



May 15, 2020

BY ELECTRONIC SUBMISSION

The Honorable Paul Ray
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
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**Re: Nondiscrimination in Health and Health Education
Programs or Activities (Section 1557 NPRM), RIN
0945-AA11**

Dear Administrator Ray:

The Transgender Legal Defense & Education Fund (TLDEF) is a 501(c)(3) nonprofit whose mission is to end discrimination and achieve equality for transgender and non-binary people, particularly those in our most vulnerable communities. We provide legal representation to transgender individuals who have been subject to discrimination, focusing on the key issues of employment, education, public accommodations, and healthcare. We also provide public education on transgender rights.

TLDEF appreciates the opportunity to meet regarding the Notice of Proposed Rulemaking Regarding Nondiscrimination in Health Programs and Activities under Section 1557 of the Patient Protection and Affordable Care Act (ACA). Section 1557 contributes to the health equity of the transgender community, promotes equal access to healthcare for all, and increases affordability and accessibility of coverage and care for all individuals.

As detailed in our enclosed comments to Health & Human Services on August 13, 2019, TLDEF opposes the proposed rule and the rolling back of explicit and necessary protections for transgender individuals.¹ This letter highlights relevant legal developments that have occurred since submitting those comments.

1. Postpone rulemaking until the Supreme Court issues its decision in *Harris Funeral Homes*.

In its NPRM, the Department itself recognized the harms that come from the Department using interpretations of Title IX that differ from other Departments or courts and referenced the pending Title VII cases interpreting the meaning of sex.²

In October, the U.S. Supreme Court heard oral arguments in *R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, No. 18-107, 2019 WL 1756679 (U.S. Apr. 22, 2019). The questions before the court are: “Does Title VII of the Civil Rights Act of 1964 prohibit discrimination against transgender employees based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)?” Because courts have frequently looked to Title VII authority for guidance with Title IX cases,³ the *Harris* case will have implications for how Title IX—including Title IX as incorporated into § 1557—will be interpreted.

Withdrawing the explicit protections for transgender people in the face of a forthcoming ruling under *Harris* that potentially clarifies that sex discrimination protections apply equally to transgender

¹ These are currently codified at 45 C.F.R. pt. 92.

² Nondiscrimination in Health and Health Education Programs or Activities, 84 FR 27846-01, 27874-75 (Jun. 14, 2019).

³ See, e.g., *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999) (“This Court has also looked to its Title VII interpretations of discrimination in illuminating Title IX.”); Title IX’s “hostile environment harassment” cause of action originated in a series of cases decided under Title VII of the Civil Rights Act of 1964 (“Title VII”). *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 534 (3d Cir. 2018), cert. denied sub nom. *Doe v. Boyertown Area Sch. Dist.*, 139 S. Ct. 2636, 204 L. Ed. 2d 300 (2019) (looking to Title VII to interpret hostile environment harassment under Title IX); *Papelino v. Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81, 89 (2d Cir. 2011) (“We have held that Title VII principles apply in interpreting Title IX.”).

individuals would not only create confusion for those subject to the rule, it would also demonstrate that the rule is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.⁴

2. Withdrawing explicit protections for transgender people lacks a legitimate reason for the change, especially in the face of recent court decisions favoring such protections.

The inclusion of transgender-specific provisions⁵ in the 2016 rule was well-supported in a rulemaking process that included 24,875 public comments.⁶ It was determined that explicit protections were necessary to achieve the purpose of prohibiting sex discrimination under the statute. In 2016, the case law was already clear that sex discrimination includes sex stereotypes and transgender discrimination, and the final rule cited a variety of these cases.⁷

Since the publication of the proposed repeal in June 2019, as detailed herein, the case law in favor of transgender protections has continued unabated. Removing explicit protections is arbitrary given that there has been no change in case law meriting such a reversal and virtually all decisions have favored such protections. Doing so makes the proposed rule inconsistent and unlawful.⁸

In the context of insurance exclusions for health care related to gender transition, federal courts have consistently found that gender reassignment exclusions in employee health plans violate Title VII⁹

⁴ 5 U.S.C.A. § 706(2).

