

**CIVIL LIBERTIES COMMITTEE
OF THE
CHICAGO COUNCIL OF LAWYERS**

August 12, 2019

U.S. Department of Health and Human Services
Office for Civil Rights
Attention: Section 1557 NPRM, RIN 0945-AA11
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue SW
Washington, DC 20201

Re: Nondiscrimination in Health and Health Education Programs or Activities

Dear Sir or Madam:

The Chicago Council of Lawyers (Council) is a reform-minded bar association whose focus is on the needs of the poor and disadvantaged populations who often have unequal access to the justice system. The Civil Liberties Committee (Committee) is a standing committee of the Council that advocates for policies that strengthen the civil liberties of American citizens.

The Department of Health and Human Services (HHS) has proposed a rule (Proposed Rule) that purports to “clarify” the scope of Section 1557 of the Affordable Care Act, which prohibits discrimination on the basis of race, color, national origin, sex, age, or disability under any health program or activity that receives federal financial assistance. Under the Obama Administration, HHS adopted a rule (Existing Rule) that defined discrimination “on the basis of sex” to include, among other things, discrimination on the basis of gender identity. 45 CFR 92.4 (2018). The Proposed Rule would revise the Existing Rule substantially and would no longer prohibit discrimination on the basis of gender identity. *See* 84 Fed. Reg. 27846, 27852-57 (June 14, 2019).

The Committee submits these comments in opposition to the Proposed Rule. We believe that discrimination on the basis of gender identity should be prohibited both for legal and policy reasons.

As noted in the Federal Register notice publishing the Proposed Rule, a number of federal courts have rendered decisions on whether discrimination on the basis of gender identity is covered by various civil rights laws that prohibit discrimination “on the basis of sex.” Different courts have answered that question differently. Although the early cases ruled that gender identity was not covered by the civil rights laws, a number of more recent cases have taken the opposite view. We believe that the legal reasoning of those more recent cases is persuasive.

For example, in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), an employee at a Michigan funeral home was born biologically male, but decided to transition from male to female and to dress as a woman at work. After being notified of this decision by the employee, the funeral home fired the employee because “he was no longer going to represent himself as a man. He wanted to dress as a woman.” The court held that the funeral home violated Title VII of the Civil Rights Act of 1964 by firing the employee on the basis of her transgender or transitioning status, ruling that discrimination on the basis of transgender and transitioning status is “necessarily discrimination on the basis of sex.” It should be noted that the U.S. Supreme Court recently granted petitions for writs of certiorari in this case and two others that raised the question whether Title VII’s prohibition on discrimination on the basis of sex also bars discrimination on the basis of gender identity or sexual orientation.

As a matter of public policy, discrimination on the basis of gender identity can have serious consequences in the area of health care. For example, the Arizona state employee health plan has a blanket exclusion for gender-confirming surgery, and transgender persons are not offered the opportunity to demonstrate that their transition-related surgery is medically necessary. We believe that this type of discrimination should be prohibited under Section 1557 of the Affordable Care Act so that the claims of transgender persons that gender-confirming surgery is medically necessary will be evaluated under the same standards and procedures the health plan applies to other medical treatments.

For the reasons set forth above, the Civil Liberties Committee of the Chicago Council of Lawyers urges HHS not to adopt the Proposed Rule and to retain the policies contained in the Existing Rule.

Respectfully submitted,

David Melton
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Gordon Waldron
Co-chairs of the Civil Liberties Committee