

CALLEN-LORDE

August 7, 2019

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

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

On behalf of Callen-Lorde Community Health Center (Callen-Lorde), we submit these comments to the federal Department of Health and Human Services (“Department”) in **vehement opposition to the proposed rule entitled “Nondiscrimination in Health and Health Education Programs or Activities” and we urge HHS to withdraw it.**

Callen-Lorde is a federally qualified health center (FQHC) with three locations in New York City and a mission to serve lesbian, gay, bisexual and transgender communities and people living with HIV in addition to its geographic service areas. As a community-based health center, Callen-Lorde is open to all regardless of ability to pay. Callen-Lorde provides primary care, dental care, behavioral health care, care coordination and case management, as well as health education services, and its current primary care patient base nearly 18,000 people, approximately 25 percent of whom are patients of transgender or gender non-binary experience and 20% of whom are people living with HIV.

Callen-Lorde Community Health Center opposes the proposed rule. If finalized, this proposed rule would severely threaten LGBT patients’ access to all forms of health care, create confusion among patients and providers about their rights and obligations, and promote discrimination. The proposed rule would encourage hospitals to deny care to LGBT people, and enable insurance companies to deny transgender people coverage for health care services that they cover for non-transgender people. The rule would also make it harder for other people experiencing discrimination in health care to know and exercise their rights, including people with Limited English Proficiency (LEP) and people suffering from chronic health conditions, like HIV. Callen-Lorde urges the Department of Health and Human Services (HHS) to withdraw the proposed rule.

The proposed rule will threaten LGBT patients’ access to health care and coverage

Most important, the regulations fail to account for the significant burden that will be imposed on patients, a burden that will fall disproportionately and most harshly on women, people of color, people living with disabilities, and Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) individuals. These communities already experience severe health disparities and discrimination, conditions that will be exacerbated by the proposed rule, possibly ending in in poorer health outcomes.

The proposed rule will compound the barriers to care that LGBTQ individuals face, particularly the effects of ongoing and pervasive discrimination by potentially allowing providers to refuse to provide services and information vital to LGBTQ health.

LGBTQ people continue to face discrimination in many areas of their lives, including health care, on the basis of their sexual orientation and gender identity. The Department’s Healthy People 2020 initiative recognizes, “LGBT individuals face health disparities linked to societal stigma, discrimination, and denial of

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their civil and human rights.”¹ LGBTQ people still face discrimination in a wide variety of services affecting access to health care, including reproductive services, adoption and foster care services, child care, homeless shelters, and transportation services – as well as physical and mental health care services.² In a recent study published in *Health Affairs*, researchers examined the intersection of gender identity, sexual orientation, race, and economic factors in health care access.³ They concluded that discrimination as well as insensitivity or disrespect on the part of health care providers were key barriers to health care access and that increasing efforts to provide culturally sensitive services would help close the gaps in health care access.⁴

a. Discrimination against the transgender community

Discrimination based on gender identity, gender expression, gender transition, transgender status, or sex-based stereotypes is necessarily a form of sex discrimination.⁵ Numerous federal courts have found that federal sex discrimination statutes reach these forms of gender-based discrimination.⁶ In 2012, the Equal Employment Opportunity Commission (EEOC) likewise held that “intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination based on sex and such discrimination therefore violates Title VII.”⁷

Twenty-nine percent of transgender individuals were refused to be seen by a health care provider on the basis of their perceived or actual gender identity and 29 percent experienced unwanted physical contact from a health care provider.⁸ Additionally, the 2015 U.S. Transgender Survey found that 23 percent

¹ *Healthy People 2020, Lesbian, Gay, Bisexual, and Transgender Health*, U.S. DEPT. HEALTH & HUMAN SERV., <https://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health>, (last accessed on Mar. 8, 2018).

² HUMAN RIGHTS WATCH, *All We want is Equality: Religious Exemptions and Discrimination against LGBT People in the United States*, (Feb. 2018), <https://www.hrw.org/report/2018/02/19/all-we-want-equality/religious-exemptions-and-discrimination-against-lgbt-people>.

