



AMERICA'S ESSENTIAL HOSPITALS

August 9, 2019

Roger Severino
Director
Office for Civil Rights
U.S. Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Ave. SW
Washington, DC 20201

Ref: Nondiscrimination in Health and Health Education Programs or Activities

Thank you for the opportunity to comment on the above-captioned proposed rule. America's Essential Hospitals is concerned this rule fails to account for existing barriers certain patients face when seeking care, including members of the lesbian, gay, bisexual, transgender, and queer or questioning (LGBTQ) community and individuals with limited English proficiency (LEP).

America's Essential Hospitals is the leading champion for hospitals and health systems dedicated to high-quality care for all, including vulnerable populations. Filling a vital role in their communities, our more than 300 member hospitals provide a disproportionate share of the nation's uncompensated care, and three-quarters of their patients are uninsured or covered by Medicare or Medicaid. Our members provide state-of-the-art, patient-centered care while operating on margins one-fifth that of other hospitals—1.6 percent on average compared with 7.8 percent for all hospitals nationwide.¹ Essential hospitals' commitment to serving all people, regardless of income or insurance status, and their diverse patient mix pose unique challenges. A disproportionate number of their patients face sociodemographic challenges to accessing health care, including poverty, homelessness, language barriers, and low health literacy. Ten million people in communities served by essential hospitals have limited access to healthy food, and nearly 24 million live below the poverty line.²

Essential hospitals are uniquely situated to address these social determinants of health and are committed to serving all patients. Given essential hospitals' commitment to providing high-quality, patient-centered care to all patients, we urge the Department of Health and Human Services (HHS) to consider the following comments before it finalizes this policy, which could have a disproportionate and negative effect on vulnerable patient populations.

1. HHS should not finalize changes that remove crucial nondiscrimination protections for patients based on sex, including gender identity.

¹ Clark D, Roberson B, Ramiah K. *Essential Data: Our Hospitals, Our Patients—Results of America's Essential Hospitals 2017 Annual Member Characteristics Survey*. America's Essential Hospitals. April 2019. <https://essentialdata.info>. Accessed July 22, 2019.

² Ibid.

Section 1557 of the Affordable Care Act (ACA) prohibits discrimination on the basis of race, color, national origin, sex, age, or disability under any health program or activity that receives federal financial assistance or under any program or activity administered by an executive agency under Title I of the ACA. In 2016, HHS finalized definitions for key terms and groups protected by Section 1557. HHS defined discrimination “on the basis of sex” to include, among other things, discrimination on the basis of gender identity. At the time, America’s Essential Hospitals expressed strong support for the nondiscrimination requirements and their inclusion in Medicare and Medicaid conditions of participation, citing the importance of equity of care in improving outcomes and reducing disparities. As a country, we must remain committed to eliminating disparities in health and health care. Federal policies must reinforce equity of care for all patients, regardless of the patients’ socioeconomic and sociodemographic characteristics or other defining factors.

HHS’ proposal would narrow the scope of Section 1557 by removing the specific definition of discrimination on the basis of sex, thus eliminating protections based on gender identity. Specifically, this change would eliminate federal protection against discrimination in health care settings for transgender individuals and others who do not identify as the sex assigned to them at birth. As proposed, the HHS Office of Civil Rights (OCR) will continue to enforce protections against discrimination on the basis of sex, but gender identity will no longer be included in those protections.

Essential hospitals take pride in providing high-quality care to all, including members of the LGBTQ community. In 2018, more than 80 essential hospitals took part in the Human Rights Campaign’s Healthcare Equality Index (HEI), an annual report measuring policies and practices designed to support LGBTQ inclusion in health care settings.³ The voluntary survey evaluates facilities’ current policies and practices and identifies gaps where there is room for improvement. Several essential hospitals were designated as LGBTQ Healthcare Equality Leaders, earning the highest possible score on the HEI and demonstrating their dedication to equity. Essential hospitals respond to the needs of their communities, developing specialized services for LGBTQ patients. For example, one essential hospital in Ohio runs a clinic to respond to the unique needs of transgender youth, who face an extremely high risk of attempting suicide and other self-harm.⁴

Research has shown that discrimination against individuals seeking health care can lead to lower care quality and worse health outcomes. Equitable access to health services is crucial to better care, healthier individuals and populations, and lower health care costs. Transgender individuals, like others in the LGBTQ community, often face challenges and barriers to accessing necessary care. They experience stigma, violence, substandard care, and outright denial of care by some providers. Transgender individuals also are more likely to face social risk factors, including poverty and interpersonal violence.⁵ As proposed, the rollback of federal protection from discrimination will exacerbate the challenges transgender individuals face in health care settings. Without these protections, transgender patients are less likely to receive high-quality, equitable care. HHS provides no rational policy justification for these changes. **America’s Essential Hospitals urges HHS not to finalize these changes, as they will harm LGBTQ**

³ Healthcare Equality Index 2018. Human Rights Campaign. <https://assets2.hrc.org/files/assets/resources/HEI-2018-FinalReport.pdf>. Accessed July 16, 2019.

⁴ Toomey R, Syversten A, Shramko, M. Transgender Adolescent Suicide Behavior. *Pediatrics*. 142: 4. October 2018. <https://pediatrics.aappublications.org/content/142/4/e20174218>. Accessed July 16, 2019.

