Ethan Rice
Staff Attorney

November 9, 2015

ELECTRONIC SUBMISSION

Sylvia Matthews Burwell
Secretary
United States Department of Health and Human Services
Office for Civil Rights
Attention: 1557 NPRM (RIN 0945-AA02)
Hubert H. Humphrey Building, Room 509F
200 Independence Ave., S.W.
Washington, DC 20201

Re: Proposed Rule on Section 1557
of the Affordable Care Act (RIN 0945-AA02)

Dear Secretary Burwell:

The Transgender Legal Defense and Education Fund ("TLDEF") submits these comments in response to the Notice of Proposed Rulemaking by The United States Department of Health and Human Services ("HHS" or the "Department"), Office of Civil Rights ("OCR"), regarding the proposed rule relating to Section 1557 of the Affordable Care Act ("ACA").

TLDEF is committed to achieving equality – including equal access to health care – for transgender people. We have significant experience in matters related to ensuring access to appropriate care for transgender individuals, including services related to gender transition and the treatment of gender dysphoria, and have worked with countless individuals who have suffered discrimination related to receiving sufficient health care. We commend HHS's proposed rule, which would be a significant step toward ensuring that all individuals across the country receive vital health care free from discrimination. However, we recommend that certain changes be made to the proposed rule in order to

better reflect current treatment standards in transgender health care and to ensure that the goals of the ACA are implemented to the fullest extent possible.

The importance of Section 1557 is highlighted by the pervasive nature of discrimination against transgender individuals and the harm that such discrimination causes. In a recent survey, 28% of transgender individuals reported that when they were sick or injured, they postponed seeking medical treatment out of a fear of being discriminated against, and 19% of transgender individuals reported being refused care due to their transgender or gender non-conforming status.[1] The consequences of such discrimination or fear of discrimination can be fatal. For example, when a transgender woman named Tyra Hunter was critically injured in a traffic accident, the paramedic at the scene refused to provide treatment after discovering that she was transgender.[2] Instead of providing life-saving care, the paramedic directed slurs and even laughed at Tyra. Tyra later died at the hospital. Similarly, on June 15, 2012, emergency service responders refused to treat Shaun Smith, a transgender woman who went into diabetic shock, after discovering that she was transgender. Shaun also did not survive.[3] Refusal to provide medical care is not limited to first responders, but is pervasive throughout the entire health care system. For example, when a surgeon operating on Jay Kallio, a transgender man, discovered that Kallio had breast cancer, he was so shocked that Kallio's body was incongruent with his gender designation that the surgeon could not bring himself to deliver the diagnosis.[4] Instead, Kallio first heard he had breast cancer when a lab technician called to see how he was doing with the diagnosis. Additionally, when seeking later treatment, an oncologist was hostile and refused to advise Kallio of available treatment options.[5]

Over a quarter of the transgender individuals who are brave enough to seek medical attention—approximately 28%—reported experiencing verbal harassment while doing so, and 2% even reported being victims of physical violence. For example, M.J., a transgender woman who is a TLDEF client, was taken to a hospital on an emergency

---

1 Grant, Jaime M, Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, and Mara Keisling, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, National Center for Transgender Equality and National Gay and Lesbian Task Force, at 72 (2011).

2 *See* Statement of Rick Rosendall, President, Gay & Lesbian Activists Alliance (Dec. 11, 1998), *available at* http://www.glaa.org/archive/1998/margiehunter1211.shtml.

3 *See* Ilie Mitaru, *EMS Denied Transgender Patient Care Causing Her Death, Alleges Sheepshead Bay Lawyer*, Sheepshead Bites (April 2, 2013), *available at* http://www.sheepsheadbites.com/2013/04/ems-denied-transgender-patient-care-causing-her-death-alleges-sheepshead-bay-lawyer/.

4 Susan Donaldson James, *Trans Man Denied Cancer Treatment; Now Feds Say It's Illegal*, ABC News (Aug. 8, 2012), *available at* http://abcnews.go.com/Health/transgender-bias-now-banned-federal-law/story?id=16949817.

5 *Id.*

basis, but she was placed in the men's section of the hospital despite that she had already legally changed her name and corrected the sex designation on her driver's license and insurance card. She was harassed and called names by male patients, without staff intervention, and a male staff member even made sexually inappropriate comments discussing her breasts and genitalia. Medical visits can be uncomfortable, frightening, and humiliating at the best of times. It was against this backdrop that Congress determined to expansively protect all individuals from discrimination by enacting Section 1557 of the ACA. We therefore applaud the proposed regulation to the extent that it assists in ensuring that discrimination of this kind will no longer be tolerated.

To further strengthen the proposed rule, we make several recommendations and provide comments below. Our comments are structured to follow the provisions of the proposed rule in the order that they appear.

I. Subpart A – General Provisions

A. Section 92.2 Application – Subpart (a)

With respect to Section 92.2, subpart (a), TLDEF supports the broad application of the regulation to all health programs and activities, to the fullest extent permitted under the statute. TLDEF agrees with the Department that the purpose of the ACA and of Section 1557 is to ensure that all individuals have access to health care free from discrimination on the basis of race, color, national origin, sex, age, or disability, and TLDEF believes that a broad application of Section 1557 is critical to make sure that this purpose is fulfilled.[6] There are two aspects of this subpart that TLDEF believes should be clarified in order to do so.

First, the proposed rule states that it will cover only those health programs and activities that receive Federal financial assistance from the Department. However, the text of Section 1557 of the ACA provides that an individual shall not "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance . . . or under any program or activity that is administered by an Executive Agency or any entity established under this title."[7] This language makes clear that Section 1557 does not apply only to health programs and activities that receive Federal financial assistance from HHS, but to health programs and activities that receive *any* Federal financial assistance, regardless of the source of that funding. Further, Congress delegated broad authority to the Department, and only the Department, to issue regulations under this

---

[6] *See also* Remarks by the President and Vice President at Signing of the Health Insurance Reform Bill (Mar. 23, 2010) (the core principle "enshrined" in the ACA is "that everybody should have some basic security when it comes to their health care."), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-and-vice-president-signing-health-insurance-reform-bill.

