



Department of Health

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August 6, 2019

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

Re: Center for Medicare & Medicaid Services' Notice of Proposed Rulemaking (Docket No.: HHS-OCR-2019-0007; RIN 0945-AA11)

To Whom it May Concern:

The New York State Department of Health (NYSDOH) submits the following comments in response to the notice in the Federal Register soliciting comments on the Proposed Rule regarding "Nondiscrimination in Health and Health Education Programs or Activities" (84 Fed. Reg. 27846). NYSDOH supervises the administration of a wide range of programs that provide services and support to low-income families and individuals. The mission of NYSDOH is to protect, improve and promote the health, productivity and well-being of all New Yorkers.

Thank you for the opportunity to comment.

Sincerely,

Howard A. Zucker, M.D., J.D.
Commissioner



New York State Department of Health
Comments in Response to the Center for Medicare & Medicaid Services’
Notice of Proposed Rulemaking

The New York State Department of Health (NYSDOH) strongly opposes the rule proposed by the Centers for Medicare & Medicaid Services, titled “Nondiscrimination in Health and Health Education Programs or Activities” (hereinafter, “Proposed Rule”). Among other things, this rule would roll back crucial protections for vulnerable populations nationwide, such that individual healthcare providers or healthcare plans will no longer be prohibited under federal law from denying treatment or healthcare coverage to individuals who are transgender or gender non-conforming, or persons who have received or are seeking an abortion.

I. Opposition to the Proposed Rule’s Discrimination Provisions

A. New York State Nondiscrimination Laws and Policies

In New York State, it is unlawful to deny equal access to healthcare because of gender identity or expression; indicate that transgender persons are unwelcome or objectionable; refuse to use a transgender person’s legal name; refuse to refer to a transgender person by that person’s requested pronouns; deny the use of restrooms or other facilities consistent with a person’s gender identity; or refuse to treat a transgender person because that person has complained about discrimination.

In 2016, New York State Division of Human Rights (NYSDHR) adopted regulations on gender identity which clarified that discrimination on the basis of gender identity is a form of sex discrimination. These regulations provide that the term “sex,” when used in the Human Rights Law, includes gender identity and the status of being transgender, and that harassment on the basis of a person’s gender identity or the status of being transgender constitutes sexual harassment (9 NYCRR 466.13[c]).

In 2019, with the passage of the Gender Expression Non-Discrimination Act (GENDA), “gender identity or expression” was added as an explicit protected class under the Human Rights Law (Laws 2019, ch 8, §§ 2,3). The term “gender identity or expression” means “a person’s actual or perceived gender-related identity, appearance, behavior, expression, or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender” (N.Y. Exec. Law § 292[35]). Discrimination based on gender identity or expression is prohibited in all places of public accommodation, including hospitals and other healthcare providers (*id.* § 296).¹ These legal amendments only serve to

¹ See also NYSDHR, “New Yorkers are Protected from Gender Identity Discrimination by Hospitals,” https://dhr.ny.gov/sites/default/files/pdf/postings/DHR_Gender_Identity_Handout.pdf.

amplify what has been the longstanding understanding in New York State: that sex stereotyping and discrimination based on gender identity are forms of sex discrimination.

At that time, NYSDOH also amended the Hospital Patients' Bill of Rights to expressly require all hospitals in New York State to update their statements of patient rights to prohibit discrimination against transgender patients (10 NYCRR 405.7). These regulations required hospitals to affirmatively inform patients of their rights related to gender identity.

Further, New York State's Reproductive Health Act, which codified into state law the reproductive health protections articulated in *Roe v. Wade*, has made New York State a national leader in this area by allowing New Yorkers to make confidential, personal healthcare decisions with their healthcare provider. The Reproductive Health Act is one piece of New York State's commitment to ensuring that individuals are not treated differently based on their reproductive health choices.

Consistent with New York State law, all programs within the Department of Health provide eligible services to individuals regardless of sexual orientation and gender identity or reproductive health choices. NY State of Health (NYSOH)—New York State's Official Health Plan Marketplace—helps New Yorkers enroll in healthcare programs like Medicaid, Child Health Plus, the Essential Plan, and Qualified Health Plans (QHP) and explains what financial assistance is available to help applicants purchase health insurance. These services have always been, and will continue to be, provided regardless of an applicant's sex or gender identity, including identification as an LGBTQ individual. Additionally, the Comprehensive Family Planning and Reproductive Health Care Services Program within the Department's Division of Family Health provides comprehensive, confidential reproductive health services for approximately 300,000 low-income, uninsured and underinsured New Yorkers of reproductive age, including adolescents, through a statewide network of 48 grant-funded healthcare facilities that operate 172 service sites.

