



August 13, 2019

VIA ELECTRONIC SUBMISSION

Secretary Alex Azar
Department of Health and Human Services
Hubert H. Humphrey Building, Room 509F,
200 Independence Avenue SW,
Washington, DC 20201

RE: HHS-OCR-2019-0007: Nondiscrimination in Health and Health Education Programs or Activities

Dear Secretary Azar,

We write on behalf of HEAL Trafficking, Freedom Network USA, and the National Survivor Network to express strong opposition to the proposed rule entitled “Nondiscrimination in Health and Health Education Programs or Activities,” published on June 14, 2019 by the Department of Health and Human Services (HHS), the Centers for Medicare & Medicaid Services (CMS), and the Office for Civil Rights (OCR) (collectively, “the Department”).

Founded in 2013, HEAL Trafficking is a united group of multidisciplinary professionals dedicated to ending human trafficking and supporting survivors by advancing a public health perspective. HEAL Trafficking is a network of approximately 2800 survivors and professionals, including physicians, advanced practice clinicians, nurses, dentists, psychologists, counselors, public health workers, health educators, researchers, social workers, attorneys, administrators, and other professionals who work with and advocate for survivors of human trafficking. HEAL Trafficking works to mobilize a shift in the anti- trafficking paradigm toward approaches rooted in public health principles and trauma-informed care by expanding the evidence base; enhancing collaboration among multidisciplinary stakeholders; educating the broader anti-trafficking, public health, and health care communities; and advocating for policies and funding streams that enhance the public health response to trafficking and support survivors. HEAL Trafficking engages in work that combats all forms of human trafficking; supports trafficked

people of all genders, ages, races/ethnicities, religions, origins, cultures, and sexual orientations; approaches human trafficking from a public health perspective that incorporates a socio-ecological framework and prevention strategies; and promotes a survivor-centered, trauma-informed, evidence-based, practice-based approach to anti-trafficking efforts. Most importantly, in the context of this comment, HEAL Trafficking believes all trafficked persons deserve access to a full range of health care including medical, mental/behavioral health, reproductive health, dental, and substance use disorder treatment services.

Freedom Network USA (FNUSA), established in 2001, is a coalition of 68 non-governmental organizations and individuals that provide services to, and advocate for the rights of, trafficking survivors in the US. Cumulatively, FNUSA members serve over 2,000 survivors of human trafficking in the US each year. The network harnesses the expertise of its membership to advocate for comprehensive and compassionate federal policy, provide quality training and technical assistance to the field, and build the capacity of survivors and other stakeholders to influence the anti-trafficking movement. FNUSA is committed to a human rights-based approach to human trafficking. Focusing on the rights of each individual is the only path to restoring their dignity and giving them the opportunity they deserve to pursue a better life. As the largest network of providers working directly with trafficking survivors in the US, FNUSA is uniquely situated to evaluate the impact of US government efforts to address human trafficking, identify challenges, and propose solutions.

The National Survivor Network (NSN) is a Survivor Led Program of the Coalition to Abolish Slavery and Trafficking (CAST). In February 2011, CAST launched the NSN to foster connections between survivors of diverse forms of human trafficking and to build a national anti-trafficking movement in which survivors are at the forefront and recognized as leaders. Members of the NSN include survivors with various backgrounds and origins spanning 24 countries. The NSN's diverse membership makes it uniquely representative of the myriad of situations experienced by survivors of human trafficking. By connecting survivors across the country, the NSN supports survivors to realize and develop their own leadership and fosters collaboration with others who value their insight and expertise in the field.

HEAL Trafficking, FNUSA, and NSN bring their collective experience to comment on the ways that implementation of the proposed rule, "Nondiscrimination in Health and Health Education Programs or Activities," will harm trafficking survivors and individuals at risk for being trafficked. The proposed rule would dismantle many of the protections contained in the rules adopted in 2016 to implement the nondiscrimination requirements of Section 1557 of the Affordable Care Act. These protections offer critically important safeguards for human trafficking survivors who are at significant risk of limited access to essential health care services and often subject to discrimination in health care. In particular, trafficking survivors who identify as LGBTQ, those with limited English proficiency, and those who have sought or may seek comprehensive reproductive health services will be adversely affected by the proposed rule. Therefore, HEAL Trafficking and FNUSA strongly urge the Department to maintain the current regulations implementing Section 1557 and withdraw the proposed rule in its entirety.

The Department has described the proposed rule as representing “substantial revisions”¹ to the regulations implementing Section 1557 of the Affordable Care Act (ACA) that are currently in place.² Section 1557 prohibits discrimination based on race, color, national origin, sex, age, and disability in health programs and activities receiving federal financial assistance.³ For example, Section 1557 applies to health care providers, such as physicians’ practices, hospitals, nursing homes, and organ procurement centers that receive federal funds such as Medicare (excluding Part B) or Medicaid payments; health-related education and research programs; state Medicaid, CHIP, and public health agencies; health insurance issuers and third-party administrators; state-based Marketplaces; and health programs administered by HHS. The statutory requirements of Section 1557 have not changed and can only be altered by Congress, but the proposed rule would dramatically affect the way they are implemented.