[7] Patient Protection and Affordable Care Act ("ACA") § 1557, codified at 42 U.S.C. § 18116 (2012).

section.[8] To accomplish the statute's purpose, the Department should construe the regulation as broadly as possible to cover all entities that receive federal funding for any health program or activity, and to all federally-administered programs or activities.

If the Department chooses to implement regulations covering entities that only receive funding from the Department or that are administered by the Department, discrimination may continue in spite of Congress's clear intent to eradicate such practices. For example, the Department of Veterans Affairs has indicated in its 2017 Advance Appropriations Requests that it needs $63.3 billion in discretionary funding for medical care.[9] The entities that receive this funding will not be covered by the proposed rule even though they receive financial assistance from the federal government because that funding comes from the Department of Veterans Affairs, not HHS. Since Congress permitted the Secretary of HHS to create regulations to implement Section 1557 for all federal agencies, it should do so.

Second, TLDEF recommends that the Department make clear that administrators of self-funded health insurance plans are covered by the rule when the administrator receives federal funds in some capacity, even if unrelated to the self-funded plans. Without clearly articulating the scope of the proposed rule in this way, it may be possible for administrators of self-funded plans that serve as issuers and providers in other instances to argue that they are not covered by the proposed rule with respect to self-funded plans because they do not receive federal funds related to administering those plans. In TLDEF's view, if that administrator receives federal funds at all, even when related to other plans, it should be covered by the regulation so as to ensure that Section 1557 is implemented to the broadest extent permitted under the statute. This approach is consistent with the current language of the regulation, which covers "every health program or activity, *any part of which* receives Federal financial assistance as administered by the Department." (emphasis added).

Recommendation

TLDEF recommends that the rule be revised to read: "(a) Except as provided otherwise in this part, this part applies to every program or activity, any part of which receives Federal Financial assistance, even if the activity or program involved is not that which receives such Federal Financial assistance; every health program or activity administered by the federal government; and every health program or activity administered by a Title I entity."

---

[8] 42 U.S.C. 18116(c) ("The Secretary may promulgate regulations to implement this section."). The "Secretary" for purposes of Title I of the ACA is further defined in Section 1304(c) to be the Secretary of Health and Human Services.

[9] *See* Department of Veterans Affairs, Budget in Brief, at 1 (2016), *available at* http://www.va.gov/budget/docs/summary/Fy2016-BudgetInBrief.pdf

B. Section 92.2 Application – Subpart (b)

The Department seeks comment on whether the regulation should include any specific exemptions for health providers, health plans, or other covered entities with respect to requirements of the proposed rule related to sex discrimination, including the particular requirements that are discussed in the Notice of Proposed Rulemaking. It also requests comment on whether the exemptions found in Title IX and its implementing regulation should be incorporated into the proposed rule.[10]

TLDEF strongly agrees with prior comments submitted to the OCR in response to the Request for Information Regarding Nondiscrimination in Certain Health Programs or Activities ("RFI"), emphasizing that exceptions to the antidiscrimination provisions in Section 1557 must be narrowly construed. More specifically, TLDEF believes that there are several reasons why a religious exemption, such as that found in Title IX, is neither warranted nor permissible in this instance.

First, Section 1557 has only one exception; it applies "[e]xcept as otherwise provided" in Title I of the ACA.[11] Unlike the statutory text of Title IX, the ACA does not contain a religious exemption. Therefore, the ACA does not permit the Department to create this additional exemption in the implementing regulation. Even though Title IX is referenced in Section 1557, along with several other federal anti-discrimination statutes, the reference is made for the grounds on which the statutes prohibit discrimination and the remedies available under them. This reference does not permit the Department to apply the exemptions found in those statutes to the ACA, and nothing in the legislative history of the ACA would permit such a reading.

Second, even if the Department construed the ACA as permitting a religious exemption such as that found in Title IX, creating such an exemption would be improper in light of the purpose of the ACA. Title IX applies in the context of education, not health care, and religious educational institutions generally require an individual to go through an application process and be accepted before being permitted to attend. There is no analogous application process with respect to medical care providers. On the contrary, medical facilities are generally expected to provide care to all individuals, especially in emergency situations.[12] The sheer number of religiously affiliated hospitals

---

[10] *See, e.g.*, 20 U.S.C. § 1681(a)(3) (Title IX) (exempting "any educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization.").

[11] 42 U.S.C. § 18116.

[12] *See* June M. McKoy, *Obligation to Provide Services: A Physician-Public Defender Comparison*, AMA Journal of Ethics, Vol. 8 No. 5 (May 2006) ("under the [Emergency Medical Treatment and Active Labor Act], all hospitals that participate in Medicare and their physicians are duty bound to stabilize and provide medical screening examinations for each patient who comes to the facility for emergency care"), *available at* http://journalofethics.ama-assn.org/2006/05/msoc1-0605.html.

ensures that such an exemption would vitiate the main goal of Section 1557, that all individuals receive health care free from discrimination. Today, there are 645 Catholic Hospitals in this country, together caring for one in six patients.[13] Currently, approximately 29% of all hospitals are religious or religiously affiliated, up from 14% in 1976.[14] As a result of uncertainty as to how the ACA would impact the financial health of hospital networks, there has been a significant increase in the consolidation of several hospital systems throughout the country, leading to the continued expansion of religiously affiliated groups.[15]

Permitting medical-care providers to refuse to provide services based on religious objections has had a material, negative impact on the lives and health of transgender individuals. For example, one of TLDEF's clients, S.L., was scheduled to undergo a double mastectomy and chest reconstruction as part of his gender transition – a medically necessary procedure recommended by S.L.'s doctor and approved for coverage by S.L.'s insurance provider. The surgery was to be performed by a surgeon at a religiously affiliated hospital which routinely provides cosmetic breast surgery, and which was the only hospital where that surgeon had surgery privileges. On the day prior to the surgery, the surgeon informed S.L. that he could no longer perform the surgery at the hospital because the hospital determined that the surgery violated its religious beliefs when performed on a transgender person. S.L. pleaded with the hospital, but the administration refused to reconsider its decision. Fortunately in this case, the surgeon was able to obtain emergency privileges at another hospital, and the surgery was performed later. However, not only should such measures be unnecessary, they also in many circumstances may be completely futile – particularly in more rural areas where treating options may be limited to religiously affiliated institutions. Another client, J.C., had a similar experience. J.C. sought a hysterectomy as part of his gender transition in June 2015, and Medicaid approved coverage for the surgery because it was medically necessary. His doctor agreed to provide the surgery, but only had surgical privileges at a local, religiously affiliated hospital. When the doctor attempted to schedule the surgery, he was told that the hospital would not allow it to take place at the facility. J.C. was forced to seek out a new surgeon that could perform his surgery at a different facility, delaying the medically necessary procedure by several months. Although J.C. also was eventually able to have the surgery, he too should not have been forced to surmount such obstacles to obtain the care that he needed.

