EXHIBIT 12

Comments by The California Endowment

The California Endowment

1000 North
Alameda Street
Los Angeles
CA 90012

213.928.8800
FAX 213.928.8801
800.449.4149

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

RIN 0945-AA11: Nondiscrimination in Health and Health Education Programs and Activities, Proposed Rule

Mr. Severino:

The California Endowment strongly opposes the above-referenced proposed rule[1] that arbitrarily and unjustifiably weakens Section 1557 of the Patient Protection and Affordable Care Act (ACA), contrary to the ACA's underlying legislative purpose to expand access to affordable, quality, health insurance coverage for all Americans, especially the most historically excluded and medically underserved.

Mission of the Office of Civil Rights and Statutory Intent of ACA Section 1557

The mission of U.S. Department of Health and Human Services (HHS) Office of Civil Rights (OCR) is to protect of the civil rights of all Americans, not issue administrative rules that limit its own authority, and narrows the scope of protections against discrimination for entire classes of Americans. We are deeply disappointed that OCR has proposed this rule repealing and otherwise weakening significant sections of its own prior final regulation - which went through detailed administrative development and extensive public comment - and that implemented the ACA's statutory intent to ensure that all Americans are protected against unlawful discrimination in health care insurance and all of HHS's funded programs and services.

We are particularly disturbed that, throughout this proposed rule, OCR repeatedly references the unsubstantiated and self-proffered burdens on covered entities such as large national and multi-state health insurance plans and pharmacy benefit management companies, but barely mentions the real harms that past and ongoing discrimination by health insurance plans and other federally-funded health care providers and systems experienced by tax-paying women, individuals who are limited English proficient, and sexual and gender minorities, especially transgender individuals. Indeed, OCR acknowledges that its proposed rule will

[1] 84 Fed. Reg. 27846-27895, June 14, 2019.

primarily benefit 180 health insurance plans, 84 Fed. Reg. at 27877.[2] In contrast, OCR states that:

> Continued enforcement of Section 1557 includes *vindication of legal rights, the benefits of which are difficult to quantify*…OCR will continue to vigorously enforce civil rights in order to help guarantee more access to health care and concomitant improved health outcomes – but *those benefits are difficult to estimate* given that many of the prohibitions encompassed by the proposed rule, as with the Final Rule, have been in place at the Federal level for many years or have been otherwise required by State or local law. 84 Fed. Reg. at 27886 (emphasis added).

It is unconscionable that a taxpayer-funded federal agency charged with enforcing civil rights laws is unable to describe the real harms experienced by victims of discrimination when OCR itself receives countless discrimination complaints every day, every month, and every year. If there is any issue that OCR should have expertise and experience about, it is the devastating consequences of discrimination on individuals and their families and communities, especially when it occurs in the provision of health care. The mission of the OCR - and the appropriate use of its rulemaking authority - should be to protect the civil rights of all Americans against discrimination, rather than protecting the self-interests of 180 health insurance plans, pharmacy benefit management companies, and other recipients of millions of dollars of federal funding.

About The California Endowment

The California Endowment (The Endowment) is a statewide health foundation, with a mission and charitable purpose to expand access to affordable, quality health care for underserved individuals and communities, and to promote fundamental improvements in the health status of all Californians. For over the past two decades, The Endowment has supported expanding access to health insurance coverage, nutrition, physical activity, housing, and other supports for healthy living and optimal health. For example, The Endowment has invested significantly in supporting the implementation of the ACA in California. Due to the collaborative efforts of community members and organizations, the California Department of Health Care Services, Covered California (California's ACA health insurance marketplace), and many other stakeholders, the rate of uninsured

[2] OCR reveals its motivations for the proposed rule: "The proposed rule would particularly reduce the economic burden imposed on health care providers and insurers required to provide taglines under the Final Rule…eliminating the taglines requirement wil alleviate burdens on patients and insurance beneficiaries that neither need nor want to receive repeated tagline mailings." 84 Fed. Reg. at 27887. On the other hand, OCR neglects to mention, let alone balance, the real and ongoing harms from discrimination experienced by limited English proficient Americans.