⁵ *E.g.*, 42 C.F.R. §§ 92.4, 92.206, 92.207(b)(3), 92.207(b)(4), and 92.207(b)(5).

⁶ Nondiscrimination in Health and Health Education Programs or Activities, 81 FR 31375, 31376 (May 18, 2016).

⁷ 81 FR 31375, 31385 n. 43 & 31387 n. 58.

⁸ *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (noting “an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance”).

⁹ *Fletcher v. Alaska*, No. 1:18-cv-00007-HRH, 2020 WL 1731478 (D.Alaska Mar. 6, 2020) (granting summary judgment for plaintiff where Alaska state employee health plan excluded surgeries “related to changing sex or sexual characteristics” because “[p]lainly, defendant treated plaintiff differently in terms of health coverage because of

or analogous sex discrimination provisions in Title IX or directly under Section 1557,¹⁰ including in four cases that have been decided since June 2019.

Health plans have made variety of unsuccessful arguments as to why transgender exclusions are allegedly not sex discrimination, including the following:

- The exclusion does not limit coverage based on sex because it

her sex, irrespective of whether ‘sex’ includes gender identity.”); *Toomey v. Arizona*, No. 4:19-cv-00035-RM-LAB, 2019 WL 7172144, at *6 (D. Ariz. Dec. 23, 2019) (denying motion to dismiss because a “narrow exclusion of coverage for ‘gender reassignment surgery’ is directly connected to the incongruence between Plaintiff’s natal sex and his gender identity. Discrimination based on the incongruence between natal sex and gender identity—which transgender individuals, by definition, experience and display—implicates the gender stereotyping prohibited by Title VII.”); *Boyd v. Conlin*, 341 F. Supp. 3d 979, 997 (W.D. Wis. 2018) (granting summary judgment against the Wisconsin state employee health plan because “[w]hether because of differential treatment based on natal sex, or because of a form of sex stereotyping where an individual is required effectively to maintain his or her natal sex characteristics, the Exclusion on its face treats transgender individuals differently on the basis of sex, thus triggering the protections of Title VII and the ACA’s anti-discrimination provision.”). See also *Baker v. Aetna Life Ins. Co. & L-3 Communications Corp.*, 228 F. Supp. 3d 764, 771 (N.D. Tex. 2017) (allowing Title VII claim to proceed, but ultimately finding no facial discrimination on the basis that the plan did not categorically exclude breast reconstruction for transgender women. *Baker v. Aetna Life Ins. Co.*, No. 3:15-cv-03679-D (N.D. Tex. Jan. 26, 2018)). Cf. *Darin B. v. McGettigan*, E.E.O.C. App. No. 0120161068, 2017 WL 1103712 (Mar. 6, 2017) (establishing that a claim may proceed under Title VII where a transgender man was denied nipple reconstruction under his federal employee health plan).

¹⁰ *Kadel v. Folwell*, No. 1:19-cv-272-LCB-LPA, 2020 WL 1169271, at *7 (M.D.N.C. Mar. 11, 2020) (rejecting a motion to dismiss against the North Carolina state employee health plan under Title IX under a *Price Waterhouse* sex-stereotyping theory and also because the exclusion discriminates “based on employee’s physical sex characteristics.”); *Flack v. Wisconsin Dep’t of Health Servs.*, 395 F. Supp. 3d 1001, 1015 (W.D. Wis. 2019) (finding a transgender exclusion in Medicaid discriminates on the basis of sex under § 1557 as detailed in *Flack*, 328 F. Supp. 3d at 951); *Boyd v. Conlin*, 341 F. Supp. 3d 979, 997 (W.D. Wisc. 2018) (applying § 1557 to Wisconsin state employee health plan); *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 954 (D. Minn. 2018) (holding that employer and third-party administrator may be held liable under § 1557 for administering a self-funded plan containing an exclusion for “gender reassignment” treatment); *Cruz v. Zucker*, 116 F. Supp. 3d 334, 348 (S.D.N.Y. 2015) (entertaining a § 1557 sex discrimination claim for transgender people under Medicaid).