---

[13] *See* Elizabeth B. Deutsch, Note, *Expanding Conscience, Shrinking Care: The Crisis in Access to Reproductive Care and the Affordable Care Act's Nondiscrimination Mandate*, Yale 124 L.J. 7 (2015).

[14] *Id.*

[15] For example, since 2011, Catholic hospital networks have engaged in a systematic pattern of acquiring smaller hospital networks, and have grown by over 30%. *See* Nina Martin, The Growth of Catholic Hospitals, By the Numbers, ProPublica (Dec. 18, 2013), *available at* http://www.propublica.org/article/the-growth-of-catholic-hospitals-by-the-numbers.

The consolidation of hospital networks after the ACA was passed has resulted in a situation in which a large percentage of Americans live in areas where the only available hospital network is run by a religiously affiliated group, leaving patients no choice but to seek treatment at one of these facilities. In contrast to the case of secular educational institutions, which are generally available, an individual may not have the choice to seek out a secular hospital, especially in emergency situations. Refusal to provide coverage for health care services based on sex or gender identity is far different from considerations in education programs. Accordingly, it would be entirely improper to create a religious exemption to Section 1557 of the ACA.

Third, even assuming that the Department had the authority to create additional exemptions to the ACA, exemptions like those in Title IX are unnecessary and inadvisable. As recognized by the Department, a number of other provisions address the exercise of sincerely held religious beliefs. These additional protections include provider conscience laws, the Religious Freedom and Restoration Act ("RFRA"), provisions of the ACA relating to abortion services, and regulations relating to preventative health services.[16]

Furthermore, the continued viability and application of certain of these laws in face of the ACA's sweeping mandate is currently being litigated. RFRA provides that a federal law may not "substantially burden a person's exercise of religion" unless the government "demonstrates that application of the burden to the person . . . is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest."[17] The United States Supreme Court has recently decided to review a split in the United States Circuit Courts of Appeal as to whether the ACA's accommodation process for the contraception mandate violates RFRA.[18] Considering that RFRA and several of the other federal conscience objection laws require a delicate balancing between the interests of the objecting individual or institution and the importance of the government interest, the Department should leave the resolution of such exemptions to the courts, the proper venue for such a challenge.

---

[16] *See, e.g.*, 42 U.S.C. 42 U.S.C. § 300a-7; 42 U.S.C. § 238n; Consolidated and Continuing Appropriates Act 2015, Pub. L. No. 113-235, 507(d) (Dec. 16, 2014); RFRA, 42 U.S.C. § 2000bb-1; 42 U.S.C. § 18023; 45 C.F.R. § 147.131.

[17] RFRA, 42 U.S.C. § 2000bb-1.

[18] *See Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 794 F.3d 1151 (10th Cir. 2015), *cert granted*, 2015 WL 6759642, at*1 (Nov. 6, 2015) (cite to the federal reporter currently not available); *see also Sharpe Holdings, Inc. v. U.S. Dep't of Health and Human Servs.*, 2015 WL 5449491, at *7 (8th Cir. September 17, 2015) (cite to the federal reporter currently not available) (holding that the accommodation process violates RFRA) (collecting cases that form split in the circuits, including *Catholic Health Care Sys. v. Burnell*, 796 F.3d 207 (2d Cir. 2015); *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 794 F.3d 1151 (10th Cir. 2015); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. 2015); *Geneva Coll. v. Sec'y U.S. Dep't of Health and Human Servs.*, 778 F.3d 422 (3d Cir. 2015)).

Since there are laws that already adequately protect religious objections, and since the application of such exemptions is currently being litigated, the Department should defer to the courts and resist creating additional exemptions that will almost certainly require recalibration in response to any changes in jurisprudence.

Although TLDEF strongly believes that no additional exemptions are required, permitted, or necessary, if the Department decides to create additional religious exemptions, the scope of those exemptions and the processes for claiming them should track those under Title IX at 45 C.F.R. § 86.12, which require submission in writing of a statement identifying the provisions of the law that conflict with a specific tenet of the religious organization.

Recommendation

TLDEF recommends that no exemptions be included that are not already listed in Title I of the ACA, and that no religious exemption be created.

C. Section 92.3 Relationship to Other Laws

TLDEF strongly supports the proposed rule's language that the ACA should not be construed as imposing a lesser standard than those statutes specifically referenced in Section 1557, including, Title VI, Title IX, Section 504 of the Rehabilitation Act, and the Age Discrimination Act. TLDEF also supports subpart (b) which confirms that the rights and remedies available under those other federal statutes are not in any way limited or invalidated because of the proposed rule.

D. Section 92.4 Definitions

TLDEF largely supports the definitions as drafted in the proposed rule, and will only comment on the specific definitions that have particular relevance to TLDEF's clients and the mission of the organization.

1. *Gender identity*

TLDEF generally supports the definition of Gender identity proposed by the Department, but feels that certain clarifying language should be added to help the definition adequately capture how the term is used by transgender advocacy groups and to help the definition be consistent with the legal construction used by the courts.[19] The

[19] *See, e.g.*, *Avendano-Hernandez v. Lynch*, 800 F.3d 1072 (9th Cir. 2015) (granting petition to vacate removal order under the Convention Against Torture for a transgender Mexican citizen); *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415 (D. Minn. March 16, 2015) (transgender status is part of gender identity); TLDEF, *Policy & Protocol for Serving Transgender Patients* ("Gender identity refers to a person's internal, deeply felt sense of being either male or female, man or woman, or something other or in-between. Because gender identity is internal and personally defined, it is not always visible to others. Gender expression refers to all of the external characteristics and behaviors that are socially defined as either masculine or feminine, such as dress, mannerisms, speech patterns, social

Department should resist, however, any recommendations to redefine the term more narrowly.

