September 27, 2022

The Honorable Xavier Becerra
Secretary, U.S. Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

Re: Covered California Comments on the Proposed Rule, Nondiscrimination in Health Programs (RIN 0945-AA17)

Dear Secretary Becerra:

Covered California is pleased to submit comments in response to the rule proposed by the U.S. Department of Health and Human Services (HHS) implementing Section 1557 of the Affordable Care Act (ACA). Covered California applauds HHS's proposal to restore and strengthen antidiscrimination protections for individuals based on sex, sexual orientation, and gender identity, and increase protections and access to interpretation and translation services for individuals with limited English proficiency. Additionally, Covered California appreciates the opportunity to share lessons learned from its own experiences advancing health equity for all as HHS considers future policies to further expand upon such protections and address avoidable disparities in health care.

Section 1557 of the ACA explicitly prohibits discrimination on the basis of race, sex, color, national origin, disability, and age in any program or activity receiving federal financial assistance (including credits, subsidies, or contracts of insurance), or in any health program or activity administered by an executive agency or entity. While the interpretation of Section 1557 has been highly contested over the years, at the heart of the issue is the ACA, which is built upon the core goal of providing access to high-quality, affordable health care to *all* individuals. Congress's intent to utilize Section 1557 to eliminate unlawful discrimination in every facet of health care is clear when it incorporated existing civil rights protections into Section 1557. These protections include antidiscrimination protections in Title VI, the Age Discrimination Act, and Section 504 as they apply to health care activities and programs and extending the sex discrimination protections of Title IX to health care.[1]

Implementing regulations issued by HHS in 2016[2] further reinforced the importance of Section 1557 in carrying out one of the main goals of the ACA: ensuring access to high-quality, affordable health care for all individuals without the threat of discrimination,

[1] 42 U.S.C. § 18116.
[2] 81 Fed.Reg. 31375 (July 18, 2016).

which can often discourage enrolling in coverage, leading to poor and inadequate health outcomes while exacerbating existing health disparities in underserved communities. The 2016 rule codified important nondiscrimination protections including a broad definition of "on the basis of sex," prohibiting discrimination by protecting individuals from having their health insurance canceled or limited solely based on their race, color, national origin, sex (including pregnancy, gender identity, and sex stereotyping), age, or disability. Further, this rule protected transgender individuals from having their coverage denied or limited based on the fact that they are transgender. The 2016 rule also codified protections for limited English proficient individuals, as well as individuals that suffer from disabilities by providing them with appropriate aids and access to buildings and services.

Sadly, much of this progress was reversed when revisions were later made to the rule in 2020.[3] The 2020 rule significantly narrowed the prior interpretation by eliminating the general prohibition on discrimination based on gender identity and sex-stereotyping and specific health insurance coverage protections for transgender individuals. Additionally, the 2020 rule adopted blanket abortion and religious freedom exemptions for health care providers, eliminated the provision preventing health insurers from varying benefits in ways that discriminate against certain groups, such as people with HIV or LGBTQ+ individuals, reduced protections that provide access to interpretation and translation services for individuals with limited English proficiency, and eliminated prohibitions against discrimination based on gender identity and sexual orientation.

Just days before the 2020 rule was published, the U.S. Supreme Court determined in *Bostock v. Clayton County*[4] that an individual's sexual orientation and gender identity are "inextricably bound up with sex," such that they must be protected under Title VII's protection against sex discrimination. Despite the preamble's open acknowledgment that the interpretation of nondiscrimination provisions in Title VII has often informed the interpretation of protections in Title IX, the 2020 rule did not consider the Court's reasoning and instead suggested that the term "sex" would be interpreted solely as "biological sex."[5] Covered California supports the renewed efforts to bring these requirements into alignment with other federal laws by clearly stating that discrimination based on an individual's sexual orientation and gender identity is discrimination on the basis of sex under Section 1557, consistent with the *Bostock* decision.

Given the recent actions that have been taken to eliminate the prohibition of discrimination in health care, we commend HHS for taking action to protect individuals from unnecessary discrimination. In particular, Covered California strongly supports the following proposals:

[3] 85 Fed.Reg. 37160 (June 19, 2020).
[4] *Bostock v. Clayton County* 140 S.Ct. 1731, 1742 (2020).
[5] 85 Fed.Reg. 37160, 37168 (June 19, 2020).

- **Clarifying and Expanding the Scope of 1557**
  As proposed, HHS will increase the number of individuals protected from discrimination by expanding the scope of Section 1557. HHS will require that covered entities[6] prohibit discrimination with their health programs and activities. As proposed, covered entities would be expanded to many health insurance issuers, including qualified health plan (QHP) issuers offering health insurance through an Exchange. To ensure compliance with these requirements, HHS will require entities affected to develop and implement policies and procedures clarifying their nondiscrimination policies.

- **More Explicitly Prohibiting Discrimination**
  HHS focuses much of this rule on restoring nondiscrimination protections that were eliminated in the 2020 rule. HHS reiterates that Section 1557 provides a general prohibition of discrimination on the basis of race, sex, national origin, age, or disability under health programs or activities.

