August 13, 2019

SUBMITTED ELECTRONICALLY VIA www.regulations.gov

Roger Severino
Director, Office for Civil Rights
U.S. Department of Health and Human Services
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue, SW
Washington, DC 20201

Re: **RIN 0945-AA11; Nondiscrimination in Health and Health Education Programs or Activities**

Dear Mr. Severino:

The undersigned members of the Coalition to Preserve Rehabilitation ("CPR") appreciate the opportunity to comment on the Department of Health and Human Services' proposal to revise the regulations in Section 1557 of the Patient Protection and Affordable Care Act. CPR is a coalition of national consumer, clinician, and membership organizations that advocate for policies to ensure access to rehabilitative care so that individuals with injuries, illnesses, disabilities, and chronic conditions may regain and/or maintain their maximum level of health and independent function.

CPR agrees with the Department's stated aim of maintaining "vigorous civil rights enforcement" on the basis of federally protected categories, and recognizes the importance of reducing unnecessary regulatory burdens. However, we question why the administration has decided to propose modifications to the Section 1557 rule that will serve to undercut the protections afforded by current law, especially in areas that impact individuals with disabilities and chronic conditions. Regulatory expediency is not a reason compelling enough to weaken long-standing civil rights and nondiscrimination protections in the provision of health care. We find these proposals deeply concerning and lacking a principled basis for modification. As a result, we urge the Department of Health and Human Services not to finalize the proposed rule in its current form.

This comment letter will focus specifically on the provisions in the proposed rule impacting individuals with disabilities and the protections afforded them by the existing Section 1557 regulation, as well as related federal disability nondiscrimination law.

I. Background

Section 1557 of the ACA was enacted as a broad provision to prohibit discrimination on the basis of the federally protected categories of race, color, national origin, disability, age, and sex in the provision of health care. The rule applies to any health program or activity that receives federal financial assistance, any program or activity that is administered by an executive agency under Title I of the ACA, and any entity established under Title I of the ACA.[1] The protections in Section 1557 are based on a variety of nondiscrimination and civil rights laws with longstanding support throughout the United States, including the Civil Rights Act of 1964, the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990.

On May 18, 2016, the HHS Office of Civil Rights (OCR) finalized its first set of regulations implementing Section 1557 at 45 C.F.R. Part 92.[2] We recognize that the proposal to replace the regulations has arisen in part as a response to litigation filed by several states and organizations challenging certain aspects of these regulations. However, we do not view this ongoing litigation as sufficient reason for OCR to "substantially replace" the existing Section 1557 regulations, as the office states in the Proposed Rule.[3]

When the Americans with Disabilities Act (ADA) was enacted in 1990, it represented a watershed moment enshrining the civil rights protections of individuals with disabilities. The ADA notably omitted language addressing the field of health care in any significant way. Section 1557 of the Patient Protection and Affordable Care Act (ACA) acted as a capstone to the ADA expanding disability discrimination protections in the provision of health insurance. Section 1557 was key to clarifying that discrimination in the health insurance arena would not be tolerated. There is no reason to turn back the clock on protections for individuals with disabilities in this critical area.

We find it alarming that the administration's proposal reopens settled areas of civil rights protections that date back to the ADA and earlier legislation, and seeks to uproot these protections without clear justification. The statutory language and accompanying regulations of Section 1557 function well and protect the rights of individuals with disabilities. We see no reason to replace the regulation, and unless OCR furnishes a compelling rationale to do so, we see no reason to finalize the proposed rule. CPR supports keeping the existing Section 1557 language in place and maintaining the robust civil rights protections it affords.

II. Scope of the Nondiscrimination Rules

The existing section 1557 rules apply to "any health program or activity, any part of which is receiving federal financial assistance, including credits, subsides, or contracts of insurance."[4]

---

[1] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1557, 124 Stat. 119, 260 (210) (codified at 42 U.S.C. § 18116).
[2] Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376 (May 18, 2016).
[3] Nondiscrimination in Health and Health Education Programs or Activities (hereinafter the "Proposed Rule"), 84 Fed. Reg. 27846 (June 14, 2019).
[4] 42 U.S.C. § 18116(a).

The current regulations define "federal financial assistance" to include assistance that HHS "plays a role in providing or administering, including tax credits under Title I of the ACA."[5]

The administration's proposal would remove the "plays a role" language. As a result, the regulations would no longer cover issuers of Exchange plans solely on the basis that HHS plays a role in administering tax credits.[6] We are concerned that the proposed changes would limit the applicability of the Section 1557 nondiscrimination protections to certain entities involved in providing health insurance. The "plays a role" language is important to the impact of the rule and should not be deleted.

