

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

STATE OF NEW YORK, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:20-cv-5583-AKH
	)	
U.S. DEPARTMENT OF HEALTH	)	
AND HUMAN SERVICES, <i>et al.</i> ,	)	
	)	
Defendants.	)	
	)	

**JOINT STATUS REPORT**

The parties, by and through undersigned counsel, respectfully submit this Joint Status Report pursuant to the Court’s Order Granting Unopposed Motion to Stay Proceedings, ECF No. 141.

On May 12, 2021, Defendants provided Plaintiffs an update as to two recent developments regarding the subject matter of this litigation. Plaintiffs have reviewed the information provided by Defendants. The Parties separately set forth their positions as to the appropriate course of action in these proceedings below.

**I. Defendants’ Position**

As previously addressed, new leadership began arriving at the U.S. Department of Health and Human Services (“HHS”) and the U.S. Department of Justice on January 20, 2021, and have been reassessing the issues that this case presents. Defendants report that HHS’s reassessment remains ongoing. Defendant Secretary Becerra<sup>1</sup> took office less than two months ago, on March

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<sup>1</sup> Xavier Becerra and Robinsue Frohboese have been substituted for Alex M. Azar II and Roger Severino, respectively, as Defendants in this case pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

19, 2021, and HHS continues to await a permanent director of the HHS Office for Civil Rights. Nevertheless, Defendants report the following two substantive developments arising from their ongoing reassessment:

**1. *Determination that HHS Anticipates Initiating a Section 1557 Rulemaking Proceeding***

HHS has determined that it intends to initiate a rulemaking proceeding on Section 1557 of the Affordable Care Act. Section 1557 prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs or activities, and a final rule on Section 1557 is the subject of Plaintiffs' Administrative Procedure Act claims in this case. The anticipated rulemaking proceeding will provide for the reconsideration of many or all of the provisions of the current Section 1557 regulations that Plaintiffs challenge here. HHS anticipates issuing a Notice of Proposed Rulemaking as expeditiously as reasonably possible. An anticipated timeframe for issuing a Notice of Proposed Rulemaking must account for HHS's limited resources, including the heavy costs in terms of valuable time and effort expended on litigation that might otherwise be directed to the anticipated rulemaking.

**2. *May 10, 2021 Notice of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments Act of 1972***

On May 10, 2021, HHS issued a notification to inform the public that, consistent with the Supreme Court's decision in *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020), and Title IX, HHS will interpret and enforce Section 1557's prohibition on discrimination on the basis of sex to include: (1) discrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity. A copy of the notice is attached and it will be published in the Federal Register.

In light of Defendants' ongoing reassessment of the challenged rule and the developments discussed above, Defendants request that this case remain stayed and that the Court order the parties to file another joint status report in 90 days.

## II. Plaintiffs' Position

While Plaintiffs recognize that HHS's recent Notice likely impacts some aspects of their Administrative Procedure Act challenge to Defendants June 19, 2020 Rule interpreting Section 1557 of the Affordable Care Act (the "Rule"), Plaintiffs are concerned about a continued indefinite stay.

The Rule remains in effect, except for certain portions enjoined by other courts. *See Walker v. Azar*, 480 F. Supp. 3d 417 (E.D.N.Y. Aug. 17, 2020), *appeal docketed*, No. 20-3827 (2d Cir. Nov. 10, 2020); *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Human Servs.*, 485 F. Supp. 3d 1, (D.D.C. Sept. 2, 2020), *appeal docketed*, No. 20-5331 (D.C. Cir. Nov. 9, 2020). Those portions currently enjoined pertain to Defendants' previous interpretation of discrimination on the basis of sex under federal law and related provisions of the Rule. *See Walker v. Azar*, No. 20CV2834FBSMG, 2020 WL 6363970, at \*4 (E.D.N.Y. Oct. 29, 2020) (clarifying that scope of court's preliminary injunction covers "the repeal of the 2016 Rule's definition of 'on the basis of sex,' 'gender identity,' and 'sex stereotyping' set forth in 45 C.F.R. § 92.4" and "the repeal of 45 C.F.R. § 92.206," which requires health providers to treat individuals consistent with their gender identity.); *Whitman-Walker*, 485 F. Supp. 3d 1, 64–65 (D.D.C. 2020) ("HHS will be preliminarily enjoined from enforcing the repeal of the 2016 Rule's definition of discrimination '[o]n the basis of sex' insofar as it includes "discrimination on the basis of ... sex stereotyping. . . . [and] from enforcing its incorporation of the religious exemption contained in Title IX.").

