

April 30, 2020

ATTORNEY GENERAL RAOUL URGES HHS NOT TO FINALIZE RULE THAT WOULD PERMIT HEALTH CARE DISCRIMINATION DURING GLOBAL COVID-19 PANDEMIC

Chicago — Attorney General Kwame Raoul today joined a coalition of 24 attorneys general in sending a letter to the U.S. Department of Health and Human Services (HHS) urging it not to finalize its proposed regulation, “Nondiscrimination in Health and Health Education Programs or Activities” (Section 1557 Rule). Section 1557 is an anti-discrimination provision that prohibits discrimination in health care based on gender, race, ethnicity, sex, age or disability. If finalized, the proposed changes would seriously undermine the Affordable Care Act’s (ACA) critical anti-discrimination protections at a time when they are most needed to help address the COVID-19 pandemic.

“This proposed rule eliminates protections for vulnerable populations during a time when health disparities are already exacerbated,” Raoul said. “I urge the HHS not to finalize this dangerous rule that would have the effect of denying care for marginalized communities, and place unnecessary burdens on health care providers.”

Raoul and the coalition assert that the proposed rule would roll back anti-discrimination protections for communities of color, women, LGBTQ individuals, those with limited English proficiency, and people with disabilities by undermining critical legal protections that guarantee health care as a right. Data shows that the COVID-19 pandemic is already exacerbating racial and ethnic disparities in health care that the ACA attempted to address, particularly in states that have not expanded Medicaid. Communities of color have been disproportionately impacted, and recently more than 100 national and local organizations signed on to an open letter to the health care community about how COVID-19 may pose an increased risk to the LGBTQ population. HHS itself has long noted that discrimination within the health care system contributes to poor coverage and health outcomes, and exacerbates existing health disparities in underserved communities. Individuals who have experienced discrimination in health care often postpone or forgo needed care, resulting in adverse health outcomes.

[In the letter](#), Raoul and the coalition argue that moving forward with the rule in the midst of this unprecedented health care crisis will create unnecessary confusion and administrative burdens for state agencies, health care providers, and patients at a time when the health care system is battling to save lives. Data suggests that increased access to health care could assist with prompt COVID-19 detection and increase early treatment, which helps diminish spread of the disease. For these reasons, Raoul and the coalition warn HHS that making this major regulatory change in the midst of the current crisis is not only irresponsible, it is potentially deadly.

Joining Raoul in the letter are the attorneys general of California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Vermont, Virginia, Washington, and Wisconsin.



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ATTORNEY GENERAL

THE STATE OF CALIFORNIA
OFFICE OF THE ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL



MAURA HEALEY
ATTORNEY GENERAL

April 30, 2020

Secretary Alex Azar
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Director Roger T. Severino
Office for Civil Rights
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Dear Secretary Azar and Director Severino:

On behalf of the states of California, Massachusetts, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Vermont, Virginia, Washington, and Wisconsin, we write to express our opposition to any action by the U.S. Department of Health and Human Services (HHS) to finalize its proposed regulation, “Nondiscrimination in Health and Health Education Programs or Activities,” (Section 1557 Rule or Rule). If finalized, the Rule will undermine critical protections that prohibit discrimination on the basis of race, color, national origin, disability, sex, and age. Finalizing this Rule will risk restricting access to care at a dangerous time and directly conflicts with the Office of Management and Budget’s directive to focus on “mission critical work.” We urge the federal government to withdraw the proposed rule, or, at minimum, suspend rulemaking for this Rule in the midst of the global healthcare crisis in order to avoid restricting access to life-saving care and creating unnecessary administrative burdens and confusion for state agencies, healthcare providers, and patients at a time when the healthcare system is battling to save lives.

The data shows that the COVID-19 pandemic is exacerbating health disparities that the Affordable Care Act has helped to mitigate. The crisis has brought racial and ethnic disparities into stark relief, with communities of color disproportionately affected by the virus.¹ Immigrant

¹ See Xenia Shih Bion, *COVID-19 Shines a Harsh Light on Racial and Ethnic Health Disparities*, California Health Care Foundation (Apr. 13, 2020), <https://tinyurl.com/ybl3m93o>; Jeffery C. Mays and Andy Newman, *Virus Is Twice as Deadly for Black and Latino People Than Whites in N.Y.C.* (Apr. 9, 2020), <https://tinyurl.com/rhqnzpm>; Jossie Carreras Tartak and Hazar

communities have also been particularly hard hit, and people with limited English proficiency face particular challenges in accessing care during the pandemic.² Some disabilities lead to increased susceptibility to infection, while current conditions make it difficult for people with disabilities to get the care that they need.³ COVID-19 may also pose an increased risk to the lesbian, gay, bisexual, transgender, and queer or questioning (LGBTQ) population,⁴ and has exacerbated gender inequities which impact access to care for women.⁵

