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The Time Has Come Today: Trump Administration Finally Proposes its Rule to Erase Transgender Protections in Health Care

After much waiting, the [time has come today](#) – the Trump Administration has [released its proposed rule](#) redefining what it means to discriminate in health care. Unfortunately for health care access advocates and the patients they work with, the [waiting will not be the hardest part](#). If enacted as written, this new rule promises to destroy [hard-won protections](#) for transgender patients in health care. This development is part of the current Administration's larger agenda to erase transgender protections across the spectrum of public life, including [education](#), [employment](#), [military service](#) and [other public facilities](#). We have [written previously](#) about this looming threat, because the federal government [announced two years ago](#) that [its arrival was imminent](#). Now that the day has arrived, *Health Care in Motion* will offer a summary of the new rule, discuss its immediate impact, and offer some views on where we go from here. Today's short edition will be followed by a more in-depth *Health Care in Motion* that goes through the rule section by section, with historical perspective, legal analysis and strategic insight. The Trump Administration's full-fledged attack on legal protections for LGBTQ people is now in full bloom. It is [time to fight back](#).

The Proposed Rule

Despite the long wait, the intent behind today's proposed rule is relatively straightforward. The rule interprets Section 1557 of the Affordable Care Act. Section 1557 prohibits health programs and activities, such as health insurers and hospitals that receive federal funds from discriminating on the basis of race, color, national origin, sex, age, or disability. Today's proposed rule – among many other things -- applies to what it means to discriminate “on the basis of sex,” including as it relates to gender identity and abortion. In addition, the rule proposes significant changes to language access provisions and the scope of what individuals and entities are covered by Section 1557.

Section 1557 is significant because it represents the first time that discrimination “on the basis of sex” was prohibited in federally-funded health programs and activities. It accomplished this step forward using language that applies a pre-existing civil rights law – named “Title IX” – to health care settings. Title IX generally forbids discrimination on the basis of sex in educational settings. Like other older civil rights laws, the law is silent on the question of whether “on the basis of sex” encompasses discrimination on the basis of sexual orientation and gender identity. It is now the case that the U.S. Supreme Court is scheduled to [weigh in on a similar question](#) in the context of employment law next fall. While the outcome and import of the Supreme Court's opinion on these questions remains to be seen, rulemaking by a federal agency may fill the interim void. The [Obama-era predecessor](#) of today's proposed rule filled in the law's silence by extending protection to patients experiencing discrimination on the basis of gender identity and sex stereotype (but not explicitly on the basis of sexual orientation). But that rule never went into effect as conservative opponents managed to convince a [single federal judge in Texas](#) to [halt HHS enforcement nationwide](#). Should today's proposed rule be enacted as written, that litigation would become moot, and the Obama-era rule consigned to the pages of history.

Health Care in Motion

Today's proposed rule – which is accompanied by a 175-page introduction – covers a wide array of issues and areas. The details of the proposed rule are beyond the scope of this piece. In the coming weeks, we will publish a longer *Health Care in Motion* with analysis of the worst parts of the proposed rule. For today, advocates should understand that HHS has proposed a significant change in the government's legal position that will harm patients. By eliminating the prior rule's protections, the proposed rule expresses the view that pre-existing civil rights laws do not extend to reach sexual orientation or gender identity discrimination. It thus puts the weight of the federal government behind an [overly restrictive](#) and [scientifically dubious](#) definition of “on the basis of sex” that credits only a binary conception of the term.

The Impact

It is important to note that today's proposed rule is not yet the final word. Today's release is a “Proposed Rule,” which is a first step in agency rulemaking to interpret federal law. With this description of the agency's proposal, the public is put on notice and given the opportunity to respond via the [comment process](#). We have seen time and time again that [comments matter](#) as the public pushes back on the Trump Administration's regressive policy agenda. Whether it is in connection with the [fight against Medicaid work requirements](#) or [advocacy to preserve Medicare Part D protections](#) for people living with HIV, recent history shows that comments make a difference, both in shaping the final action of the agency and in the lawsuits that are likely to follow. Full information about how to submit comments appears in the next section.

