August 13, 2019

VIA ELECTRONIC SUBMISSION

Secretary Alex Azar
U.S. Department of Health and Human Services
Herbert H. Humphrey Building, Room 509F
200 Independence Ave. SW
Washington, DC 20201

Re: Docket ID HHS-OCR-2019-0007, RIN 0945-AA11. Nondiscrimination in Health and Health Education Programs or Activities

Dear Secretary Azar:

The Center for Law and Social Policy (CLASP) is a national, nonpartisan anti-poverty nonprofit advancing policy solutions for low-income people. CLASP strives to reduce poverty, promote economic security and advance racial equity. We work at federal, state, and local levels, supporting policy and practice that makes a different in the lives of people living in conditions of poverty.

CLASP submits the following comments to the Office of Civil Rights (OCR) at the U.S. Department of Health and Human services (HHS) in response to the notice or proposed rulemaking (NPRM) on Section 1557 of the Patient Protection and Affordable Care Act (ACA) ("Health Care Rights Law" or "Section 1557"). CLASP strongly opposes the language in the proposed rule, as outlined below.

We believe that quality, affordable healthcare is critical for everyone, but for many families, particularly those who are low-income, medical care often remains inaccessible. Section 1557 prohibits discrimination on the basis of race, color, national origin, sex, age, and disability. As an organization that is committed to upholding the civil rights of all persons – and particularly for persons with low-incomes - we strongly oppose the NPRM provisions which seek to eliminate and limit protections for individuals who are limited English proficient, LGBTQ+ persons, persons with disabilities and chronic conditions, and persons needing reproductive health services. Section 1557 addresses not only protections for each protected class covered, but the intersection of those protections. As such, an attack on the civil rights of one group in the NPRM is an attack on the civil rights of all.

Section 1557 of the ACA, finalized in 2016, was the product of a lengthy process of deliberation and public input. The rule was developed over the course of six years of study and following two comment periods, with over 25,000 comments from stakeholders, which were overwhelmingly supportive of inclusion of protections against discrimination based on sex stereotyping, gender identity, and limited English proficiency. HHS engaged stakeholders through listening sessions, participation in conferences, and other outreach prior to taking regulatory action.

While Section 1557 is still the law, this proposed rule attempts to change administrative

implementation in ways that are contrary to the plain language of the law. While unlawful, the NPRM's proposed changes could impose wide ranging harm, falling hardest upon those who already struggle to access health care. The proposed rule is dangerous and contravenes not only the language of Section 1557, but the ACA broadly.

Discriminating on the basis of national origin

Discrimination on the basis of national origin, which encompasses discrimination on the basis of language, creates unequal access to health care. Over twenty-five million Americans are limited English proficient (LEP).[1] Language assistance is necessary for LEP persons to access federally funded programs and activities in the healthcare system. The proposed changes, including narrowing the scope of who is subject to Section 1557, eliminating a private right of action and repealing the notice, taglines and language access plans severely threaten the civil rights of LEP persons. A 2004 study conducted in the Annual Review of Nursing Research underscores that health disparities are magnified for patients who are LEP. Language barriers are associated with more emergency room visits, more lab tests, less follow-up from health care providers, less health literacy among patients, and less overall satisfaction with health services.[2]

The proposed rule would negatively impact the majority of LEP individuals who are Latino. In a 2018 poll, about 6 in 10 Latino adults reported having trouble communicating with their providers about their health care needs due to language or cultural barriers. The nondiscrimination language access protections that the proposed rule seeks to weaken are crucial to minimizing the health care risks LEP Latinos face in the health care system, including avoidable hospital readmissions, lower rates of outpatient follow up, limited use of preventive services, poor medication adherence, and lack of understanding discharge diagnosis and instructions. Spanish-speaking LEP Latinos are more likely to report experiencing worse health outcomes than Latinos who are monolingual in English or bilingual in English and Spanish.

Language access in health care services and activities particularly impacts Asian Americans (AAs), Native Hawaiians (NH) and Pacific Islanders (PI), given the population's demographics. AAs and NHPIs represent the fastest growing communities in the United States and similarly represent incredible diversity. AAs and NHPIs trace their heritage to nearly 100 different ethnic groups and speak more than 250 different languages. Sixty six percent of AAs speak a language other than English at home and twenty nine percent are LEP, meaning that English is not their primary language and they have a limited ability to read, write, speak or understand English. Twenty-eight percent of NHPIs speak a language other than English at home. Sixty-three percent of Burmese, 45 percent of Nepalese and 44 percent of Bangladeshis are LEP, as are 16 percent of Micronesians. AAs and NHPIs make up twenty-two percent of LEP individuals in the country.

Language barriers to health care are further compounded by immigration and citizenship status, educational attainment and poverty. Sixty percent of Asian Americans are foreign-born, representing every immigration status. Medically underserved AA and NHPI communities—including communities where AAs and NHPIs lack access to health care, have high rates of poverty, and have high numbers of LEP populations—are growing across the country. As of the 2000 Census, there were 282 counties or 13.1% of counties classified as medically underserved or severely underserved AA and NHPI communities.