Recommendation

To make the definition as clear as possible, we recommend changing the definition to: "Gender identity is an individual's internal sense of gender, which may be male, female, neither, both, or a combination of male and female, and which may be different from that individual's sex assigned at birth. The way an individual expresses gender identity is frequently called 'gender expression,' and may not conform to social stereotypes associated with a particular gender. A transgender individual is an individual whose gender identity is different from the sex assigned to that person at birth; an individual with a transgender identity is referred to in this part as a transgender individual."

2. *On the basis of sex*

The Department seeks comment on the best way to ensure that the definition of "on the basis of sex" includes the most robust set of protections supported by the courts on an ongoing basis. The Department is correct to note that the definition of "on the basis of sex" has evolved, and courts now routinely interpret the term to cover discrimination based on sex stereotypes and gender identity. For instance, a recent decision of the United States District Court in Arkansas held that it is well-settled that Title VII's prohibition of discrimination "'because of [an] individual's sex,' . . . prohibits an employer from taking adverse action because an employee's behavior or appearance fails to conform to gender stereotypes."[20] This holding is consistent with a growing body of court decisions. [21] Therefore, TLDEF agrees that the definition's inclusion of sex stereotypes and gender identity is well-supported by the current state of case law.

---

roles and social interactions."), *available at* www.transgenderlegal.org/media/uploads/doc_22.pdf.

[20] *Dawson v. H&H Elec., Inc.*, No. 4:14cv00583, 2015 WL 5437101, at *3 (D. Ark. September 15, 2015) (denying motion to dismiss because plaintiff alleged discrimination based on sex due to sex stereotyping related to her transgender status).

[21] *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superseded on other grounds by statute as stated in Burrage v. U.S.*, 134 S.Ct. 881 (2014); *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415 (D. Minn. March 16, 2015) (denying motion to dismiss because transgender status is sufficient for a claim of sex discrimination); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); *Mitchell v. Axcan Scandipharm, Inc.*, No. 05–cv–243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006); *Macy v. Holder*, 2012 WL 1435995 (EEOC Apr. 20, 2012) (discrimination "because a transgender person is transgender is, by definition, discrimination 'based on . . .sex,' and such discrimination therefore violates Title VII").

As the Department correctly noted, the application of the language "on the basis of sex" with respect to sexual orientation has also evolved over time. The Equal Employment Opportunity Commission affirmed in a recent decision that Title VII's prohibition of discrimination on the "basis of sex" precludes sexual orientation discrimination because discrimination due to sexual orientation necessarily includes sex-based considerations.[22] In the context of discrimination based on the sex of a spouse or partner, a federal court also held that an employer is engaged in unlawful discrimination under Title VII if the employee discriminated against would have been treated differently if she were a man dating a woman, instead of a woman dating a woman.[23] In the health care context, a federal court reached a similar conclusion in *Hall v. BNSF Railway Co.*, when an employee was denied same-sex spousal coverage on the company health plan.[24] In that case, the judge denied the defendant's motion to dismiss a plaintiff's claim of sex discrimination under Title VII and the Equal Pay Act because the plaintiff sufficiently alleged "adverse employment action in the denial of spousal health benefit due to sex, where similarly situated females [married to males] were treated more favorably by getting the benefit."[25] Given this precedent, and anticipated similar rulings in light of the Supreme Court's decisions in *Obergefell v. Hodges*[26] and *U.S. v. Windsor*[27], the Department should include in this definition discrimination based on sexual orientation. At the very least, the Department should make clear that the definition is not intended to be exhaustive, ensuring that courts may interpret the definition, consistent with the case law cited above, as encompassing discrimination based on sexual orientation.

Recommendation

TLDEF recommends that the definition be revised to read: "On the basis of sex includes, but is not limited to, on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, gender identity, or sexual orientation."

3. *Sex stereotypes*

---

22 *Baldwin v. Foxx*, EEOC Appeal no. 0120133080, Agency No. 2012-24738-FAA-03, at 5-6 (July 15, 2015).

23 *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 123-24 (D. Or. 2002).

24 No. C13-2160, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014).

25 *Id.* at *2; *see also Deneffe v. Skywest, Inc.*, No. 14-cv-00348, 2015 WL 2265373 (D. Colo. May 11, 2015) (alleged discrimination based on use of domestic partner benefits for same-sex partner and failure to participate in colleagues' anti-gay jokes and bragging about heterosexual sexual activity stated Title VII claim).

26 135 S.Ct. 2584 (2015).

27 133 S.Ct. 2675 (2013).

TLDEF supports the broad definition as drafted. TLDEF views this definition as encompassing how an individual expresses himself or herself either through dress or mannerisms, and includes perceptions by others of the person's masculinity or femininity. Importantly, in our view, this definition would cover when an individual is harassed for not appearing to be as masculine or as feminine as they should be in the view of the person perpetrating the harassment, even if the harassment or insults take a form commonly associated with insulting an individual's gender identity or sexual orientation. For example, in *E.E.O.C. v. Grief Brothers Corp.*, the court found that insults directed at the plaintiff related to his perceived sexual orientation sufficiently raised a claim under Title VII because the harassers did not know that the plaintiff was homosexual.[28] The court held that the comments were not directed at the individual because of his sexual orientation, but because he did not comport with the harassers' anticipation of how a heterosexual male should act. TLDEF views the definition of "sex stereotypes" as drafted to encompass this decision. In the event that the Department feels differently, the definition should be clarified to ensure that such harassment or victimization based on sex stereotypes is covered.

E. Section 92.5 Assurances Required

TLDEF supports the requirement that each covered entity must submit an assurance that its health programs and activities will be operated in a nondiscriminatory manner consistent with the proposed rule. In light of the government's interest in assuring that vital health care services are broadly and non-discriminatorily available to all individuals throughout the country, the burden of making such assurances as provided for in the proposed rule is not overly burdensome.

