

United States Senate

WASHINGTON, DC 20510

May 10, 2017

The Honorable Thomas E. Price, M.D.
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Dear Secretary Price:

We write with grave concerns about your plans for enforcement of Section 1557 of the Affordable Care Act (ACA), which prohibits health care discrimination on the basis of race, color, national origin, sex, age, or disability. Each person in our country is entitled to protection against such discrimination. Your Department's enforcement of the law is their first line of defense, and the Administration's recent efforts to roll back enforcement are unacceptable.

Section 1557 dictates that on the basis of race, color, national origin, sex, age, or disability, an individual cannot be

excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency.¹

Under your leadership, HHS has taken several actions that raise concerns about the Trump Administration's commitment to enforcing Section 1557 and combatting discrimination. Just last week, the Trump Administration filed a motion in court indicating plans to roll back protections provided under Section 1557. On December 31, 2016, Judge O'Connor of the U.S. District Court for the Northern District of Texas entered a nationwide injunction for the provisions of Section 1557 that apply to discrimination on the basis of gender identity and termination of pregnancy.² Despite numerous court decisions holding that federal laws against discrimination based on sex apply to discrimination based on gender identity, the Trump Administration in early March indicated that it did not plan to appeal the Judge's order.³ On May 2, 2017, the Administration filed a motion to remand the matter to HHS and stay the litigation pending future rulemaking.⁴ In its filing with the Court, the Administration indicated it "has concerns as to the need for, reasonableness, and burden imposed" by these provisions and plans to initiate rulemaking proceedings to reconsider Section 1557 regulations.

¹ 42 U.S.C. §18116

² *Franciscan Alliance, Inc. et al v. Burwell et al* (N.D. Tex. Dec. 31, 2016).

³ <https://www.aclu.org/known-your-rights/transgender-people-and-law>;
<http://www.transequality.org/press/releases/trump-administration-says-it-will-try-to-legalize-anti-transgender-discrimination-in>

⁴ Defendants' Motion for Voluntary Remand and Stay, *Franciscan Alliance, Inc. et al v. Burwell et al* (N.D. Tex. May 2, 2017).

This action follows early troubling steps by the Administration with regard to Section 1557. In late March, the Office for Civil Rights (OCR) removed language from the “Frequently Asked Questions” section of its webpage about the Section 1557 regulations that stated, “Areas of sex discrimination that HHS OCR may continue to enforce include: harassment based on sex and allegations related to sex stereotyping that do not involve gender identity claims, as well as other forms of discrimination based on sex other than gender identity or termination of pregnancy.” It is unclear whether the removal of this language signals a change in enforcement strategy.

The change in website language came on the heels of your hiring of Roger Severino as the Director of OCR. As Senator Murray and eleven Senate Democrats outlined in a previous letter, Mr. Severino has a long history of extreme hostility toward lesbian, gay, bisexual, and transgender people and attacking women’s access to health care services and reproductive rights. These actions raise serious questions about whether you will protect the rights of women and lesbian, gay, bisexual, and transgender people.

President Trump has consistently used divisive and harmful rhetoric, and we are concerned that this rhetoric is translating into policy changes that invite discrimination against individuals across the country. We have already seen policy proposals that if implemented would fail to protect those who are subjected to discrimination most frequently. President Trump’s budget released in March proposed cuts to education, medical research, housing, transportation, and many other programs, which raises uncertainty for many individuals, including people with disabilities. For the populations who have gained the most under the ACA, including immigrants, people of color, and low-income individuals, any proposal from the Trump Administration and Congressional Republicans to repeal the ACA would result in losses in coverage and in fewer patient protections. Three million African Americans and four million Hispanics – the minority groups most likely to lack health insurance – access coverage through the ACA.⁵

We are concerned that the Trump Administration is not committed to protecting individuals against discrimination and are outraged that the Administration questions the need for discrimination protections for transgender men and women. We strongly oppose any efforts to roll back Section 1557 regulation or to weaken enforcement of the law. No matter the personal views of its leaders, every federal agency must respect and serve all people, including people of color, women, LGBTQ Americans, immigrants, people who communicate in a language other than English, people with disabilities, people experiencing homelessness, and people of all religious backgrounds and beliefs. This is the purpose of OCR, which is charged with enforcing, among other civil rights laws, the non-discrimination protections provided by Congress under Section 1557 of the ACA.