  Additionally, HHS clarifies that the term "on the basis of sex" includes sex stereotypes, sex characteristics, including intersex traits, pregnancy or related conditions, sexual orientation, and gender identity.[7] This broader definition will require covered entities to provide equal access to health programs and activities without the threat of discrimination on the basis of sex and will be prohibited from denying or limiting health services for gender-affirming care on the basis of an individual's sex assigned at birth, gender identity, or gender otherwise recorded. This clarification will also prohibit discrimination on the basis of sex, race, color, national origin, age, and disability in the provision and administration of health insurance coverage.

- **Proper Notification of Nondiscrimination Protections**
  To ensure individuals are aware of steps being taken by covered entities to protect them from discrimination, covered entities will be required to notify the public of their nondiscrimination requirements as well as provide participants, beneficiaries, enrollees, and applicants with a notice of nondiscrimination relating to its health programs and activities.

- **Restoring Protections for Limited English Proficient Individuals**
  HHS proposes to require covered entities to provide meaningful access to language services in the 15 most common languages spoken by individuals with limited English proficiency in each state. Covered entities would also be required to develop and implement written language access procedures to support

[6] The proposed definition of a "covered entity" includes recipients of federal financial assistance, HHS, and Exchanges.
[7] Consistent with legal conclusions reached in *Price Waterhouse v. Hopkins* 490 U.S. 228 (1989) (sex discrimination includes discrimination based on sex stereotypes), and *Bostock v. Clayton County*, 140 S.Ct. 1731, 1742 (2020) (sex discrimination includes discrimination based on sexual orientation and gender identity).

compliance with the meaningful access requirement. To ensure participants, beneficiaries, enrollees, and applicants are aware of these language access services, covered entities will be required to inform them with a notice, that these services exist.

Proudly serving an extremely diverse population in a state with very robust nondiscrimination protections, Covered California deeply understands the need to stand with all communities, and the impact that commitment has on individuals' ability to get the care they need. California law broadly prohibits business establishments from engaging in discrimination, and QHP issuers are specifically prohibited from discriminating in their insurance practices, including issuing contracts and imposing benefit limitations.[8] California law also prohibits QHP issuers from employing marketing practices or benefit designs that discriminate based on an individual's race, color, national origin, present or predicted disability, age, sex, gender identity, sexual orientation, expected length of life, degree of medical dependency, quality of life, or other health conditions.[9]

California has also extended nondiscrimination protections to individuals with limited English proficiency. Under California law, QHP issuers must provide enrollees with a written notice of the availability of free interpretation services in the top 15 languages spoken by limited English proficient individuals in California and must provide enrollees with translations of vital records into the top one or two languages spoken by the QHP issuer's enrollees.[10]

Covered California encourages further actions at the federal level to establish and clearly define nondiscrimination protections in health care settings to provide individuals across the nation with the care and support they need to thrive.

Solicitation of Comments on Civil Rights Data Collection and Prohibiting Discrimination in Clinical Decision-Making Algorithms and Telehealth Services

Covered California appreciates HHS's prioritization of equity as a foundational element in this proposed rule and its programs more broadly. Since its inception, addressing health equity and disparities in health care has been integral to the mission of Covered California and central to its benefit design and QHP issuer accountability efforts. More recently, Covered California has been working with Medi-Cal, California's Medicaid health care program, and the California Public Employees' Retirement System (CalPERS), the state's public employee health benefits purchaser, to align our work on quality and equity. Covered California has also had longstanding contractual requirements for QHP issuers on demographic data collection. Our experiences may prove helpful for both federal and state efforts in this area.

[8] Civ. Code § 51, Health & Saf. Code, § 1365.5; Ins. Code § 10140.
[9] Health & Saf. Code, § 1399.851, subd. (a)(3); Ins. Code, § 10965.5, subd. (a)(3).
[10] Health & Saf. Code, § 1367.04, Ins. Code, § 10133.11.

Requirements to Collect Civil Rights Data

Covered California recommends that HHS require covered entities to collect standardized data on race, ethnicity, language, sex, gender, gender identity, sexual orientation, disability status, and age. As HHS noted in its request for comments, effective data collection can play a vital role in ensuring civil rights compliance, yet that data remains largely uncollected for many demographic subgroups. HHS has further noted the potential difficulty in requiring covered entities to collect such sensitive data. Covered California welcomes the chance to comment on this proposal from the perspective as an active purchaser with extensive experience balancing the administrative and financial burdens on QHP issuers with the benefits of collecting and utilizing demographic data. Specifically, Covered California is focused on increasing the accuracy and completeness of its demographic data in order to enable and assess health care disparity interventions.