Effective treatment of communicable diseases requires equitable access to care for all members of our community, regardless of race, ethnicity, language proficiency, disability, gender, sexual orientation, or gender identity. Indeed, HHS has long recognized that discrimination in the healthcare system contributes to poor coverage and health outcomes, exacerbates existing health disparities in underserved communities, and leads to ineffective distribution of healthcare resources. Increased access to care can assist with prompt COVID-19 detection and aid with early treatment, which, in turn will help diminish spread of the disease that occurs when individuals delay seeking care until their conditions deteriorate.⁶ Finalization of this Rule will engender fear and distrust among communities which are most impacted by the pandemic, potentially causing members of those communities to be less likely to seek testing and

Khidir, Opinion: U.S. Must Avoid Building Racial Bias Into COVID-19 Emergency Guidance, NPR (Apr. 21, 2020), <https://tinyurl.com/yap5ml55>.

² See Gaby Galvin, *Language Access Barriers During Covid 19*, U.S. News and World Reports (Apr. 16, 2020), <https://tinyurl.com/yd5ppha6>; Margarita Alegria, *Language Barriers Can Mean Life or Death in Fight Against Coronavirus*, The Hill (Apr. 23, 2020), <https://thehill.com/changing-america/opinion/494284-isolated-with-no-family-members-for-non-english-speakers-with>.

³ See Abigail Abrams, *'This Is Really Life or Death.' For People With Disabilities, Coronavirus Is Making It Harder Than Ever to Receive Care*, Time Magazine (Apr. 24, 2020), <https://time.com/5826098/coronavirus-people-with-disabilities/>; Richard E. Besser and Rebecca Coakley, *Disabled Americans Can't Be a Covid-19 Afterthought*, CNN Opinion, (Apr. 23, 2020), <https://www.cnn.com/2020/04/23/opinions/disabled-americans-need-help-covid-19-cokley-besser/index.html>.

⁴ National LGBT Cancer Network et al., *Open Letter About Coronavirus And The LGBTQ+ Communities* (Mar. 11, 2020), <https://tinyurl.com/ya4ltvka>; See also Charlie Whittington et al., *Human Rights Campaign Found., The Lives and Livelihoods of Many in the LGBTQ Community are at Risk Amidst COVID-19 Crisis* (Mar. 19, 2020), <https://tinyurl.com/y7xftqsk>; Ilan H. Meyer & Soon Kyu Choi, *The Williams Institute, Vulnerabilities to COVID-19 Among Older LGBT Adults in California* (Apr. 2020), <https://tinyurl.com/ydz7cf8k>.

⁵ Jamielle Fields Allsbrook, *The Coronavirus Crisis Confirms That the U.S. Health Care System Fails Women*, Center for American Progress (Apr. 23, 2020), <https://tinyurl.com/y9tf44n9>.

⁶ Christen Linke Young, et al., *Responding To COVID-19: Using The CARES Act's Hospital Fund To Help The Uninsured, Achieve Other Goals*, Health Affairs (Apr. 11, 2020), <https://tinyurl.com/yavmreh4>.

treatment. HHS has long recognized that “individuals who have experienced discrimination in the health care context often postpone or do not seek needed health care; individuals who are subject to discrimination are denied opportunities to obtain health care services provided to others, with resulting adverse effects on their health status.”⁷ It will also decrease protections to ensure that those who do seek treatment get the care they need. In these uncertain times, the Administration should be working aggressively to ensure access to healthcare, not finalizing a rule that limits it.

As documented in our August 13, 2019, letter, the Rule will inflict harm on the States and their residents— particularly underserved populations including communities of color, people with limited English proficiency, individuals with disabilities, women, and LGBTQ individuals—by undermining legal protections that guarantee healthcare as a right.⁸ Rolling back anti-discrimination protections for these vulnerable members of our communities, as the Administration proposes to do in finalizing its Section 1557 Rule, will restrict care and undermine public health efforts to address the current COVID-19 crisis.

