



August 13, 2019

U.S. Department of Health and Human Services
Office for Civil Rights
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue, S.W.
Washington, D.C. 20201

**RE: Proposed Rule, Nondiscrimination in Health and Health Education Programs or Activities,
Docket ID HHS-OCR-2019-0007, RIN 0945-AA11**

To Whom It May Concern:

The District of Columbia Health Benefit Exchange Authority (HBX) appreciates your consideration of our comments.

By way of background, HBX is a private-public partnership established by the District of Columbia (District) to develop and operate the District's on-line health insurance marketplace, DC Health Link (DCHealthLink.com). We cover approximately 100,000 people -- District residents and people who work for District small businesses. DC Health Link fosters competition and transparency in the private health insurance market, enabling individuals and small businesses to compare health insurance prices and benefits and to purchase affordable, quality health insurance. District residents have 25 health plan options from two insurers and small businesses have 152 health plan options from United, Aetna, CareFirst, and Kaiser. Since we opened for business, we've cut the uninsured rate by 50% and now more than 96% of District residents have health coverage.

HBX advocates for all our customers including for members of our community who have been discriminated against in the past, before the Affordable Care Act added protections against abusive insurance practices. We strongly oppose the proposed changes and encourage you not to eliminate rights and protections that millions of Americans have today.

Protections against discrimination

The District of Columbia has been a leader in addressing discrimination related to gender identity and expression. Working with HBX, the Department of Insurance, Securities and Banking (DISB) issued guidance to clarify that health insurance carriers are prohibited from discriminating on the basis of gender identity or expression and specified that "exclusionary clauses that discriminate on the basis of 'gender identity or expression' are *prima facie* prohibited...." DISB also clarified that "attempts by companies to limit or deny medically necessary treatments for gender dysphoria, including gender reassignment surgeries" would be viewed as discriminatory. District of Columbia Department of Insurance Securities and Banking, Bulletin 13- IB-01-30/15 Revised (February 27, 2014).



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Research shows that the transgender community has been subject to discrimination in health insurance benefits – coverage being denied that is not denied to others. We believe that the 2016 Federal regulations are critical to protect every person’s civil rights and to prohibit insurance practices that create barriers to accessing medical care. The District of Columbia has protections in place to prevent health insurance carriers from discriminating on the basis of sexual orientation, as well as on the basis of gender identity and expression (as addressed above). We strongly support the 2016 Final Rule as these protections exist in the District of Columbia and believe that these protections should be maintained to clearly prohibit discrimination and to protect people living in all states.

The Administration’s proposal to scale back these protections are both bad public policy – taking away civil rights is not a defensible public policy -- and is contrary to law. The Administration is exceeding its authority under the statute. Many commenters have provided in-depth legal analysis, with which we agree.¹ Moreover, as eighteen State Insurance Commissioners, including the District’s, have noted in their comment letter, the administration’s proposal is inconsistent with federal court rulings finding that Section 1557 prohibits discrimination based on sex stereotyping or transgender status.²

Notice and enforcement requirements and remedies

The Administration seeks to eliminate civil rights protections by limiting the enforcement mechanisms and remedies available under Section 1557 for patients who have experienced discrimination. HHS does not have authority to eliminate requirements for notice and grievance procedures and does not have authority to limit private causes of action. As many commenters have said, Section 1557 fills gaps and enhances civil rights protections. It is therefore impermissible for HHS to restrict or limit such protections.³

Language Access Protections

We agree with other commenters that the regulatory impact analysis for removing the language access protections is insufficient and fails to identify and quantify costs to protected individuals. As others have noted, the administration ignores the costs to Limited English Proficiency (LEP) individuals such as reduced awareness of language services. It also fails to consider alternatives, but rather proposes a complete repeal of notices and taglines based on estimates of covered entities on voluntary actions for compliance.

Conclusion

The Administration’s proposal to eliminate civil rights protections is bad public policy and contrary to the plain language of the statute. The proposal, if finalized, will put at significant risk people the law is intended to protect - people who historically have experienced significant barriers to accessing medical

¹ See the National Health Law Program (NHeLP) analysis in Letter from Elizabeth Taylor, Executive Director, NHeLP to Sec. Azar, Dept. of HHS and Dir. Severino, Office for Civil Rights, HHS, Nondiscrimination in Health and Health Education Programs and Activities (Section 1557 NPRM), RIN 0945-AA11, Aug. 12, 2019 (referred hereafter as NHeLP Comment Letter).

² Letter from Ricardo Lara, CA. Insur. Commissioner, Stephen C. Taylor, D.C. Insur. Commissioner, et al. to Sec. Azar, Dept. of HHS, Proposed rule RIN 0945-AA11, Docket ID number HHS-OCR-2019-0007, Aug. 5, 2019, <https://www.insurance.ca.gov/0400-news/0100-press-releases/2019/upload/nr057LtrToAzarSec1557-080519.pdf>.

³ See NHeLP Comment Letter and Letter from National Women’s Law Center (NWLC) to Office for Civil Rights, Dept. of HHS, Comments in Response to the Dept. of HHS, Office of Civil Rights, 1557 NPRM, RIN 094-AA11, Aug. 13, 2019.

care including the LGBTQ community, women who need reproductive health care, including abortion, women of color, people living with disabilities and/or chronic conditions, and people whose primary language is not English.

HBX opposes the proposal and urges the Administration to rescind the entire proposed rule. Thank you for considering our comments.

Sincerely,

A handwritten signature in black ink, appearing to be 'Mila Kofman', with a long horizontal flourish extending to the right.

Mila Kofman
Executive Director
DC Health Benefit Exchange Authority