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Sent: Tuesday, May 24, 2016 9:34 AM
To: clarkeross10@comcast.net
Subject: How Federal Nondiscrimination Rule in Healthcare Will Affect People With Disabilities

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DREDF: Disability Rights Education & Defense Fund
Doing Disability Justice

May 2016

How the Affordable Care Act, Section 1557 Will Affect People in Cross–Disability Communities

DREDF's call for recognition of intersectional discrimination in healthcare settings **was successful in part but our call for data collection that is critical for reducing health disparities was refused**.

Disability Rights Education & Defense Fund (DREDF) is encouraged by the final regulation issued on May 13 by the Office of Civil Rights (OCR) in the US Department of Health and Human Services (HHS) regarding the implementation of Section 1557 of the Affordable Care Act of 2010 (ACA). Section 1557 is the provision in the law that explicitly prohibits discrimination on the ground of race, color, national origin, sex, age, or disability in certain health programs and activities. OCR had issued a

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Health and Human Services Office for Civil Rights' Final Rule Implementing Section 1557 of the Patient Protection and Affordable

proposed rule for Section 1557 in September 2015 and the final rule has been eagerly awaited.

The long–standing experience of people with disabilities in both medicine and insurance coverage is integral to understanding the significance of the regulation. Discrimination in such forms as coverage limitations or differential treatment imposed on the basis of disability have been historically commonplace.

One significant benefit of the final rule is its acknowledgement that structural disability discrimination occurs in healthcare settings and systems, and must be addressed through specific legal and regulatory prohibitions.

Highlights in the final rule that are of interest to individuals with disabilities include:

The nondiscriminatory rule applies to many – but not all — health entities and excludes Medicare Part B providers. The Section 1557 final rule applies to any health program or activity, any part of which receives HHS funding, such as hospitals that accept Medicare or doctors who receive Medicaid payments; the Health Insurance Marketplaces and issuers that participate in those Marketplaces; and any health program that HHS itself administers.

Unfortunately, Medicare Part B providers continue to be an exception to Section 1557's coverage, despite strong advocacy from DREDF and others in comments on the proposed rule that such providers should be included.

We agree that Section 1557 reaches many Medicare

DREDF Comments on the Affordable Care Act Section 1557 Notice of Proposed Rulemaking

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providers through other routes, such as acceptance of Medicaid payments or inclusion in a marketplace provider network. But DREDF sees no logical reason for fee–for–service Medicare Part B payments not to be characterized as federal financial assistance for the purposes of nondiscrimination, especially when Medicare Part B providers who accept only fee-for-service Medicare Part B payments **are** covered by Title III of the Americans with Disabilities Act.

DREDF will continue to seek opportunities to positively influence HHS's policy on including Medicare Part B providers under Section 1557.

Communication access was addressed and covered entities must give "primary consideration" to an individual's choice of aid or service. Consistent with existing requirements, Section 1557 requires covered entities to take appropriate steps to ensure that communications with individuals with disabilities are as effective as communication with others.

Section 1557 also requires covered entities to provide appropriate auxiliary aids and services, such as alternative formats and sign language interpreters, where necessary for effective communication.

The final rule included two additional positive developments recommended by DREDF. OCR confirmed that all covered entities will be held to the higher standards established under Title II of the ADA, which requires covered entities to give primary consideration to the choice of an aid or service requested by the individual with a disability. OCR also explicitly stated that the

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communications requirements of Section 1557 apply to providers with fewer than 15 employees.

Covered entities must post a notice of individuals' rights, providing information about communication assistance among other information.

Consumers with disabilities have strong protections regarding electronic and information technology, but 1557 does not extend those protections to health employees with disabilities. Covered entities are required to make all programs and activities provided through electronic and information technology accessible to individuals with disabilities, unless doing so would impose undue financial or administrative burdens or would result in a fundamental alteration in the nature of the covered entity's health program or activity.

Unfortunately, OCR did not agree with DREDF and other commentators that the accessibility standards should apply equally to electronic and information technology that is primarily used by health employees. OCR believed that employees were adequately protected under existing law such as Title I of the ADA.

