August 13, 2019

Mr. Roger Severino
Director
U.S. Department of Health and Human Services, Office for Civil Rights
Hubert H. Humphrey Building, Room 509F, 200 Independence Avenue, SW
Washington, DC 20201

Submitted electronically via www.regulations.gov

Re: Section 1557 NPRM, RIN 0945–AA11
Proposed Rule on Nondiscrimination in Health and Health Education Programs or Activities

Dear Director Severino:

Bi-State Primary Care Association (Bi-State), appreciates the opportunity to provide comments to the U.S. Department of Health and Human Services (HHS) Office for Civil Rights (OCR) on the proposed rule, “Nondiscrimination in Health and Health Education Programs or Activities,” 84 Fed. Reg. Vol. 115 (June 14, 2019).

Established in 1986, Bi-State is a nonpartisan, nonprofit 501(c)(3) charitable organization promoting access to effective and affordable primary care and preventive services for all, with special emphasis on underserved populations in Vermont and New Hampshire. Bi-State’s combined Vermont and New Hampshire membership includes 22 Federally Qualified Health Centers (FQHCs), one Rural Health Clinic, the Vermont Coalition of Clinics for the Uninsured, and Planned Parenthood of Northern New England. Our members deliver primary care at over 120 locations for over 300,000 patients, including over 135,000 Medicare and/or Medicaid beneficiaries.

Bi-State’s Comments

Health Centers are Pioneers in Providing High-Quality, Value Based Care to All Americans

Health centers, by long-standing mission and mandate, provide comprehensive primary and preventive care to all who come through their doors, regardless of insurance status or ability to pay for services. Our Rural Health Clinic, Planned Parenthood clinics, and coalition of free clinics also serve as important safety-nets in our two-state region. The vastly diverse and growing health center patient population includes: low-income working families, the medically underserved and uninsured, and high-risk and vulnerable populations.

In addition to primary and preventive care, health centers provide nonclinical services, known as “enabling services,” that facilitate access to needed care. Health center enabling services include: health education, case management, interpretation, transportation, financial education, and other mechanisms to eliminate barriers to care. Enabling services may include eligibility assistance or peer recovery support provided through a community health worker.
Health centers have become trusted community providers for more than 50 years, because both policymakers and communities know that they are able to provide a wide array of high-quality evidence-based services to diverse communities in culturally and linguistically appropriate care settings.

**Section 1557 Statute and Regulations Reinforce the Health Center Mission and Mandates**

Section 1557 of the Affordable Care Act (ACA) prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in health programs or activities that receive federal financial assistance, or under any program or activity that is administered by an executive agency under Title I of the ACA or by an entity established under such Title. As HHS OCR stated in 2016, “a fundamental purpose of the [Affordable Care Act] is to ensure that health services are available broadly on a nondiscriminatory basis to individuals throughout the country.”  

As entities participating in Medicare and Medicaid, and often receiving grant funds from the Health Resources and Services Administration (HRSA), all health centers are required to comply with Section 1557 and the implementing rules finalized in 2016. Indeed, the 2016 Final Rule added a new layer of complexity to an already intricate regulatory environment for health centers. Health centers have embraced the 2016 Final Rule, including the access, notice, and grievance procedures, and we continue to support the mechanisms it established to implement and enforce Section 1557. Bi-State stands with our National Association of Community Health Centers (NACHC) in believing that concerns about the additional burden of complying with Section 1557 could be resolved through clarifying guidance. And further, the benefit of these additional requirements are significantly outweighed by the benefit to the health of the patients we serve.