F. Section 92.6 Remedial Action and Voluntary Action

TLDEF strongly supports subpart (a) as drafted. After a finding that a covered entity has discriminated on a prohibited basis, including on the basis of sex, it should be required to take remedial action to overcome the effects of that discrimination. TLDEF also supports subpart (b) as drafted allowing covered entities to take additional steps to overcome the effects of such discrimination. However, TLDEF recommends that it be made clear that these provisions do not in any way limit an individual's right to bring an enforcement action pursuant to Subpart D.

Recommendation

At the end of (b) Voluntary action, clause (c) should be added that states: "Neither (a) nor (b) limit or otherwise effect an individual's right to bring an enforcement action under Subpart D of this section."

G. Section 92.7 Designation of Responsible Employee and Adoption of Grievance Procedures

[28] No. 02-cv-468S, 2004 WL 2202641, at *10 (W.D.N.Y. Sept. 30, 2004).

TLDEF supports the designation procedures and the requirements for adopting grievance procedures for all covered entities. These requirements will ensure that all covered entities will be responsible for complying with the ACA and Section 1557.

H. Section 92.8 Notice Requirement

TLDEF strongly supports the notice requirements as drafted. The ACA is a complex statute, and most people in the United States are not aware of their rights under the statute. These notice requirements will help ensure that all individuals are informed of their rights to receive vital health care free from discrimination, and, in the event of such discrimination, seek immediate relief. The government's compelling interest in ensuring that the ACA is implemented to the greatest extent practical outweighs any inconvenience to covered entities.

II. Subpart B – Nondiscrimination Provisions

A. Section 92.101 Discrimination Prohibited

1. General Discriminatory Actions Prohibited: § 92.101(a)

TLDEF strongly supports section 92.101(a)(1), which broadly prohibits discrimination on the basis of sex under any health program or activity subject to the proposed regulations. The Department has sought comment on section 92.101(a)(2), which excludes from this general prohibition liability for employment discrimination not otherwise covered by the regulation. TLDEF agrees that it is appropriate for most employment discrimination to be addressed under existing laws, but thinks that the explicit carve-out is unnecessary.

As a whole, section 92.101(a) implements Section 1557's prohibition on discrimination. This section is therefore one of the key operative provisions of the proposed rule that will afford broad protections to individuals that experience discrimination in health programs or activities. Consistent with the approach taken with the Age Discrimination Act and Title VI, however, the proposed regulation excludes from its scope certain types of employment discrimination. For example, section 92.101(a)(2) states that "this part does not apply to discrimination by a covered entity against its own employees." Even though the exclusion is subject to section 92.208, which speaks directly to when an employer may be liable, such liability can arise only when one of following three conditions is met: (1) the employer is "principally engaged in providing or administering health services or health insurance coverage"; (2) the employer has an employee health benefit program that receives Federal financial assistance; or (3) the employer operates a health program or activity that receives Federal financial assistance.

The Department states that the purpose and effect of sections 92.101(a)(2) and 92.208 are to carve out from the regulation's prohibition on discrimination hiring, terminations, promotions, or terms and conditions of employment outside the three conditions identified in section 92.208. Any such claims would need to be brought under existing laws such as Title VII, Title IX, Section 504, the Americans with Disabilities

Act, and the Age Discrimination in Employment Act. The Department takes the position that this approach is consistent with the ACA's focus on discrimination in health programs and activities.

As noted above, TLDEF thinks this explicit carve out is unnecessary and may lead to confusion because the proposed rule applies only to exclusions, denials, and discrimination "under any health program or activity." The actions contemplated by the carve out would not fall within the scope of the regulation's prohibitions anyway, and, therefore, do not require exclusion. Should the Department nonetheless feel that it is necessary to include the carve out, TLDEF recommends that the Department in its final rule provide specific examples of the types of actions that would fall within the scope of section 92.101(a)(1) but would be exempted under section 92.101(a)(2).

2. Specific Discriminatory Actions Prohibited: § 92.101(b)

Section 92.101(b) specifies certain discriminatory actions that are prohibited, by incorporating into the proposed rule the actions prohibited under each civil rights law that is referenced in Section 1557. The Department requested comments on this approach.

TLDEF supports the approach taken by the Department in section 92.101(b). By incorporating the discriminatory actions prohibited by the other federal statutes, the Department avoids potential confusion over which interpretation of a discriminatory action might apply when it appears in more than one statute. However, TLDEF also notes that subsection (5) is a key piece of section 92.101(b), and is important to retain this subsection if the Department maintains this approach. Subsection (5) provides that the enumeration of specific forms of discrimination does not limit the general applicability of 92.101(a). TLDEF strongly supports the inclusion of this subsection in order to emphasize that the prohibitions laid out in the regulations are not exhaustive and that section 92.101(a) protects broadly against all forms of discrimination, even those not listed.

3. Applicable Exceptions & Sex-Based Distinctions: § 92.101(c)

Section 92.101(c) provides that exceptions applicable to Title VI, Section 504 and the Age Discrimination Act apply also to discrimination under the proposed rule. Although it does not specifically address exemptions under Title IX, the Department states that it does not intend to prohibit single-sex facilities where comparable facilities are available regardless of sex. The Department seeks comment on what other sex-based distinctions, if any, should be permitted in the context of health programs and activities and the standards for permitting distinctions. TLDEF agrees with comments to the RFI that any single-sex programs should be narrowly construed to accomplish an essential health purpose, and to the extent that they are permitted, all transgender individuals should be treated consistent with their health care needs, based on their gender identity or a determination of medical necessity.

TLDEF recognizes that certain single-sex programs are permissible under Title IX. As recognized by the Department, however, sex-based distinctions should not as

frequently apply in the context of health care as they do in education. Two examples offered by the Department of health care-related, sex-based distinctions are a women's health clinic and a counseling program limited to male victims of domestic violence. TLDEF does not contest that at times sex-based distinctions may be necessary or advisable in the health care context, but takes the position that any such distinctions should be employed sparingly and only where there is a clear benefit to the distinction. Just as importantly, individuals should be able to participate in programs or activities that utilize sex-based distinctions, and to access sex-segregated facilities, consistent with their gender identity or based on medical necessity. Accordingly, TLDEF recommends that the Department make clear through language in the final rule or comment to the rule that it would be a violation of the regulations to prevent, based on gender identity, transgender individuals from participating in programs or activities, or from using the facilities consistent with their gender identity. It also should be clear, as discussed *infra*, that individuals must be able to access facilities and services deemed medically necessary. *See* Section III.A.

