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**COMMENTS to Proposed Rule by the Department of Health and Human Services (HHS) Centers for Medicaid & Medicare Services (CMS) and Office for Civil Rights (OCR), Docket No. HHS-OCR-2019-0007, RIN No. 0945-AA11.**

**RE: Request for Comment on Nondiscrimination in Health and Health Education Programs and Activities (Section 1557 NPRM)**

**Submitted by** Kentucky Equal Justice Center

**Date:** 08/13/2019

Dear Secretary Azar,

Kentucky Equal Justice Center (KEJC) submits these comments in response to the above referenced NPRM by HHS and OCR. KEJC is a 501(c)(3) advocacy center dedicated to addressing issues that affect low-income Kentuckians. As part of that work, we have Certified Application Counselors on staff to enroll consumers in Medicaid and Federal Marketplace plans, and we operate Maxwell Street Legal Clinic, a low-cost immigration clinic that assists Kentucky's immigrant and refugee populations. After closely reviewing the proposed changes, KEJC expresses deep concern that deleting groups from the rule's protection, limiting resources for non-English speakers, and loosening enforcement mechanisms will promote discriminatory practices and undermine the very purpose of § 1557 and the Patient Protection and Affordable Care Act (ACA) generally.

**Eliminating protections for LGBTQ+ and transgender patients.** Under current law and regulations, Section 1557 prohibits discrimination on the basis of sex, which includes discrimination based on gender identity and sexual orientation.<sup>1</sup> This proposed rule would remove gender identity and sexual orientation from the definition, sending the message to federally funded providers and insurers that discrimination against LGBTQ+ and transgender individuals is acceptable behavior.

HHS and OCR offer no explanation for this policy shift beyond the opinion of one district court judge in Texas. *See Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016). Relying on one judge's narrow interpretation of Section 1557 is really no explanation at all, particularly when a number of federal judges have reached different conclusions about discrimination on the basis of gender identity and sexual orientation as forms of sex

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<sup>1</sup> 45 C.F.R. § 92.4.

discrimination,<sup>2</sup> including judges in our own Sixth Circuit. *See E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018) (holding that discrimination “on the basis of sex” under Title VII of the Civil Rights Act includes discrimination based on sex stereotypes and transgender/transitioning status); *Dodds v. U.S. Dept. of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016) (“Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination.”). If HHS and OCR believe that the definition of “sex” for purposes of § 1557 should be based on relevant case law, we strongly encourage a thorough review of the relevant case law beyond *Franciscan Alliance*. The health and wellbeing of LGTBQ+ and transgender Kentuckians depend on it.

Kentucky is home to a reported 132,000 LGBT adults,<sup>3</sup> and sex discrimination in healthcare has a disproportionate impact on members of the LGBT community. According to a 2018 survey, twenty-nine percent of transgender individuals had a health care provider refuse to treat them on the basis of their perceived or actual gender identity, and the same percentage experienced unwanted physical contact from a health care provider.<sup>4</sup> Twenty-one percent had a provider use

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<sup>2</sup> See also *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. Axcán 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).

<sup>3</sup> *LGBT People in Kentucky*, The Williams Institute at UCLA School of Law.

<sup>4</sup> <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Kentucky-fact-sheet.pdf>

<sup>4</sup> Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGTBQ People from Accessing Health Care*, Ctr. for American Progress, (Jan. 18, 2018),

harsh or abusive language when treating them.<sup>5</sup> Additionally, the 2015 U.S. Transgender Survey found that twenty-three percent of respondents did not see a provider for needed health care because of fears of mistreatment or discrimination.<sup>6</sup> The study *When Health Care Isn't Caring* found that fifty-six percent of LGB people reported experiencing discrimination from health care providers – including refusals of care, harsh language, or even physical abuse – because of their sexual orientation.<sup>7</sup>

This new rule would affirm those discriminatory behaviors, allowing providers to refuse to treat LGBT individuals for a cold or a broken bone simply because of their gender identity or sexual orientation. HHS and OCR have failed to offer any logical explanation for such a decision. The very name of the Act, the *Patient Protection and Affordable Care Act*, calls for a different result.

We are confident that when the Administration considers all relevant case law instead of basing its proposed rule on the outlying, retrograde opinion of one federal district court judge, the Administration will join the emerging consensus of judges, scholars, and policymakers and find that discrimination on the basis of a person's gender identity or sexual orientation is "impermissible discrimination."

**Limiting resources for individuals with limited English proficiency.** Over 87,000 Kentuckians report that they speak English less than "very well."<sup>8</sup> (That's more than the population of Bowling Green, Kentucky's third largest city.) The staff at our immigration clinic can attest that interpretative services for individuals with limited English proficiency (LEP) are incredibly important when communicating about technical matters (*e.g.* legal *and* medical conversations).