DREDF had commented that health professionals and employees with disabilities require accessible electronic and information technology to practice their professions, and that such employees are an important means of reducing the health and healthcare disparities experienced by people with disabilities

Physical access standards are stronger. Section 1557 incorporates the 2010 Americans with Disabilities Act Standards for Accessible Design as the standards for

physical accessibility of new construction or alteration of buildings and facilities. Almost all covered entities are already required to comply with these standards.

Moreover, DREDF and others achieved a small victory as the final rule has further narrowed the applicability of the old Uniform Federal Accessibility Standards to those few federal buildings that are not covered by the 1991 or 2010 ADA standards where construction or alteration began before the effective date of the final rule (July 2016), and not eighteen months **after** the effective date as initially stated in the 2015 proposed rule (January 2018).

The very design of the benefits, such as what is covered and the conditions of coverage, cannot exclude people with disabilities. Covered entities cannot use marketing practices or benefits designs that discriminate on the basis of disability.

While the final rule did not provide examples of the kind of benefits design that will be considered discriminatory, as urged by DREDF and others, the final rule affirms that it fully incorporates the broad definition of "disability" as defined and construed under the Americans with Disabilities Act, as amended.

It should therefore be possible to challenge insurance carriers that try and maintain traditional coverage limitations or benefits designs that tend to exclude individuals with certain disabilities or chronic conditions.

Reasonable changes for equal access are required. Covered entities must make reasonable changes to policies, practices, and procedures where necessary to

provide equal access for individuals with disabilities unless the covered entity can demonstrate that making the changes would fundamentally alter the nature of the health program or activity.

HHS declined to follow DREDF's urging to provide any further specific examples on the breadth of potential accommodations required for programmatic accessibility, such as longer appointments or modified wait times, assistance with dressing, and ensuring availability of accessibility exam rooms and equipment.

On the important matter of enforcement, OCR reiterated its understanding that Section 1557 authorizes a private right of action for claims of disparate impact discrimination and added language to the final rule explicitly acknowledging that compensatory damages for violations of Section 1557 are available in administrative and judicial actions, as they are under authorities referenced in Section 1557.

DREDF's call for recognition of intersectional discrimination was successful in part but our call for data collection that is critical for reducing health disparities was refused. OCR did not change the text of the actual regulation in response to DREDF's call for the rule to recognize intersectional elements of discrimination faced by people with disabilities who fall into more than one protected group. However, in the preamble to the rule, OCR clarified that "Section 1557's prohibition of discrimination reaches intersectional discrimination" and stated that "the regulatory text encompasses this approach."

As a disability civil rights organization, we applaud the fact that the final rule clearly recognizes sex stereotyping and gender identity as grounds of discrimination that are included in the prohibition against discrimination on the basis of sex.

At the same time, DREDF is discouraged by OCR's refusal to mandate data collection from covered entities as part of the assurances required under Section 1557. We strongly believe that voluntary data collection is a critical tool for identifying individuals with disabilities, and particularly individuals who hold multiple identity factors and face cumulative factors of health disparities.

Without accurate identification of the populations that they serve, covered entities cannot fully recognize when and how discrimination and resulting health disparities occur. OCR pointed out that Section 4302 of the ACA mandates data collection measures, but we note that Section 4302's provisions have not been provided with the authorized funding and attention that would ensure the section's effectiveness.

Background

In November, we submitted a detailed and extensive response to proposed Section 1557 regulations. DREDF argued that the proposed rule failed to critically develop what disability nondiscrimination would and should look like in the current US healthcare system under the ACA. For example, key opportunities to elaborate on how section 1557 applies in the growing context of managed care delivery systems, provider network accessibility, benefit design, and the right to live in the community were

overlooked.

Healthcare Equity for People with Disabilities is one of our core programs. DREDF has continued working to recognize and respond to foundational issues of access and inclusion that are still unresolved in the US healthcare system under the Affordable Care Act (ACA) and the myriad state-level systems connected to it.

Our consistent message is that meeting the healthcare needs of people with disabilities is central to the success of any healthcare system. In this, we are fighting for the current and future needs of nearly every family in this country.

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