LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

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August 13, 2019

VIA ELECTRONIC SUBMISSION

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

RE: Docket ID HHS-OCR-2019-0007, RIN 0945-AA11, Nondiscrimination in Health and Health Education Programs or Activities

Dear Secretary Azar:

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") submits these comments in response to the Department of Health and Human Services' ("HHS," "the Department") and the Center for Medicare and Medicaid Services ("CMS") Notice of Proposed Rulemaking ("Proposed Rule," "NPRM") to express our concerns with the Proposed Rule entitled "Nondiscrimination in Health and Health Education Programs or Activities," published in the Federal Register on July 14, 2019.

The Lawyers' Committee is a nonpartisan, nonprofit organization that was formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and vindicating the civil rights of African-Americans and other racial minorities. The Lawyers' Committee has a strong interest in eliminating systemic and structural barriers to healthcare coverage (including access to reproductive health) experienced by people of color, including women and LGBTQ individuals and to that end has served as *amicus curiae* in relevant cases. *See, e.g., Pennsylvania v. Trump et al.,* 351 F. Supp. 3d 791 (E.D. Pa. 2019), *appeal filed,* No. 19-1189 (3d Cir. Jan. 23, 2019); *Gresham v. Azar,* 363 F. Supp. 3d 165 (D.D.C. 2019).

For over fifty years, the Lawyers' Committee has been at the forefront of many of the most significant cases involving race and national origin discrimination. The Lawyers' Committee has litigated numerous claims under federal statutes, including the Fair Housing Act and Title VII of the Civil Rights Act. Through this experience, we have seen firsthand that the ability to bring private litigation to enforce civil rights statutes through both intentional and disparate impact claims are essential to challenging structural racism and discrimination in our society. We have championed impact litigation, including litigation utilizing the disparate impact standard as a crucial tool for securing equal opportunity and treatment for members of groups still struggling under the weight of historical and present-day discrimination.

Racial health disparities persist in the United States for a myriad of reasons, and African Americans continue to have worse health outcome measures than whites. People of color are more likely to earn lower wages, and less likely to have access to health coverage, or be able to afford out-of-pocket health care costs. Coverage gains under the ACA have played an important role in combatting these structural barriers. The ACA also included a number of provisions, like Section 1557 designed to *explicitly* address and remedy racial, ethnic and sex-based discrimination and disparities in health care. Equal access to health coverage and services, free from discrimination is vital for communities of color. The Lawyers' Committee is deeply concerned that the Proposed Rule severely limits the scope of the anti-discrimination protections under Section 1557 and its enforcement mechanisms, disproportionately affecting the communities of color that we serve.

This Proposed Rule interprets Section 1557's "enforcement mechanism" provision in a manner that renders critical parts of Section 1557 meaningless and redundant. Specifically, the Lawyers' Committee opposes the Department's position that Section 1557 does not authorize a private cause of action, including for disparate impact claims. The Lawyers' Committee also opposes the inequitable standard that would result from the implementation of the Proposed Rule by creating varying protections on the basis of different protected categories. Moreover, the Department fails to offer any reasonable justification supporting its proposal to preclude administrative enforcement of disparate impact claims on the basis of sex. And, compensatory damages are clearly available to Section 1557 litigants and the Department offers no reasonable justification for implying otherwise. If finalized, the Proposed Rule will essentially eliminate critical tools for people of color, including those with intersectional identities (*i.e.,* women of color and people of color with disabilities) who are especially vulnerable to discrimination in the healthcare system. In order to reflect the ACA's clear intent and its overriding purpose of eliminating discrimination in health care, the Proposed Rule should not be finalized.

I. The Lawyers' Committee Opposes Eliminating a Private Cause of Action for Disparate Impact Claims

The ACA states that the "enforcement mechanisms for and available under [ ] title VI, title IX, section 504, or such Age Discrimination Act shall apply," for purposes of enforcing Section 1557. 42 U.S.C. 18116(a). The Final Rule correctly interpreted Section 1557 as authorizing a private right of action for claims of disparate impact discrimination on the basis of any of the criteria enumerated in the legislation. 81 FR at 31440.

However, the Proposed Rule impermissibly seeks to eliminate these important protections. The Proposed Rule seeks to "explicitly apply[] the enforcement mechanisms provided under the civil rights statutes and related implementing regulations cited by Section 1557 to the health contexts identified in Section 1557." OCR's position eliminating a private right of action to disparate impact race discrimination claims creates redundancy and renders Section 1557 meaningless. Under the Proposed Rule, Section 1557's protections against racial discrimination would not create rights different than those already existing under Title VI. Moreover, the Proposed Rule creates vast inequities between members of all protected classes under this single statute. For the reasons discussed below, the Proposed Rule should not be finalized.

