November 9, 2015

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

RE: Nondiscrimination in Health Programs and Activities, Proposed Rule
RIN 0945-AA02

To Whom It May Concern:

We appreciate this opportunity to provide comments in response to the Notice of Proposed Rulemaking Regarding Nondiscrimination in Health Programs and Activities. Family Equality Council is a national organization working to ensure full social and legal equality for lesbian, gay, bisexual, transgender, and queer (LGBTQ) parents and their children by providing direct support, educating the public, and securing inclusion in legislation, policies, and practices impacting families. We believe in the critical importance of eliminating health disparities and ensuring that all people, including LGBTQ parents and their children, do not face discriminatory barriers when seeking quality, affordable health coverage and care. We therefore strongly support the reforms introduced by the Affordable Care Act (ACA), particularly the application of essential nondiscrimination protections to the U.S. health system by ACA Section 1557, and we applaud the work of the HHS Office for Civil Rights (OCR) to enforce these protections by actively investigating complaints and giving us the opportunity to provide comments that we hope will further strengthen the proposed rule.

In particular, we strongly urge you to ensure that the final rule addresses three points of critical importance to LGBTQ parents and their children:

1. Establish a robust enforcement scheme to ensure nondiscrimination in benefit design, including codifying the transgender-inclusive protections in the proposed rule and clarifying that Section 1557 prohibits other forms of discrimination in benefit design, such as restricting access to medications used to treat specific conditions by placing them in high cost-sharing tiers, using discriminatory standards to determine medical necessity for specific populations or conditions, and failing to recognize certain family members and structures as eligible for benefits.

2. Clarify that the scope of protections under Section 1557’s sex nondiscrimination provision includes protections on the basis of sexual orientation, as well as clarifying protections for individuals with non-binary gender identities.

3. Do not undermine the purpose and effectiveness of this rule by adding a religious exemption.

Below, we describe these issues in more detail. We also discuss other provisions of the rule that are of particular importance for addressing the discrimination facing LGBTQ people and their families, including those living at the intersections of multiple marginalized communities. For
example, there are particular issues affecting LGBTQ people and their families when they are also people of color, immigrants, have disabilities, or are people for whom English is not their primary language.

**Discrimination Affecting LGBTQ-Headed Families**

Discrimination against LGBTQ people in health coverage and care remains a pervasive problem that the Affordable Care Act must address. This discrimination extends not only to people who are discriminated against on the basis of their sexual orientation or gender identity, but also to their family members, who may similarly face discrimination on the basis of their close association. Despite recent advances in legal protections for LGBTQ individuals and LGBTQ-headed families such as the expansion of marriage equality for same-sex couples to all 50 states, the estimated three million LGBTQ parents and their six million children living across the United States continue to regularly encounter discrimination on the basis of sexual orientation and gender identity when seeking health insurance coverage and health care.

This discrimination, paired with other experiences of LGBTQ people and their families, shows that the unfettered access to healthcare by LGBTQ-headed families is especially essential. For example, LGBTQ people and their families are more likely to be living in poverty and uninsured.¹ Add to this the reality that, as a result of discrimination, LGBTQ-headed families face substantial barriers to quality healthcare, including refusals of care, substandard care, and exclusion from healthcare outreach efforts, and the result is a significant health disparity when compared to the general population.²

The robust enforcement of nationwide nondiscrimination protections under ACA Section 1557 that clearly address discrimination against LGBTQ people and their families on the basis of sexual orientation, gender identity, and sex stereotypes are essential to helping LGBTQ-headed families successfully connect with the coverage and care that they need.

**§ 92.2 Application**

a. **Enforcement Authority**

In the health reform law, Congress explicitly delegated to HHS the authority to issue government-wide regulations for the implementation of Section 1557’s nondiscrimination protections for all health programs and activities that receive federal financial assistance from any federal agency. Consistent with the broad authority delegated by Congress, we strongly believe that HHS should apply its Section 1557 regulations to all federally-administered health programs and activities and all health program and activities, any part of which receive federal funding.