persons in California has been reduced from 17 percent in 2013 to 7 percent in 2017.[3]

Impact of Proposed Regulation on Californians

Since California is the state with the highest overall population, and one of the most demographically diverse populations in the nation, the harmful impacts of the proposed rule will be disproportionately experienced by Californians. Our comments will highlight the adverse impacts of the proposed rule on four classes of Californians that have historically experienced discrimination by health insurance plans and providers: women, individuals who are limited English proficient, individuals with disabilities, and transgender people:

- Using the latest available American Community Survey (ACS) data from 2017, there are over 8.7 million women in the child-bearing ages of 16 to 49[4] residing in California (ACS, 1-year estimates, Table B01001).[5]
- 44% of the 37 million Californians ages 5 years and older - nearly 16.5 million individuals - speak a language other than English at home, and that 40% of those individuals - over 6.6 million Californians - do not speak English "very well" and are limited English proficient (LEP) individuals (ACS, 1-year estimates, Table S1601).
- The 2017 ACS also reports that 10.6% of the 39 million Californians (total non-institutionalized population) - or over 4.1 million individuals, are individuals with disabilities; including over 295,000 children under age 18, and over 1.8 million seniors ages 65 and older (ACS, 1-year estimates, Table DP02).
- The Williams Institute at the University of California Los Angeles estimates that there are 218,400 transgender adults (ages 18 and older)[6] and another 22,200 transgender youth (ages 13-17) residing in California.[7]

Purpose of ACA Section 1557

ACA Section 1557 prohibits discrimination on the basis of race, color, national origin, sex, age, and disability, referencing and codifying prohibitions against discrimination from Title VII of the 1964 Civil Rights, Title IX of the Education Amendments of 1972, Section 504 of the 1973 Rehabilitation Act, and the 1972 Age Discrimination Act. In enacting those successive laws, Congress clearly

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[3] Berchick ER, Hood E, Barnett JC. Health Insurance Coverage in the U.S., U.S. Census Bureau, 2018, https://www.census.gov/content/dam/Census/library/publications/2018/demo/p60-264.pdf

[4] CDC Definition of Childbearing Age, https://www.cdc.gov/biomonitoring/glossary.html

[5] American Community Survey, https://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t

[6] Flores AR, Herman JL Gates GJ, Brown TNT. How Many Adults Identify as Transgender in the United States, Williams Institute, 2016, https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf

[7] Herman JL, Flores AR, Brown TNT, Wilson BDM, Conron KJ. Age of Individuals Who Identify as Transgender in the United States, Williams Institute, 2017, https://williamsinstitute.law.ucla.edu/wp-content/uploads/TransAgeReport.pdf

intended these protections against discrimination to be expanded to ever larger numbers of Americans, i.e. based on disability through the enactment of the Rehabilitation Act, and based on age through the enactment of the Age Discrimination Act. By referencing and codifying these prior laws, the clear intent of ACA Section 1557 was to continue to expand these protections against discrimination to more, not fewer, Americans, e.g., on the basis of sex.

Accordingly, we strongly oppose the proposed changes in 45 Code of Federal Regulations (CFR) Section 92.3 that would narrow the scope of application of ACA Section 1557, 84 Fed. Reg. at 27862-27863. Section 1557 applies to any health program or activity, any part of which is receiving federal financial assistance or under any program or activity that is administered by an Executive Agency or any entity established under Title I of the ACA. Thus, Section 1557 applies to *all* health programs or activities administered by the Department (as well as other federal Departments) *in addition to* those established under Title I. Further, similar to Title VI, Section 1557 applies to *all* parts of the covered entity, not only the portion of the covered entity receiving federal financial assistance.

