

NYLPI

JUSTICE THROUGH COMMUNITY POWER

**Public Comment of New York Lawyers for the Public Interest
Regarding Nondiscrimination in Health Programs and Activities
RIN 0945-AA17
HHS Docket No. HHS-OS-2022-0012**

October 3, 2022

New York Lawyers for the Public Interest (NYLPI) submits this comment in response to the Department of Health and Human Service's advance notice of proposed rulemaking (ANPRM) published on August 4, 2022. NYLPI's position is that reinstating regulations that implement Section 1557 and clarifying their broad applicability is necessary to advance health equity and access for the communities we serve. For more than 40 years, NYLPI has been a leading civil rights and legal services advocate for New Yorkers marginalized by race, poverty, disability, and immigration status. Our work integrates the power of individual legal services, impact litigation, and comprehensive organizing and policy campaigns. Guided by the priorities of our communities, we strive to create equal access to healthcare, achieve equality of opportunity and self-determination for people with disabilities, ensure immigrant opportunity, strengthen local nonprofit organizations, and secure environmental justice for low-income communities and communities of color.

Immigrants in the United States are more likely to live in poverty, experience food and housing insecurity, and face challenges with healthcare access, all of which lead to poor health outcomes.¹ For example, immigrant communities across the country have had disproportionately high mortality rates from COVID-19.² NYLPI's UndocuCare program aims to lessen these disparities by providing holistic services to immigrant New Yorkers who are undocumented and uninsured, including comprehensive immigration and health screenings, legal representation, and organ transplant advocacy to connect seriously ill immigrant New Yorkers to healthcare. Following this approach, NYLPI's UndocuCare TGNCI+ program provides direct legal services to transgender, gender-nonconforming, and intersex (TGNCI) undocumented individuals living with HIV by filing for viable relief, including asylum, U- and T-visas, and family-based

¹ Cindy D. Chang, *Social Determinants of Health and Health Disparities Among Immigrants and Their Children*, 49 *CURR. PROBL. PEDIATR. ADOLESC. HEALTH CARE* 23 (Dec. 2018).

² Eva Clark, Karla Fredricks, Laila Woc-Colburn, et al., *Disproportionate impact of the COVID-19 pandemic on immigrant communities in the United States*, *PLOS NEG. TROP. DIS.* Available at: <https://journals.plos.org/plosntds/article?id=10.1371/journal.pntd.0008484> (July 13, 2020).

applications. Additionally, NYLPI addresses human rights crises in immigration detention by bringing civil suits against municipalities and private contractors, some of which are covered entities, with the goal of eliminating discrimination and abuse. This work is community-driven and informs our policy and legislative advocacy.

NYLPI is supportive of HHS's efforts to reinstate and broaden Section 1557's nondiscrimination provisions in health programs and activities. Our clients often struggle to receive the care they need, even when they are recipients of state-funded Medicaid. While states must establish the citizenship and immigration status assessments for Medicaid applicants,³ covered entities may not administer their programs in a manner that has a discriminatory impact on individuals of a particular national origin, which includes those of differing immigration statuses.⁴ Despite this, NYLPI has represented many immigrant clients with end-stage renal disease who faced barriers to receiving organ transplants and even denied access to the care they need. Our clients' experiences have shown us that people enrolled in state-funded health insurance—theoretically eligible to receive kidney transplants—do not, in part because of their immigration status. Despite legal frameworks requiring that only medical criteria be used in allocating organs, inability to pay and lack of language services prevent many from getting a life-saving transplant.⁵ From our advocacy work, we have learned that many providers wrongfully assume that they cannot offer transplants to certain immigrant patients who are not legal permanent residents, even when they are enrolled in health insurance. Moreover, many providers may unknowingly discriminate against immigrant patients during the assessment process, assuming they lack social support or the ability to care for themselves after organ transplantation, resulting in a denial of care.⁶

Transplantation may also be delayed because patients are unaware of their rights. For example, NYLPI client Mr. L endured over ten years of dialysis because he was under the belief his immigration status barred him from receiving a kidney transplant—his providers did not tell him otherwise.⁷ By strengthening training requirements for providers and making it clear to them that discrimination on the basis of immigration status is prohibited under Section 1557, clients like Mr. L will be able to live healthy, productive lives.

Additionally, like many transgender and gender-nonconforming people living throughout the United States, our TGNCI+ clients are often unable to access culturally sensitive and

³ *Policy Guidance Regarding Inquiries into Citizenship, Immigration Status and Social Security Numbers in State Applications for Medicaid, State Children's Health Insurance Program (SCHIP), Temporary Assistance for Needy Families (TANF), and Food Stamp Benefits*, DEP'T OF HEALTH & HUMAN SERVICES, available at: <https://www.hhs.gov/civil-rights/for-individuals/special-topics/national-origin/tri-agency/index.html> (July 26, 2013).

