



Ned Lamont
GOVERNOR
STATE OF CONNECTICUT

By U.S. Mail and electronic submission

August 6, 2019

U.S. Department of Health and Human Services
Office for Civil Rights, Attention: Section 1557 NPRM,
RIN 0945-AA11, Hubert H. Humphrey Building, Room 509F
200 Independence Avenue, SW
Washington, DC 20201

<https://www.regulations.gov/document?D=HHS-OCR-2019-0007-0001>

RE: Proposed Rule on Nondiscrimination in Health and Health Education Programs or Activities,
Docket No.: HHS-OCR-2019-0007

Dear Secretary Azar:

On behalf of the 3.6 million citizens of Connecticut, our healthcare providers, oversight agencies, nonprofit partners, and health insurance exchange, I request that you retract the Proposed Rule on Nondiscrimination in Health and Health Education Programs or Activities (the Proposed Rule), which was issued by the U.S. Department of Health and Human Services' (HHS) Office of Civil Rights (OCR). As a matter of principle, law, and policy, Connecticut strenuously objects to this Proposed Rule, which will:

- Reduce access to health care and equal treatment of people in receipt of health care;
- Exacerbate health disparities and inconsistencies across states; and
- Expose Medicaid programs and states to additional costs that could be prevented through patients' timely and effective access to, and utilization of, health care.

OCR is using the Proposed Rule to exploit the scope of its executive authority to institutionalize discrimination in health care and health education programs. Further, we object to OCR's and the Administration's attempt to hold harmless health care entities that put their personal beliefs and bias above patient care, despite already well-recognized exemptions for *bona fide* religious beliefs.

Connecticut champions the right of all of its citizens and legal residents to receive timely and effective health care. We expanded health care coverage through a state-based exchange and Medicaid expansion. We built upon federal discrimination law (related to race, color, national origin, sex, age and

860-566-4840 • Governor.Lamont@ct.gov
www.governor.ct.gov • @GovNedLamont

disability) with state law that prohibits discrimination on the basis of sexual orientation and gender identity or expression. We recognize a woman's rights under federal and state law to make their own decisions about medical treatment, including decisions around termination of a pregnancy¹, in consultation with their medical providers. We extended our Medicaid and insurance coverage to include services for transgender individuals. We support people whose first language is not English gain the language assistance and culturally informed support that they need. And, in advance of the U.S. Supreme Court's decision to universalize this right across the country, Connecticut was one of the first states to recognize the right of lesbian and gay couples to marry, and all associated privileges of that legal status, including workplace coverage of health care. The Proposed Rule undermines and contracts these protections, and will create greater disparity and inconsistency among states in basic rights associated with health care.

Connecticut strongly supports the entirety of the Affordable Care Act's nondiscrimination provisions. We cannot allow health care providers in Connecticut to object to treating a patient based on immutable characteristics such as sexual orientation or gender identity. We also reject the right of issuers to limit or exclude people from coverage on that basis. We oppose provisions that will limit women in making choices about their health care and in exercising their constitutional right to terminate a pregnancy. And not least important, Connecticut objects to weakening language supports that enable people to engage with and use their health care. While we will continue to protect our residents under state law, there are important reasons for these protections to be extended to all, nationally. Please see below for detail on our position on the current regulations, and for our objections to all of the changes that are proposed under the Proposed Rule.

The Need for, and Merits of, the Current Rule

Section 1557 prohibits discrimination based on race, color, national origin, sex, age, and disability in health programs and activities that receive federal financial assistance. In furtherance of this, Section 1557 also requires means of facilitating access to health care, including language translation, and processes for enforcing noncompliance with its provisions.

Section 1557 recognizes and responds to the documented reality that access to, and coverage under, health care in the United States historically has not been equal for all U.S. citizens and legal residents. People face barriers related to their race, ethnicity, sexual orientation and gender identity that are not simply wrong from a moral standpoint, but expose them to delay in receiving medical care or outright denial of such care. Women who exercise their constitutional rights should not be denied health care based on exercise of that right. And people whose first language is not English strain to navigate and effectively utilize their health care.