A. The Department's position that Section 1557 does not provide a private right of action for disparate impact claims on the basis of race is unreasonable in light of existing legal authority

The Department contends that Section 1557 does not afford rights that are not available under the corresponding statute because Section 1557 "merely take[s] existing protected classes and enforcement mechanisms and appl[ies] them to health care programs or activities." However the statute's explicit reference to Title VI renders this interpretation outright implausible, and the premise that Section 1557 does nothing more than apply existing laws to the health care setting is entirely inaccurate.

Contrary to the Department's assertion, Title VI has applied to health care programs and activities that receive "Federal financial assistance" since its inception in 1964.[1] As explained by the Fifth Circuit twenty-six years prior to the passage of the ACA, "[o]ne specific area of discrimination in services provided by recipients concerning Congress at the time Title VI was passed was discrimination *by hospitals and other medical facilities in the provision of health care services*." (emphasis added) *United States v. Baylor Univ. Med. Ctr.*, 736 F.2d 1039, 1044 (5th Cir. 1984) (citing 110 Cong. Rec. 1661 (1964) (views of Sens. Lindsay, McCulloch, Cahill, Shriver, MacGregor, Mathias, Bromwell) (Title VI should counteract existing racial discrimination in "vendor payments for medical care of public assistance recipients. Hospitals, nursing homes, and clinics in all parts of the country participate in these programs....")) (emphasis added); *see also* H.R. Rep. No. 98-442, 98th Cong., 1st Sess. 77 (Oct. 26, 1983) ("[T]he Committee wishes to reaffirm that *health care facilities and other providers that receive Medicare and Medicaid funds are required, under existing statutes and long-standing Department of Health and Human Services regulations and interpretations, to provide services without discrimination not just to Medicare and Medicaid beneficiaries, but to all patients*.").

That Title VI has always applied in the health care context cannot be ignored. It makes little sense that Section 1557 references Title VI, which has always applied to health care programs and activities, only to "apply [it] to health care programs or activities," as the Department argues. The Department's rationale creates inexplicable redundancy in the context of racial discrimination. "The Court usually tries to avoid an interpretation of a statutory provision that would make the provision redundant and accomplish virtually nothing." *United States v. Davis*, 139 S. Ct. 2319, 2347 (2019). Indeed, the Department's rationale does just this—reads Section 1557 so that it accomplishes nothing new as to racial discrimination in health care. Permitting private disparate impact claims under Section 1557 ensures that the statute provides at least some rights that are separate and distinct from those provided under Title VI.

[1] Section 504, which is also referenced in the statute, has also applied to the health care setting since its inception. *See Baylor, supra* ("just as the language of Section 504 itself tracks that of Title VI, so the definitions of pertinent terms in the regulations under Section 504 substantially echo those under Title VI.").

The Department's theory that Section 1557 "merely take[s] existing protected classes and enforcement mechanisms and appl[ies] them to health care programs or activities" also fails to justify eliminating a private right of action for any protected class. The asserted logic is glaringly inconsistent with the majority of court rulings cited in the NPRM itself. Each of the NPRM's cited cases that reached this issue held that Section 1557, in fact, creates a new private right of action. *See Southeastern Pennsylvania v. Gilead*, 102 F. Supp. 3d 688, 698-99 (E.D. Pa. 2015) (noting that "Section 1557 does create a new private right under the Affordable Care Act . . ."); *Briscoe v. Health Care Serv. Corp.*, 281 F. Supp. 3d 725, 738 (N.D. Ill. 2017) ("this Court agrees with other district courts that § 1557 provides a private right of action") (citing *Rumble*, supra); *York v. Wellmark, Inc.*, No. 4:16-cv-00627-RGE-CFB, at *15-16 (S.D. Iowa Sep. 6, 2017) ("the Court agrees with other district courts that § 1557 provides a private right of action.").

The Department curiously neglects to explain how, exactly, Section 1557 at once creates a new cause of action for discrimination while merely referring litigants aggrieved by discriminatory health care practices to other statutes. Beyond that, the Department's rationale renders Section 1557's discrimination provision purposeless if, as the Department argues, it is so intertwined with the underlying statutes as to, essentially, extinguish its own cause of action. "It is 'a cardinal principle of statutory construction that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Only if read in view of the statute's true intent—to provide new causes of action independent of the underlying statutes—does the statute have purpose and significance with respect to all discrimination claims, including those alleging disparate impact.