We also strongly oppose the proposed amendment to 45 CFR Section 92.3(c) that would create an unprecedented and irrational exemption for health insurance plans from ACA Section 1557's prohibitions against discrimination. Given that the majority of Americans access health care through insurance plans, the provision of health insurance is a "health program or activity" and thus Section 1557 applies to it. The proposed changes run counter to the statutory text and intent of Section 1557 to broaden, not limit, protections against discrimination as health insurance coverage is expanded to more Americans under the ACA.

We also oppose the proposed changes that would limit private rights of action and give OCR the sole authority to enforce ACA Section 1557, proposed 45 CFR Section 92.5. Given this proposed rule severely limiting OCR's civil rights mandate, preserving a private right of action is even more urgent. Moreover, the numerous lawsuits regarding the protections against discrimination based on gender identity have all been brought as private rights of action by victims of such discrimination. OCR is being disingenuous by proposing to restrict the rights of victims of discrimination to be able to pursue legal remedies under ACA Section 1557.

Finally, we oppose the proposed repeal of requirements for a designated compliance coordinator at each covered entity with 15 or more employees, who would be responsible for responding to grievances and complaints related to ACA Section 1557, and a written grievance procedure, 84 Fed. Reg. at 27883. Assigning a designated staff person to this task and requiring a written grievance procedure are not burdensome on covered entities, would ensure that covered entity's familiarity with its obligations not to discriminate under ACA Section 1557, and is highly likely to decrease the number of complaints made to OCR, when grievances and complaints are resolved through internal procedures at the covered entity.

Importance of Prohibiting Discrimination Against American Women

Prior to the enactment of the ACA, it was lawful to deny women health insurance based solely on their sex, for being of child-bearing age, being pregnant, having a prior pregnancy, being survivors of domestic violence, or being treated after a sexual assault. It also was lawful to charge women more for health insurance than men, and to impose different annual or lifetime limits on how much coverage health insurers would provide based on sex. For example, a pre-ACA survey conducted in 2008 reported that health insurers charged up to 48% higher premiums for a 40-year old woman than a 40-year old man.[8] Health insurers also could outright deny any pregnancy-related or maternity-related coverage. The ACA explicitly and intentionally ended these sex-based exclusions, denials, and differential treatment of women. Unfortunately, even with the ACA, women still face exclusions and differential treatment from health insurers and often have to challenge these unlawful practices to ensure equal access.[9]

Under the unjustified pretext of protecting religious freedom, the proposed rule would severely undermine the clear statutory intent of ACA Section 1557 by carving out an open-ended exemption in 45 CFR Section 92.6 for any federally-funded health insurer or provider to once again discriminate against women on the basis of sex, including a prior termination of pregnancy, 84 Fed. Reg. at 27864. We urge the restoration of the clear definitions and examples in the 2016 final rule of the types of sex-based discrimination prohibited by Section 1557, including a prior termination of pregnancy or refusal to provide reproductive health services including birth control, and that OCR continue to interpret and enforce the statute accordingly.

Importance of Prohibiting Discrimination Against Transgender Americans
Transgender Americans continue to experience persistent health disparities, including exclusion and stigmatization by health insurance plans and health care providers.[10] More alarmingly, transgender Americans are one of the few populations that experience outright denials of care, and even physical harm, from health care providers.[11] For example, the National Center for Transgender Equality reported these results from its 2015 U.S. Transgender Survey:

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[8] National Women's Law Center, Nowhere to Turn: How the Individual Health Insurance Market Fails Women, 2008, https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2015/08/NWLCReport-NowhereToTurn-81309w.pdf

[9] Palankar D, Davenport K. Women's Health Coverage Since the ACA: Improvements for Most, But Insurer Exclusions Put Many At Risk, The Commonwealth Fund, 2016, https://www.commonwealthfund.org/publications/issue-briefs/2016/aug/womens-health-coverage-aca-improvements-most-insurer-exclusions

[10] Institute of Medicine, The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding, 2011, http://www.nationalacademies.org/hmd/Reports/2011/The-Health-of-Lesbian-Gay-Bisexual-and-Transgender-People.aspx