Additionally, the Proposed Rule would further limit the scope of application of the nondiscrimination requirements depending on whether the entity receiving federal financial assistance is or is not "principally engaged in the business of providing health care."[7] Under the proposal, if an entity that receives federal financial assistance is not "principally engaged in the business of providing health care," the new Section 1557 regulations would only apply to the operations of that entity that receives federal financial assistance.[8] This would be a major limitation on the breadth of coverage of Section 1557 disability discrimination protections.

The proposed changes seek to restrict the applicability of Section 1557 to entities involved in the provision of health care; as such, we are wary of the potential impact on individuals with disabilities. To the extent that the proposed rule allows health plans to operate outside the purview of the nondiscrimination rules while they are providing health coverage for individuals, we oppose the changes to the scope of the nondiscrimination protections. The Proposed Rule states that short term limited duration insurance (otherwise known as "short term plans") would not be subject to nondiscrimination rules under the administration's proposal.[9] Additionally, the new rules would not apply to Medicare Part B, self-funded group health plans under the Employee Retirement Income Security Act of 1974 ("ERISA"), or the Federal Employees Health Benefits (FEHB) Program.

The administration should not create new limitations on the scope of disability nondiscrimination rules. The intent of the ACA was to apply protections against discrimination to all health plans. Creating loopholes for entities to avoid compliance with Section 1557—three years after the final rules went into effect, 9 years after enactment of the ACA, and 29 years after enactment of the ADA—will only serve to water down the protections afforded to individuals with disabilities. Additionally, as the administration defines "recipients" of federal financial assistance, HHS should confirm that sub-recipients are subject to the rules as well, in order to avoid creation of shell organizations to dodge nondiscrimination requirements.

[5] 45 C.F.R §. 92.4.
[6] Proposed Rule at 27861.
[7] Proposed Rule at 27862.
[8] *Id*.
[9] Proposed Rule at 27863.

III. Accessibility Provisions for Individuals with Disabilities

We appreciate that the Proposed Rule would retain existing provisions related to accessibility for individuals with disabilities, but remain concerned about OCR's requests for comment on modifications to these provisions.[10] We oppose the imposition of additional exceptions to the existing rule which would limit the types of facilities that accessibility requirements apply to and circumscribe the steps that facilities must take to comply with existing requirements.

Effective Communication for Individuals with Disabilities

OCR seeks comments on whether to propose an exemption from the requirement for covered entities to provide appropriate auxiliary aids and services if a covered entity has fewer than 15 employees.[11] The regulations implementing Section 504 of the Rehabilitation Act of 1973 permit this exemption, but allow OCR to impose this requirement on recipients of federal financial assistance with fewer than 15 employees if the provision of auxiliary aids and services would not significantly impair the ability of the recipient to provide the benefits and services.

We do not support such an exemption. According to the 2017 Annual Disability Status Report issued through Cornell University, more than 11 million Americans have a hearing disability, and more than 7 million have a visual disability.[12] Individuals with disabilities affecting their ability to communicate represent a significant portion of the disability community, and it is paramount that their needs for effective communication are met without additional restrictions. Additionally, many physicians who practice in a private office have fewer than 15 employees. A new exemption would exclude large swaths of providers who routinely interact with individuals with disabilities from nondiscrimination requirements, which could have a negative impact on this population. Finally, providers have built the costs of effective communications into their business models for years; there is no reason to change the dynamic at this time.

Effective communication is particularly essential in health care, where individuals with communication impairments require an appropriate level of necessary communication to explain and understand complex diagnoses, treatment regimens, and other detailed health care information. We support the current practice of maintaining this requirement.

Accessibility Standards for Buildings and Facilities

OCR also seeks comments on the appropriateness of applying the definition of "public building or facility" in the 2010 ADA Standards for Accessible Design to all entities covered under Section 1557. The Proposed Rule specifically questions whether the 2010 Standards create burdens on private entities.[13]

[10] 45 C.F.R. §§ 92.202 - 92.205.
[11] Proposed Rule at 27867.
[12] Erickson, W., Lee, C., & von Schrader, S. (2019). 2017 Disability Status Report: United States. Ithaca, NY: Cornell University Yang-Tan Institute on Employment and Disability (YTI).
[13] *Id.*

We believe that the 2010 Standards should continue to apply to all entities covered under Section 1557. The ADA represented a tremendous leap forward for physical accessibility of public spaces, and there is no reason to turn back the clock or weaken the requirement to furnish accessible buildings and facilities three decades after the ADA was enacted. Private entities that are involved in the provision of health care should follow the long-existing standards for accessibility.