LEP makes navigating an already complicated healthcare system even more difficult, especially when it comes to understanding medical or insurance terminology. Even LEP professionals who communicate well in English day to day may not be able to communicate effectively about medical needs or financial information. For LEP individuals to access federally funded health care, language assistance is crucial. Without it, LEP individuals will lose access to programs and

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[https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/?link\\_id=2&can\\_id=d90c309ac9b5a0fa50d294d0b1cdf0b2&source=email-rx-for-discrimination&email\\_referrer=&email\\_subject=rx-for-discrimination](https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/?link_id=2&can_id=d90c309ac9b5a0fa50d294d0b1cdf0b2&source=email-rx-for-discrimination&email_referrer=&email_subject=rx-for-discrimination).

<sup>5</sup> *Id.*

<sup>6</sup> Nat'l Ctr. for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* 5 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

<sup>7</sup> Lambda Legal, *When Health Care Isn't Caring: Lambda Legal's Survey of Discrimination Against LGBT People and People with HIV*, 5 (2010), <http://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report-when-health-care-isnt-caring.pdf>.

<sup>8</sup> *Languages Spoken at Home, Kentucky 2015*, Kentucky Cabinet for Health and Family Services, [https://chfs.ky.gov/agencies/dph/Documents/2017KYLanguage\\_Spoken\\_Home.pdf](https://chfs.ky.gov/agencies/dph/Documents/2017KYLanguage_Spoken_Home.pdf)

services. This language-based discrimination qualifies as discrimination based on national origin under the ACA.

This new rule proposes to cut protections for LEP individuals and those who have LEP family members by rolling back tagline requirements. Once more, OCR and HHS fail to provide any reasonable explanation for the changes. The notice requirements are consistent with the long history of civil rights regulations requiring posting of a notice of rights, and OCR has created a consolidated civil rights notice to minimize the burden on covered entities, forestalling OCR's new position that the notice requirements are redundant.

Moreover, the regulatory impact analysis is insufficient. It fails to identify and quantify the costs to protected individuals while providing no tangible analysis on the costs and burden of the notice and tagline requirements to providers and insurers. Without the notice, LEP individuals will have limited information on language services and auxiliary aids and will find it more difficult to determine what services are available and how to request them. All consumers will have less information about what to do if they face discrimination and how to file a complaint.

The rule also replaces the two-part mandatory test for determining *what* language services are necessary with a four-factor optional test for determining *if* language services are necessary. We strongly oppose these changes, which are inconsistent with Section 1557's intent. If an LEP individual needs language assistance, the covered entity *must* provide such assistance under the ACA. The question is merely what kind of assistance he or she needs. To deprive an LEP individual of access to language services is discrimination on the basis of national origin. In healthcare, it can mean effectively denying the individual appropriate healthcare, nullifying the ACA for that individual. Language access means that patients can communicate about their ailments and needs effectively with insurance and medical staff who hold the patient's life in their hands.

Without explanation, HHS and OCR also propose to eliminate recommendations for providers to develop language access plans even though the recommendations are just that – recommendations.<sup>9</sup> In short, these changes further invite discrimination by requiring less of providers without adequate justification.

**Nullifying enforcement mechanisms.** Along those same lines, the proposed changes water down consumer protections further by eliminating notice and grievance procedures, private rights of action, and opportunities for money damages.<sup>10</sup> We're particularly opposed to the language

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<sup>9</sup> In our work, we try to focus to the policy and the policy's efficacy rather than guessing at what values motivate a policymaker's proposal. In this case, however, it is nearly impossible to read this change as anything but open hostility to people this Administration perceives as outsiders and interlopers. This hostility, while it may have a long history in American life and politics, is contrary to our most noble aspirations for our nation: to be a land and people generous in spirit and in fact.

<sup>10</sup> Absent a credible proposal to increase governmental enforcement of discrimination claims, it is impossible to see restricting a person's private right of action as anything but

limiting available remedies to those provided for each protected characteristic (race, color, national origin, age, disability or sex) under their corresponding civil right statute. This interpretation of Section 1557 is contrary to the ACA’s actual language and Congress’s intent. Congress purposely designed Section 1557 to build and expand on prior civil rights laws, giving individuals access to the full range of available civil rights remedies. Section 1557 expressly provides individuals access to any and all of the “rights, remedies, procedures, or legal standards available” under the cited civil rights statutes, regardless of the type of discrimination. In other words, enforcement is not limited to those remedies provided to a particular protected group under prior civil rights laws.

These changes create a confusing mix of legal standards and available remedies and limit claims of intersectional discrimination.

Taken as a whole, the proposed changes undermine meaningful access to healthcare for hundreds of thousands of Americans, including women who have received abortions or treatment for miscarriages, LGBT individuals, people with limited English proficiency, and disabled consumers. Ultimately, the proposal is focused on making everything (even discrimination) easier for providers and insurers, even though the Act itself is consumer-focused, aimed at protecting patients and providing affordable healthcare coverage. Accordingly, we respectfully oppose finalization of these proposed rules.

Thank you for this opportunity to comment,

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a desire to subject more people to discrimination, a result to which we are—predictably—absolutely opposed.