[11] Lambda Legal, When Health Care Isn't Caring, 2010, http://www.lambdalegal.org/publications/when-health-care-isnt-caring; National Gay and Lesbian Task Force and National Center for Transgender Equality, Injustice at Every Turn: A Report of the National Transgender Discrimination Survey, 2011, http://www.thetaskforce.org/reports_and_research/ntds

- One in four (25%) respondents experienced a problem in the past year with their insurance related to being transgender, such as being denied coverage for care related to gender transition or being denied coverage for routine care because they were transgender.
- More than half (55%) of those who sought coverage for transition-related surgery in the past year were denied, and 25% of those who sought coverage for hormones in the past year were denied.
- One-third (33%) of those who saw a health care provider in the past year reported having at least one negative experience related to being transgender, with higher rates for people of color and people with disabilities. This included being refused treatment, verbally harassed, or physically or sexually assaulted, or having to teach the provider about transgender people in order to get appropriate care.[12]

More recently, the Center for American Progress reported that in 2017, transgender Americans continued to experience denials of access to health care based on gender identity:

- 29 percent said a doctor or other health care provider refused to see them because of their actual or perceived gender identity
- 29 percent said that they experienced unwanted physical contact from a doctor or other health care provider (such as fondling, sexual assault, or rape)
- 21 percent said a doctor or other health care provider used harsh or abusive language when treating them
- 23 percent said a doctor or other health care provider intentionally misgendered them or used the wrong name
- 12 percent said a doctor or other health care provider refused to give them health care related to gender transition.[13]

HHS continues to acknowledge the ongoing widespread discrimination against transgender Americans and the need for protections against such discrimination. On the current healthcare.gov website, HHS states:

> Many health plans are still using exclusions such as "services related to sex change" or "sex reassignment surgery" to deny coverage to transgender people for certain health care services…. Plans might use different language to describe these kinds of exclusions. Look for language like "All procedures related to being transgender are not covered." Other terms to look for include "gender change,"

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[12] National Center for Transgender Equality, U.S. Transgender Survey, 2015, http://www.ustranssurvey.org/reports#USTS

[13] Mirza SA, Rooney C. Discrimination Prevents LGBTQ People from Accessing Health Care, Center for American Progress, January 18, 2018, https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/

> "transsexualism," "gender identity disorder," and "gender identity dysphoria."…These transgender health insurance exclusions may be unlawful sex discrimination. The health care law prohibits discrimination on the basis of sex, among other bases, in certain health programs and activities.[14]

OCR even admits in the proposed rule that the 2016 final regulation would have resulted in an increase in discrimination complaints brought by transgender Americans, 84 Fed. Reg. at 27883. It is the mission of OCR of protect Americans against discrimination, not issue administrative interpretations that limit such protections.

Despite significant legislative and policy advances for the LGBTQ communities here in California, many LGBTQ Californians still face discrimination, bullying, stigma, and barriers to accessing services and otherwise fully participating in all aspects of life.[15] The California Endowment has proudly defended the rights of LGBTQ Californians and supported community-based organizations that are providing health and other services that address the needs of LGBTQ Californians.

There is a clear consensus among medical experts that gender-affirming care is medically necessary for transgender patients.[16] These medical experts note that ending discrimination based on gender identity in both health insurance coverage and in the provision of health care is essential to improving the health of transgender Americans.[17]

Yet despite the overwhelming evidence of significant and ongoing discrimination against transgender Americans, the proposed rule would arbitrarily and unjustifiably repeal any protections against such discrimination based on gender identity, using the pretext of one lawsuit that has been filed against OCR's administrative interpretation of ACA Section 1557. 84 Fed. Reg. at 27848. While OCR references other lawsuits regarding Section 1557 in its proposed rule, 84 Fed. Reg. at 27855, it fails to acknowledge that in those lawsuits, four federal

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[14] https://www.healthcare.gov/transgender-health-care/