⁴ *Section 1557: Frequently Asked Questions*, DEP'T OF HEALTH & HUMAN SERVICES, available at: <https://www.hhs.gov/civil-rights/for-individuals/section-1557/1557faqs/index.html> (May 18, 2017).

⁵ Garyphallia Poulakou, Oscar Len & Murat Akova, *Immigrants as donors and transplant recipients: specific considerations*, 45 INT. CARE MED. 401 (Jan. 2019).

⁶ *Id.*

⁷ Erica Pearson, "UndocuCare' program tries to find and help immigrants in New York State who can qualify for health insurance," NEW YORK DAILY NEWS, available at: <https://www.nydailynews.com/new-york/immigrants-new-york-state-receive-medicaid-article-1.2402260> (Oct. 18, 2015).

concordant care that respects their gender identities. TGNCI+ people have reported that the biggest barrier to receiving gender-affirming and other medical care is the lack of providers who are knowledgeable about the needs of TGNCI+ people.⁸ The proposed regulations codify a new definition of sex discrimination and mandate training for providers that will advance TGNCI+ people's access to care. NYLPI's work with immigrant TGNCI+ clients who have been detained demonstrates the need for strengthened protections from sex discrimination. At least five of our TGNCI+ clients who have been detained requested and never received hormone therapy while in immigration detention. The World Professional Association for Transgender Health has stated in its standard of care guidelines that hormone therapy is medically necessary treatment for many TGNCI+ people.⁹ Healthcare units within carceral settings, many of which receive services from third-party contractors, may be subject to Section 1557 if they receive any amount of federal funds.¹⁰ Thus, NYLPI suggests that HHS release nondiscrimination guidance specific to health care providers who operate in carceral settings to prevent grave human rights abuses that often occur in these settings.¹¹

Despite some providers' best intentions to care for immigrant patients, these barriers to care persist, and they represent the types of discrimination that Section 1557 was intended to prevent. NYLPI believes that strengthening Section 1557's protections and expanding their applicability will decrease health disparities and facilitate more equitable access to life-saving care. Additionally, the regulations will be broadly applicable to all health insurance issuers and institutions receiving federal funds and newly apply them to Medicare Part B beneficiaries, which will further support equitable access to care for the populations NYLPI serves.

In this comment, we highlight several provisions of the proposed rule to demonstrate how they have the potential to increase access to care and equity for our UndocuCare and TGNCI+ clients.

⁸ Joshua D. Safer, Eli Coleman, Jamie Feldman, et al., *Barriers to Care for Transgender Individuals*, 23 CURR. OPIN. ENDOCRINOL. DIABETES OBES. 168 (Apr. 2016).

⁹ *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7*, THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, available at: https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English2012.pdf?_t=1613669341 (2012).

¹⁰ At least three correctional health providers have received PPP loans, according to data published by the Small Business Administration. One of them, CFG Health Systems, LLC, has a history of medical neglect and discrimination. See "Longtime New Yorker Files Civil Rights Lawsuit Over Injuries Resulting from Inadequate Healthcare in ICE Detention," NEW YORK LAWYERS FOR THE PUBLIC INTEREST, available at: <https://www.nylpi.org/longtime-new-yorker-files-civil-rights-lawsuit-over-injuries-resulting-from-inadequate-healthcare-in-ice-detention/> (Jan 23, 2020). See also "Family of Man Who Bled to Death in Immigration Custody Sues Hudson County Over Medical Care," NEW YORK LAWYERS FOR THE PUBLIC INTEREST, available at: <https://www.nylpi.org/family-of-man-who-bled-to-death-in-immigration-custody-sues-hudson-county-over-medical-care/> (May 30, 2019).

¹¹ See *Justice Free Zones: U.S. Immigration Detention Under the Trump Administration*, AMERICAN CIVIL LIBERTIES UNION RESEARCH REPORT, available at: https://www.hrw.org/sites/default/files/supporting_resources/justice_free_zones_immigrant_detention.pdf (2020).

1. Reinstating a definition of discrimination on the basis of sex will likely improve equity in access to care and coverage for TGCNI+ people.

The rule proposes to define sex discrimination as “discrimination on the basis of sex stereotypes; sex characteristics, including intersex traits; pregnancy or related conditions; sexual orientation; and gender identity.”¹² This language brings Section 1557 in line with the Supreme Court’s decision in *Bostock v. Clayton County*, which held that that discrimination on the basis of sex includes discrimination on the basis of sexual orientation and gender identity.¹³ Reinstating this definition of sex discrimination shows promise for NYLPI’s TGCNI+ clients, who have experienced discrimination in health clinics and carceral settings because of their gender identity.