Human trafficking survivors in the US include women and men; children, adolescents, and adults; individuals trafficked for labor and for sex; immigrants, refugees, and US citizens. Many have experienced severe trauma. All require access to appropriate and comprehensive health care. A large majority interact with health care providers and systems both while they are under the control of traffickers and after they are no longer in trafficked situations. HEAL Trafficking, FNUSA, and NSN are committed to ensuring that all of these survivors can receive the health care they need and are protected from discrimination in their interactions with health care providers and systems.

Discrimination on the Basis of Sex, Gender Identity, and Sexual Orientation

Gender Identity and Sexual Orientation

Section 1557 prohibits discrimination on the basis of sex. The current rule defines sex discrimination to include discrimination on the basis of gender identity and sex stereotyping, as well as pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions. The proposed rule would remove this definition entirely. The current rule also contains important protections for transgender individuals that prohibit discrimination in health insurance coverage and access to gender transition services. The proposed rule would also remove these protections. In doing so the proposed rule threatens to harm individuals who identify as transgender, including many trafficking survivors.

Transgender individuals, among other LGBTQ people, experience many obstacles in their daily lives that put them at increased risk for being trafficked. These may include alienation from or rejection by family; severe economic hardship and instability; discrimination in employment;

¹ 84 *Fed. Reg.* 27846-27895, 27848 (June 14, 2019), <https://www.federalregister.gov/documents/2019/06/14/2019-11512/nondiscrimination-in-health-and-health-education-programs-or-activities>.

² Kaiser Family Foundation, *Summary of HHS’s Final Rule on Nondiscrimination in Health Programs and Activities* (July 14, 2016); 81 *Fed. Reg.* 31375-31473 (May 18, 2016), <https://www.federalregister.gov/documents/2016/05/18/2016-11458/nondiscrimination-in-health-programs-and-activities>.

³ 42 U.S.C. § 18116.

pervasive mistreatment and violence; mistrust of law enforcement; harmful effects on physical and mental health; and the compounding effects of other forms of discrimination based on race, ethnicity, or immigration status.⁴

Transgender individuals also encounter significant discrimination in the health care system. One study from the National Center for Transgender Equality found that approximately 25% of individuals who identified as transgender were denied insurance coverage because of being transgender.⁵ In 2012, a large gender center in Boston, Massachusetts reported that most young patients who identified as transgender and were deemed appropriate candidates for recommended gender care were unable to obtain it because of such denials, which were based on the premise that gender dysphoria was a mental disorder, not a physical one, and that treatment was not medically or surgically necessary.⁶

Removing gender identity and sex stereotyping from the definition of prohibited sex-based discrimination could allow health care providers to refuse to serve individuals who are transgender or who do not conform to traditional sex stereotypes. This would drastically exacerbate the stark inequities that already exist for trafficking survivors who identify as transgender as it relates to access to care. This practice would only increase stigma and increase risk for adverse mental health outcomes. Furthermore, it may also lead patients to seek nonmedically supervised treatments that are potentially dangerous.

The proposed rule would also eliminate the provision that prohibits a health plan from categorically or automatically excluding or limiting coverage for health services related to gender transition. The rollback of these protections could have a devastating impact on access to medically necessary services for those who identify as transgender and adversely affect self-esteem and contribute to the perception that they are undervalued by society and the health care system. Insurance denials also can reinforce a socioeconomic divide between those who can finance the high costs of uncovered care and those who cannot.

The current rule contains additional protections against sex-based discrimination in Medicaid that would be weakened by the proposed rule. Specifically, the proposed rule removes sexual orientation and gender identity as prohibited bases of discrimination by Medicaid managed care entities, and replaces the terms gender, gender identity, and sexual orientation with the more general term sex in the anti-discrimination requirements for state Medicaid agencies, thereby opening the door to allowing discrimination on the basis of gender identity or sexual orientation.

⁴ James SE, Herman JL, Rankin S, Keisling M, Mottet L, Anafi M. The Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality; 2016.

<https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

⁵ Ibid.

⁶ Edwards-Leeper L, Spack NP. Psychological evaluation and medical treatment of transgender youth in an interdisciplinary “Gender Management Service” (GeMS) in a major pediatric center. *J Homosex*. 2012;59(3):321–336pmid:22455323

Discrimination Based on Pregnancy Termination or Other Pregnancy-Related Status

Furthermore, in an additional form of sex-based discrimination, the proposed rule opens the door to discrimination on the basis of pregnancy termination or other pregnancy-related status. HEAL Trafficking, FNUA, and NSN are committed to ensuring that trafficking survivors have access to the comprehensive range of health care services that are essential to meeting their needs. Many trafficking survivors need access to sexual and reproductive health care, including prevention, diagnosis, and treatment for sexually transmitted infections; pregnancy prevention; and other pregnancy-related care, including pregnancy termination. Access to such care is especially critical due to the frequency with which survivors of both sex and labor trafficking have been subjected to sexual violence.