TLDEF's position is supported by the interpretation of discrimination "on the basis of sex." *First*, under Title IX, no person may be excluded from, be denied participation in, or denied the benefits of an education activity or program receiving Federal financial assistance on the basis of sex. As discussed previously, the term "sex" has been interpreted in the case law to include gender identity, transgender status, and sex stereotypes, because gender identity is an aspect of sex.[29] It is therefore a violation to bar a transgender individual from using facilities consistent with that individual's gender identity.[30] As discussed *infra*, however, individuals must not be prohibited from accessing health care that is ordinarily only available to individuals of one gender if such health care is medically necessary for that individual. *See* Section III.A.

Second, OCR has issued guidance explaining that Title IX protects transgender students from discrimination based on gender identity.[31] It also specifically noted that under Title IX, an educational entity must treat transgender students consistent with their gender identity. [32] Given OCR's position, it is clear that these regulations should be interpreted to require that transgender individuals be permitted to participate in programs

---

[29] *See, e.g.*, *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Macy v. Holder*, 2012 WL 1435995 (EEOC Apr. 20, 2012) (discrimination "because a transgender person is transgender is, by definition, discrimination 'based on . . .sex,' and such discrimination therefore violates Title VII").

[30] *Lusardi v. McHugh*, Appeal No. 0120133395, 2015 WL 1607756 (EEOC Apr. 1, 2015).

[31] *See* OCR, Questions and Answers of Title IX and Sexual Violence (Apr. 29, 2014), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

[32] *See* OCR, Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities (Dec. 1, 2014), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf.

or activities that utilize sex-based distinctions, and to access sex-segregated facilities, consistent with their gender identity.

Recommendation

As currently drafted, section 92.101(c) does not address sex-based distinctions at all. Because of the frequency with which this issue has arisen in the educational context, TLDEF recommends that the Department clarify in the rule itself that transgender individuals must be permitted to participate in programs or activities that utilize sex-based distinctions, and to access sex-segregated facilities, consistent with their gender identity. Specifically, TLDEF recommends the addition of the following sentence to 92.101(c): "To the extent that exceptions applicable to Title IX apply to discrimination on the basis of sex under this part, all individuals participating in programs or activities that utilize sex-based distinctions, or accessing sex-segregated facilities permissible under such exceptions must be permitted to participate or accept such programs, activities or facilities in a manner consistent with the individual's gender identity or with the individual's medical needs." Alternatively, TLDEF recommends that the Department refer to section 92.206, which provides specifically that individuals must be treated consistent with their gender identity. Such an addition would read as follows: "To the extent that exceptions applicable to Title IX apply to discrimination on the basis of sex under this part, any programs or activities operating under such an exception must comply with 92.206."

Should the Department feel that such a provision within the rule is unnecessary, TLDEF recommends that the Department provide in its commentary to the final rule an explanation to the same effect. Regardless of approach, it is critical that those implementing these regulations be aware that individuals must be treated in a manner consistent with their gender identity.

III. Subpart C – Specific Applications to Health Programs and Activities

A. Section 92.206 Equal Program Access on the Basis of Sex

TLDEF strongly supports the Department's inclusion of discrimination on the basis of gender identity in the prohibition on sex discrimination. This section makes clear that health care that is ordinarily available to individuals of one sex cannot be denied or limited based on the individual's gender identity.[33] It also makes clear, however, that transgender individuals cannot be denied coverage for treatments and procedures that are ordinarily associated with the opposite gender. This is a vitally important provision. TLDEF's clients routinely face this type of discrimination, which

[33] TLDEF notes with approval that this provision is consistent with the Department's voluntary resolution agreement with The Brooklyn Hospital, which ensures that transgender patients of the hospital receive care and treatment free from discrimination, in accordance with Section 1557. *See* Voluntary Resolution Agreement between U.S. Dep't of Health and Human Servs. and Brooklyn Hospital Center (July 2015), at www.hhs.gov/ocr/civilrights/activities/agreements/TBHC/vra.pdf.

can prevent individuals from obtaining the care that they need or force them to pay for care that would otherwise be covered. For example, one of TLDEF's clients, J.A., is a transgender man who was denied health insurance coverage for routine gynecological care and recommended follow-up care. The denial was based on the fact that his sex designation was listed as male with the insurance company. J.A. spoke with individuals at the company and explained that he was transgender. He also gave them permission to note his transgender identity in their system. The company stated that it could not do so and refused to provide coverage until TLDEF filed an appeal on J.A.'s behalf. The proposed rule would ensure that transgender individuals like J.A. will not need to overcome unnecessary administrative obstacles to receive the care they need. To assist in the proper implementation of the regulation, particularly because the proposed language is somewhat complex, the Department should include a number of examples of the application of this rule in the comment section, noting, however, that such examples are not exclusive. For instance, TLDEF recommends that the Department provide examples illustrating that covered entities must provide and cover routine gynecological exams for transgender men (using a fact pattern similar to that encountered by J.A.), that covered entities must provide and cover routine prostate exams for transgender women, and that covered entities must provide and cover other services that are generally only available for one gender if those treatments are medically necessary for the individual, irrespective of their gender.

B. Section 92.207 Nondiscrimination in Health-Related Insurance and Other Health-Related Coverage

TLDEF strongly supports Section 92.207(b), which is critically important to transgender individuals. TLDEF has been contacted by hundreds of clients and potential clients who have had coverage for transition-related care denied because of their sex. For example, A.T., a transgender woman, was denied all treatments for gender dysphoria by her employer-provided health plan. She applied for coverage for transition-related surgery, which was determined to be medically necessary by her medical doctor and a psychologist who evaluated her for purposes of the surgery. However, even after submitting the required documentation from her physician, she was denied coverage because of the explicit exclusion on transition-related care in her policy. Similarly, R.A., a transgender man who had insurance coverage through his employer, was denied coverage for gender reassignment surgery because the policy had an explicit exclusion for coverage of "sex change procedures." On appeal, R.A.'s surgeon participated in the review of this decision with the insurance company's medical review team and put forth his determination that this surgery was medically necessary for R.A. along with the same determination made by R.A.'s therapist and an independent psychologist. The insurance company upheld the denial of coverage because it was based on an explicit exclusion rather than a determination of medical necessity.

