SUBMITTED ELECTRONICALLY

October 3, 2022

Melanie Fontes Rainer
Director, Office for Civil Rights
Department of Health and Human Services
Washington, DC 20201

Subject: RIN 0945-AA17 Nondiscrimination in Health Programs and Activities

Dear Director Fontes Rainer,

On behalf of our over 5,000 members and partners including mission-driven organizations representing the entire field of aging services, 38 state associations, hundreds of businesses, consumer groups, foundations, and research centers, LeadingAge is pleased to offer the following comments to the Department of Health and Human Services (the Department) in response to the Nondiscrimination in Health Programs and Activities proposed rule.

General Policy

LeadingAge strongly supports the Department's proposed regulatory language to prohibit discrimination on the basis of sex, including sex stereotypes, sex characteristics, including intersex traits, sexual orientation, and gender identity; as well as the proposal to reinstate the prohibitions of discrimination based on sexual orientation and gender identity in Medicaid and Programs for All-Inclusive Care for the Elderly (PACE).

Citing research showing that older LGBTQ+ adults have experienced discrimination in health care and aging services settings and have concern that they will face discrimination in the future if they need care, LeadingAge in 2019 opposed the proposal to revise implementation of section 1557 in accordance with the 2016 final rule. The 2019 proposal revised implementation in a manner that narrowed what was included as discrimination on the basis of sex, specifically to eliminate references to sex stereotyping and gender identity as it relates to discrimination on the basis of sex. As we stated then and believe now, people seeking health care and aging services should be able to do so without worry that their gender identity and/or alignment with sex stereotypes will affect their care.

Other Specific Proposals

We offer the following comments relating to certain practical and operational implications of the proposed rule.

Application

We support the proposal in section **92.2(b)** that employment discrimination complaints alleging violations of similar protections against discrimination to those that are covered under Section 1557 be handled by other Federal agencies under the statutes they enforce, and not by the Department.

Remedial Action Provisions

We wish to note questions and concerns regarding the implications of **section 92.6(a)(2)**, which authorizes the Department to take remedial action against a recipient that exercises control over another recipient that is found to have discriminated against an individual. Absent evidence that the actions or inactions of the controlling recipient specifically led to the instance of discrimination, this type of upstream liability may not be appropriate. In addition, the proposed rule does not define what constitutes exercising control over a recipient or specify the nature and extent of what remedial action is available to the Department. We respectfully ask that remedial action be limited to the recipient actually found to have discriminated against an individual and for a specific enumeration of the actions available to the Department as well as the circumstances under which such actions will be taken.

Designating a Section 1557 Coordinator

Aging services providers across the spectrum of care, services and supports are experiencing an historic and unprecedented workforce crisis. In this context, LeadingAge supports the proposal in **section 92.7** to permit covered entities to assign one or more designees to carry out some of the responsibilities of the Section 1557 Coordinator. All providers, but especially smaller and rural organizations, will need as much flexibility as reasonable possible in the implementation of the proposed rules. For example, an organization might already have designated individual to review grievances, and it should have the flexibility to include grievances arising under section 1557 within that role.

Policies and Procedures

Concerning the development of policies and procedures in **section 92.8**, the Department notes in the preamble to the proposed rule that it is committed to supporting covered entities as they develop these materials and plans to provide sample documents on the Department's website. We strongly support and encourage the Department to fulfill this commitment and to make these materials available, including translations, as far in advance of the final rule's effective date as possible. Providing template materials will be important to reducing and managing the burden of implementation, and we share additional examples below where resources will be beneficial.

Training

LeadingAge understands the importance of training staff with respect to nondiscrimination, but notes that aging services providers already are subject to extensive training requirements, in addition to providing training voluntarily relating to additional issues identified as priorities by their organizations.

In this context, LeadingAge advocates for flexibility in the requirement at **section 92.9** and supports aspects of the proposed rule that offer such flexibility – such as a one-year extension beyond the effective date to conduct initial training, the discretion for agencies and facilities to use the training method of their choosing, and the ability to incorporate section 1557 training into broader compliance training. We also specifically appreciate the recognition of potential burdens on covered entities that is reflected in the proposed requirement that only relevant staff (such as Section 1557 Coordinator and staff involved in client and resident interaction) be trained, rather than requiring all staff to be trained. Allowing these types of discretion will give covered entities the ability to design training that meets the specific needs and goals of their respective organizations and those they serve.

Following implementation of the 2016 rule, the Department made model training materials available for covered entities to download, and we encourage the Department to do the same following finalization of the currently proposed rule.

Notice of Nondiscrimination and Notice of Availability of Language Assistance Services and Auxiliary Aids and Services

In response to concerns raised by stakeholders regarding the lack of specificity in the term "significant publications or significant communications," the Department proposes in section **92.11(c)(5)** to provide a list of specific electronic and written communications that must be accompanied by the Notice of Availability, rather than providing a general class of documents for which the notice must be provided. We support this approach, which provides additional clarity compared to the general standard of providing such notices with significant publications or communications.

LeadingAge members serve diverse populations, and we support the goal of access to language assistance and auxiliary aides and services to support those individuals. In order to comply with the proposed regulations, LeadingAge members will need and benefit from strong support from the Department in identifying the 15 languages most commonly spoken by limited English proficient individuals in specific states, as well as sample documents for as many materials as possible, in addition to the notices of nondiscrimination and notice of availability of language assistance services and auxiliary aides and services.