Defendants' Notice acknowledges their intent to comply with these orders,<sup>2</sup> but does nothing to address the remaining portions of the Rule, which include Plaintiffs' challenge to the Rule's exclusion of many health insurers from Section 1557's non-discrimination mandate, its

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<sup>2</sup> Defendants' appeals of both preliminary injunctions remain pending. *See* No. 20-5331 (D.C. Cir. Nov. 9, 2020); No. 20-3827 (2d Cir. Nov. 10, 2020).

alterations to covered entities' responsibility to provide meaningful access to individuals with Limited English Proficiency, its incorporation of various exemptions from unrelated laws, and its elimination of non-discrimination requirements from other HHS regulations affecting a panoply of regulated entities. *See generally* ECF Nos. 108-111; 136-137. As explained in Plaintiffs' prior briefing, these provisions have caused and will likely continue to cause Plaintiffs to suffer: (1) administrative and regulatory costs; (2) additional investigation and enforcement costs; and (3) the burden of higher health care costs arising from adverse health impacts to their resident populations. *See generally* ECF No. 128.

Plaintiffs' claims have not been rendered moot by Defendants' recent actions, and Defendants' announcement of future rulemaking to be initiated at some yet-to-be-determined date does not provide sufficient clarity as to whether or how it will affect Plaintiffs' claims. Plaintiffs are concerned by the absence of further concrete details regarding Defendants' intention to promulgate rulemaking, including the scope and timing of such rulemaking.

In light of the above, Plaintiffs agree that this case should remain stayed for a limited period of time to permit HHS to make progress on initiating a rulemaking proceeding, but respectfully request that the Court order the parties to file another joint status report in 30 days.

Dated: May 14, 2021

Respectfully submitted,

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**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**42 U.S.C. § 18116(a)**

**Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972**

**AGENCY:** Office of the Secretary, HHS.

**ACTION:** Notification of Interpretation and Enforcement.

**SUMMARY:** This Notification is to inform the public that, consistent with the Supreme Court’s decision in *Bostock* and Title IX, beginning May 10, 2021, the Department of Health and Human Services (HHS) will interpret and enforce Section 1557’s prohibition on discrimination on the basis of sex to include: (1) discrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity. This interpretation will guide OCR in processing complaints and conducting investigations, but does not itself determine the outcome in any particular case or set of facts.

**DATES:** This Notification is effective May 10,2021.

**FOR FURTHER INFORMATION CONTACT:** Rachel Seeger at (202) 619–0403 or (800) 537–7697 (TDD).

**SUPPLEMENTARY INFORMATION:** HHS is informing the public that, consistent with the Supreme Court’s decision in *Bostock*<sup>1</sup> and Title IX<sup>2</sup>, beginning May 10, 2021, the Department of

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<sup>1</sup> *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). [https://www.supremecourt.gov/opinions/19pdf/17-1618\\_hfci.pdf](https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf)

<sup>2</sup> Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 *et seq.* <https://www.govinfo.gov/content/pkg/CFR-2011-title45-vol1/pdf/CFR-2011-title45-vol1-part86.pdf>

Health and Human Services (HHS) will interpret and enforce Section 1557's<sup>3</sup> prohibition on discrimination on the basis of sex to include: (1) discrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity.

## I. Background

The Office for Civil Rights (OCR) at the U.S. Department of Health and Human Services (the Department) is responsible for enforcing Section 1557 of the Affordable Care Act (Section 1557) and regulations issued under Section 1557, protecting the civil rights of individuals who access or seek to access covered health programs or activities. Section 1557 prohibits discrimination on the bases of race, color, national origin, sex, age, and disability in covered health programs or activities. [42 U.S.C. § 18116\(a\)](#).

On June 15, 2020, the U.S. Supreme Court held that Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (Title VII)<sup>4</sup>'s prohibition on employment discrimination based on sex encompasses discrimination based on sexual orientation and gender identity. [\*Bostock v. Clayton County, GA\*, 140 S. Ct. 1731 \(2020\)](#). The *Bostock* majority concluded that the plain meaning of “because of sex” in Title VII necessarily included discrimination because of sexual orientation and gender identity. *Id.* at 1753-54.

Since *Bostock*, two federal circuits have concluded that the plain language of Title IX of the Education Amendments of 1972's (Title IX) prohibition on sex discrimination must be read similarly. See *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), *as*

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<sup>3</sup> Section 1557 of the Patient Protection and Affordable Care Act. <https://www.govinfo.gov/content/pkg/USCODE-2010-title42/pdf/USCODE-2010-title42-chap157-subchapVI-sec18116.pdf>

<sup>4</sup> Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (41 CFR Part 60-20). <https://www.govinfo.gov/content/pkg/FR-2015-01-30/pdf/2015-01422.pdf>

amended (Aug. 28, 2020),<sup>5</sup> *reh'g en banc denied*, 976 F.3d 399 (4th Cir. 2020), *petition for cert. filed*, [No. 20-1163 \(Feb. 24, 2021\)](#); *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1305 (11th Cir. 2020), *petition for reh'g en banc pending*, No. 18-13592 (Aug. 28, 2020).<sup>6</sup> In addition, on March 26, 2021, the Civil Rights Division of the U.S. Department of Justice issued a memorandum to Federal Agency Civil Rights Directors and General Counsel<sup>7</sup> concluding that the Supreme Court's reasoning in *Bostock* applies to Title IX of the Education Amendments of 1972. As made clear by the Affordable Care Act, Section 1557 prohibits discrimination "on the grounds prohibited under . . . Title IX." [42 U.S.C. § 18116\(a\)](#).