The Administration itself recently recognized that it should hold steadfast to Section 1557’s important protections during the pandemic when HHS issued a bulletin reminding providers that Section 1557 and other civil rights laws protect persons with disabilities from being denied medical care on the basis of stereotypes, assessments of quality of life, or judgments about a person’s relative “worth” based on the presence or absence of disabilities or age.⁹ HHS added that decisions by covered entities concerning whether an individual is a candidate for treatment should be based on an individualized assessment of the patient and their circumstances, based on the best available objective medical evidence.

Any effort by HHS to promulgate the Final Rule would be inconsistent with the Office of Management and Budget’s (OMB) Directive M-20-16, Federal Agency Operational Alignment to Slow the Spread of Coronavirus COVID-19, issued on March 17, 2020. Directive M-20-16 instructs agency heads to focus on mission-critical work and “prioritize all resources to slow the transmission of COVID-19.” There is no plausible argument that implementation of the Rule would slow the transmission of COVID-19. To the contrary, the Rule would restrict access to care and exacerbate the spread of the virus. In keeping with the OMB Directive, HHS should immediately focus all resources on the critical issues patients and healthcare workers face in

⁷ *Nondiscrimination in Health Programs and Activities*, 81 Fed. Reg. 31376, 31,444 (May 18, 2016) (codified at 45 C.F.R. pt. 92).

⁸ Letter from Xavier Becerra, California Attorney General and Maura Healey, Massachusetts Attorney General to Alex Azar, Secretary, Department of Health and Human Services (Aug. 13, 2019), <https://tinyurl.com/yaskjhq5>.

⁹ Dept. of Health and Human Services, OCR Issues Bulletin on Civil Rights Laws and HIPAA Flexibilities That Apply During the COVID-19 Emergency (Mar. 28, 2020), <https://tinyurl.com/qraqatua>.

responding to the coronavirus—rather than expending any resources on promulgating and implementing the Rule.

States are working to communicate to *all* residents the importance of accessing healthcare and other needed benefits in the face of COVID-19. Recognizing that immigrants are disproportionately harmed by the pandemic, California, Massachusetts, Oregon, and Washington offer information in many languages, as well as guidance about reasonable accommodations that may be necessary to individuals with disabilities due to the pandemic.¹⁰ By removing critically important protections to help ensure that disproportionately impacted communities get the care that they need, the Rule would undermine this crucial work and could prove deadly.¹¹

A new rule at this time would place unnecessary burdens on healthcare providers and state agencies to interpret the new rule rather than devote all resources to pandemic response and recovery efforts. Further, the Rule itself will have the effect of denying marginalized communities care. In finalizing this Rule, HHS risks aiding the spread of the disease across the country, to the detriment of our citizens and our economy.

For these reasons we urge that HHS withdraw the proposed rule or, at the very least, that the rulemaking process for the Section 1557 Rule be suspended until the national emergency has ended and the COVID-19 pandemic has fully subsided.

Sincerely,



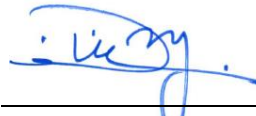
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¹⁰ <https://covid19.ca.gov/img/wp/covid-19-immigrant-guidance-accessible-1-2.pdf>;
<https://www.mass.gov/info-details/attorney-generals-office-multilingual-covid-19-publications>;
<https://www.mass.gov/info-details/attorney-generals-office-multilingual-covid-19-publications>;
Attorney General Guidance: Rights of Disabled Persons During COVID-19 Crisis (Apr. 27, 2020), <https://www.doh.wa.gov/Emergencies/Coronavirus>.

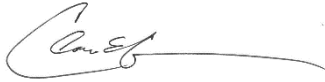
¹¹ Joshua Kaplan, *Hospitals Have Left Many COVID-19 Patients Who Don't Speak English Alone, Confused and Without Proper Care*, ProPublica (Mar. 31, 2020), <https://tinyurl.com/yx5f388m>.



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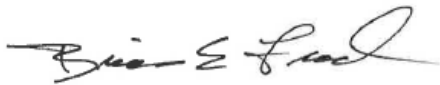
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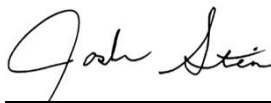
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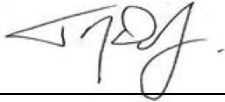
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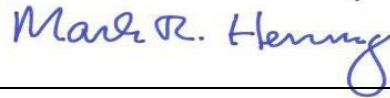
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