Denying or delaying medically necessary care does not eliminate health care needs. When health care conditions are not timely and effectively addressed, people experience poor health outcomes up to, and including, shortened lifespans. Lack of effective medical care also affects peoples' capacity to gain employment and to remain gainfully employed. But the adverse consequences of inadequate medical care are not limited to individual impact. Public health care payers and states face economic exposure related to emergency department and hospital care, employers face diminished workforce capacity, and individual families face losing the wherewithal to provide for themselves.

¹ Conn.Gen.Stat. §19a-602(a),(b).

Section 1557 provides specific, actionable and enforceable protections nationwide, giving all Americans the opportunity to be treated equitably in health care and supporting states in improving health outcomes, care experience, and quality of life of their residents.

Overview of Connecticut’s Key Concerns with the Proposed Rule:

Section 1557 protections have direct and practical impact on people and on the bottom line for states. They should be retained, intact. That said, Connecticut particularly objects to the Proposed Rule for the following reasons:

- **The Proposed Rule will categorically eliminate federal health care rights for lesbian, gay, bisexual, transgender, and questioning (LGBTQ+) individuals, exposing them to denials of coverage and care and other types of unequal treatment and making it likely that their health care outcomes will worsen.**

For millions of Americans, including residents of Connecticut, the Proposed Rule will undermine their ability to access health services without fear of discrimination based on gender identity or expression, sexual orientation, or status as patients who have otherwise exercised their rights under laws recognized by the highest court in this nation. According to HHS’s Office of Disease Prevention and Health Promotion:

Research suggests that LGBT individuals face health disparities linked to societal stigma, discrimination, and denial of their civil and human rights. Discrimination against LGBT persons has been associated with high rates of psychiatric disorders, substance abuse, and suicide. Experiences of violence and victimization are frequent for LGBT individuals, and have long-lasting effects on the individual and the community. Personal, family, and social acceptance of sexual orientation and gender identity affects the mental health and personal safety of LGBT individuals.²

All of the above adverse outcomes are likely to increase, in the absence of the current federal regulatory discrimination protections.

- **The Proposed Rule will weaken existing health care rights for women (including those whose gender identity is as women) who are seeking health care services such as those related to pregnancy or procedures that were historically limited based on the gender binary, exposing them to access barriers and other types of unequal treatment and making it likely that their health care outcomes will worsen.**

The Proposed Rule eliminates the regulatory definition of sex-based discrimination, and ignores the existence of current exemptions for *bona fide* religious beliefs. This gives safe harbor to providers to decline to provide, or to delay, needed services and supports, such as services associated with pregnancy and related medical conditions.

In the absence of the current federal regulatory discrimination protections, adverse outcomes, including, but not limited to, poor maternal outcomes, are likely to increase.

² <https://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health>

- **The Proposed Rule will weaken existing health care rights for individuals with Limited English Proficiency, exposing them to access barriers and other types of unequal treatment and making it likely that their health care outcomes will worsen.**

The Proposed Rule eliminates information provided to individuals with Limited English Proficiency. This will likely chill people from seeking care entirely, and compromise the effectiveness of the treatment that they do receive.

According to HHS' Agency for Health Care Research and Quality:

Research suggests that adverse events affect LEP patients more frequently, are often caused by communication problems, and are more likely to result in serious harm compared to those that affect English-speaking patients. Effective provider-patient communication is vital, especially in areas as critical as medication reconciliation, hospital discharge, informed consent, and surgical care (pre-, peri-, and post-op), to name a few. In fact, these communication-sensitive processes don't just put patients with LEP at risk. Patients with limited health literacy, those who may be affected by disabilities, and those who are subject to other vulnerabilities face an increased risk of misunderstanding and, in turn, medical errors.³

All of the above adverse outcomes are likely to increase, in the absence of the current federal regulatory provisions around effective language supports.