applies equally to both men and women.¹¹

- The plan does not discriminate against transgender people because they can be on the plan and receive coverage for non-transgender related care.¹²
- A surgery exclusion does not target gender dysphoria treatments because other gender dysphoria treatments such as hormones or mental health care may be provided under the plan.¹³
- The exclusion cannot be rooted in sex discrimination because the plan contains many other exclusions; i.e., not all medically necessary care is covered under the plan.¹⁴
- It is not a sex-based classification because the exclusion doesn't target transgender people, it just targets a procedure; gender-transition surgeries are simply not provided to

¹¹ *E.g.*, Defendants State of Arizona, Davidson, and Shannon's Motion to Dismiss Complaint, Toomey v. Arizona, 4:19-cv-00035-RM-LAB (D. Ariz. Mar. 28, 2019) [hereinafter Toomey MTD] ("The exclusion is facially neutral, applicable to all employees, regardless of sex."); State of Alaska's Combined Memorandum in Support of Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Partial Summary Judgment at 13, 17, Fletcher v. Alaska, No. 1:18-cv-00007-HRH, (D. Alaska Aug. 16, 2019) [hereinafter Fletcher MSJ] ("[T]he exclusion applies to all employees regardless of their sex. Clearly, therefore, Plaintiff's case does not fall under the gender stereotyping standard announced in *Price Waterhouse*").

¹² Defendant's Opposition to Plaintiffs' Motion for Modification of the Preliminary Injunction, Flack v. Wisconsin, No. 3:18-cv-00309-wmc (W.D. Wisc. Nov. 16, 2018) [hereinafter Flack Opposition] at 29 ("[T]he Exclusion does not draw any facial classifications based on transgender status. It 'does not deny [transgender individuals] access to [Medicaid coverage] or exclude them from the particular package of Medicaid services [Wisconsin] has chosen to provide.'").

¹³ *E.g.*, Toomey MTD *supra* note 11, at 24 ("[T]he Health Plan does provide coverage for other forms of treatment for individuals with gender dysphoria. For example, coverage is provided for mental health counseling and hormone therapy medically necessary for gender dysphoria."); Fletcher MSJ *supra* note 11, at 13 (citing coverage for hormone therapy and counseling as evidence of nondiscrimination).

¹⁴ *E.g.*, Toomey MTD *supra* note 11, at 24 ("Thus, not all services and procedures deemed medically necessary by a clinician are covered under the Health Plan; certain medically necessary procedures may be excluded from coverage.").

anyone.¹⁵

- The exclusion is just a specific example clarifying a broader, facially-neutral exclusion, such as a cosmetic exclusion.¹⁶

These arguments have all been rejected.¹⁷ The only court that has denied a Title VII claim did so by citing outdated pre-*Price Waterhouse* Eighth Circuit precedent.¹⁸

¹⁵ Memorandum in Support of Motion to Dismiss by Treasurer Dale Folwell, Executive Administrator Dee Jones, and the North Carolina State Health Plan for Teachers and State Employees at 11-12, *Kadel v. Folwell*, No. 1:19-cv-272-LCB-LPA (M.D.N.C. July 8, 2019) (“Nowhere do Plaintiffs allege the Health Plan classifies on the basis of gender or transgender status, because the Plan does not. The challenged benefits exclusions do not mention transgender individuals; no person—regardless of gender or gender identity—receives assistance with “gender transformation” or “sex changes or modifications.”); Flack Opposition, *supra* note 12, at 23 (The exclusion “does not even draw lines between different types of *people*—it excludes coverage for particular *procedures* (transsexual surgeries and related hormone therapy), only given to persons with a particular condition (gender dysphoria).” (emphasis added)).