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[1] Center for Law and Social Policy Analysis of 2017 American Community Survey Data. https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_17_1YR_S1602&prodType=table

[2] Annual Review of Nursing Research 22.1 (2004): 59–73, "Language Barriers and Access to Care," http://www.springerpub.com/samples/9780826141347_chapter.pdf

We strongly disagree that the nondiscrimination notice, taglines and language access plan language in the 2016 Final Rule were not justified by need, were overly burdensome, imposed unjustified costs, and created inconsistent requirements. The notice requirement is consistent with the long history of civil rights regulations requiring the posting of notice of rights. The notice is not redundant as OCR created the option of using one consolidated civil rights notice to minimize burden on covered entities. Without the notice, members of the public will have limited means of knowing that language services and auxiliary aids and services are available, how to request them, what to do if they face discrimination, and their right to file a complaint.

We oppose removing all references to language access plans because under the 2016 Final Rule, they are voluntary, not required by law and only a factor to be considered. We oppose changes in the NPRM that would shift the inquiry of meaningful access away from the individual LEP person to that of the entity as doing so would weaken the standard.

Taglines are well-supported by existing federal and state regulations, guidance and practice. Taglines are a cost-effective approach to ensure that covered entities are not overly burdened. In the absence of translated documents, taglines are necessary "to ensure that individuals are aware of their protections under the law, and are grounded in OCR's experience that failures of communication based on the absence of auxiliary aids and services and language assistance services raise particularly significant compliance concerns under Section 1557, as well as Section 504 and Title VI."

Racial and ethnic bias, along with language barriers, often make health care difficult or impossible to access. Bias clearly has implications on how patients see health and can have grave consequences on their stress and anxiety levels, thereby impacting one's mental health. Removing key aspects of Section 1557 will further limit peoples' access to behavioral health care and treatment for opioid-related health conditions.

The regulatory impact analysis is insufficient and fails to identify and quantify costs to protected individuals. OCR has provided no tangible analysis on the costs and burdens to protect individuals from removal of the notice and tagline requirements. The costs are not only reduced awareness of language services by LEP persons, but also reduced awareness by the general public about their rights as protected by 1557.

Finalizing the proposed rule would have a detrimental and damaging effect on LGBT populations

If finalized, this proposed rule would severely threaten LGBT patients' access to all forms of health care, create confusion among patients and providers about their rights and obligations, and promote discrimination. Of all LGBT populations living in the United States, twenty percent of adults living alone earn less than $12,000 annually.[3] Restrictions to basic health access due to one's gender identity and/or sexual orientation for populations already living in poverty are damaging. Ultimately, as health inequities for these populations increase because of a lack of access, costs to the healthcare system will follow.

CLASP is opposed to the proposed changes to roll back long-standing rules that prohibit discrimination on the basis of gender identity and sexual orientation.[4] These changes are outside of the Office for Civil Rights' jurisdiction and are unrelated to Section 1557 of the ACA.

[3] Badgett MVL, Durso, LE, Schneebaum A. The Williams Institute. New Patterns of Poverty in the Lesbian, Gay, and Bisexual Community. June 2013. http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Poverty-Update-Jun-2013.pdf
[4] 45 CFR 155.120(c)(1)(ii) and 155.220(j)(2), 45 CFR 147.104(e), 45 CFR 156.200(e) and 156.1230(b)(3), 42 CFR 460.98(b)(3) and 460.112(a), 42 CFR 438.3(d)(4), 438.206(c)(2), and 440.262.

The proposed rule will make it more challenging for patients—including LGBT, people who are also limited English proficient (LEP) or have LEP family members—to understand their health care rights under federal law. Many individuals may not know about their rights, how to request language services, or how to file a complaint if they face discrimination. By eliminating tagline requirements and notice standards, the proposed rule will undermine access to health care, health insurance, and legal redress for vulnerable communities.

The proposed rule would have a disproportionate impact on those in poverty, communities of color, LGBT communities, and those with chronic conditions.

Section 1557 applies longstanding federal civil rights laws that bar discrimination based on race, color, national origin, age, disability, and sex to all health programs and activities that receive federal funding, including ACA health insurance marketplaces, Medicaid and the Children's Health Insurance Program (CHIP).

The NPRM would enable discrimination in virtually all facets of health care, negatively affecting all U.S. health and healthcare stakeholders, and ultimately driving up the costs of care. The above provisions are also troublesome in the context of persons with low incomes, and will severely impact medical institution costs in the future. In 2015, about 23 percent of LEP individuals lived in households with income below the official poverty line – nearly twice as high as the share of English proficient persons.[5] The provisions proposed in this rule will disproportionately affect those in poverty, adding yet more barriers to accessing health care for this population.

Thank you for the opportunity to submit comments. Please contact Isha Weerasinghe (iweerasinghe@clasp.org), Senior Policy Analyst, with any questions.

[5] Batalova J, Zong J. Migration Policy Institute. Language Diversity and English Proficiency in the United States. 11 Nov 2016. https://www.migrationpolicy.org/article/language-diversity-and-english-proficiency-united-states