As noted below, some of the documents the Department identifies as needing to include the Notice of Availability are ones that will be specific to a particular covered entity; however, to the extent the Department itself has created or will create materials that may be used by covered entities, we strongly encourage the Department to make samples of those documents available in the identified languages most commonly used by limited English proficiency (LEP) individuals (64 such languages following finalization of the 2016 rule), such as:

- the notice of nondiscrimination and notice of availability of language assistance services and auxiliary aids and services required by proposed rule,
- the notice of privacy practices required by the implementing regulations for the Health Insurance Portability and Accountability Act of 1996,
- statements of federal rights (e.g., for participants in home health, hospice or skilled/nursing facilities), or
- communications issued by federal agencies related to a public health emergency.

We recognize that many documents, including some of those identified as ones that must be accompanied by a notice of availability (e.g., application and intake, consent forms, grievance or complaint forms, handbooks), are not the type where the Department could provide templates and translations. This is due to a variety of factors, including the lack of national consistency for these types of documents, specific state requirements for items such as discharge papers or living wills, as well as a covered entity's specific policies and procedures, and the specifics of care and services being provided to a client or resident.

However, we believe it is important to acknowledge the cost of language assistance and the resources available to the covered entity, which the 2016 rule included in the list of factors to be considered when evaluating compliance. From this perspective, we appreciate the flexibility that the preamble and proposed rule appears to allow providers to maintain translations of certain core documents, for example, while also allowing providers to be in compliance with the applicable requirements if they provide oral interpretation of these items to clients and residents who request that support, or to translate significant documents (or summaries of such documents when appropriate) on an as needed basis, following an approach that supports the individual receiving service or support. If this is not the Department's intention, we ask that the final rule provide such flexibility. We also urge the Department

to consider ways in which it could support the cost of providing language assistance services in the future.

Language Assistance Services

Regarding the language assistance services requirements of section **92.201(d)(2)**, we recommend the proposed rule be revised to include, as one of the enumerated factors for the Department to consider in evaluating compliance, the geographic location of the covered entity and the hour of the day when the need for language assistance services arises. Nursing homes, home health agencies, and hospices receive new admissions at all hours of the day and night and on all days of the week, including weekends. The ability of a small, rural provider in Nebraska, for example, to find an interpreter for an individual of limited English proficiency at midnight on a Saturday is going to be substantially more challenging than it would be for a provider in an urban setting. We note also that section **92.201(b)** requires that language assistance services be provided on a timely basis yet does not provide a definition for timeliness. We, therefore, ask that the aforementioned factors be included in this provision as well.

Technology Issues

(1) Machine Translation

Under proposed section **92.201(c)(3)**, if a covered entity uses machine translation[1] when the underlying text is critical to the rights, benefits, or meaningful access of a limited English proficient individual, when accuracy is essential, or when the source documents or materials contain complex, non-literal or technical language, the translation must be reviewed by a qualified human translator.

We agree with the Department's observation that this technology, which can involve speech-based machine translation to facilitate patient-provider communication as well as text-based machine translation to develop multilingual health materials, is increasingly being used as a method to assist communication in the health care setting and increase access to in-language health resources. The Department goes on, however, to express concern that possibilities of possibilities of significant consequences from inaccurate translation continue to exist and invites comments on these issues.

LeadingAge asks the Department to allow covered entities appropriate flexibility and discretion in the use of machine translation, which in many cases offers affordable, effective and timely translation mechanisms that support communication with LEP individuals. As written, the proposed rule appears not to allow sole reliance on machine translation in cases where "essential," "complex" or "technical" language is involved. We are concerned this proposal may create too narrow of an opportunity to utilize this technology, which, as noted, can be effective in supporting communication between providers and those they serve and help reduce the burden and cost of providing needed translations. We further note that codifying an overly narrow spectrum of use cases may not adequately account for the prospect that machine translation technology will continue to evolve and improve rapidly in future years.

[1] Proposed to be defined as "automated translations, without the assistance of or review by a qualified human translator, that are text-based and provide instant translations between various languages, sometimes with an option for audio input or output."

2) Telehealth

The Department proposes to add a new section **92.211(b)** stating that a covered entity must not, in delivery of its health programs and activities through telehealth services, discriminate on the basis of race, color, national origin, sex, age, or disability, and seeks comment whether covered entities and others would benefit from a specific provision addressing accessibility in telehealth services, for individuals with disabilities and LEP individuals.

LeadingAge urges the Department to strike an appropriate balance between allowing covered entities to continue using existing telehealth platforms and technologies, while encouraging the use of alternative and appropriate models, systems and accommodating approaches (such as telephone-based interactions for visually impaired individuals), whether alone or in conjunction with telehealth tools, to meet the needs of specific individuals.

As the preamble notes, there are significant benefits to be gained from telehealth, including lower cost of care and transportation costs, lower exposure to communicable diseases, and access to specialized care including care provided across state lines. This rings true across the aging services spectrum, especially based on our members' experience with providing services and supports during the COVID-19 pandemic. Telehealth, and remote communications platforms generally, have supported virtual visitation in congregate care settings, delivery of remote adult day services in some areas, virtual physician visits both for nursing facility residents and for individuals living in community, as well positive clinical outcomes through the use of remote monitoring technologies. Further, these platforms support access to care, especially in light of systemic workforce shortages.

Current federal law and policies limit the situations in which providers can bill for telehealth services, and many aging services providers are bearing the cost for technology used in their remote support of their clients. As the Department considers policies and requirements relating to the accessibility of telehealth, we encourage you to consider the value of existing technologies and support their use as a powerful tool for the delivery of healthcare, even as work continues toward the goal of addressing challenges and limitations concerning the accessibility of current platforms.

Conclusion

Please contact me (jlips@leadingage.org) if I may answer any questions about our comments or the proposed rule's potential impact on aging services providers and the older adults they serve. Thank you for your consideration.

Sincerely,

Jonathan Lips
Vice President of Legal Affairs