. *See, e.g., Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017); *Dodds v. U.S. Dept. of Educ.*, 845 F.3d 217 (6th Cir. 2016); *Tovar v. Essentia Health*, 342 F. Supp. 3d 947 (D. Minn, 2018); *Boyden v. Conlin*, 341 F.

Supp. 3d 979 (W.D. Dis. 2018); *Adams v. Sch. Bd.*, 318 F. Supp. 3d 1293 (M.D. Fla. 2018); *M.A.B. v. Bd. of Educ.*, 286 F. Supp. 3d 704 (D. Md. 2018); *A.H. ex rel. Handling v. Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321 (M.D. Pa. 2017); *Prescott v. Rady Children’s Hospital-San Diego*, 265 F. Supp. 3d 1090 (S.D. Cal. 2017); *Bd. of Ed. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850 (S.D. Ohio 2016); *Cruz v. Zucker*, 195 F. Supp. 3d 554 (S.D.N.Y. 2016); *Rumble v. Fairview Health Servs.*, 2015 U.S. Dist. LEXIS 31591 (D. Minn, 2015).²

The Proposed Regulation cannot alter the meaning of sex in either Title IX or the ACA. The federal government, however, speaks with a powerful and far reaching voice. The removal of the definition of sex that includes gender identity and transgender status will lead to confusion and misinformation about the scope and meaning of nondiscrimination protections for transgender people in healthcare. Healthcare providers, hospitals, and insurers, perceiving a weakening of protections, may now falsely believe that they are safe from legal recourse when they discriminate against transgender people. By the same token, given the history of pervasive discrimination, transgender people will be more likely to avoid healthcare – both for treatment of gender dysphoria as well as for basic medical care unrelated to gender dysphoria – due to fears of exclusion and stigmatization.

The likely confusion and misinformation emanating from the Proposed Regulation is not limited to the ACA. In recent years, 19 states and the District of Columbia have issued directives aimed at ensuring access to healthcare for transgender people. In GLAD’s region, Massachusetts, Connecticut, Rhode Island, and Vermont have issued directives, including based on state sex anti-discrimination protections, prohibiting insurers and state Medicaid agencies from discriminating against transgender beneficiaries.³ The Proposed Regulation risks reversing state insurance commission decisions that have been pivotal in providing comprehensive healthcare coverage for transgender people.

² Two legal developments are notable with respect to the precedent under Title IX: First, the Proposed Regulation cites to *Franciscan Alliance v. Azar*, 227 F. Supp. 3d 660 (N.D. Tex. 2016), as a reason to revoke portions of the 2016 Regulation. That decision found that the definition of sex in Title IX and the ACA refers only to the biological differences between males and females and enjoined enforcement of the relevant portions of the 2016 Regulation. *Id.* at 696. Simply, the *Franciscan Alliance* decision is wrong. It is an outlier among the vast precedent to the contrary. That decision has not been subjected to appellate review and did not require HHS to revise the 2016 Regulation. Second, the Supreme Court has granted certiorari in three cases that raise the question whether the term “sex” in Title VII of the Civil Rights Act of 1964 includes discrimination on the basis of sexual orientation or gender identity. The Court’s ruling in those cases may well be informative, but not dispositive, with respect to the scope of Title IX’s protections.

³ See Div. of Insurance, Massachusetts Office of Consumer Affairs & Business Regulation, Bull. No. 2014-03, Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity or Gender Dysphoria Including Medically Necessary Transgender Surgery and Related Health Care Services (2014).; Conn. Ins. Dep’t, Bull. No. IC-37, Gender Identity Nondiscrimination Requirements (2013); R.I. Health Ins. Comm’n, Health Bull. 2015-3, Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity or Expression (2015); Vt. Dep’t of Fin. Reg., Div. of Ins., Bull. No. 174, Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity Including Medically Necessary Gender Dysphoria Surgery and Related Health Care (2013).

In sum, the removal of the definition of sex in the Proposed Regulation will sow misinformation and increase discrimination.

2. GLAD’s Clients and Callers Demonstrate That Discrimination Against Transgender People in Access to Healthcare Persists and Will Worsen Under the Proposed Regulation.

Transgender people experience significant discrimination in access to healthcare. The United States Transgender Survey found that one-third of transgender people who saw a healthcare provider in the past year reported having at least one negative experience related to being transgender, including being refused treatment. S. E. James et al., *The Report of the 2015 U.S. Transgender Survey* (2016). One-quarter reported insurance problems such as being denied coverage for care related to gender transition: more than 55% of respondents who sought coverage for transition-related surgery were denied, while 25% who sought coverage for hormones for surgery were denied. *Id.* at 95.

The 2016 Regulation has powerfully expanded access to healthcare for transgender people, including leading to the elimination of categorical exclusions of gender affirming care in many private insurance and state Medicaid plans. But discrimination and barriers to healthcare for transgender people have not been relegated to history. GLAD’s experiences with its clients and callers to its GLAD Answers legal information hotline demonstrate that while there has been improvement since the 2016 Regulation, problems with access to healthcare continue. The examples below illustrate problems GLAD hears about regularly.

Categorical Exclusion of Gender Affirming Medical Treatment.

In 2019, GLAD filed a complaint at the Massachusetts Commission Against Discrimination against Ascend Hospice and Aetna Insurance on behalf of a transgender man who was diagnosed with gender dysphoria and sought medically necessary gender affirming surgery. Our client was denied this treatment because his policy had a blanket exclusion for “[a]ny treatment, drug, service or supply related to changing sex or sexual characteristics.” *Pangborn v. Ascend*, <https://www.glad.org/cases/pangborn-v-ascend/> (last visited Aug. 8, 2019).