¹⁶ State Defendants’ Brief in Support of Motion for Summary Judgment at 20, *Boyden v. Conlin*, 341 F. Supp. 3d 979 (W.D. Wis. June 1, 2018) (No. 3:17-cv-00264-WMC) (“Since the Exclusion simply specifies procedures that are generally excluded for all Group Health Plan members—cosmetic procedures meant to alleviate psychological distress—Plaintiffs are not subjected to discrimination on the basis of sex or transgender status.”); *Id.* at 16 (“They cannot [establish discrimination] because the Uniform Benefits neutrally exclude all coverage for cosmetic procedures meant to treat psychological conditions. The Exclusion merely states that surgical services associated with gender dysphoria are subject to the same generally-applicable cosmetic exclusion.”).

¹⁷ See cases cited *supra* nn. 9-10.

¹⁸ *Krei v. Nebraska*, 4:19-cv-03068-BCB-SMB (D. Neb Mar. 16, 2020) (dismissing Title VII claim regarding Nebraska state employee health plan where plaintiff didn’t make sex stereotyping arguments and the court narrowly viewed the issue as one of “transgender” discrimination, which it rejected under *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir. 1982)). However, even the Eighth Circuit has assumed that transgender people can bring sex discrimination claims. *Tovar v. Essentia Health*, 857 F.3d 771, 775 (8th Cir. 2017); *Hunter v. United Parcel Serv., Inc.*, 697 F.3d 697, 704 (8th Cir. 2012); see also *Lewis v. Heartland Inns of Am., LLC*, 591 F.3d 1033, 1039 (8th Cir. 2010) (endorsing sex stereotyping claims under *Price Waterhouse* and approvingly citing *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004): “As the Sixth Circuit concluded in *Smith*, an adverse employment decision based on ‘gender non-conforming behavior and appearance’ is impermissible under *Price Waterhouse*.”).

Insurance exclusions for gender transition care are widely interpreted to be sex discrimination, and the repeal of regulations explicitly protecting transgender people from discrimination in health care and insurance is arbitrary and unlawful.

3. Retaining nondiscrimination notice requirements is essential for efficient enforcement of Section 1557.

The proposed rule would largely eliminate the current regulation's nondiscrimination notice and grievance procedure requirements. This would remove an important avenue of redress for individuals who have been subjected to discrimination—one that we actually know has worked in numerous cases. Numerous individuals have gotten redress because they were given notice of the private-sector grievance procedure and actually obtained medical care that they were unlawfully denied, without needing to go to a federal agency or a court. The proposed rule would thus allow for increased discrimination and use the public's tax dollars to address issues that previously would have been resolved privately. The Department's analysis in the NPRM failed to take this into account.

Additionally, lacking notice, many individuals will not know of their right to bring complaints and may in fact not do so even though § 1557's purpose is to create an avenue for them to do so. The Department's analysis in the NPRM does take this into account, but ignores it.

Finally, the COVID-19 pandemic exacerbates these harms because people are presently seeking to stop the spread of the disease and guarantee their safety and that of their loved ones by minimizing person-to-person interaction. Therefore, notice that otherwise could have arisen from in-person interactions or on-premises postings will no longer come to pass. Rather, notice must be provided remotely. Because the Department issued the regulation was issued by the before the pandemic, it could not consider the pandemic's effects. To the contrary, the proposed rule would, quite astonishingly, amend healthcare regulations to reduce public protections during a pandemic, without taking the pandemic's effects into account.

For these reasons, repeal of the notice and grievance provisions of the current implementing regulations is arbitrary and unlawful

We respectfully request that the proposed rule be withdrawn in its entirety. If you have any questions, please contact David Brown, Legal Director (646) 862-9396, dbrown@transgenderlegal.org).

Sincerely,

Transgender Legal Defense & Education Fund