If HHS chooses not to use its rulemaking authority to apply the final rule government-wide, it must at least work with the Department of Justice and other federal agencies to ensure that the Section

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1557 standards established in the final rule are fully implemented across all health programs and activities that receive federal financial assistance from any federal department. In these collaboration efforts, HHS should prioritize those agencies with significant involvement in health care, such as the Department of Veterans Affairs.

b. Exemption from Section 1557’s Protections

The proposed rule appropriately does not incorporate any religious exemptions. However, the preamble to the proposed rule seeks comment as to whether any exemptions should be added.3 HHS further asks if the rule “appropriately protects religious beliefs” and if any additional exemption should be included to protect religious beliefs.4

We strongly believe that no such religious exemptions should be added. Nothing in the text of Section 1557 authorizes the addition of a religious exemption. Further, adding such exemptions could cause great harm to members of the vulnerable populations that Section 1557 is intended to protect, including LGBTQ people and their families, by creating a wide range of instances in which discrimination against both LGBTQ people and their families is still allowed.

There are numerous accounts of negative outcomes for LGBTQ parents and their families following discriminatory healthcare practices with foundations in religious or moral objections. One story is that of Lupita Benitez, a lesbian woman who, with her partner, wanted to start a family and have a child. However, because of her sexual orientation, she was denied the full range of infertility treatments that she needed by her conservative Christian doctors, who claimed that their religious beliefs gave them the right to withhold this care. As a result, Benitez was forced to abandon her course of treatment and seek out another doctor who would help her to start her family.5

More recently, 6-day-old Bay Contreras, who has lesbian mothers, was brought to her first doctor visit only to be told that the pediatrician her mothers had chosen after a seemingly successful prenatal visit was nowhere to be found. Instead, a letter written by the pediatrician explained that, due to her religious views, she would not treat Bay because of the sexual orientation of Bay’s mothers. The discrimination extended to Bay and this unethical behavior was not explicitly illegal under state law.6

Section 1557 of the ACA is intended to prevent this kind of treatment. In order to reflect the ACA’s clear intent and its overriding purpose of ensuring that no one should face discrimination in health care, Section 1557 regulations should not be undermined by the addition of a religious exemption.

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4 Id.
5 N. Coast Women's Care Med. Grp., Inc. v. San Diego Cnty Superior Court, 44 Cal. 4th 1145 (2008).
§ 92.4 Definitions

a. Definitions of Gender Identity and Sex Stereotypes

We commend HHS for clearly stating that discrimination based on sex stereotypes or gender identity constitutes discrimination on the basis of sex. As many federal agencies and courts have recognized, discrimination based on gender identity—including gender expression, gender transition, and transgender status—or on sex-based stereotypes, is necessarily a form of sex discrimination. By explicitly describing how Section 1557 applies to discrimination based on gender identity and sex stereotypes, the proposed rule will help address a widespread and urgent problem.

We support the proposed definitions of gender identity and sex stereotypes. In order to make clear that these protections against sex discrimination extend to people of all gender identities—including non-transgender and transgender men and women as well as people of non-binary genders—the definition in the final rule should clarify in plainer language that it includes stereotypes “that individuals consistently identify with one and only one of two genders (male or female), and that they act in conformity with the gender-related expressions stereotypically associated with that gender.” The proposed definition of gender identity should also be clarified to state that gender identity “may be male, female, neither, both, or a combination of male and female.”

b. Protection from Discrimination on the Basis of Sexual Orientation

We appreciate the explicit recognition that gender identity and sex stereotypes fall within the definition of sex in Section 1557. To effectively address the full scope of discrimination against LGBTQ people and their families, however, we very strongly urge HHS to also clarify that the protections against sex discrimination in Section 1557 include discrimination on the basis of sexual orientation.

Lesbian, gay, and bisexual (LGB) people and their families continue to face discrimination in many areas of their lives, including health care, on the basis of sexual orientation. The study “When Health Care Isn’t Caring” found that 56 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. Almost ten percent of LGB respondents reported that they had been denied necessary health care expressly because of their sexual orientation.