³ Ning Hsieh and Matt Ruther, *HEALTH AFFAIRS, Despite Increased Insurance Coverage, Nonwhite Sexual Minorities Still Experience Disparities In Access To Care* (Oct. 2017) 1786–1794.

⁴ *Id.*

⁵ See, e.g., *EEOC v. R.G. & G.R. Harris Funeral Homes*, No. 16-2424 (6th Cir. Mar. 7, 2018); *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017) (Title IX and Equal Protection Clause); *Doddsv. U.S. Dep’t of Educ.*, 845 F.3d 217 (6th Cir. 2016) (Title IX and Equal Protection Clause); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (Title VII of the 1964 Civil Rights Act); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (Title VII); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (Equal Credit Opportunity Act); *A.H. ex rel. Handling v. Minersville Area School District*, 3:17-CV-391, 2017 WL 5632662 (M.D. Pa. Nov. 22, 2017) (Title IX and Equal Protection Clause); *Stone v. Trump*, ---F.Supp.3d ---, No. 17-2459 (D. Md. Nov. 21, 2017) (Equal Protection Clause); *Doe v. Trump*, ---F.Supp.3d ---, 2017 WL 4873042 (D.D.C. Oct. 30, 2017) (Equal Protection Clause); *Prescott v. Rady Children’s Hospital-San Diego*, ---F.Supp.3d ---, 2017 WL 4310756 (S.D. Cal. Sept. 27, 2017) (Section 1557); *E.E.O.C. v. Rent-a-Center East, Inc.*, ---F.Supp.3d ---, 2017 WL 4021130 (C.D. Ill. Sept. 8, 2017) (Title VII); *Brown v. Dept. of Health and Hum. Serv.*, No. 8:16DCV569, 2017 WL 2414567 (D. Neb. June 2, 2017) (Equal Protection Clause); *Smith v. Avanti*, 249 F.Supp.3d 1194 (D. Colo. 2017) (Fair Housing Act); *Students & Parents for Privacy v. U.S. Dep’t of Educ.*, No. 16-cv-4945, 2016 WL 6134121 (N.D. Ill. Oct. 18, 2016) (Title IX); *Mickens v. Gen. Elec. Co.* No. 16-603, 2016 WL 7015665 (W.D. Ky. Nov. 29, 2016) (Title VII); *Fabian v. Hosp. of Cent. Conn.*, 172 F.Supp.3d 509 (D. Conn. 2016) (Title VII); *Cruz v. Zucker*, 195 F.Supp.3d 554 (S.D.N.Y. Jul. 5, 2016) (Section 1557); *Doe v. State of Ariz.*, No. CV-15-02399-PHX-DGC, 2016 WL 1089743 (D. Ariz. Mar. 21, 2016) (Title VII); *Dawson v. H&H Elec., Inc.*, No. 4:14CV00583 SWW, 2015 WL 5437101 (E.D. Ark. Sept. 15, 2015) (Title VII); *U.S. v. S.E. Okla. State Univ.*, No. CIV-15-324-C, 2015 WL 4606079 (W.D. Okla. 2015) (Title VII); *Rumble v. Fairview Health Serv.*, No. 14-cv-2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015) (Section 1557); *Finkle v. Howard Cty.*, 12 F.Supp.3d 780 (D. Md. 2014) (Title VII); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (Title VII); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F.Supp.2d 653 (S.D. Tex. 2008) (Title VII); *Mitchell v. Axcan Scandipharm, Inc.*, No. Civ.A. 05-243, 2006 WL 456173 (W.D. Pa. 2006) (Title VII); *Tronettiv. Healthnet Lakeshore Hosp.*, No. 03-CV-0375E, 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003) (Title VII).

⁶ See, e.g., *Smith v. City of Salem*, 378 F.3d 566, 572-75 (6th Cir. 2004); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000) (Equal Credit Opportunity Act); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (Gender Motivated Violence Act). See also Statement of Interest of the United States at 14, *Jamal v. Saks*, No. 4:14-cv-02782 (S.D. Tex. Jan. 26, 2015).

