

Nondiscrimination Protections in Gender-affirming Surgery: US Government's Proposed Update to Section 1557 of the Affordable Care Act

Amitai S. Miller, BA*†; Kavitha Ranganathan, MD‡; Sean Cahill, PhD§¶

On August 4, 2022, the US Department of Health and Human Services (HHS) published a proposed rule updating Section 1557 of the Affordable Care Act to strengthen civil rights protections for patients.¹ If implemented, the update would critically expand health-care access, particularly for individuals seeking gender-affirming surgery (GAS).

Originally passed in 2010, Section 1557 of the Affordable Care Act ensures access to and coverage of health care in a nondiscriminatory manner, specifically prohibiting sex-based discrimination. In 2016, HHS published its first rule implementing Section 1557 of the Affordable Care Act and defined gender-identity-based discrimination within the umbrella of sex-based discrimination.² In 2020, the Trump administration reversed the 2016 update by narrowing the scope of sex-based discrimination to again exclude gender-identity-based discrimination. Shortly thereafter, the US Supreme Court ruled in *Bostock v. Clayton County, Georgia* that anti-gay and anti-transgender discrimination in employment violate federal sex nondiscrimination law.

The 2022 proposed rule reinstates pre-Trump administration protections for LGBTQIA+ patients by defining sex-based discrimination to include gender identity, aligning Section 1557 with the *Bostock* ruling. The proposed rule ensures that providers and health systems receiving federal funds cannot deny transgender and gender-diverse (TGD) people surgical care that cisgender people would be offered. For instance, a plastic surgeon who offers breast reduction to cisgender women could not deny this procedure to TGD people. Moreover, the rule would prohibit health insurers from imposing additional cost sharing, denials, or coverage limitations for gender-affirming care. The proposed update clarifies

that insurers are not obligated to cover surgeries for TGD individuals that they do not otherwise cover when medically necessary in cisgender people. Furthermore, providers are not expected to perform surgeries outside of their expertise or when unsafe due to a patient's unique clinical characteristics. However, providers cannot refuse care to TGD people solely based on their belief that GAS is never beneficial.

Recent court decisions have affirmed religious exemptions for providers and health insurers.^{3,4} This leaves many TGD people, especially those living in areas with few surgeons, increasingly vulnerable to gaps in care. To address this, HHS should take steps to ensure that TGD individuals without available affirming providers or health systems can access care, such as encouraging interstate pacts to allow for telehealth across state lines, easing preoperative and postoperative appointment access. In addition, national training guidelines on GAS-specific clinical skills, experience, and competencies should be implemented within relevant surgical residency programs, particularly plastic surgery programs. This move would significantly expand the workforce capable of performing such procedures.⁵

Health-care access is crucial for everyone, and this proposed update would further guarantee that TGD people can obtain the care and coverage they need. The update's other components, such as expanding provisions for people with low English-proficiency or disabilities, and prohibiting discrimination on the basis of sexual orientation and diverse family unit structures, would all enhance health-care access and delivery for TGD people. Especially with increasing state legislation restricting gender-affirming care, we welcome HHS's proposed Section 1557 update and encourage its swift finalization and implementation to improve access to GAS.

From the *Harvard Medical School, Boston, Mass.; †Harvard Kennedy School, Cambridge, Mass.; ‡Division of Plastic and Reconstructive Surgery, Department of Surgery, Brigham and Women's Hospital, Boston, Mass.; §The Fenway Institute, Boston, Mass.; and ¶Department of Health Law, Policy and Management, Boston University School of Public Health, Boston, Mass.

Received for publication November 1, 2023; accepted November 9, 2023.

Copyright © 2024 The Authors. Published by Wolters Kluwer Health, Inc. on behalf of The American Society of Plastic Surgeons. This is an open-access article distributed under the terms of the [Creative Commons Attribution-Non Commercial-No Derivatives License 4.0 \(CCBY-NC-ND\)](https://creativecommons.org/licenses/by-nc-nd/4.0/), where it is permissible to download and share the work provided it is properly cited. The work cannot be changed in any way or used commercially without permission from the journal.

Plast Reconstr Surg Glob Open 2024; 12:e5528; doi: 10.1097/GOX.0000000000005528; Published online 19 January 2024.

Amitai S. Miller, BA

25 Shattuck St.

Boston, MA 02115

E-mail: amiller@hms.harvard.edu

Twitter: @Amitaimiller

DISCLOSURES

The authors have no financial interest to declare in relation to the content of this article. The open access fee was paid for by Harvard University's Open Gate Foundation grant.

REFERENCES

1. U.S. Department of Health and Human Services. Nondiscrimination in health programs and activities. Federal register. Available at <https://www.federalregister.gov/documents/2022/08/04/2022-16217/nondiscrimination-in-health-programs-and-activities>. Published August 4, 2022. Accessed July 22, 2023.

2. Cahill S, Miller AS, Keuroghlian AS. Sexual and gender minority health equity in the Biden administration. *JAMA Health Forum*. 2022;3:e214868.
3. Keith K. Fifth Circuit Rules in Franciscan Alliance, Other Section 1557 Litigation. Health Affairs. Available at <https://www.healthaffairs.org/content/forefront/fifth-circuit-rules-franciscan-alliance-other-section-1557-litigation>. Published August 31, 2022. Accessed July 22, 2023.
4. Levitt L, Cox C, Dawson L, et al. Q&A: implications of the ruling on the ACA's preventive services requirement. KFF. Available at <https://www.kff.org/policy-watch/qa-implications-of-the-ruling-on-the-acas-preventive-services-requirement/>. Published April 4, 2023. Accessed August 19, 2023.
5. Leighton NA, Pratt-Chapman M, Peters BR. Gender-affirming care in plastic surgery training: moving beyond metrics of exposure. *Plast Reconstr Surg*. 2022;149:601e–602e.