Latest Section 1557 rule rescinds trans patients' rights, but SCOTUS has other ideas

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HHS finalized the Section 1557 final rule last month, which would seem to remove civil rights protections for trans or non-binary patients seeking federal payer coverage for treatment. But other events, including a recent Supreme Court decision, suggest that little has changed for providers as far as discrimination against such patients is concerned, and you should proceed as if it has not.

The rule issued June 12 and in effect starting August 18 is called "Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority," and refers to the Section 1557 protections included in the 2010 Affordable Care Act. Section 1557, according to HHS, "prohibits discrimination on the basis of race, color, national origin, sex, age or disability in certain health programs or activities."

Under a 2016 rule issued by the Obama Administration, the federal government had interpreted Section 1557 to mean that discrimination on the basis of "sex" included discrimination on the basis of sexual orientation and gender identity (*PBN blog, 5/13/16*). The rule affirmed the liberal interpretation of 1557 that insurers could not deny coverage specific to a trans patient's needs, such as hormone therapy. Also, barring a good-faith conscience exemption, providers could not deny treatment. Providers also had to respect the gender identity preference of patients, including pronouns and designations on forms (*PBN 2/29/16*).

That rule was not solely about the sex-basis interpretation. It also laid down specific requirements for meeting the needs of limited-English-proficient (LEP) patients and potential patients, such as on forms and marketing materials (*PBN 6/6/16*). The rule also specified discrimination standards for disabled patients, whose rights are largely covered by the Americans with Disabilities Act (*PBN 4/11/19).*

Pushback on Obama rule

The sex-basis parts of the Obama-era rule have been vigorously challenged, and plaintiffs in the Franciscan Alliance v. Burwell suit (ongoing as Franciscan Alliance v. Azar) won an injunction in 2017, partly on grounds that the rule required providers to perform services against their will in violation of the Religious Freedom Restoration Act (RFRA) (*PBN 2/13/17*). In 2019, the Trump administration proposed a new Section 1557 rule that officially rescinded the Obama Administration's reading of 1557 as regards non-binary patients (*PBN 6/6/19*).

The new final rule sticks closely to the Trump interpretation, proclaiming that HHS, CMS and the HHS Office for Civil Rights (OCR) are, according to the HHS fact sheet, "returning ... to the plain meaning of the word 'sex' as male or female and as determined by biology" in their enforcement

Combined with a revised "conscience" rule finalized by HHS and OCR in May, which strengthened a provider's right to refuse treatment on religious or belief grounds, this rule would at first glance seem to support a provider's right to refuse accommodation to non-binary patients in their treatment, records and forms (*PBN 5/30/19*).

"As a matter of policy, federal civil rights law should not be used to override providers' medical judgments regarding treatments for gender dysphoria," the rule states. "Even if it were appropriate policy, such an end could not be achieved through application of Section 1557 and Title IX. There is no statutory authority to require the provision or coverage of such procedures under Title IX protections from discrimination on the basis of sex."

Watch two impediments

Two outside events, however, affect how you should react to the new rule, says Lora Zimmer, an attorney with McCarty Law in Appleton, Wisc.

Days after the new final rule was released, the U.S. Supreme Court held in Bostock v. Clayton County, Ga. "that discrimination based on sex does include sexual orientation and gender identity, in the context of employment law," Zimmer notes. "The rule and the Supreme Court are therefore at odds with one another, even though they are looking at different areas of the law."

Zimmer hears that "litigation is already in the works seeking to reverse the new rule based on Bostock," and warns that this could affect the way your treatment of non-binary patients is seen in any legal action arising from it.

Also, the aforementioned conscience rule was blocked by a federal judge in New York in November of last year, and is not in effect.

"There do remain conscience and religious freedom laws on the books that were not affected by that decision, but those relate to individual providers, so a health care provider entity that accepts federal dollars needs to ensure patients are treated in a non-discriminatory manner, even if that means swapping out the individual provider who is seeing them," Zimmer says.

"While providers could take the position that the HHS rule allows them to refuse to treat trans patients — barring any applicable state law to the contrary — I would strongly advise against that," Zimmer adds. "Not only could that be considered a breach of professional ethics, but the courts could very well decide that the U.S. Supreme Court interpretation of 'sex' in the context of discrimination laws applies to discrimination in the health care setting as well."

Eric D. Fader, a partner with the Rivkin Radler firm in New York City, believes that a provider could still stand on their rights under RFRA to deny transgender-specific services to patients, barring state law to the contrary. But "generally these days where almost anything can be a *cause celebre*, I wouldn't want to be a practitioner turning away a patient without a really good reason — whether it's legal or not under state or federal law."

Like the proposed rule, the final rule says providers may "return to the language access standard previously in place" before the 2016 rule. That includes removing the necessity of advertising their non-English-language services, but maintaining the requirement to offer free and timely translation services to LEP patients. It largely leaves its discrimination provisions regarding disabled patients as they were.

Resources

- HHS fact sheet: *www.hhs.gov/sites/default/files/1557-final-rule-factsheet.pdf*
- Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, final rule: *www.federalregister.gov/documents/2020/06/19/2020-11758/nondiscrimination-in-health-and-health-education-programs-or-activities-delegation-of-authority*

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