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U.S. Department of Health and Human Services, Office for Civil Rights
Attention: Section 1557 NPRM, RIN 0945-AA11
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue SW
Washington, DC 20201

Re: **Docket ID number HHS-OCR-2019-0007.**
RIN 0945-AA11.

To the Department of Health and Human Services:

These Comments concern proposed changes to the 2016 Section 1557 Final Rule under the Affordable Care Act. My Comments break down into a couple of concrete areas, identified below.

1. The analysis in your proposed changes does not comply with the Administrative Procedure Act nor with substantive law governing the interpretation of statutes and existing rules.

In Section 4 of your Summary, you contend that "[i]n 2016, the Section 1557 Final Rule added certain language access provisions ***that were not required*** by Title VI case law or the underlying Title VI regulation."[33] (Emphasis added.) In your footnote 33, you state the following as your authority for these proposed changes: "***The Supreme Court has not specified*** what ***particular linguistic requirements*** may constitute 'meaningful access' outside of the education context." (Emphasis added.)

You are mistaken. This is not how statutes or rules or case law are interpreted, and it is not how they are applied. The United States Supreme Court is not in the business of "specifying particular linguistic requirements." You are. You are an administrative agency charged by Congress with performing a delegated function of implementing a statute enacted by Congress, in this case, the Affordable Care Act.

You would never win a legal argument in any court by saying that "certain language access provisions ... were not required." No court that ever sat in the United States has had the power to strike down a Final Rule like Section 1557 because that court was of the opinion that the Final Rule "was not required." The courts can only strike down rules and regulations that are unconstitutional or otherwise unlawful or perhaps because the rules are unauthorized, but never because a majority of the judges on any given panel of judges think that the rules are "not required."

Whether provisions are required is an option left to Congress to delegate, if it chooses, to an administrative agency to determine. Congress chose to do so in the ACA. Congress

delegated that authority to you. The only reason that you want to change the 2016 Section 1557 Final Rule is because you disagree with it in 2019.

Saying that the 2016 Section 1557 Final Rule was "not required" in one respect or another is an illegitimate basis to repeal it. Rather, the requirement of language access nondiscrimination healthcare plans was authorized by the power expressly delegated to DHHS by Congress. The justifications advanced for the Section 1557 Final Rule before it took effect in 2016 were appropriate for its enactment at that time. You cannot go back and repeal it in 2019 by contending -- without authorities or evidence -- **that the justifications advanced up to 2016 were insufficient in your view at that time.**

What you can try to do is advance reasons ***now*** that the 2016 Section 1557 Final Rule ***is no longer required in 2019 but this you have failed to do***.

2. It is "difficult," you say, "for covered entities to implement the language access nondiscrimination requirements of the Section 1557 Final Rule. You do not cite any evidence worth considering. The evidence you do cite is not evidence at all of the things you try to prove with it.

The evidence you offer in support of your assertion that "covered entities" find it "difficult" to comply with the law, boils down to a pair of opinions, neither of which prove your assertion (even assuming that "difficulty" complying with the law is ever a reason for not complying with the law).

You say that one source of difficulty for "covered entities to implement" requirements of language access nondiscrimination under the Section 1557 Final Rule is that these "covered entities" are subject to many laws, rules, and regulations. You then offer in your footnote 83 what is called a "string cite" of many federal statutes, rules and regulations, and one State statute. Listing many laws that command obedience by the "covered entities" which they govern is a long, far way from proving that the covered entities of which you speak thereby must find it difficult to comply with the law. That idea is ridiculous on its face. It is no wonder that neither you (nor anyone else so far as I know) put that assertion into a brief or a pleading in a court to contest the validity of the Final Rule.

You also say that the difficulty of complying with the language access requirements of the Section 1557 Final Rule is proven with the opinion "that some recipients may be disregarding the information entirely." Yet before any weight can be given to this assertion, your evidence is that you have "heard from ***multiple stakeholders***" (emphasis added). Where is the evidence from "some" or for that matter, from any of the ***recipients*** who "may be disregarding the information entirely?" How can it be that "multiple stakeholders" and not "recipients" are your authorities on whether the recipients of the information disregard it in any way?

The answer is that that cannot be the case. You provide hearsay and expect people not only to believe it, but to acquiesce in your repeal of the Section 1557 Final Rule under the ACA for no better reason than that you want to repeal it. That is not sufficient.

Conclusion

Your authorities do not support your arguments to repeal or change the Section 1557 Final Rule.

In addition, the evidence you submit is contrary to the Administrative Procedure Act and to substantive law.

Finally, you are an administrative agency authorized to act only by statute of Congress. No administrative agency is empowered to act if Congress did not place restrictions on its actions. That includes you. To say again, a federal administrative agency such as DHHS can only act as it is ***authorized*** to act by statute of Congress. There is no statute authorizing your current proposed repeal of Section 1557 Final Rule language access nondiscrimination provisions. If anything, your proposed repeal is contrary to the ACA and to Title VI of the Civil Rights Act of 1964 which you invoke. Your present proposed rules change is certainly not authorized by Title VI and the ACA, and for that reason alone, whether taken together with all the other reasons discussed here, your proposed rules change is invalid.

Thank you for your consideration.