The proposed rule erects inappropriate barriers to these services. Beyond emboldening providers to discriminate in these and other instances, it would leave the patient without redress for such discrimination. Permitting health care entities that receive federal funding to refuse care to patients who have had a pregnancy termination or accessed other reproductive health care services will have a dangerous effect on access to care.

Discrimination Resulting from Explicit Religious Exemptions

The proposed rule would allow discrimination against trafficking survivors when a health care provider or other covered entity uses religious beliefs as justification to deny, delay, or discourage patients from receiving needed health care services. This could place patients at risk of serious or life-threatening outcomes in emergencies and other circumstances where the individual's choice of health care provider is limited. For instance, the proposed rule may allow a health care provider to refuse care to a trafficked person who seeks essential health services, such as contraception for pregnancy prevention, simply because the provider objects to such care. By permitting sex discrimination based on a provider's religious beliefs, the proposed rule hinders the delivery of reproductive health care aligned with clinical guidelines and the recommendations of major professional medical organizations. Allowing the broad religious exemptions proposed in the rule will discriminate against women seeking necessary sexual and reproductive health care services. Any such exemption would be contrary to Congressional intent and the express purpose of Section 1557 and has the potential to cause great harm to trafficking survivors.

Discrimination Based on Limitations in Language Access

Many trafficking survivors have limited English proficiency for a variety of reasons. Some are immigrants themselves or are children of immigrants or refugees. These are groups that face persistent discrimination in accessing health care. Lack of health care coverage is more common among immigrants and refugees, and children in immigrant families, than for nonimmigrants.

Even when immigrants and their families can access health care providers, they face further obstacles when language barriers prevent effective communication on medical issues. Without access to qualified medical interpreters in health care settings, language barriers can interfere with delivery of appropriate medical care.

The proposed rule would increase barriers to access to care for individuals with limited English proficiency (LEP). Although the proposed rule would continue to require covered entities to take reasonable steps to provide meaningful access to LEP individuals, it removes the reference to “each individual” and also allows much greater latitude to covered entities in determining when language assistance services are required to provide meaningful access; it also removes the requirement for remote video-interpreting services, allowing for audio-only remote interpretation.

When language services are lacking, patient care suffers. 80% of health care providers report encountering patients with LEP,⁷ and under the proposed changes may be forced to resort to harmful alternatives to a licensed, qualified, medical interpreter: they may rely on inadequate second language skills, recruit untrained bilingual staff or strangers *ad hoc*, and incorrectly assume patients understand English, or place children in the uncomfortable and unethical position of interpreting for their parents. Inadequate language resources can ultimately lead to negative, costly, and sometimes deadly consequences.

Some trafficked persons appear in health care settings accompanied by their traffickers. If they are limited in their own English proficiency and are not offered adequate language assistance, they may only be able to communicate with health care providers through their traffickers, thereby limiting their access to proper medical care and drastically reducing any chance that their victimization will be identified and they will be provided with appropriate assistance.

The proposed rule also removes the requirement that covered entities provide non-discrimination notices in English with taglines in multiple languages and information that language assistance services are available. The Department has provided no explanation for how individuals will know of their rights and how elimination of notices will not deny individuals with LEP meaningful access. Without fully translated documents, taglines are necessary to ensure that individuals with LEP are aware of the protections available under the law, and to ensure compliance under Section 1557. Without notice and appropriate taglines, members of the public, including trafficking survivors, will have limited means of knowing that language services and auxiliary aids and services are available, how to request them, and what to do if they face discrimination.

Currently, trafficking survivors face multiple forms of discrimination, including when attempting to access services in health care settings. This proposed rule would exacerbate those

⁷ Proctor K, Wilson-Frederick SM, Haffer SC. The Limited English Proficient Population: Describing Medicare, Medicaid, and Dual Beneficiaries. *Health Equity*. 2018;2(1):82-89. doi:10.1089/heq.2017.0036

discriminations, decreasing the likelihood of trafficked persons accessing health care, which is a critical avenue toward their healing and restoration.

HEAL Trafficking, FNUSA, and NSN appreciate the opportunity to comment on the proposed rule, "Nondiscrimination in Health and Health Education Programs or Activities." For all the foregoing reasons, we strongly urge the Department to withdraw the proposed rule in its entirety and maintain in place the regulations adopted in 2016 to implement Section 1557 of the Affordable Care Act.

Sincerely,



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Nat Paul
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