2. Reinstating requirements that covered entities take meaningful steps to provide language services free of charge and provide notice of nondiscrimination in multiple languages may decrease health disparities experienced by immigrant New Yorkers.

The rule proposes that covered entities “take reasonable steps to provide meaningful access to each limited English proficient (LEP) individual eligible to served or likely to be directly affected by its health programs and services.”¹⁴ As the ANPRM states, the COVID-19 pandemic has demonstrated the deleterious effects of poor access to language services: LEP individuals are less likely to be vaccinated and 35 percent more likely to die of COVID-19.¹⁵ This puts immigrant populations at an increased risk of long-COVID symptoms, which are poorly understood and difficult to treat effectively. Language barriers in healthcare decrease patient safety and the quality of the care delivered.¹⁶

Due to the chilling effect of the Trump administration’s public charge rule, many immigrants who are legally entitled to benefits have forgone applying for them or seeking care because they have feared apprehension by immigration authorities.¹⁷ Though the Department of Homeland Security recently issued a new final rule on public charge, the public charge concept continues to prevent immigrants from seeking care. HHS’s proposed rule requires that covered entities provide a notice of nondiscrimination on an annual basis and upon request in the entity’s state’s fifteen-most spoken languages.¹⁸ Providing notice of nondiscrimination policies may help

¹² Proposed Rule § 92.101(a)(2).

¹³ *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020).

¹⁴ Proposed Rule § 92.201.

¹⁵ Martha Bebinger, “Pandemic Imperiled Non-English Speakers More Than Others,” KAISER FAMILY FOUNDATION, available at: <https://khn.org/news/article/pandemic-imperiled-non-english-speakers-more-than-others/> (Apr. 27, 2021).

¹⁶ Hilal Al Shamsi, Abdullah G. Almutairi, Sulaiman Al Mashrafi, et al., *Implications of Language Barriers for Healthcare: A Systematic Review*, 35 OMAN MED. J. e122 (Apr. 30, 2020).

¹⁷ Sara Rosenbaum, “The New ‘Public Charge’ Rule Affecting Immigrants Has Major Implications for Medicaid and Entire Communities,” THE COMMONWEALTH FUND, available at: <https://www.commonwealthfund.org/blog/2019/new-public-charge-rule-affecting-immigrants-has-major-implications-medicaid-and-entire> (Aug. 15, 2019).

¹⁸ Proposed Rule § 92.10(a)(2).

alleviate these longstanding fears. HHS may want to consider mandating that a nondiscrimination notice be provided with all significant patient communications like explanations of benefits, new patient intake forms, and other written communications routinely sent to patients.

3. Nondiscrimination training for providers and the development of grievance procedures will hold covered entities accountable and increase transparency for those affected.

The proposed rule reinstates numerous training requirements and procedural protections for those who have been unlawfully discriminated against.¹⁹ These measures show potential for increasing accountability for covered entities that engage in unlawful discrimination and provide needed transparency for patients who have been harmed.

Despite best intentions, providers often lack training in matters of cultural competence and humility. For example, a 2011 survey of medical school deans revealed that medical students receive on average five hours of training on LGBTQ+ health issues while in school, most of which was during pre-clinical, non-patient care years.²⁰ Another 2020 survey reported that resident physicians have received little or no training related to health disparities.²¹ By requiring covered entities to designate a Section 1557 coordinator and provide training to new and existing employees, providers will be better equipped to recognize and adequately address patients who are at risk for poor health outcomes simply because they are immigrants, TGNCI, or disabled.

Conclusion

Health disparities are pervasive, but they are preventable. Discrimination in healthcare and carceral settings, a major contributor to health disparities, is a serious civil rights issue that HHS is right to address with such focus and detail. NYLPI's clients, many of whom are the most vulnerable to discrimination and bias, will be positively impacted by reinstating regulations implementing Section 1557 and broadly applying them to all healthcare entities, including certain private correctional health corporations, receiving any amount of federal funding.

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¹⁹ Proposed Rule §92.5-11.

²⁰ Juno Obedin-Maliver, Elizabeth S. Goldsmith, Leslie Stewart, et al., *Lesbian, gay, bisexual, and transgender-related content in undergraduate medical education*, 306 J. AM. MED. ASSOC. 971 (2011).

²¹ Denise M. Dupras, Mark L. Wieland, Andrew J. Halvorsen, et al. *Assessment of Training in Health Disparities in US Internal Medicine Residency Programs*, 3 J. AM. MED ASSOC. NETWORK OPEN e20122757 (Aug. 2020).