Consistent with the Supreme Court's decision in *Bostock* and Title IX, beginning today, OCR will interpret and enforce Section 1557's prohibition on discrimination on the basis of sex to include: (1) discrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity. This interpretation will guide OCR in processing complaints and conducting investigations, but does not itself determine the outcome in any particular case or set of facts.

In enforcing Section 1557, as stated above, OCR will comply with the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*,<sup>8</sup> and all other legal requirements. Additionally, OCR will comply with all applicable court orders that have been issued in litigation involving the Section 1557 regulations, including *Franciscan Alliance, Inc. v. Azar*, 414 F. Supp. 3d 928

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<sup>5</sup> *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020).

<https://www.ca4.uscourts.gov/opinions/191952.P.pdf>

<sup>6</sup> *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1305 (11th Cir. 2020).

<https://media.ca11.uscourts.gov/opinions/pub/files/201813592.pdf>

<sup>7</sup> March 26, 2021, the Civil Rights Division of the U.S. Department of Justice memorandum to Federal Agency Civil Rights Directors and General Counsel re: Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972. <https://www.justice.gov/crt/page/file/1383026/download>

<sup>8</sup> Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* <https://www.govinfo.gov/content/pkg/USCODE-2010-title42/pdf/USCODE-2010-title42-chap21B-sec2000bb-1.pdf>



(N.D. Tex. 2019)<sup>9</sup>; *Whitman-Walker Clinic, Inc. v. U.S. Dep’t of Health & Hum. Servs.*, 485 F. Supp. 3d 1 (D.D.C. 2020)<sup>10</sup>; *Asapansa-Johnson Walker v. Azar*, No. 20-CV-2834, 2020 WL 6363970 (E.D.N.Y. Oct. 29, 2020)<sup>11</sup>; and *Religious Sisters of Mercy v. Azar*, No. 3:16-CV-00386, 2021 WL 191009 (D.N.D. Jan. 19, 2021)<sup>12</sup>.

OCR applies the enforcement mechanisms provided for and available under Title IX when enforcing Section 1557’s prohibition on sex discrimination. [45 C.F.R. § 92.5\(a\)](#). Title IX’s enforcement procedures can be found at [45 C.F.R. § 86.71](#) (adopting the procedures at 45 C.F.R. §§ 80.6 through 80.11 and 45 C.F.R. Part 81).

If you believe that a covered entity violated your civil rights, you may file a complaint at <https://www.hhs.gov/ocr/complaints>.

Dated:

Xavier Becerra,  
Secretary, Department of Health and Human Services

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<sup>9</sup> *Franciscan Alliance, Inc. v. Azar*, 414 F. Supp. 3d 928 (N.D. Tex. 2019).  
[https://www.govinfo.gov/content/pkg/USCOURTS-nyed-1\\_20-cv-02834/pdf/USCOURTS-nyed-1\\_20-cv-02834-0.pdf](https://www.govinfo.gov/content/pkg/USCOURTS-nyed-1_20-cv-02834/pdf/USCOURTS-nyed-1_20-cv-02834-0.pdf)

<sup>10</sup> *Whitman-Walker Clinic, Inc. v. U.S. Dep’t of Health & Hum. Servs.*, 485 F. Supp. 3d 1 (D.D.C. 2020).  
<http://www.ca5.uscourts.gov/opinions/unpub/20/20-10093.0.pdf>

<sup>11</sup> *Asapansa-Johnson Walker v. Azar*, No. 20-CV-2834, 2020 WL 6363970 (E.D.N.Y. Oct. 29, 2020).  
[https://www.govinfo.gov/content/pkg/USCOURTS-nyed-1\\_20-cv-02834/pdf/USCOURTS-nyed-1\\_20-cv-02834-0.pdf](https://www.govinfo.gov/content/pkg/USCOURTS-nyed-1_20-cv-02834/pdf/USCOURTS-nyed-1_20-cv-02834-0.pdf)

<sup>12</sup> *Religious Sisters of Mercy v. Azar*, No. 3:16-CV-00386, 2021 WL 191009 (D.N.D. Jan. 19, 2021).  
<https://www.hhs.gov/sites/default/files/document-124-memorandum-opinion-and-order.pdf>