Id.
As described above, the reach of this discrimination does not stop at LGB people, but also extends to their children and family members. For LGB-headed families, the result of this discrimination is not only substandard healthcare, but also a delay and avoidance of healthcare. Fear of discrimination compounds the significant health disparities that affect the LGB population and their families. To protect LGB-headed families in gaining access to health insurance coverage and successfully accessing health care, we very strongly believe that the final rule should include explicit protections from discrimination on the basis of sexual orientation.

We therefore support the following recommendations:

1. Revise the definition of “on the basis of sex” in § 92.4 as follows:

   On the basis of sex includes, but is not limited to, on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, sexual orientation, or gender identity.

2. Add language defining sexual orientation to § 92.4 as follows:10

   Sexual orientation means homosexuality, heterosexuality, or bisexuality.

3. Define sex stereotypes in § 92.4 as follows (incorporating the above recommendation regarding gender identity):

   Sex stereotypes refers to stereotypical notions of gender, including expectations of how an individual represents or communicates gender to others, such as behavior, clothing, hairstyles, activities, voice, mannerisms, or body characteristics. These stereotypes can include the expectation that individuals consistently identify with one and only one of two genders (male or female), and that they act in conformity with the gender-related expressions stereotypically associated with that gender. They also include gendered expectations related to the appropriate roles of men and women, such as the expectation that women are primary caregivers, and aspects of an individual’s sexual orientation, such as the sex of an individual’s sexual or romantic partners.

§ 92.5 Assurances Required

We strongly support having assurances required for compliance with Section 1557 for entities receiving federal funds. In addition, we support the recommendation of other commenters requiring data collection and reporting as part of the assurances and to demonstrate compliance with Section 1557. Specifically, we support adding demographic data collection requirements to § 92.5 of the proposed rule for all covered entities. Per the requirements of ACA Section 4302 and the subsequent steps that HHS has taken to advance data collection related to the LGBTQ population, covered entities should be required to collect and report data relevant for understanding and addressing health disparities, including disparities related to gender identity, sexual orientation, sex assigned at birth, race, ethnicity, language, disability status, and age.

10 This definition is adapted from the Equality Act (H.R. 3185, 114th Cong. § 1101, 2015).
§ 92.8 Notice Requirements

To ensure that covered entities are adequately aware of their responsibility to notify the individuals they serve and the public at large of the full scope of applicable nondiscrimination protections under Section 1557, we support the recommendation of other commenters that the language in § 92.8(a)(1) and the proposed Appendix to Part 92 (“Sample Notice Informing Individuals about Nondiscrimination and Accessibility Requirements”) be revised to reflect the full scope of protected classes described in § 92.4, including gender identity, sex stereotypes, and sexual orientation, as well as primary language, immigration status, and pregnancy.

§ 92.101 Discrimination Prohibited

The proposed rule would not apply to discrimination by a covered entity against its own employees except for employee health benefit programs. However, no basis exists in the text of Section 1557 that would permit this exclusion. The final rule should eliminate this exclusion and make clear the Section 1557’s prohibition against discrimination applies to employment discrimination by a covered entity.

§ 92.201 Meaningful Access for Individuals with Limited English Proficiency

We strongly support the rule’s specific requirements to ensure meaningful access to care for individuals with limited English proficiency. In particular, we support the definition of qualified interpreter, and we suggest including a definition of a qualified translator. Further, we strongly support including specific thresholds for translating written documents to ensure minimum standards exist that would directly aid evaluating compliance and enforcement. We also support requirements regarding taglines but recommend that covered entities include taglines in the top 15 languages in their state/service area rather than the proposal to only include the top 15 languages nationally. In many states, the top 15 languages nationally will not be useful for informing local limited English proficient communities. Finally, we oppose continuing the exclusion of Medicare Part B providers from coverage under Section 1557.