B. The Proposed Rule would produce unfair and inequitable results

Even assuming the Department had asserted some reasonable justification for the Proposed Rule, it has entirely neglected to analyze or even acknowledge the vast inequities that would result if only some litigants could pursue private disparate impact claims under Section 1557. The 2016 Final Rule attempted to address this issue and relied upon *Rumble v. Fairview Health Services*:

> Here, looking at Section 1557 and the Affordable Care Act as a whole, it appears that Congress 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.
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> Reading Section 1557 otherwise would lead to an illogical result, as different enforcement mechanisms and standards would apply to a Section 1557 plaintiff depending on whether the plaintiff's claim is based on her race, sex, age, or disability. For instance, a plaintiff bringing a Section 1557 race discrimination claim could allege only disparate treatment, but plaintiffs bringing Section 1557

> age, disability, or sex discrimination claims could allege disparate treatment or disparate impact . . .
>
> Similarly, a plaintiff bringing a Section 1557 age discrimination claim would have to exhaust administrative remedies and would be barred from recovering damages, but plaintiffs bringing Section 1557 race, disability, or sex discrimination claims would not have to exhaust administrative remedies and would not be barred from recovering damages . . .
>
> Plaintiff recognizes the absurd inconsistency that could result if the Court interpreted Section 1557 as Defendants do. Rumble also aptly notes that if different standards were applied based on the protected class status of the Section 1557 plaintiff, then courts would have no guidance about what standard to apply for a Section 1557 plaintiff bringing an intersectional discrimination claim.
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> However, the Court does not intend to imply that Congress meant to create a new anti-discrimination framework that is completely "unbound by the jurisprudence of the four referenced statutes." Nonetheless, given the inconsistency that would result if the Court interpreted Section 1557 as Defendants do, the Court holds that Congress likely referenced the four civil rights statutes mainly in order to identify the "ground[s]" on which discrimination is prohibited—i.e., race, sex, age, and disability. Congress also likely intended that the same standard and burden of proof to apply to a Section 1557 plaintiff, regardless of the plaintiff's protected class status. To hold otherwise would lead to "patently absurd consequences."

Rumble v. Fairview Health Servs., No. 14-CV-2037 SRN/FLN, 2015 WL 1197415, at *11–12 (D. Minn. Mar. 16, 2015) (citations omitted)). Thus, according to the *Rumble* court, Section 1557 creates a new cause of action separate and apart from the underlying statutes, and also applies a single disparate impact cause of action to all plaintiffs, regardless of their protected class.

"The disparate impact theory of discrimination combats not intentional, obvious discriminatory policies, but a type of covert discrimination in which facially neutral practices are employed to exclude, unnecessarily and disparately, protected groups . . . ." *Lanning v. Se. Pennsylvania Transp. Auth. (SEPTA)*, 181 F.3d 478, 489–90 (3d Cir. 1999). In the healthcare context, many facially neutral policies and practices could have an impermissible disparate impact on certain communities of color. For example, a hospital's decision to limit its number of Medicaid beds, to relocate to a wealthier neighborhood, to eliminate critical services, to refuse to participate in the Medicaid program, or to deny services on the basis of criteria that are pretext for race and/or

national origin could have an unlawful disparate impact on communities of color.[2] If the Proposed Rule is finalized, only certain litigants would be able to bring disparate impact claims. Individuals who are discriminated against on the basis of race and/or gender would be foreclosed from bringing disparate impact claims, as well as those that allege intersectional discrimination.

In light of OCR's lowest enforcement rates in recent years,[3] elimination of Section 1557 disparate impact litigation would undoubtedly give regulated entities a license to discriminate without repercussion. Existing inequities in health care would be, undoubtedly, exacerbated. All individuals covered under the statute, including those seeking reproductive health care, like abortion, LGBTQ individuals, women, those living with disabilities, and people of color should be able to avail themselves of broad protections afforded by disparate impact litigation. Of course, this result would run counter to the undisputed purpose of Section 1557, which is in part to remedy racial and gender health disparities.

II. The Lawyers' Committee Opposes Revocation of Agency Enforcement of Disparate Impact Discrimination on the Basis of Sex

The Final Rule strengthened protections for all covered individuals by extending enforcement provisions applicable only to some of the underlying civil rights laws to all of the prohibited bases of discrimination under Section 1557. The Department aims to weaken the administration's ability to punish bad actors that engage in activities that have the effect of discriminating on the basis of sex arguing that:

> The Section 1557 Regulation similarly extended the prohibition, in the Title VI, Section 504, and Age Discrimination Act regulations, on the utilization of criteria or methods of administration that have the effect of subjecting individuals to discrimination, to claims of discrimination on the basis of sex under Section 1557, although that prohibition is not included in the Title IX regulations.