Section 92.207(b)(3) and (4) will provide important protections against exclusions such as those in the policies of A.T. and R.A. – and many others. TLDEF strongly supports these provisions.

However, there are two aspects of the section that make it vulnerable to being rendered meaningless in many cases. TLDEF requests that the Department clarify the rule so as to ensure that denial of coverage is prohibited for medically necessary transition-related care and to ensure that such coverage is not denied on the basis that similar services, if provided to non-transgender individuals, could be deemed to be "cosmetic" in nature.

First, subsection (b)(4) prohibits only categorical or automatic exclusion of coverage related to gender transition. This prohibition will be sufficient to remove wholesale exclusions in policies that operate to deny coverage for any transition-related care. However, it does not on its face prevent an insurer from denying coverage if it considers that the procedures are not medically necessary – which in many cases amounts to a denial of coverage based on gender identity. *Second*, subsection (d) of the proposed rule specifically provides that nothing in the section is intended to "determine, or restrict a covered entity from determining, whether a particular health service is medically necessary or otherwise meets applicable coverage requirements in any individual case." Together, these subsections appear to permit plans to deny coverage for certain types of transition-related care, so long as there is no categorical exclusion in the policy.

The effect of these aspects of the proposed rule could be far-reaching. Procedures sometimes deemed "cosmetic" for non-transgender individuals often are critically important and medically necessary for an individual diagnosed with gender dysphoria.[34] For example, D.C. is a transgender man who has health insurance through his State Medicaid Program. In September 2015, his surgeon submitted a claim for double mastectomy and chest reconstruction for the treatment of gender dysphoria. The State Medicaid Program denied coverage on the basis that the treatment was cosmetic, and not medically necessary. D.C., therefore, has no way to obtain coverage for the care that he requires and that his treating physician has determined to be medically necessary. By leaving unaddressed both the fact that in many instances individuals are denied coverage because of a perceived lack of medical necessity and the denial of coverage based on determination that certain procedures are "cosmetic" in nature, the Department risks allowing insurers to circumvent the intent of the rule and continue to discriminate against transgender individuals.

The World Professional Association for Transgender Health ("WPATH") includes in its Standards of Care ("SOC 7" or "Standards") explanations of medically necessary procedures. These guidelines recommend as treatment for gender dysphoria several procedures that might go uncovered under the proposed rule as drafted. For example, the WPATH Standards recognize breast augmentation as a potentially medically necessary treatment for certain patients with gender dysphoria.[35] WPATH

---

[34] World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender and Gender Nonconforming People*, Version 7, available at http://www.wpath.org/uploaded_files/140/files/Standards%20of%20Care,%20V7%20Full%20Book.pdf.

[35] SOC 7, at 59.

also includes voice and communication therapy as potentially medically-necessary treatments that may "help to alleviate gender dysphoria."[36] Further, WPATH recognizes "Nongenital, nonbreast surgical interventions" as potentially medically-necessary treatments for gender dysphoria, including: "facial feminization surgery, liposuction, lipofilling, voice surgery, thyroid cartilage reduction, gluteal augmentation (implants/lipofilling), [and] hair reconstruction." In TLDEF's experience, these procedures are often deemed "cosmetic" by insurance companies, but for individuals diagnosed with gender dysphoria, they can be, and often are, medically necessary.

Recommendation

As discussed, certain aspects of the proposed regulation create the potential for providers to discriminate on the basis of gender identity. Where an individual seeks a particular treatment or service for medically necessary reasons, that individual should receive coverage for that treatment in accordance with WPATH's SOC. TLDEF therefore recommends that the Department add a sentence to the end of subsection (b)(5) that reads: "Such discrimination includes, but is not limited to, the denial or limitation of coverage for health services for the treatment of gender dysphoria or gender transition when coverage for the same or substantially the same health service is covered for other diagnoses under the plan, and the denial or limitation of coverage for health services for other medically necessary services or procedures for the treatment of gender dysphoria or gender transition, even if such services or procedures are not considered medically necessary for individuals not diagnosed with gender dysphoria."

In addition, TLDEF recommends that the Department make clear in the commentary that accompanies the final rule that the rule is intended to prohibit denial of coverage for procedures that may be medically necessary for the treatment gender dysphoria as described in the WPATH's SOC guidelines.

IV. Subpart D – Enforcement

TLDEF strongly agrees with prior comments submitted to the OCR in response to the RFI arguing that the regulations implementing Section 1557 should include the full range of enforcement mechanisms available under the other anti-discrimination statutes referenced in Section 1557. TLDEF commends the Department on confirming that Section 1557 affords a private right of action. However, in the proposed rule, the Department merely restated the statutory language with respect to the enforcement mechanisms available to individual claimants without clarifying what legal standard applies to such claims. The current rule states that "[t]he enforcement mechanisms provided for and available under such Title VI, title IX, Section 504, or the Age Act shall apply for purposes of Section 1557 and this part with respect to covered entities." In TLDEF's view, this does not go far enough to ensure that all claims for discrimination

[36] SOC 7, at 52. Voice and communication therapy assist individuals in adapting their voice and communication styles to be congruent with their gender identity. SOC 7, at 53.

are covered, irrespective of whether those actions are premised on claims of disparate treatment or disparate impact.

TLDEF agrees with Judge Nelson that Congress must have intended to create "a new, health-specific, anti-discrimination cause of action that is subject to a singular standard, regardless of a plaintiff's protected class status,"[37] otherwise, plaintiffs bringing claims under Section 1557 would be treated to a host of different legal standards depending on whether the discrimination is related to race, sex, age, or disability.[38] This indeed would be a confusing and unfair result.

