

## OIRA/OMB meeting 10/18 – Nondiscrimination in health programs and activities

Since our May meeting, we have continued to see the life-changing and life-saving impact that Section 1557's protections have had on the lives of transgender Americans. These developments have continued to demonstrate how HHS's 2016 rule is **legally, medically, and economically sound and protects fundamental fairness.**

### Legal developments

- Courts have continued to find that the plain language of Section 1557 protects transgender people from discrimination in health care, and ordered state and private health plans and the Medicaid program to provide health care without discrimination to transgender consumers, employees and beneficiaries.
  - **Flack v. Wisconsin Department of Health Services**  
On July 25th a federal district court ruled that Wisconsin's Medicaid program exclusion of coverage for transition-related care constitutes "text-book discrimination based on sex" under Section 1557 of the Affordable Care Act and the Equal Protection Clause of the Constitution. The court issued a preliminary injunction ordering the state to cover this care for the two transgender plaintiffs (Flack v. Wisconsin Department of Health Services, 18-cv-309, 2018 WL 3574875 (W.D. Wis. Jul. 25, 2018)).

*"Indeed, the Seventh Circuit further concluded in Whitaker that a policy subjecting a transgender student -- because he was transgender -- "to different rules, sanctions, and treatment [compared to] non-transgender students" violated the prohibition against sex discrimination under Title IX. ... This is what the Challenged Exclusion does as well: it creates a different rule governing the medical treatment of transgender people. Specifically, Wisconsin Medicaid covers medically necessary treatment for other health conditions, yet the Challenged Exclusion expressly singles out and bars a medically necessary treatment solely for transgender people suffering from gender dysphoria. In fact, by excluding "transsexual surgery" from coverage, the Challenged Exclusion directly singles out a Medicaid claimant's transgender status as the basis for denying medical treatment. ... This is text-book discrimination based on sex."*

- **Boyden v. Conlin**  
On September 18th a federal court held that Wisconsin's state employee plan refusal to cover transition-related care constitutes sex discrimination in violation of Title VII, Section 1557 of the ACA, and the Equal Protection Clause (Boyden v. Conlin, No. 17-cv264-WMC, 2018 (W.D. Wis. September 18, 2018)). In October, a jury awarded the two transgender plaintiffs in this case \$780,000 as restitution for the discrimination they suffered and costs incurred. Wisconsin subsequently removed the exclusion in its state employee plan.

*"[T]he exclusion at issue here 'denies coverage for medically necessary surgical procedures based on a patient's natal sex... As such, this is a 'straightforward case of sex discrimination.'"*

- **Tovar v. Essentia**

On September 20th, a federal court found that a health care plan and its third-party administrator discriminated on the basis of sex by excluding coverage for health services related to gender dysphoria, in violation Section 1557 of the ACA's plain language protections against discrimination based on transgender status (Tovar v. Essentia Health, No. 16-cv-00100-DWF-LIB (D. Minn. September 20, 2018)).

*"Here, the Court's conclusion that Section 1557 prohibits discrimination based on gender identity relies solely on the plain, unambiguous language of the statute. The Court does not base its decision on the constitutionality of the DHHS regulation at issue in Franciscan Alliance."*

- Federal courts have also continued to find that anti-transgender bias constitutes sex discrimination under Title VII, Title IX and the Equal Protection Clause
  - EEOC v. A&E Tire, No. 1:17-cv-02362 (D. Colo. Sept. 5, 2018) (holding that an employer that denied an applicant a job because he was transgender likely violated Title VII).
  - Adams v. Sch. Bd. of St. Johns Cty., 318 F.Supp.3d 1293 (M.D. Fla. Jul. 26, 2018) (holding that excluding transgender student from school restrooms consistent with his gender identity constituted sex discrimination).
  - Grimm v. Gloucester Cty. Sch. Bd., 302 F.Supp.3d 730 (E.D. Va. May 22, 2018) (same).
  - Doe v. Massachusetts Dept. of Correction, et al., No. CV 17-12255-RGS (D. Mass. June 14, 2018) ("where a State creates a classification based on transgender status, the classification is tantamount to discrimination based on sex").
- New Mexico's Superintendent of Insurance joined 19 other insurance commissioners in releasing a bulletin outlining carriers' obligation to avoid discrimination against transgender consumers under federal and state laws, including Section 1557.
- Washington state's Insurance Commissioner issued an agreement with Kaiser Permanente after finding the carriers' practice to institute blanket exclusions on certain procedures for transition-related care to violate federal and state laws, including Section 1557.

## Medical developments

- This month, the American Academy of Pediatrics became the latest professional medical association to adopt an official position statement calling for equal access to health care for transgender patients. Their position statement recommends that:
  - Patients have access to care in safe and inclusive spaces,
  - Patients be treated according to their gender identity, including in records, and
  - Insurance plans offer equal coverage, including for transition-related care.
- The AAP joins the American Medical Association, American Psychiatric Association, American Psychological Association, the Endocrine Society, the National Association of Social Workers, the American Academy of Family Physicians, the American College of Obstetricians and Gynecologists, and others in supporting nondiscriminatory access and coverage for transgender people in health care.

## Economic and social developments

- On August 22, the Wisconsin Group Insurance Board voted to remove its exclusion of transition-related care. The vote happened shortly before the court decision in *Boyden* finding its exclusion to violate Section 1557's sex discrimination provisions.
  - The decision was informed by a memorandum noting the developments in the "legal landscape regarding transgender health care" and in employer coverage since the initial 2016 decision to reinstate the exclusion.
  - The memo also outlined the low costs of providing nondiscriminatory coverage for transgender employees, which were estimated to be between 0.007% and 0.018% of the \$1.3 billion in state health plan premiums.
- Other public employers have similarly removed exclusions. For example, in the past five months cities such as Baltimore and Houston started providing nondiscriminatory coverage for their transgender employees.

## Administrative Procedure Act

- We reiterate the request that **OMB ensure that the rule provides an adequate Regulatory Impact Analysis** (per EOs 12866 and 13563) or assessment of costs and benefits, that substantially addresses the potential harms to transgender patients that would result from increase in discriminatory practices.
  - This analysis should take into consideration the impact to those who will not be able to access or will avoid accessing health care due to discrimination, as well as the substantial increase in potential litigation around Section 1557 as a result of a rule that would go against dozens of federal court rulings, including the recent rulings on Section 1557's statutory protections for transgender people
  - By creating confusion among patients, providers, and insurers who have already changed and their practices to abide by the 2016 rule; proposing changes contrary to dozens of court rulings; and likely leading to increased litigation, this proposed rule will not meet the goal of reducing regulatory burdens or "imposing the least burden on society."
- In light of recent actions and statements by administration officials concerning nationwide injunctions, we are concerned that the administration appears to have one approach to nationwide injunctions that would *protect* the rights of transgender people, and another approach to nationwide injunctions that *undermine* the rights of that same population of Americans. **This disparity in responses to nationwide injunctions on federal policies concerning transgender people raises further questions about this rule under the APA.**
  - In the former context, the administration has used every possible litigation tactic to resist the rulings even when all courts are in agreement.
  - In the present context, the administration has chosen to abandon a duly adopted rule based on one outlier ruling that conflicts with dozens of others.