Covered California would welcome this data collection requirement as a first step to streamlining universal data collection. While Covered California is committed to collecting a range of demographic data elements to inform our health equity work, the manner in which we do so is disjointed and confusing to our consumers due to constraints from federal law and guidance. Currently, Covered California provides individuals who apply for coverage through the single-streamlined application the ability to answer *optional* questions identifying their race and ethnicity, but is prohibited from requiring the questions.[11] The optional nature of this question results in unreliable response rates and incomplete data. Covered California also has limited ability to collect information on an applicant's disability status, which we are only able to collect if an applicant is applying for financial assistance in order to determine if they may qualify for Medi-Cal coverage for a reason outside of being low-income. Additionally, Covered California has been prohibited from collecting information on applicants' sexual orientation and gender identity (SOGI) through the application. Applicants who are motivated to provide this optional data are required to navigate to supplementary questions located in their Covered California account, leading to extremely low response rates. Therefore, in order to maximize response rates, Covered California urges HHS to consider regulations or guidance that would allow all ACA exchanges to collect a full complement of demographic data elements within the core application.

To improve the accuracy and impact of demographic data collection, Covered California supports a unified federal civil rights data collection requirement which would support vital data collection efforts across the health care ecosystem. This would allow covered entities like Covered California to strengthen its current data collection efforts while also enhancing data collection from covered entities that have not collected demographic data to date.

[11] 42 U.S.C. 18081(g) currently limits the collection of information from applicants to only the information strictly necessary to authenticate identity, determine eligibility, and determine the amount of credit or reduction.

In an attempt to fill the current void, Covered California has contractual provisions requiring its participating QHP issuers to collect and store members' self-identified race and ethnicity data. The National Committee for Quality Assurance (NCQA) has recently established data collection standards for race/ethnicity stratification of Healthcare Effectiveness Data and Information Set (HEDIS) quality measures for health plans. Ideally, a federal requirement for universal standardized data collection would create administrative simplification for purchasers, issuers, and health systems alike to collect and share demographic data.

Some demographic data elements that are related to an individual's health status and access to appropriate care, such as self-identified race or gender identity, have been shown to shift and evolve over an individual's life. In addition, race and gender identity are linked to well-documented health care disparities, making the accurate collection of this demographic data crucial to the intent of these proposed regulations. To ensure accuracy, Covered California recommends that HHS requires the annual submission of demographic data.

Prohibiting discrimination in clinical decision-making algorithms, including telehealth services

Covered California supports HHS's efforts to mitigate the potential harm caused by valuable clinical algorithmic tools, machine learning, or other similar developing technology. Awareness of the potential and actual discriminatory harms caused by clinical algorithms has grown in recent years, and Covered California urges HHS to continue to pursue meaningful protections despite the challenge of building and maintaining the technical knowledge required to implement and maintain these guardrails. Covered California has recently begun to assess QHP issuers' approaches to monitoring algorithms used in health care, including clinical algorithms, for potential bias.

Importantly, we note protections against discrimination should be applied beyond clinical algorithms to include all related automated or augmented decision-making tools such as artificial learning or artificial intelligence. As HHS notes in this proposed rule, there is a growing body of evidence that confirms that a number of applications of these decision-making tools result in the discriminatory allocation of health care resources.

While the prohibition against discrimination is foundational, effective federal action to mitigate discriminatory outcomes will need to be specific and include guidance for covered entities in how to appropriately assess algorithms for bias. Augmented decision-making tools are being increasingly adopted by a variety of health care entities ranging from individual clinicians to hospital systems to issuers, many of whom may not have the resources or technical knowledge to assess whether their tools are driving discriminatory outcomes. In other words, the issue at hand is not discriminatory intent; therefore, any action must go beyond intentional discrimination and also provide workable solutions.

Given the widespread variation in knowledge and technical expertise in this area, standardizing actions covered entities could take – as well as providing technical assistance and guidance – would accelerate progress and reduce harm in this area.

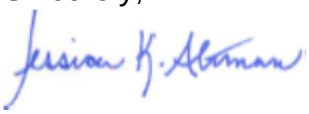
Prohibiting discrimination in telehealth services

As HHS noted in proposing these new regulations, there is a growing body of evidence illustrating how access to effective telehealth services differs for individuals by race, color, national origin, sex, age, or disability status. A unified federal approach for covered entities would benefit individuals, providers, and carriers, as many variables determine whether a patient has access to high-quality non-discriminatory telehealth services, and a piecemeal approach may leave some patients out. When choosing how to provide telehealth services, an issuer or provider could choose to contract with a vendor or provide the services in-house, and in both cases, there are a variety of technical solutions available, some of which may work better to provide adequate access. Covered California recommends that HHS require telehealth vendors to integrate the availability of third-party interpretation services to all encounters in order to provide adequate, culturally appropriate care to all individuals no matter their preferred spoken language.

Covered California also encourages HHS to require parity in access and reimbursement between real-time audio-visual telehealth services and those that are accessible to those without high-speed internet such as real-time text-only or audio-only visits while issues of broadband and digital access are addressed. Understanding the inequity in access to broadband services and the importance of telehealth services, Covered California recommends that HHS require issuers to develop and provide enrollees with resources and educational materials to increase digital literacy among enrollees who do not have experience or comfort with telehealth services.

We appreciate your consideration of Covered California’s comments and look forward to continuing our partnership with you to make the ACA work as effectively as possible for all individuals. If you have any questions or would like more information about the proposed rules' impact on individuals' access to affordable coverage, please feel free to contact me.

Sincerely,



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