In addition, construing Section 1557 as permitting both disparate treatment and disparate impact claims is consistent with current Supreme Court precedent. In *Texas Dep't of Housing and Comty. Affairs v. Inclusive Communities Project, Inc.*, the Supreme Court held that disparate impact claims were cognizable under the Fair Housing Act ("FHA") because the statutory text referred to the consequences of the prohibited actions, and not just the mindset of the actors, and the broad interpretation was consistent with the statutory purpose of eradicating discrimination within the entire housing sector of the economy.[39] Similarly, Section 1557 contains effect-related language and interpreting Section 1557 to allow disparate impact claims is consistent with the statutory purpose.

First, in *Texas Dep't of Housing and Comty. Affairs*, the Court noted that the FHA, which made it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familiar status, or national origin," covered disparate impact claims because Congress prohibited the effects of discrimination by adding the phrase "otherwise make unavailable." Similar to that statute, Section 1557 makes it unlawful for individuals to be "denied the benefits of" any health program or activity. The phrase "denied the benefits of" looks to the effects and consequences of actions, not the mindset of the actors. So, even if there is no discriminatory intent, protected classes cannot be denied the benefits of the health programs and activities covered by the statute.

Second, just as with the FHA, where the Court noted that the statute was "enacted to eradicate discriminatory practices within a sector of our Nation's economy,"[40] the ACA is specifically limited to a sector of our Nation's economy: the health sector. Therefore, Section 1557 by its own text covers claims premised on both direct discrimination and disparate impact.

---

37 *See Rumble v. Fairview Health Servs.*, 2015 WL 1197415, at *11 (D. Minn. March 16, 2015).

38 *Id.*

39 135 S.Ct. 2507, 2518-21 (2015).

40 *Id.* at 2521.

However, the proposed rule is at best ambiguous as to whether disparate impact claims, as well as disparate treatment claims, are permitted under Section 1557. The rule states that "[t]he enforcement mechanisms available for and provided under Title VI, Title IX, Section 504, or the Age Act shall apply for purposes of Section 1557 and this part with respect to covered entities." Two of those referenced statutes, Title VI and Title IX, do not permit claims based on disparate impact, but at least one, Section 504 of the Rehabilitation Act, does permit such claims.[41] Therefore, the proposed rule would appear to allow different standards to be used based on the grounds alleged for the discrimination. This cannot be what Congress intended. Looking to Section 1557, it is true that Congress stated that the "enforcement mechanisms available for and provided under Title IV, Title IX, Section 504, or the Age Act shall apply for claims under Section 1557," but there is no indication, either in the text of the statute or in the legislative history, that Congress intended the word "mechanisms" to include legal standards. Instead, Congress likely included reference to Title VI, Title IX, Section 504 and the Age Act here to ensure that a private cause of action was created for all of the protected classes covered by the statute. In light of this ambiguity, the Department should construe the plain text of the statute consistent with the Supreme Court's ruling in *Texas Dep't of Housing and Comty. Affairs v. Inclusive Communities Project, Inc.*, and make clear that claims under Section 1557 can be premised on both disparate treatment and disparate impact.

It is particularly important to permit such claims in the health sector because it is often very difficult to prove intentional discrimination, and the effects of latent discrimination can have sweeping effects. For example, if a hospital refuses to alter patient intake forms to take into account gender identity, the result could be that transgender individuals will continue to experience discrimination, including extended wait times at hospitals, assignment to incorrect facilities, and even the denial of benefits. Since it would be difficult to show intentional discrimination by the hospital in this instance, transgender individuals could continue to experience discrimination, in

---

[41] *See Alexander v. Sandoval*, 532 U.S. 275, 288-93 (2001) (holding that Title VI only prohibits intentional discrimination and does not permit disparate impact claims); *Xiaolu Peter Yu v. Vassar College*, 2015 WL 1499408, at * 10, n. 6 (S.D.N.Y. March 31, 2015) (collecting cases holding that Title IX only prohibits intentional discrimination, not claims based on disparate impact); *P.P. v. Compton Unified Sch. Dist.*, No. CV153726, 2015 WL 5755964, at *10 (C.D. Cal. Sept. 29, 2015) (Section 504 permits claims that are not based on intentional discrimination); *Helen L. v. DiDario*, 46 F.3d 325, 335 (3d Cir. 1995) (the ADA is not limited to claims of intentional discrimination); *Class v. Towson Univ.*, No. CIV.A. RDB-15-1544, 2015 WL 4423501, at *9-10 (D. Md. July 17, 2015) (the law of the 4th Circuit allows claims based on disparate treatment to be cognizable under Section 504); *Wright v. New York State Dep't of Corr. & Cmty. Supervision*, No. 9:13-CV-564, 2015 WL 5751064, at *6 (N.D.N.Y. Sept. 30, 2015) (the 2d Circuit allows claims under Section 504 based on disparate impact). The law on whether the Age Act permits such claims is not settled. *Compare NAACP v. Medical Center, Inc.*, 657 F.2d 1322, 1331 (3d Cir.1981) (allowing disparate impact claims under the Age Act) *with Kamps v. Baylor Univ.*, 592 F. App'x 282, 285-86 (5th Cir. 2014) (denying disparate impact claims under the Age Act), *cert. denied*, 135 S. Ct. 2380 (Aug. 10, 2015).

violation of the purpose of Section 1557, and might not have the ability to seek relief. For these reasons, it is imperative that the Department make clear that disparate impact claims are cognizable under Section 1557.

Recommendation

TLDEF recommends that the proposed rule be amended to include that "Disparate treatment and disparate impact claims are cognizable under Section 1557." Alternatively, the Department should make clear in the notes to the regulation that both sets of claims are covered.

Conclusion

We reiterate our support for the proposed rule and commend the Department for its laudable commitment to equal treatment for transgender individuals. Our modifications include important changes to the proposed rule that will ensure that it applies to the greatest extent possible under the ACA and Section 1557, and that it comports with the most current medical understandings of the treatment for gender dysphoria. We would be happy to provide you with any additional information you might need as you consider our comments and the comments received from other organizations or entities.

Very truly yours,

Ethan Rice