



April 26, 2017

Roger Severino
Director
Office for Civil Rights
U.S. Department of Health and Human Services
200 Independence Ave. S.W.
Room 509F, HHH Building
Washington, DC 20201

Dear Director Severino,

On behalf of The Leadership Conference on Civil and Human Rights and its Health Care Task Force, we wanted to thank you for holding your first “Listening Session” with members of the Task Force and colleagues. As you know, our members are strong supporters of Section 1557 of the Affordable Care Act and have advocated for its full and complete implementation since its enactment in 2010. And as we emphasized during our meeting, we fully expect the Office for Civil Rights (OCR) to strongly enforce and implement Section 1557, and will be closely monitoring the actions of your office to determine whether OCR is living up to its responsibilities under the law.

We also write to reiterate certain issues raised during the meeting to ensure our joint understanding of The Leadership Conference’s positions. To begin with, in response to your question at the meeting about whether we were satisfied with the Section 1557 final regulation, **we want to clearly and unambiguously state that we oppose any reopening of the rule.** The final rule for Section 1557 provides necessary protections against discrimination in health care. It was crafted over a significant period of time with multiple opportunities for concerned individuals and organizations to weigh in, including both during the regulatory process but also during a Request for Information prior to the Noticed of Proposed Rulemaking. The final rule was based on longstanding civil rights protections and principles. And while Section 1557 marks the first time that sex discrimination in health care was broadly prohibited by federal law, the sex discrimination protections it extends to the health care arena—including the protections against discrimination on the basis of sex stereotyping and gender identity—are rooted in the core civil rights protections afforded by Title IX. Indeed, all of the principles embodied in Section 1557’s protections are rooted in established civil rights protections. We believe that, overall, the final rule accomplishes Section 1557’s core goal of prohibiting discrimination and should not be changed or amended.

Second, we want to reiterate that the final rule was correct in not including a religious exemption. There is no justification either in the text of Section 1557 or as a

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matter of policy for creating religious exceptions for Section 1557, in general, or that apply to sex discrimination, specifically. Section 1557's ban against discrimination in health programs or activities includes a single exception – that it applies “[e]xcept as otherwise provided” in Title I of the ACA. The plain language of the statute bars any interpretation that would suggest that any other exceptions apply, either through rulemaking or subregulatory actions. As noted in the final rule, nothing in the rule or statutory text prohibit OCR from considering claims for individual exemptions under the Religious Freedom Restoration Act (RFRA) on a case-by-case basis.

Third, and as we noted at the meeting, we do not believe that the HHS determination on 1557's coverage of sexual orientation discrimination justifies a reopening of the rule. HHS did not adopt our recommendations to the NPRM that the regulations set forth a bright-line rule that discrimination against someone due to their sexual orientation is a form of sex discrimination, as it did for discrimination on the basis of gender identity and expression or gender transition. Rather, the rule indicated that cases of discrimination against lesbian, gay and bisexual people would be assessed on their specific facts, with the understanding that many such cases will involve impermissible sex stereotyping. As demonstrated by the recent *en banc* decision from the Seventh Circuit (*Hively v. Ivy Tech Community College*), courts are increasingly recognizing that discrimination against lesbian, gay and bisexual people often stems from their failure to conform to sex stereotypes. For this reason, even though HHS did not adopt our preferred approach in the final rule, the regulation gives HHS sufficient flexibility to assess fact patterns as they arise and to adjust its approach as appropriate in response to legal developments in this area.

As another example, we discussed taglines, and our understanding that some covered entities have expressed concerns about how to address this requirement. We would not support re-opening the rule to address this issue. OCR has alternate avenues for providing additional information to covered entities on compliance without re-opening the rule. We would ask that if OCR considers providing additional clarifications, it first conduct a Listening Session specifically on this topic so that additional language access advocates could participate.

Finally, we think it is important to reiterate the issue of intersectionality and its importance to implementation and enforcement of Section 1557. When The Leadership Conference worked with Members of Congress to craft Section 1557, we sought to create uniformity in the enforcement of antidiscrimination protections. By bringing all forms of discrimination under one civil rights provision, we sought to ensure that individuals would not face different legal results merely because of differences in the relevant underlying civil rights law. This also recognizes that many individuals may face discrimination due to multiple factors.

For example, we briefly discussed intersectionality in the disability context during the meeting. Individuals with disabilities may face discrimination based on their disability as well as concurrent or additional discrimination based on other factors such as race/ethnicity or sexual orientation/gender identity. Therefore, in the implementation and enforcement of Section 1557, OCR must examine all aspects of a complainant to understand the full scope of discrimination; that discrimination may not be one-dimensional but could be cumulative based on a number of

interrelated factors. For this reason, it is important to keep in mind that any actions by your office that, for example, dilute the protections against sexual orientation and gender identity, will have negative collateral effects on people who aren't simply LGBT but are also people with disabilities or people of color, and who will need protection against discrimination due to various aspects of who they are.

In addition to ensuring our mutual understanding of our positions regarding enforcement and implementation of Section 1557, we would request that you provide answers to the questions we raised during the meeting. We do not believe these questions are subject to the deliberative process due to the ongoing Section 1557 Texas litigation as they concern more general workings of OCR as well as broader implementation and enforcement. Here are the questions for which we request answers:

1. What are your enforcement priorities for 2017 (and beyond)?
2. Given that you spoke about how much of OCR's work is day-to-day enforcement of longstanding civil rights laws, how are your philosophies or priorities aligned with the ongoing work of OCR?
3. For complaints that you are not investigating due to the nationwide injunction, will you commit to informing complainants that OCR cannot investigate those cases at the current time and what other legal remedies may be available to them?
4. What is OCR's current capacity for investigating all complaints?
5. What steps will OCR take to ensure all parts of HHS comply with Section 1557?
6. Will OCR work to ensure that any amendments to regulations throughout HHS, but particularly within CMS, do not eliminate nondiscrimination protections based on Section 1557, Title VI, Title IX, Section 504 of the Rehabilitation Act, and the Age Discrimination Act, or the Affordable Care Act itself?
7. Will HHS/DOJ vigorously defend Section 1557 in the courts, including the current Texas case?
8. Why was language changed on the FAQ page to eliminate the sentence: "Areas of sex discrimination that HHS OCR may continue to enforce include harassment based on sex and allegations related to sex stereotyping that do not involve gender identity claims as well as other forms of discrimination based on sex other than gender identity or termination of pregnancy"?
9. Will you commit to meeting with experts from respected medical institutions and provider associations with expertise on treating transgender individuals, as well as individuals who have faced health care discrimination, before taking any regulatory action on 1557?

Should it be more efficient for you to provide answers to these questions in person rather than in writing, we would be happy to schedule a follow-up meeting. Indeed, we look forward to a continued dialogue to ensure that OCR continues to fulfill its mission of fully enforcing the civil rights laws within its jurisdiction.



Thank you again for inviting us to speak with you and members of your staff. If we can provide any further information, please do not hesitate to contact Leadership Conference Health Care Task Force Co-chairs Judith Lichtman at the National Partnership for Women & Families (jlichtman@nationalpartnership.org) and Mara Youdelman at the National Health Law Program (youdelman@healthlaw.org), or Leadership Conference Managing Policy Director Corrine Yu (yu@civilrights.org).

Sincerely,

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Family Equality Council
Human Rights Campaign
Lambda Legal
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National Center for Transgender Equality
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National Immigration Law Center
National Partnership for Women & Families
National Women's Law Center
PFLAG National
The Trevor Project