[15] Equality California Institute, Fair Share for Equality, 2017, https://www.eqca.org/wp-content/uploads/Fair-Share-for-Equality-Report-2017.pdf; Equality California Institute and Mental Health America of Northern California, First Do No Harm: California Reducing Disparities Project, 2013, http://www.eqcai.org/atf/cf/{8cca0e2f-faec-46c1-8727-cb02a7d1b3cc}/FIRST_DO_NO_HARM-LGBTQ_REPORT.PDF

[16] Eckstrand KL, Ng H, Potter J. Affirmative and responsible health care for people with nonconforming gender identities and expressions. AMA J. Ethics. 2016;18(11):1107-1118; Padula WV, Baker K. Coverage for gender-affirming care: making health insurance work for transgender Americans. LGBT Health. 2017;4(4):224-247

[17] Bakko M, Katari SK. Differential access to transgender inclusive insurance and healthcare in the United States: challlenges to health across life course. J. Aging Soc Policy. 2019 Jun 23, [Epub ahead of print]

courts have ruled that, regardless of any administrative interpretation by OCR, ACA Section 1557 does protect transgender Americans against discrimination.[18]

OCR references related pending litigation whether Title VII of the 1964 Civil Rights prohibits employment discrimination based on gender identity and sexual orientation. However, rather than maintaining a consistent position on these issues, OCR actually adds to the confusion by arbitrarily reversing its prior administrative interpretation and proposing to repeal Section 1557's prohibitions against discrimination based on gender identity. Moreover, OCR takes the unjustifiable and irrational position that individual states should be free to prohibit such gender identity-based discrimination on a state-by-state basis, 84 Fed. Reg. at 27874 and 27886, which would result in a patchwork of inconsistent protections. The very purpose of ACA Section 1557 was to accompany the expansion of health insurance coverage and other health care delivery system and payment reforms throughout the nation with national and uniform prohibitions against discrimination.

We also oppose the proposed overbroad repeal of ten other prohibitions against discrimination based on gender identity and sexual orientation based in other HHS statutes and regulations, 84 Fed. Reg. at 27870-27871; these are not incidental or technical "conforming amendments". Any proposed repeal of these unrelated regulations should proceed through separate and independent rulemaking that allows for additional public comment. In summary, we strongly oppose the repeal of these essential, life-saving prohibitions against discrimination against transgender Americans in the definitions and other text in the 2016 final rule, and throughout other unrelated HHS regulations.

Importance of Prohibiting Discrimination Against Limited English Proficient Americans

The Institute of Medicine has documented the importance of ensuring language access for LEP Americans, finding that without language access, LEP patients:

- Have a decreased likelihood of having a usual source of care (Kirkman-Liff and Mondragon, 1991; Weinick and Krauss, 2000)
- Have an increased probability of receiving unnecessary diagnostic tests (Hampers, 1999)
- Experience more serious adverse events (Divi, 2007)
- Experience more medication complications (Gandhi, 2000)

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[18] Keith K. Section 1557 Lawsuit Over Transgender and Abortion Protections Will Proceed, Health Affairs Blog, December 19, 2018, https://www.healthaffairs.org/do/10.1377/hblog20181219.113331/full/; Keith K. HHS Proposes to Strip Gender Identity, Language Access Protections from ACA Anti-Discrimination Rule, Health Affairs Blog, May 25, 2019, https://www.healthaffairs.org/do/10.1377/hblog20190525.831858/full/

- Experience delays in pre-hospital care (Grow, 2008)
- Experience lower health care quality (Pippins, 2007, Woloshin, 1995)
- Receive less information about end-of-life care (Thornton, 2009)
- Feel more dissatisfied with health care services (Carrasquillo, 1999; Weech-Maldanado, 2003; Baker, 1998; Hampers, 1999)[19]