⁷ *Macy v. Holder*, E.E.O.C. App. No. 0120120821, 2012 WL 1435995, *12 (Apr. 20, 2012).

⁸ Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care*, CTR. FOR AMERICAN PROGRESS, (Jan. 18, 2018),

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

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respondents did not see a provider for needed health care because of fears of mistreatment or discrimination.⁹

Callen-Lorde's very existence is a response to provider and systemic discrimination in healthcare as experienced by LGBTQ individuals and communities. So profound was the need for non-judgmental, quality primary care for LGBTQ populations, that we created our own center. Now, nearly 50 years later – when so many human and civil rights advances having been made – LGB and TGNB people still are being mistreated by providers. Sadly, Callen-Lorde's capacity to serve its communities is consistently being stretched. We firmly believe that the care we provide should be the norm and that true liberation will only come when the LGBTQ community and our families can adequately access culturally competent and comprehensive health care in all forms.

In 2018, Callen-Lorde administered a short on-line survey to its patients, staff and community members. The survey confirmed what we know already: **LGB and TBNB individuals still face discrimination in health care and are denied care as a result.** We surveyed 58 individuals ranging in age from 22- 83 years old and more than 20 percent of respondents indicated that they either may have – or were – denied care by a provider because of the provider's religious or moral objections.

A select few of the written testimonies pulled from the survey are included in these comments.

Testimonies of Transgender Discrimination

Kyle, 22-year-old transgender man and Callen-Lorde staff person stated: ***"I have had psychiatrists refuse to see me because they are uncomfortable with my gender identity and transition. I also had a primary care provider who delayed referral to transition specialists for the same reason. It was very distressing to have my transition delayed and feel like my provider isn't there to help me progress. The psychiatrist denying care makes me worried about mental health professionals more generally and have to be very careful when seeking mental health services. As a person of transgender experience, if I saw signs up in health practices notifying patients of their ability to discriminate if they choose, I would be very hesitant to return. I would feel like I had no protection and a chance of not receiving adequate healthcare."***

Aaron, a, 29 transgender man and patient of Callen-Lorde stated: ***"Where I grew up I could not find a provider to prescribe me hormones and during high school I was sent for a psych ER visit for suicidal ideation. One of the clinicians refused to see me and none of the hospital staff knew what transgender was. This was in 2005 in rural New Jersey. I did not receive treatment for my gender dysphoria and depression for many years because there were no providers who would work with me."***

Anonymous, 25 gender non-conforming person, stated: ***"Doctors would either completely avoid my gender or would tell me they didn't "understand it" and to go find a place that does. I was scared by that and never followed up on a different doctor until much later. Freedom of Speech doesn't mean freedom to oppress or discriminate."***

[people-accessing-health-care/?link_id=2&can_id=d90c309ac9b5a0fa50d294d0b1cdf0b2&source=email-rx-for-discrimination&email_referrer=&email_subject=rx-for-discrimination](https://www.callenlorde.org/people-accessing-health-care/?link_id=2&can_id=d90c309ac9b5a0fa50d294d0b1cdf0b2&source=email-rx-for-discrimination&email_referrer=&email_subject=rx-for-discrimination).

⁹ NAT'L CTR. FOR TRANSGENDER EQUALITY, *The Report of the 2015 U.S. Transgender Survey 5* (2016), available at <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [hereinafter 2015 U.S. Transgender Survey].

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The 2016 implementing rule is sound, has been crucial for LGBT patients to be able to access the care that they need, and promotes equal access to medically necessary health services.

Callen-Lorde also opposes proposed changes to roll back other, long-standing rules that prohibit discrimination on the basis of gender identity and sexual orientation.¹⁰ These changes are outside of the Office for Civil Rights' jurisdiction and are unrelated to Section 1557 of the ACA.”

It is not appropriate for these rulemakings to be combined, and it is arbitrary and capricious for HHS to characterize them as “conforming amendments” without offering any legal, policy or cost-benefit analysis about them and their impacts on various CMS programs. In particular, HHS offers no analysis of the impact these regulations have had during the years—in some cases over a decade—that they have been in effect or the impact of changing them now.”