§ 92.206 Equal Program Access on the Basis of Sex

We strongly support the requirement in § 92.206 that covered entities must provide equal access to health programs or activities without discrimination on the basis of sex and must also treat individuals consistent with their gender identity. Discrimination in access to gender-specific facilities remains one of the most common, and most harmful, forms of sex-based discrimination against transgender people.

We also strongly support the recognition in § 92.206 that health services ordinarily associated with one gender may not be denied or limited based on the fact that an individual’s sex assigned at birth, gender identity, or gender otherwise recorded in a medical record is different from that gender.

This section should also include specific language addressing how non-binary transgender people should be treated consistent with their gender identity. The final rule should state that, “in the case
of an otherwise lawful gender-specific or gender-segregated facility or program, [a covered entity] shall not deny an individual whose gender identity is not male or female access to the gender-specific health facility or program that the individual determines is most appropriate for them.”

§ 92.207 Nondiscrimination in health-related insurance and other health-related coverage

a. Benefit Design

We welcome the recognition that caution must be taken to ensure that health insurers cannot circumvent the nondiscrimination protections in the Affordable Care Act by employing discriminatory benefit designs or marketing practices when providing or administering health insurance or coverage. Several ways that health insurance issuers frequently discriminate against LGBTQ individuals, their families, and other vulnerable groups include:

- Placing entire classes of critical medications, such as those used to treat HIV, in high cost-sharing tiers in prescription drug formularies;
- Establishing narrow provider networks that exclude certain types of specialists; and
- Employing arbitrary, unreasonable, or otherwise discriminatory utilization management practices, such as transgender-specific exclusions or standards for determining medical necessity that are not based on the most up-to-date and medically sound consensus of experts in the relevant field.
- Failing to recognize certain family structures and impeding the inclusion of dependents in coverage for qualified individuals.

We urge HHS to ensure that the final rule clearly prohibits such facially discriminatory practices, regardless of whether they are motivated by a discriminatory purpose.

We also urge HHS to ensure that the final rule prohibits discrimination in coverage on the basis of membership in an LGBTQ family structure. Families come in myriad forms, but narrow statutory definitions and policies surrounding “family” and “child” can prevent some families from accessing the full range of insurance coverage options. Further, family law varies from state to state, rendering a family recognized in one state invisible in another.

For example, in some states, an enrollee whose children or dependents are neither legally nor biologically related to her may not be able to enroll them in her plan. In addition, couples who have chosen not to marry may have to purchase individual plans to cover dependent children, increasing the cost of insurance to their family. Members of these families should not be penalized by having to endure discrimination on the basis of their family structures.

Specifically with regard to the issue of transgender-specific exclusions, we strongly support § 92.207(b) in enumerating and prohibiting a range of insurance carrier and coverage program practices that discriminate against transgender individuals by arbitrarily singling them out for categorical denials of coverage for procedures and services that are the same or substantially similar to those provided to non-transgender people.
The multifaceted nature of insurance discrimination against transgender individuals means that the provisions at § 92.207(b)(3), (4), and (5) are all vital to ensuring that transgender people are able to access the health coverage and care they need. We very strongly urge HHS to preserve all three of these provisions in the final rule, with the modifications below. We also very strongly support amending § 92.207(d) to ensure that carriers cannot use standards for determining medical necessity that are themselves inherently discriminatory.

**RECOMMENDATIONS:**

- Maintain § 92.207(b)(3) without any changes and amend the proposed provisions at §§ 92.207(b)(4)-(5) as follows:

  (4) Categorically or automatically exclude from coverage, or limit coverage for, all health services related to gender transition, **including gender reassignment surgeries and other services or procedures described in the most current version of the recognized professional standard of medical care for transgender individuals;** or