B. The Proposed Rule's Effect on Healthcare Discrimination in New York State and Nationwide

NYSDOH understands that the Proposed Rule does not prohibit states from providing greater protections for individuals, and New York State will continue to mandate stronger protections given the importance of equal access to healthcare. Nevertheless, NYSDOH remains concerned about New Yorkers' welfare if this Proposed Rule goes into effect given the regularity and ease of interstate travel. New Yorkers traveling out of state who find themselves in need of medical care should not fear discriminatory conduct merely because they visit a hospital outside of New York State, nor should they be forced to forego necessary medical care rather than risk harassment at an out-of-state healthcare facility. If the federal government is to set the floor for nondiscriminatory conduct, by which all covered healthcare entities must abide, that floor must be higher than the standard set forth in the Proposed Rule. Otherwise, federal law will aggravate existing disparities to healthcare access and harm individual health. As a matter of principle, NYSDOH firmly believes that disparities in access to healthcare must be reduced, not enhanced.

Further, notwithstanding New York State’s expansive legal protections, NYSDOH anticipates that the Proposed Rule will negatively impact the healthcare industry nationwide by creating confusion among healthcare employees and recipients alike as to their rights and obligations. In New York State, covered healthcare entities may believe the federal rules prevail rather than New York State’s stronger nondiscrimination provisions. NYSDOH will therefore be forced to expend additional resources to monitor reports of LGBTQ individuals being turned away from care based on their identity. Nationwide, the Proposed Rule permits even single healthcare entities to implement varying policies on nondiscrimination across its services depending on whether its healthcare activities are funded by HHS. As a result, vulnerable individuals may receive varying care (or no care at all) merely depending on where they live or which healthcare facility they choose to visit. These healthcare disparities cannot stand.

Finally, by removing “termination of pregnancy” from the definition of sex discrimination, the Proposed Rule could have far-reaching impacts on reproductive health. The Proposed Rule seeks to undo the goals of the New York State Reproductive Health Act by impeding an individual’s ability to make personal healthcare decisions without fear of discrimination or retaliation. Such fears could prevent individuals from seeking safe, quality healthcare and promote poor outcomes for infants and their families. Individuals seeking emergency care after a termination could be denied services or referred to a facility at great distance due to healthcare providers’ moral or religious objections to the individual’s reproductive health choice.

II. Opposition to the Proposed Rule’s Limited English Proficiency and Tagline Provisions

As part of its commitment to protecting vulnerable populations, New York State strives to ensure language access. Nearly 1 in 4 New Yorkers (over 4.7 million) have comprehensive health coverage through the NYSOH Marketplace across all 62 counties of the State. Twenty-two percent of these Marketplace enrollees indicated a preferred written language other than English. Providing information and assistance to consumers in their preferred language has been critical to reaching populations with historically higher uninsurance rates. Accordingly, the NYSOH Customer Service Center answered nearly 300,000 calls in one of 101 languages over the course of the most recent open enrollment period, and NYSOH navigators assist consumers in 41 different languages.

The Proposed Rule eliminates the requirement that covered entities include the notice of nondiscrimination and taglines in at least the top 15 languages in significant publications and communications. The currently-required notices are so integrated into NYSOH’s processes, including system-generated notices and consumer education materials, that eliminating the notice of nondiscrimination and taglines from notices would result in significant cost increases to New York State. Indeed, NYSOH estimates that removing taglines and testing new notices to ensure they are displaying the correct messages will cost New York State \$2 million upon implementation of the Proposed Rule. The human toll is just as costly; removing language access would indirectly increase costs by diminishing public knowledge of the means and methods for accessing health insurance, and regressing gains made in reducing uninsured rates among persons with limited English proficiency.

By limiting protections for persons with limited English proficiency, the Proposed Rule stands to interfere with NYSOH's ability to serve the State's most vulnerable populations, and risks reversing the important progress that has been made in reducing uninsurance rates across the State.

III. Conclusion

NYSDOH adamantly opposes adoption of the Proposed Rule. As the agency whose mission it is to protect, improve and promote the health, productivity and well-being of all New Yorkers, NYSDOH has serious concerns with the Proposed Rule. The prospect of denying vital health services to individuals based on gender identity, sexual orientation, or reproductive choices is dangerous and has the potential to harm the physical health and well-being of these individuals.