The California Endowment has been a leading funder supporting the expansion of language access in health care for LEP individuals. For example, our foundation has supported the development of standards of ethics and standards of practice for health care interpreters,[20] which led to the development of national certification programs for health care interpreters.[21] We also have supported the training of health care interpreters, and increased awareness among health care providers of the importance of language access for limited English proficient patients.[22] Despite these efforts, the availability of qualified, trained health care interpreters is still uneven throughout California.[23]

Accordingly, we strongly oppose the repeal of the requirement that covered entities provide a notice of nondiscrimination that informs the public of their legal rights. The notice requirement is consistent with the long history of civil rights regulations requiring the posting of notice of rights, including Title VII of the 1964 Civil Rights, Title IX of the Education Amendments of 1972, Section 504 of the 1973 Rehabilitation Act, and the 1972 Age Discrimination Act, which all require that recipients of federal financial assistance notify recipients that they do not discriminate. Without requiring such notices, members of the public will have limited means of knowing that language services are available, how to request

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[19] Institute of Medicine, Race, Ethnicity, and Language Data: Standardization for Health Care Quality Improvement (2009), http://www.nationalacademies.org/hmd/Reports/2009/RaceEthnicityData.aspx

[20] National Council on Interpreting in Health Care, A National Code of Ethics for Healthcare Interpreters, 2004, https://www.ncihc.org/assets/documents/publications/NCIHC%20National%20Code%20of%20Ethics.pdf; National Council on Interpreting in Health Care, National Standards of Practice for Interpreters in Health Care, 2005, https://www.ncihc.org/assets/documents/publications/NCIHC%20National%20Standards%20of%20Practice.pdf

[21] Certification Commission for Healthcare Interpreters, http://cchicertification.org/certifications/; National Board of Certification of Medical Interpreters, https://www.certifiedmedicalinterpreters.org/overview

[22] Dignity Health, Catholic Healthcare West expands language access initiative, January 30, 2008, https://www.dignityhealth.org/about-us/press-center/press-releases/catholic-healthcare-west-expands-language-access-initiative; Bau I. Creating a culturally competent health system: cultural competency essential to reform June 4, 2012, https://californiahealthline.org/news/creating-a-culturally-competent-health-care-system/; California Pan-Ethnic Health Network, Building Quality & Equitable Health Systems, 2010, https://cpehn.org/sites/default/files/resource_files/buildingqualityandequitablehealthcaresystems10-10.pdf

[23] Gonzalez JM. Medical interpreters in short supply as coverage grows, San Francisco Chronicle, April 26, 2015, https://www.sfchronicle.com/health/article/Medical-interpreters-in-short-supply-as-health-6225291.php?psid=gj197

them, what to do if they face discrimination, that they have the right to file a complaint, and how to file such a complaint.

We also oppose the repeal of the requirement for covered entities to provide in-language taglines informing recipients of the availability of language assistance on significant documents. The inclusion of taglines is well-supported by long-standing federal and state regulations, guidance and practice.[24] OCR acknowledges that such taglines will continue to be required by other provisions of the ACA, as well as other statutory requirements for recipients of federal financial assistance. 84 Fed. Reg. at 27887. The use of taglines is a cost-effective approach to ensuring that covered entities are not overly burdened, while maintaining access for LEP individuals.

We also oppose removing the references to and requirements for language access plans because they have long been recognized as a way for covered entities to ensure they are compliant with the language access requirement of Title VI of the 1964 Civil Rights Act. OCR itself has required language access plans from covered entities as a key component of Title VI enforcement actions involving LEP individuals. Moreover, Executive Order 13166 required HHS to create and implement its own language access plan for its federally conducted programs and activities. Based on that Executive Order, HHS issued guidance for covered entities, which included the importance of adopting and implementing language access plans. The proposed rule's repeal of requirements for language access plans would eliminate an essential tool for OCR's enforcement of prohibitions against discrimination against LEP Americans.