  (5) Otherwise deny or limit coverage, or deny a claim, for specific health services related to gender transition if such denial or limitation results in discrimination against a transgender individual. **A denial or limitation results in discrimination if, inter alia, (a) a transgender individual is denied coverage for services to treat gender dysphoria even though substantially similar services are covered for treatment of other conditions, (b) a medically necessary service for treating gender dysphoria is denied solely because that service is designated as cosmetic when used to treat other conditions, (c) a transgender individual is denied access to medically necessary health services in accordance with the most current version of the recognized professional standard of medical care for transgender individuals.**

- Amend § 92.207(d) as follows:

  Nothing in this section is intended to determine, or restrict a covered entity from determining, whether a particular service is medically necessary or otherwise meets applicable coverage requirements in any individual case, **provided that the determination of medical necessity or meeting applicable coverage requirements is not itself discriminatory and does not result in discrimination.**

  **b. Benefit design monitoring and enforcement**

We appreciate and strongly support the work of HHS OCR in accepting, investigating, and addressing complaints of discrimination under Section 1557. We also recognize that there are multiple entities with overlapping responsibilities to investigate consumer complaints and initiate enforcement actions aside from OCR, including the Office of Consumer Information and Insurance Oversight, the HHS Office of the Inspector General, the Centers for Medicare and Medicaid Services, the Department of Justice, and state insurance regulators and consumer assistance programs. We welcome and applaud the work of all of these agencies and urge HHS to develop a broad, multi-pronged approach to nondiscrimination compliance monitoring and enforcement that
centers around HHS OCR and involves robust coordination with other federal and state monitoring and enforcement agencies to ensure that the strongest standard of federal plus state protections applies in any instance of discrimination.

RECOMMENDATION: To ensure that coverage exclusions targeting transgender individuals do not persist in plans offered or administered by entities covered under Section 1557, we join other commenters in urging HHS to include the following language in the preamble discussing § 92.207:

To be considered in compliance with this section, all health coverage programs and plans issued or administered by a covered entity will be required to:

- Revise current health plan documents to remove benefit and coverage exclusions or limitations based on an individual’s sex, gender identity, or diagnosis of Gender Identity Disorder, gender dysphoria, or related health condition (e.g., “transsexualism”);
- Revise current health plan documents to omit lists of surgeries or other procedures related to gender transition that are universally excluded from coverage, that impose other coverage limitations that are not supported by sound clinical principles, or that create clinically unsupported barriers to receiving medically necessary services related to gender transition;
- Implement protocols for determining medical necessity that are nondiscriminatory and based on the most current version of the recognized professional standard of medical care for transgender individuals; and
- Revise current health plan documents to clarify that transgender individuals seeking coverage for services will be treated in the same manner as other enrollees, including with regard to access to internal and external appeals processes.

§ 92.209 Nondiscrimination on the basis of association

We applaud the inclusion of the explicit prohibition against nondiscrimination on the basis of association. This language is critical for protecting members of many vulnerable groups from discrimination, such as people with disabilities and lesbian, gay, or bisexual individuals in relationships with a same-sex partner as well as their children and families.

Conclusion

We commend HHS for taking the important step of issuing this proposed rule. We strongly urge you again to ensure that the final rule addresses three points of critical importance to LGBT people:

1. Establish a robust enforcement scheme to ensure nondiscrimination in benefit design, including codifying the transgender-inclusive protections in the proposed rule and clarifying that Section 1557 prohibits other forms of discrimination in benefit design, such as restricting access to medications used to treat specific conditions by placing them in high cost-sharing tiers, using discriminatory standards to determine medical necessity for specific populations or conditions, and failing to recognize certain family members and structures as eligible for benefits.
2. Clarify that the scope of protections under Section 1557’s sex nondiscrimination provision includes protections on the basis of sexual orientation, as well as clarifying protections for individuals with non-binary gender identities.

3. Do not undermine the purpose and effectiveness of this rule by adding a religious exemption.

We thank you for your work to implement the crucial civil rights protections in Section 1557 and urge you to finalize the rulemaking as quickly as possible to ensure that the benefits of the Affordable Care Act reach everyone who needs them.

Thank you for your consideration of our comments.

Sincerely,

Emily Hecht-McGowan
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Family Equality Council