Section 1557 of the Affordable Care Act and the 2016 implementing rule provided many LGBT people with meaningful health care options where they previously had few or none at all, have helped address the pervasive discrimination LGBT people often face in health care and coverage, and have made it possible for many transgender and non-transgender people alike to access essential care. And, overall, New York State citizens have benefited from the Affordable Care Act and its own New York State of Health Marketplace.

New York State saw record ‘Obamacare’ enrollment last year. Nearly 272,000 people enrolled in private health insurance plans through New York State of Health, the exchange created by the Affordable Care Act, up from 253,000 at the end of last year’s open enrollment period. The state’s basic health program, which offers insurance to low-income New Yorkers who do not qualify for Medicaid, enrolled more than 790,000 people, up from 739,000 one year ago.

The state also reported that nearly 114,000 people purchased an insurance plan without any federal subsidies, up about 10 percent from last year, despite average monthly premiums increasing roughly 9 percent this year.

New York’s strong showing comes the week after California — the only state larger than New York to run its own exchange — reported a 0.5 percent drop in enrollment, blaming the disappointing figures on Republicans’ repeal of the individual mandate penalty. It is suspected the lack of the mandate penalty is one of several factors that contributed to enrollment falling 4 percent on healthcare.gov, the federal exchange that manages enrollment for 39 states.¹¹

New York also has a long Open Enrollment period, and is the only state to extend its open enrollment period through January.

In New York State, we have also worked hard to put regulations and laws in place to prevent discrimination in healthcare. This proposed rule will cause confusion for providers and patients about people’s rights under state and federal law, and how it could dissuade people from seeking care despite the state-level protections remaining clearly in place.

¹⁰ These are: 45 CFR 155.120(c)(1)(ii) and 155.220(j)(2), 45 CFR 147.104(e), 45 CFR 156.200(e) and 156.1230(b)(3), 42 CFR 460.98(b)(3) and 460.112(a), 42 CFR 438.3(d)(4), 438.206(c)(2), and 440.262.

¹¹ *Obamacare enrollment sets record in New York*, Dan Goldberg, Politico Pro, February 4, 2019.

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The proposed rule will impede health care access for people with HIV/AIDS and other serious or chronic conditions.

Section 1557 and the 2016 implementing regulations prohibit health insurance companies from discriminating through marketing practices and benefit design. These protections are especially important for people with HIV/AIDS or other serious/chronic condition. The proposed rule seeks to exempt most health insurance plans from Section 1557's nondiscrimination protections and eliminate the regulation prohibiting discriminatory benefit design and marketing, which could result in health insurers excluding benefits or designing their prescription drug formularies in a way that limits access to medically necessary care for those living with HIV and other chronic conditions.

The proposed rule will make it much harder for people to understand their legal rights and will disproportionately harm LGBT people who are limited English proficient (LEP), or who need access to reproductive care.

The proposed rule will make it more challenging for LGBT patients—including LGBT, people who are also limited English proficient (LEP) or have LEP family members—to understand their health care rights under federal law. Many individuals may not know about their rights, how to request language services, or how to file a complaint if they face discrimination. By eliminating tagline requirements and notice standards, the proposed rule will undermine access to health care, health insurance, and legal redress for vulnerable communities.

Conclusion

For all the reason stated above, Callen-Lorde Community Health Center opposes this proposed rule. If finalized, this proposed rule would severely threaten LGBT patients' access to all forms of health care, create confusion among patients and providers about their rights and obligations, and promote discrimination. The proposed rule would encourage hospitals to deny care to LGBT people, and enable insurance companies to deny transgender people coverage for health care services that they cover for non-transgender people. The rule would also make it harder for other people experiencing discrimination in health care to know and exercise their rights, including people with Limited English Proficiency (LEP) and people suffering from chronic health conditions, like HIV. Callen-Lorde urges the Department of Health and Human Services (HHS) to withdraw the proposed rule.

Thank you for the opportunity to comment. Please feel free to contact us directly with any questions or comments.

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