84 FR at 27851.

This rationale is absurd. That the Title IX regulations do not contain disparate impact prohibitions is irrelevant as to whether new regulations may be promulgated pursuant to Section 1557. As noted above, Section 1557 is its own authority, not merely a cursory reference to other

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[2] Sarah G. Steege, *Finding a Cure in the Courts: A Private Right of Action for Disparate Impact in Health Care*, 16 Mich. J. Race & L. 439, 443 (2011).

[3] The 2018 OCR budget sharply departed from the previous administration's goal of increasing the Department's reach. The Department specifically noted that the reduction would decrease "authorized regional investigators which could limit OCR's capacity to resolve complaints and perform other related agency functions such as investigations, compliance reviews, technical assistance, and outreach." *Office for Civil Rights (OCR) Fiscal Year 2018 Congressional Justification*. The Department also lowered its target number of corrective action from 5,900 in FY 2016 to 1,000 in FY 2018. *Id*.

laws. By reading Section 1557 as inexorably and rigidly intertwined with the underlying statutes and their accompanying regulations, the Department strips this provision of all meaning and force. Statutes should not be read such that the provisions "accomplish virtually nothing." *United States v. Davis*, 139 S. Ct. 2319, 2347 (2019).

At least two Supreme Court decisions indicate that regulations may validly proscribe activities that are permitted by the statute, where those regulations are not inconsistent with a law's purpose. *See Alexander v. Sandoval*, 532 U.S. at 281–82 ("[W]e must assume for purposes of deciding this case that regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601. Though no opinion of this Court has held that, five Justices in *Guardians* voiced that view of the law at least as alternative grounds for their decisions."); *Guardians Ass'n v. Civil Serv. Comm'n of City of New York*, 463 U.S. 582, 591 (1983) ("[T]he Title VI implementing regulations, which explicitly forbade impact discrimination, were valid because not inconsistent with the purposes of Title VI."); *Lau v. Nichols*, 414 U.S. 563, 571 (1974) ("[T]he validity of a regulation promulgated under a general authorization provision such as s 602 of Tit. VI 'will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'").

This change would disproportionately impact women of color who face unique and heightened barriers to accessing health care, including contraception and reproductive health services. Coupled with the Department's attempt to eradicate private causes of action for disparate impact claims, its attempt to disclaim its duties to administratively enforce such claims on the basis of sex all but ensures health care participants can advance harmful policies that discriminate on the basis of sex completely unchecked.

III. The Lawyers' Committee Opposes Revocation of Regulations Relating to all Private Rights of Action Under Section 1557

Without the right to bring a private right of action under Section 1557, litigants would be left powerless to challenge illegal and discriminatory conduct in the healthcare system. Yet, OCR would "no longer assert that a private right of action exists for parties to sue covered entities for any and all alleged violations of the Proposed Rule."[4] The Department's position is inconsistent with the rulings of multiple courts that have found § 1557 indeed provides a private cause of action. *See, e.g., Rumble v. Fairview Health Servs.*, No. 14-cv-2037-SRN-FLN, 2015 WL 1197415, at *12 (D. Minn. Mar. 16, 2015) (holding that there is a private right of action under Section 1557); *Southeastern Pennsylvania v. Gilead*, 102 F. Supp. 3d 688, 698-99 (E.D. Pa. 2015) (noting that "Section 1557 does create a new private right under the Affordable Care Act . . ."); *Briscoe v. Health Care Serv. Corp.*, 281 F. Supp. 3d 725, 738 (N.D. Ill. 2017) ("this Court agrees with other district courts that § 1557 provides a private right of action") (citing *Rumble, supra*); *York v.*

[4] *See* Proposed Rule at 84 FR 27884, "The Department would no longer take a position on that issue in its regulations, leaving the matter as primarily one for the courts to decide."

Wellmark, Inc., No. 4:16-cv-00627-RGE-CFB, at *15-16 (S.D. Iowa Sep. 6, 2017) ("the Court agrees with other district courts that § 1557 provides a private right of action.").[5]

Yet again, the Department's position renders Section 1557 toothless and inconsistent with judicial interpretations of the statute. A private right of action under § 1557 allows impacted individuals to pursue remedies for conduct proscribed by the antidiscrimination statutes referenced by Section 1557 while forcing the discriminatory entity to change its practices.[6] In bringing a civil rights suit and obtaining an injunction, plaintiffs are seen as acting "not for himself alone but also as a 'private attorney general' vindicating a policy that Congress considered of the highest priority."[7] Civil rights lawsuits address behavior "no doubt infringed upon others' civil rights as well."[8] Such litigation is necessary to achieve robust civil rights protection, particularly for statutes like Section 1557 where Congress intended a combination of public and private enforcement. Eliminating a private right of action under § 1557 would close the courthouse doors to the most marginalized individuals.