Discrimination in Access to Behavioral Health

In 2017, GLAD Answers was contacted by a transgender woman in Massachusetts in need of inpatient psychiatric care for a condition unrelated to gender dysphoria. The hospital had a discriminatory policy of refusing to place transgender patients in double occupancy rooms as they do for all patients. The client was significantly delayed in getting medical care due to the unavailability of a single room, which exacerbated her condition.

Denial and Delay in Access to Medically Necessary Hormone Therapy

In 2018, GLAD Answers heard from a transgender man whose insurer determined that his medically necessary hormone therapy was considered “off label” because he was transitioning from female to male. While this man’s situation was eventually resolved, many people in a similar situation would not have had the resources to address this type of ignorance and discrimination.

Denial of Medically Necessary Surgery

In 2018, a transgender man in Maine called GLAD Answers to report that he was denied a hysterectomy. The doctor cited his personal beliefs and said that this care was not a “choice” he could participate in.

Denial of Gender Affirming Surgery

In 2018, GLAD Answers was contacted by a transgender woman in Connecticut whose therapist determined that she needed facial feminization surgery to alleviate significant symptoms of gender dysphoria. In spite of the documented medical necessity, her insurer denied coverage for the procedure.

The Proposed Regulation will engender increased barriers to healthcare for transgender people. This will harm individuals and increase healthcare costs across the board. The physical and mental harms that flow from the denial of medically necessary transition-related care far outweigh the cost of providing appropriate medical care. For example, a 2012 economic impact study in California found that transgender insureds who have access to treatment see significant decreases in suicidal ideation, depression, anxiety, substance abuse, and other harms that come with significant cost to the healthcare system. Cal. Div. of Ins., REG-2011-00023, Economic Impact Assessment: Gender Nondiscrimination in Health Insurance (2012).

In sum, the Proposed Regulation is contrary to current medical and scientific knowledge, will increase discrimination, and will result in cost increases, not savings, to the healthcare system.⁴

3. The Proposed Regulation Will Result in Healthcare Denials to People With Limited English Proficiency.

⁴ While GLAD’s comments have focused on harm to transgender individuals, it should be noted that the 2016 Regulation also provided some protection from discrimination on the basis of sexual orientation by prohibiting discrimination based on sex stereotyping. *See* 45 C.F.R. § 92.4 (2019). Here, GLAD also notes its strong objection to the Proposed Regulation’s removal of prohibitions on both gender identity and sexual orientation nondiscrimination provisions in other 10 other regulations that apply to Medicaid and private insurance.

The Proposed Regulation significantly weakens protections for individuals who are LEP (Limited English Proficiency). The 2016 Regulation contained a variety of requirements that hospitals and healthcare providers take reasonable steps to provide access to individuals with limited English language skills. These included translation services, access to interpreters, and taglines on significant documents. 45 C.F.R. §§ 92.4, 92.8 (2019). The Proposed Regulation removes a requirement that covered entities provide meaningful access to “each individual” with LEP and replaces it with a more general reference. It also relaxes the test used to determine when a covered entity must provide language access services.

The Proposed Regulation will result in outright denials of care to the millions of Americans who speak a language other than English or who have Limited English Proficiency, including older Americans who did not grow up in the United States. Research demonstrates that LEP individuals have a higher risk of adverse medical events than English-speaking patients, have longer hospital stays when professional interpreters are not used at admission, have a greater risk of surgical delays due to difficulty understanding preparation instructions, and have greater difficulty managing medications. The Joint Comm’n, Div. of Health Care Improvement, *Overcoming the Challenges of Providing Care to LEP Patients*, Quick Safety (May 2015).

Nothing is more shameful than deliberately impeding healthcare for this vulnerable population. The Proposed Regulation will, in fact, result in pervasive discrimination on the basis of national origin.

4. The Proposed Regulation Will Harm Care for HIV and Undermine Efforts to End the HIV Epidemic.

The 2016 Regulation prohibited discrimination, including on the basis of disability, in insurance coverage, benefit design, and cost-sharing. *See* 45 C.F.R. § 92.207 (b)(2) (2019). The Proposed Regulation eliminates these protections.

Over the course of the HIV epidemic, insurers have regularly set up barriers to lifesaving care for people with HIV. These have included higher premiums, coverage refusals, limitations on lifetime benefits for people with HIV, and exorbitant copays for medications. The elimination of nondiscrimination in benefit design and cost-sharing will make it easier for insurers to resurrect these barriers.

Today, antiretroviral medications have transformed HIV into a manageable chronic disease that no longer leads to debilitation or death. Public health authorities, including the CDC, also agree that if a patient adheres to HIV medications and has an undetectable viral load, HIV cannot be transmitted to another person. Ctrs. for Disease Control & Prevention, *HIV Treatment as Prevention* (July 22, 2019), <https://www.cdc.gov/hiv/risk/art/>. Yet, the Proposed Regulation would make it easier

for insurers to place HIV medications in the highest cost sharing tier and make it harder for patients to seek recourse when that occurs.

We cannot end the HIV epidemic if our government erects barriers to treatments for HIV.

In conclusion, the Proposed Regulation guts significant protections that have advanced access to healthcare for LGBT people and people living with HIV. This regulation is unwarranted, inconsistent with established law, contrary to sound medical practice, and will result in increased discrimination and harm. GLAD strongly opposes the finalization of the Proposed Regulation.

Sincerely,



Jennifer Levi
Transgender Rights Project
Director



Bennett Klein
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Director