**The Proposed Changes Undermine the Mission of Health Centers and HHS, and Weaken Enforcement of Protections against Discrimination for People with Disabilities and Chronic Conditions**

Bi-State and NACHC have both been pleased to see efforts by both Congress and this Administration to put patients first by boldly tackling the opioid addiction and overdose crisis as well as the high costs of prescription drugs. Given the Administration’s commitment to address the opioid crisis, drug pricing, and the HIV epidemic, we are excited about the progress we can make to address these public health challenges in a bipartisan way. However, we are concerned that the proposal by OCR to narrow the scope of the 2016 Final Rule to cover only the specific programs and activities that receive federal funding, and not broader health care operations will result in a decline in the important progress being made to address access to needed health care services.

Health centers believe that applying nondiscrimination rules across the health system consistently will better serve the goal of ensuring access to high-quality primary and preventative care and other services in a way that selective enforcement would not.

We cannot support a proposal which will result in health plans or pharmacy benefit managers operating so that the public is unable to identify options to seek redress for unfair practices, such as discriminatory plan benefit design. We are concerned this proposal, if finalized, could leave the most vulnerable individuals, those with disabilities and life-threatening chronic conditions, such as HIV or opioid use disorder, with inconsistent protection of their civil rights.

The proposed changes to the 2016 Final Rule, i.e., to scale back well-guided enforcement mechanisms for Section 1557: 1) represents an abrupt departure from HHS OCR’s previous considerations of the public input it received on the rules; and 2) is counterproductive to the various initiatives undertaken by HHS as “the Federal government's lead agency for protecting the health of all Americans and providing essential human services, especially for those who are least able to help themselves.”

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2 83 Fed. Reg. 58019
Discrimination in health care takes various forms, ranging from plan benefit design to disparate panel policies. As such, the rules must be comprehensive in scope and application to address real barriers to care for the protected classes.

Given how opaque the practices of health insurers and plan benefit managers, e.g. pharmacy benefit managers, continue to be despite policies enacted under the ACA to combat insidious forms of discriminatory risk-adjustment or benefit tiers, Bi-State opposes HHS OCR’s proposal to narrow the scope of the 2016 Final Rules. More specifically, Bi-State is opposed to the proposed changes in § 92.1 - 92.3 that would narrow the scope of application of Section 1557, as they would have a detrimental effect on health center patients and recommends:

1) That HHS OCR maintain the 2016 Final Rule’s application to *all* health programs or activities administered by HHS (as well as other federal Departments) *plus* those established under Title I of the ACA.

2) That, similar to Title VI, HHS OCR maintain the 2016 Final Rule’s application to *all* parts of the covered entity, not only the portion receiving federal financial assistance.

Given the inextricable link between health care and coverage, Bi-State believes that health insurance is a “health program or activity” subject to Section 1557 requirements. OCR’s proposal to apply Section 1557 only to federal health programs and activities administered by an agency established by Title I of the ACA, is counter to the statutory text and intent of the law.

**Conclusion**

Bi-State’s 22 VT and NH health centers and other member organizations are staffed by and offer services to all individuals, regardless of their diverse characteristics or ability to pay for services.

As the regional representative for health centers and their patients, Bi-State is deeply concerned by the proposed revisions that seek to significantly scale back the 2016 Final Rule, rather than further strengthen it in ways that would put patients first. The 2016 Final Rule provides meaningful ways to ensure that the nondiscrimination protections are known, monitored, and enforced. This is especially important for individuals who are struggling to meet the day-to-day demands of life due to disabling or chronic conditions. A scaling back of the 2016 Final Rule could result in increased health care disparities, increased health system costs, and reduced access to care for historically marginalized and vulnerable populations.

Bi-State hopes that HHS OCR will ultimately withdraw this proposal and instead work with stakeholders to establish clear guidance that fully realizes the intent of the Section 1557.

Thank you for the opportunity to comment on this proposed rule. Bi-State and its member organizations are willing to provide clarification or answer any follow up information on our comments, please contact Georgia Maheras, VP of Policy and Strategy at gmaheras@bistatepca.org or 802-229-0002, ext 218.

Sincerely,

**Georgia Maheras**

Georgia Maheras  
VP, Policy and Strategy  
Bi-State Primary Care Association