Requirement to Make Reasonable Modifications

Finally, OCR seeks comment on the existing requirement to make reasonable modifications to policies, practices, or procedures when necessary to avoid discrimination on the basis of disability, except if the modification would fundamentally alter the nature of the health program or activity. OCR questions whether to retain this provision or substitute it with language conforming the Department of Justice's Section 504 coordinating regulations. The potential new regulations would instead require "reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual" with a disability, and include an exemption for "undue hardship."[14]

We do not support substituting the existing language with the coordinating regulations. The current regulation successfully applies the reasonable modifications standard, which has been in effect for decades. The existing standard does not impose undue or unreasonable restrictions on covered entities, and already includes the exemption for fundamental alterations to the nature of the health program or entity. There is no reason to apply additional exemptions to the rule, and no reason to shift the existing regulations and provide new uncertainties about accessibility requirements.

IV. Enforcement Mechanisms

In the Proposed Rule, OCR states its position that private rights of action are not permitted for disparate impact claims of discrimination on the basis of race or sex and states that "there is a split on the question with respect to disability."[15] By revising its position on disparate impact claims and limiting its enforcement mechanisms to those already provided for under other statutes,[16] OCR leaves up to the courts the issue of resolving the current split with respect to claims of discrimination on the basis of disability based on disparate impact. The discussion of the issue in the Proposed Rule creates additional confusion and ambiguity around enforcement mechanisms. We support OCR working to clarify this issue to avoid casting greater doubt as to the enforcement mechanisms available when facing prohibited discrimination under the Section 1557 rule.

V. Notice Provisions of Non-Discrimination and Language Assistance Services

The Proposed Rule would repeal the requirement that covered entities mail and/or provide notices regarding nondiscrimination and the availability of language assistance services with

[14] Proposed Rule at 27868.
[15] Proposed Rule at 27851.
[16] Proposed Rule at 27860.

every significant communication to individuals.[17] We oppose the removal of this requirement. Ensuring that beneficiaries are aware of the language assistance services available to them and the extent of their rights to nondiscrimination in health care under Section 1557 is essential. The regulation has not been in place long enough for the Department to assume that all beneficiaries are aware of this information, and removing the requirement will contribute to greater confusion and a lack of awareness in the public. The original requirement in Section 1557 was intended to increase awareness and subsequent use of these services. Reducing the number of beneficiaries that are aware of language assistance services will reduce the number of beneficiaries who request and use them. We recommend that OCR maintain the provision from Section 1557 and refrain from finalizing this proposal.

****

While OCR's Proposed Rule retains the prohibition of discrimination on the basis of disability, as statutorily required by the ACA, the proposed limitations on the scope of the regulations, enforcement mechanisms, and the removal of certain notification requirements are deeply concerning and are not justified by compelling reasons. In fact, the proposed changes conflict with the statutory intent of the ACA to protect people with disabilities.

The Coalition to Preserve Rehabilitation opposes these proposals. They will limit the effectiveness of the prohibition on discrimination and weaken the protections intended by the letter and spirit of the ACA. Limiting the types of entities that are subject to the nondiscrimination rules and reducing the ability of individuals to know about and enforce their rights under the law runs counter to the protections afforded by the ACA. We see no compelling justification for enacting the proposed changes. Therefore, we urge OCR and HHS to refrain from promulgating a Final Rule and strongly support the maintenance of the existing protections in Section 1557.

Sincerely,

The Undersigned Members of the Coalition to Preserve Rehabilitation

ACCSES
American Academy of Physical Medicine and Rehabilitation
American Association on Health and Disability
American Congress of Rehabilitation Medicine
American Dance Therapy Association
American Medical Rehabilitation Providers Association
American Music Therapy Association
American Physical Therapy Association
American Speech-Language-Hearing Association
American Spinal Injury Association
American Therapeutic Recreation Association
Amputee Coalition

[17] *Id.*

Association of Academic Physiatrists
Brain Injury Association of America
Center for Medicare Advocacy
Christopher and Dana Reeve Foundation
Clinician Task Force
National Association for the Advancement of Orthotics and Prosthetics
National Association of State Head Injury Administrators
The National Athletic Trainers' Association
National Council on Independent Living
National Multiple Sclerosis Society
National Rehabilitation Association
United Spinal Association