Importance of Prohibiting Discrimination Against Americans with Disabilities

In 2005, the U.S. Surgeon General issued a national call to action to improve the health and well-being of Americans with disabilities.[25] Among the improvements needed are eliminating physical and other access to health care.[26] Unfortunately, Americans with disabilities continue to face barriers to full access to the health care they need, beginning with continued barriers to physical access and mobility,[27] and including barriers to effective communication.[28] Lack of health

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[24] See Title VI Coordination Regulations, 29 C.F.R. § 42.405(d)(1); Marketplace and QHP issuer requirements, 45 C.F.R. § 155.205(c)(2)(iii); Medicaid Managed care plans, 42 C.F.R. § 438.10(d)(3); DOL WIOA Nondiscrimination requirements, 29 C.F.R. § 38.9(g)(3); USDA SNAP Bilingual Requirements, 7 C.F.R. § 272.4(b); and the 2003 HHS LEP Guidance.

[25] U.S. Surgeon General, A Call to Action To Improve the Health and Wellness of Persons with Disabilities, 2005, http://www.ncbi.nlm.nih.gov/books/NBK44667/pdf/TOC.pdf

[26] Institute of Medicine, Future of Disability in America, 2007, http://www.nationalacademies.org/hmd/reports/2007/the-future-of-disability-in-america.aspx

[27] Wong JL, Alschuler KN, Mroz TM, Hreha KP, Molton Ir. Identification of targets for improving access to care in persons with long term physical disabilities. Disabil Health J. 2019;12(3):363-374

[28] Sharby N, Martiire K, Iversen MD. Decreasing health disparities for people with disabilities through improved communication strategies and awareness. Int J Environ Res

care provider knowledge about the legal rights, including prohibitions against discrimination, for their patients with disabilities, contributes to these barriers.[29] Uninsured persons with disability experience greater barriers to accessing health care than do non-disabled uninsured persons.[30] The legislative purpose of the ACA, including the prohibitions against discrimination under Section 1557, was to decrease these barriers for all Americans, including Americans with disabilities.

Accordingly, we oppose the proposed "undue financial and administrative burden" exemption in 45 CFR Section 92.104 to the requirement that covered entities ensure that federally-funded programs and activities are accessible to Americans with disabilities. We also oppose the proposed exemption of covered entities with fewer than 15 employees from being required to meaningfully communicate with Americans with disabilities, i.e., through auxiliary aids and services, 84 Fed. Reg. 27867. If a federally funded covered entity is providing services to an American with a disability, Section 1557 unequivocally requires that service to be accessible; it is irrelevant how large or small that covered entity is, or how many employees it has.

Finally, we also oppose the elimination of the prohibition against discriminatory health insurance marketing and benefit design in proposed 45 CFR Section 147.104, which would allow health insurers to exclude benefits, or design their prescription drug formularies in a way that would limit access to medically necessary care for Americans living with disabilities and other chronic conditions such as HIV, diabetes, and cardiovascular disease.

For all the above reasons, we strongly oppose this proposed rule. We urge OCR to immediately withdraw the proposed rule, and instead, re-commit itself to its mission to protect all Americans from discrimination in the provision health care, health insurance, and all other HHS programs and services, by continuing to enforce the 2016 final rule implementing Section 1557 of the ACA.

Sincerely,

Robert K. Ross, MD
President and CEO

Public Health. 2015;12(3):3301-3316; Iezzoni LI. Make no assumptions: communication between persons with disabilities and clinicians. Assist Technol. 2006;18(2):212-219

[29] Agaronnik ND, Pendo E, Campbell EG, Ressalam J, Iezzoni LI. Knowledge of practicing physicians about their legal obligations when caring for persons with disability. Health Aff. 2019;38(4):545-553; Agaronnik ND, Campbell EG, Ressalam J, Iezzoni LI. Communicating with patients with disability: perspectives of practicing physicians. J Gen Intern Med. 2019;34(7):1139-1145

[30] Iezzoni LI, frakt AB, Pizer SD. Uninsured persons with disability confront substantial barriers to health care services. Disabil Health J. 2011;4(4):238-244