Close observers might question the impact of today's proposed rule, given that it's Obama-era predecessor was prevented from going into effect. Notwithstanding that fact, should the final rule remain unchanged, the impact will be profound and widespread. Even with the rule's enforcement halted, [transgender plaintiffs were successfully relying on Section 1557](#) of the Affordable Care Act to challenge insurance exclusions for gender affirming care. With this proposed change, federal courts may be inclined to give great deference to the interpretation of law by agencies that are charged with enforcement of such laws. (Note that the Supreme Court is [in the process of reconsidering](#) how much deference is to be given to administrative rulemaking.) Should the proposed rule go into effect, legal arguments made on behalf of those who have denied access to gender-affirming care will thus enjoy the formal support of the federal government. It will become significantly more difficult for patients challenging mistreatment – including [misgendering and related abuse from hospital](#) and doctor offices, [insurance exclusions aimed at denying care to transgender patients](#), and [provider refusals to accept patients on the basis of their gender identity](#). Advocates for these patients can rely on other grounds in support of their claims. But it is undoubtedly true that today's rule makes that job significantly harder.

As mentioned above, [the United States Supreme Court has now agreed to hear a trio of cases](#) with the potential to resolve the meaning of “on the basis of sex” in a parallel context. Whatever becomes of today's proposed rule may be overridden by future legal developments. In the meantime, patients will be left to deal with the dire consequences of today's rule.

The Next Steps

Advocates will not stop fighting. First, we can all connect to the [national organizing effort](#) sponsored by the [Transgender Law Center](#) and the [National Center for Transgender Equality](#). This campaign, led by two of the nation's preeminent organizations fighting for full and equal recognition of transgender individuals across all aspects of public life, is the central touchstone in the fight against discrimination. Connecting with the [Protect Trans Health](#)

Health Care in Motion

[Campaign](#) is an important first step that advocates should take, both to bolster the campaign's effect, and to help advocates understand the larger national strategy.

Second, given that this proposed rule is not yet final, it is imperative that individuals and organizations use this opportunity to speak up for the transgender and gender non-conforming community. It is [well established](#) that the LGBTQ community is disproportionately affected by chronic illness and barriers to health care access. To influence future policymaking and litigation, the stories of these obstacles now must be brought to bear. Comments centered on documenting existing barriers – including stigma, discrimination, violence, and rejection by families and communities, substandard care, and outright denial of care – will be critical. *Health Care in Motion* will provide more guidance as we go forward concerning how to submit comments and what they might say. For now, we know that [comments matter](#) – and in this case comments should urge HHS to withdraw the rule in its entirety.

It is important to note that the comment period will be open for 60 days from the date that the proposed rule is published in the Federal Register. That publication has not yet occurred – it is likely to happen within the next week.

Third, pre-existing litigation against categorical insurance exclusions for gender affirming care [have been successful](#), and will continue to be [brought on broad legal grounds](#). There are a [host](#) of [legal organizations](#) bringing such cases [across the country](#). If courts begin to defer to this new rule, [advocates will search out other grounds](#) to continue challenging discrimination. And where health insurance exclusions exist, [advocates will not be deterred from challenging them](#) with every tool available.

Last, advocates should keep apprised of the progress of the [Equality Act](#), as it makes its way through Congress. The current makeup of Congress and the White House [makes the prospect of passage difficult](#). (Even if the President is [specifically on record](#) as supporting an amendment of existing civil rights laws to explicitly encompass sexual orientation, [his word is not his bond](#)). Nevertheless, the long road to getting the Equality Act passed begins now. [Grassroots organizing](#), [congressional hearings](#) and [policy advocacy](#) are all important parts of [building consensus](#) support for eventual passage. And it bears emphasis that in this particular circumstance, Congress can have the last word. The new cases before the Supreme Court are asking the justices to interpret the previous work of Congress. A new law or amendment by Congress could render the Supreme Court's opinion meaningless.

Today's proposed rule represents another step backward by a regressive Administration. But advocates should not be discouraged. The fight to protect transgender health will continue on multiple fronts, and the movement for full and fair recognition of the legal rights of all will not rest until we achieve our goals. Stay tuned to *Health Care in Motion* for our full-length legal analysis of the proposed rule and join the national movement as the fight continues.

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