⁵ Kates J, Ranji U, Beamesderfer A, Salganicoff A, Dawson L. Health and Access to Care and Coverage for Lesbian, Gay, Bisexual, and Transgender Individuals in the U.S. Kaiser Family Foundation. May 2018. <http://files.kff.org/attachment/Issue-Brief-Health-and-Access-to-Care-and-Coverage-for-LGBT-Individuals-in-the-US>. Accessed July 16, 2019.

patients through less-equitable care, increased disparities, and worse health outcomes for transgender patients.

2. HHS should uphold all protections for individuals with LEP in health care settings.

Essential hospitals' commitment to caring for all people, including the vulnerable, has made them providers of choice for patients of virtually every ethnicity and language. In 2017, racial and ethnic minorities accounted for more than half of discharges at essential hospitals. To best serve these patients, essential hospitals work to identify the linguistic needs and preferences of their patient population and provide appropriate interpretation services to improve patient experience and overall outcomes. Research shows what essential hospitals already know: Access to appropriate interpreter services improves patient experience and clinical outcomes, while also decreasing readmission rates and costs.^{6,7} LEP patients are less likely than their English-speaking counterparts to have access to preventive care.⁸ It is vital that hospitals and other health care entities continue to provide interpreter services for LEP patients to ensure they have access to high-quality care and to reduce disparities. Further, it is the federal government's responsibility to promote and protect these LEP services.

a. HHS should continue to ensure LEP individuals have meaningful access to language assistance.

The proposed rule modifies requirements for language assistance for LEP individuals established in the 2016 final rule. Hospitals and other covered entities are required to take reasonable steps to provide meaningful access to individuals with LEP "eligible to be served or likely to be encountered." To make this determination, OCR focuses on the nature and importance of the health program or activity and the particular communication for the LEP individual. OCR also considers whether a covered entity has developed and implemented an effective and appropriate language access plan, although these plans are not required.

The proposed rule alters how OCR will determine whether an entity has met its LEP requirements. As proposed, OCR would eliminate consideration of language access plans when evaluating compliance. Rather, the extent of an entity's obligation to provide language assistance services would be determined by a four-factor test that considers:

- the number or proportion of individuals with LEP eligible to be served or likely to be encountered in the eligible service population;
- the frequency with which individuals with LEP come in contact with the entity's health program, activity, or service;
- the nature and importance of the entity's health program, activity, or service; and
- the resources available to the entity and costs.

America's Essential Hospitals is concerned that the proposed changes to these standards would increase disparities across the health care system at large for LEP individuals. Even if

⁶ Karliner LS, Jacobs EA, Chen AH, Mutha S. Do Professional Interpreters Improve Clinical Care for Patients with Limited English Proficiency? A Systematic Review of the Literature. *Health Services Research*. 2007;42(2):727-754. <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1475-6773.2006.00629.x>. Accessed July 22, 2019.

⁷ Karliner LS, Perez-Stable EJ, Gregorich SE. Convenient Access to Professional Interpreters in the Hospital Decreases Readmission Rates and Estimated Hospital Expenditures for Patients with Limited English Proficiency. *Medical Care*. 2017;55(3):199-206. https://journals.lww.com/lww-medicalcare/fulltext/2017/03000/Convenient_Access_to_Professional_Interpreters_in.1.aspx. Accessed July 22, 2019.

⁸ Smith DL. Health Care Disparities for Persons with limited English Proficiency: Relationships from the 2006 Medical Expenditure Panel Survey (MEPS). *Journal of Health Disparities Research and Practice*. 2010;3(3):57-67. <https://digitalscholarship.unlv.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=1043&context=jhdrp>. Accessed July 22, 2019.

compliance standards are altered as proposed, essential hospitals will continue to provide necessary services to their patients, a disproportionate share of whom are LEP individuals. But essential hospitals cannot do this alone. HHS should continue its role in ensuring all providers promote and protect LEP services. **America's Essential Hospitals urges HHS not to finalize any changes to requirements for LEP patients that will jeopardize access to appropriate interpreter services.**

- b. HHS should continue to promote the availability of interpreter services through notice and tagline requirements.

The 2016 final rule also established requirements that covered entities post and provide patients with notices of the covered entity's nondiscrimination policies and the availability of language assistance and interpreter services at no cost. Taglines must be provided in at least the top 15 languages spoken by LEP individuals in the entity's state. The proposed rule would remove these notice and tagline requirements.

OCR acknowledges that repealing these notice and tagline requirements will result in lower utilization by LEP individuals who are unaware of available interpreter services. It is vital that LEP individuals are provided with all necessary information to make decisions about their care. America's Essential Hospitals is concerned that removing notice and tagline requirements will reduce utilization by LEP individuals not otherwise informed of their right to interpreter services. Interpreter services are only of use if patients are adequately informed of their availability. **HHS should not remove notice and tagline requirements that promote access to and usage of interpreter services.**

America's Essential Hospitals appreciates the opportunity to submit these comments. If you have questions, please contact Senior Director of Policy Erin O'Malley at 202-585-0127 or eomalley@essentialhospitals.org.

Sincerely,

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