IV. The Lawyers' Committee Opposes Limitation of Damages for Disparate Impact Claims

Under Section 1557, compensatory damages are available in appropriate administrative and judicial actions under Section 1557. 45 CFR 92.301(b). In its preamble to the Final Rule, the Department made clear that compensatory damages are available for disparate impact claims brought under Section 1557, as well. However, OCR has noted in its Proposed Rule the "Department of Justice's Title VI Manual states that, under applicable Federal case law, compensatory damages are generally *unavailable* for claims based solely on an agency's disparate impact regulations."[9] (*emphasis added*).

Many people who experience discrimination cannot access the court system due to cost.[10] Limiting the availability of compensatory damages would make it more difficult for impacted individuals to secure counsel, making it even harder for people to enforce their rights and file complaints of discrimination.

V. Conclusion

The Proposed Rule impermissibly renders many provisions of Section 1557 meaningless by undoing the progress achieved under the existing Final Rule. The purpose of Section 1557 was

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[5] *See also Audia v. Briar Place, Ltd.*, No. 17 CV 6618, 2018 WL 1920082, at *3 (N.D. Ill. Apr. 24, 2018)*; Esparza v. Univ. Med. Ctr. Mgmt. Corp.*, No. CV 17-4803, 2017 WL 4791185, at *5 (E.D. La. Oct. 24, 2017)*; Callum v. CVS Health Corp.*, 137 F.Supp.3d 817, 848 (D.S.C. 2015).

[6] Sarah G. Steege, *Finding a Cure in the Courts: A Private Right of Action for Disparate Impact in Health Care*, 16 Mich. J. Race & L. 439, 445 (2011).

[7] Michael Waterstone, A New Vision of Public Enforcement, 92 MINN. L. REv. 434, note 35, at 442 & n.23 (quoting *Newman v. Piggie Park Enters. Inc*., 390 U.S. 400, 402 (1968) and H.R. REP. No. 94-1558, at 1 (1976)) (2007).

[8] *Id*.

[9] 84 FR at 27851

[10] *See* Brittany Kauffman, *Study on Estimating the Cost of Civil Litigation Provides Insight into Court Access*, Inst. for the Advancement of the Am. Legal System (Feb. 26, 2013), https://iaals.du.edu/blog/study-estimating-cost-civil-litigation-provides-insight-court-access; Michelle Chen, *One More Way the Courts Aren't Working for the Poor*, The Nation (May 16, 2016), https://www.thenation.com/article/one-more-way-the- courts-arent-working-for-the-poor.

to create a new cause of action independent of the underlying statutes. Statutes like Title VI has long applied to the health care setting for decades prior to the passage of the ACA. HHS has likewise been charged with enforcing Title VI since its inception.[11] That statutes like Title VI has always applied in the health care context cannot be ignored. It is counterintuitive that the purpose of Section 1557's reference to the relevant civil rights statutes is only to reiterate rights and obligations that already exist (*i.e.* the right to be free from discrimination in the health care setting).[12]

If implemented, the Proposed Rule could impose wide ranging harm, particularly falling hardest upon our most underserved populations who already struggle to access health care. It would exacerbate barriers experienced by people seeking reproductive health care, including abortion, LGBTQ individuals, individuals with limited English proficiency, those living with disabilities, and people of color. Moreover, this rule would embolden compounding levels of discrimination against those who live at the intersection of these identities. For the reasons detailed above, the Lawyers' Committee opposes the Proposed Rule and urges HHS and CMS not to finalize it.

Thank you for the opportunity to submit comments on the Proposed Rule. Please do not hesitate to contact Pilar Whitaker, Counsel, at pwhitaker@lawyerscommittee.org if you have any questions.

Sincerely,

/s/ Dariely Rodriguez
Director, Economic Justice Project
Lawyers' Committee for Civil Rights Under Law

[11] Sarah G. Steege, *Finding a Cure in the Courts: A Private Right of Action for Disparate Impact in Health Care*, Mich. J. Race & L. 439, 441-443 (2011).
[12] "The Court usually tries to avoid an interpretation of a statutory provision that would make the provision redundant and accomplish virtually nothing." *United States v. Davis*, 139 S. Ct. 2319, 2347 (2019).