We therefore request answers to the following questions by no later than May 24, 2017:

1. What is the process by which OCR is handling or plans to handle discrimination complaints? How has that process been communicated to OCR staff?

⁵ U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, “Health Insurance Coverage and the Affordable Care Act, 2010-2016” (March 3, 2016).

2. The Obama Administration sent two memoranda to civil rights heads of federal agencies regarding their enforcement responsibilities under Section 1557. Do you plan to send an updated memo to civil rights staff at other federal agencies? If so, please provide details and a timeline for the issuance of that memorandum.
3. The May 2 court filing states that new leadership at HHS “has concerns as to the need for, reasonableness, and burden imposed” by the Section 1557 regulations.
 - a. What is the nature of those concerns?
 - b. What evidence and data has been examined to justify such concerns?
4. Does the Department plan to initiate rulemaking proceedings to reconsider the Section 1557 regulations? If so, what changes have been proposed? When do you anticipate rulemaking proceedings will commence?
5. Consumers, issuers, and providers lack clarity at this time regarding their rights and responsibilities under Section 1557 given the December 31, 2016 injunction and the Administration’s recent actions. Does OCR plan to issue new information to resolve this uncertainty? If so, please provide details and a timeline for the issuance of that information.
6. Although the December 31, 2016 injunction limits the scope of sex discrimination claims that OCR may investigate by excluding gender identity discrimination and pregnancy termination, the Department still has the responsibility to pursue claims of other types of sex stereotyping and pregnancy discrimination, including through investigations of complaints. What steps are being taken to continue enforcement under Section 1557 of other types of sex discrimination, including sex stereotyping?
 - a. What process is in place to communicate with individuals whose complaints conflict with the December 31 injunction and therefore will not be investigated?
 - b. Are individuals filing such claims informed by HHS that no investigation will occur? Are these individuals informed of other means of enforcing their rights?
7. How was the decision made to remove the statement pertaining to enforcement of claims “based on sex or allegations relating to sex stereotyping that do not involve gender identity claims” from the FAQ section of the OCR website?
 - a. Who was responsible for the removal of this language from the OCR website? Were they directed by individuals at the Department, the White House, or elsewhere? Please provide the names of all executive branch personnel involved in this decision making process.
 - b. Does the removal of this language reflect a shift in OCR’s enforcement priorities? If the Department no longer plans to pursue enforcement action against certain forms of discrimination, has the requisite legal analysis been conducted to ensure that the Department is not in violation of the “Nondiscrimination in Health Programs and Activities” final rule and other activities mandated by Congress in law? If so, please share said analysis with the Committee in your response.

Thank you in advance for your prompt attention to this critical matter. If you have any questions, or would like to further discuss compliance with this request, please contact Emily Schlichting (202-224-7675) or Elizabeth Letter (202-224-6403) with Senator Murray’s HELP Committee staff.

Sincerely,



PATTY MURRAY
United States Senator



SHERROD BROWN
United States Senator



TAMMY BALDWIN
United States Senator



BENJAMIN L. CARDIN
United States Senator



SHELDON WHITEHOUSE
United States Senator



RICHARD BLUMENTHAL
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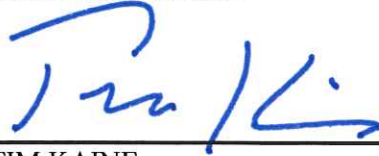
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United States Senator



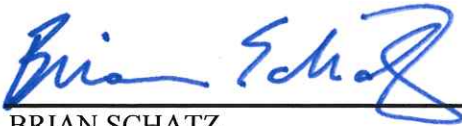
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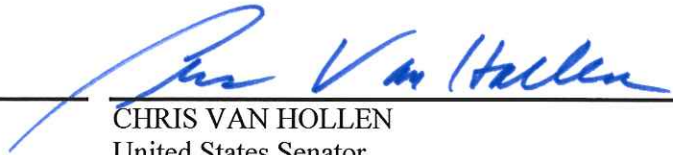
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