- **The Proposed Rule is premature, given the anticipated review of these issues by the U.S. Supreme Court, and exacerbates disparities and inconsistency in legal protections across states.**

The Proposed Rule presupposes the outcome of federal litigation by citing a case currently before the U.S. Supreme Court that would address directly the Title VII meaning of "discrimination on the basis of sex." Further, HHS ignores court cases that have held the existing regulations to be constitutionally valid, but relies on two injunctions that have put the existing finalized rules on hold. Rather than waiting for the outcome of litigation, HHS inserts its briefing position into regulation, thereby substantially and narrowly redefining the U.S. Code and reversing nondiscrimination protections for tens of millions of Americans. The Proposed Rule will also enhance disparity of experience across states, as only those residents of states with state law protections will have the benefit of equal treatment and recourse for lack of the same.

- **The Proposed Rule will expose Medicaid programs and states to additional costs that could be prevented through timely and effective access to, and utilization of, health care.**

The Proposed Rule will likely result in increased costs to Medicaid programs and other economic impacts to states, related to acute health care and also workforce constraints. When people do not have effective protections from discrimination in health care, they are often chilled from seeking any care at all, until their conditions become urgent enough to require emergency care. Further, people who cannot effectively understand and engage with their health care providers also defer care, and/or experience inadequate support with conditions that can worsen into acute events. These scenarios -

³ <https://www.ahrq.gov/sites/default/files/publications/files/lepguide.pdf>

that otherwise are preventable through timely, equitable care – increase state Medicaid and indirect costs, dehumanize people, and compromise their ability to find and keep jobs.

The Proposed Rule does not specifically prohibit states from building in their own state law protections, or expanding the scope of their Medicaid programs or health insurance plans to cover such procedures as gender-affirming surgeries. But states' capacity to set their own policy agendas in these matters is often dependent on receipt of federal funding. In narrowing the weakened protections of the Proposed Rule to entities that receive federal funding, but exempting such entities as HHS's Health Services Research Administration and the Substance Abuse and Mental Health Services Administration, states face immediate risks that federal support for various health care initiatives and interventions will be reduced or eliminated.

Specific 1557 Protections that Should Be Retained

Connecticut strongly urges that the following provisions of Section 1557 of the Affordable Care Act be retained:

- nondiscrimination protections against discrimination on the basis of sex, gender identity, and association;
- definitions of "covered entity" and "on the basis of sex";
- requirements that covered entities post information about Section 1557 nondiscrimination;
- requirements that information be made available to limited English proficiency consumers in the most frequently occurring languages other than English that are used;
- enforcement provisions including compliance coordinators, written grievance procedures for alleged violations of Section 1557, and protections against intimidation and retaliation; and
- application of the rule to all health care entities, including insurers, the Centers for Disease Control, the Substance Abuse and Mental Health Services Administration, the Indian Health Service.

Connecticut will not stand idle while the OCR attempts to regulate outside of its purview of Section 1557 in other areas of HHS and to remove longer-standing explicit nondiscrimination provisions that are critical to LGBTQ+ individuals, including protections in qualified health plans and in the marketplaces. While Connecticut will continue to protect and honor the civil rights of all of its residents, we are also deeply concerned about disparities, nationwide.

The Proposed Rule would have us revert to the widespread, institutional discrimination on the basis of gender and ethnicity that historically impaired health care access for so many of our fellow Americans. The Proposed Rule puts our fellow LGBTQ+ Americans, women who have terminated a pregnancy, and limited English proficiency Americans at risk, populations that already experience worse health care outcomes than their peers due to discrimination in health care settings.

Finally, the Proposed Rule requests comments on narrowing protections for individuals with disabilities. Existing non-discrimination protections must remain intact to avoid exacerbation of existing barriers to access to health care for individuals with disabilities, whose health care outcomes are affected daily by disparities in access to care.

I stand shoulder to shoulder with Connecticut Attorney General William Tong, Connecticut's other constitutional officers, our congressional delegation, and members of the Connecticut General Assembly in objecting to this Proposed Rule. This is a health issue, it is a civil rights imperative, and it should go without saying that enshrining discrimination into regulation contravenes the statutory purpose of the Office of Civil Rights. Again, I urge the Administration to retract the Proposed Rule and to charge HHS and OCR to protect the civil and human rights of all Americans.

Sincerely,

A handwritten signature in black ink that reads "Ned Lamont". The signature is written in a cursive, flowing style.

Ned Lamont
Governor