

JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

March 6, 2023

U.S. Department of Health & Human Services
Office for Civil Rights
Hubert H. Humphrey Building
200 Independence Avenue SW
Washington, DC 20201

Submitted electronically via [regulations.gov](https://www.regulations.gov)

Re: Safeguarding the Rights of Conscience as Protected by Federal Statutes Notice of Proposed Rule Making (RIN 0945-AA18)

Justice in Aging appreciates the opportunity to respond to the above referenced Notice of Proposed Rule Making (NPRM). For the reasons below, we support the Department of Health and Human Services (HHS) proposal to partially rescind the May 2019 final rule entitled “Protecting Statutory Conscience Rights in Health Care; Delegations of Authority.”

Justice in Aging uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources. We have decades of experience with Medicaid and Medicare, with a focus on long-term services and supports (LTSS) and the particular needs of those dually eligible for Medicare and Medicaid. Our advocacy focuses on populations of older adults who have historically faced discrimination, including LGBTQ+ people, women, people of color, people who have limited English proficiency (LEP), and people with disabilities. Therefore, ensuring that Medicare, Medicaid and other programs and services fully and fairly serve these communities in an equitable manner is at the heart of our work.

We advocate for strong anti-discrimination protections and culturally competent, person-centered care to meet the diverse needs of seniors with limited incomes and resources across the country. Every day, we work with a network of advocates and professionals serving older adults who are harmed by the discriminatory practices that this proposed rule aims to help remedy.

[Rescinding the 2019 Rule’s Expanded “Conscience” Protections is Necessary to Advance Equity](#)

The 2019 rule harms older adults by increasing barriers to care, dangerously providing authority for discriminatory actions, and worsening disparities. Ensuring that all consumers are protected from discrimination in health care is integral to the mission of the HHS Office for Civil Rights (OCR). This mission cannot be carried out without also ensuring that providers, whatever their religious beliefs or moral convictions, adhere to nondiscrimination laws and the medical and health-related standard of care.

Washington, DC



Los Angeles, CA



Oakland, CA

Those most harmed by prejudicial refusals are people with limited incomes in underserved areas who do not have the means to seek out another provider. For people with Medicare and Medicaid, the issue is exacerbated when they are also confronting narrow provider networks. Transgender older adults, for example, should not be at the mercy of their Medicare Advantage plan, hoping that the plan will contract with providers who will not refuse them treatment. Rather, strong anti-discrimination protections should ensure that *all* providers follow established medical guidelines and treat clients with dignity and respect.

For people who need long-term services and supports (LTSS), limited provider choice is a contributing factor, particularly in rural areas. There may be only one home health agency or nursing facility in a community. If those providers can use the 2019 rule as a shield for discriminatory actions, individuals who need LTSS are left with the impossible choice of forgoing life-sustaining services, enduring discrimination, or leaving their community. For example, a man with HIV was refused care by six nursing facilities before his family was finally forced to relocate him to a facility 80 miles away.¹ Such refusals result in worsening health disparities.

Due to historical and ongoing discrimination, including prejudiced denials and refusals, older adults are no exception to the stark health disparities that persist across race, national origin, gender, sexual orientation, and poverty lines in the U.S. For example, a larger share of Black and Hispanic Medicare beneficiaries report fair or poor health status than white beneficiaries.² Similarly, Black and Hispanic adults age 65 and older are almost twice as likely as white older adults to develop diabetes.³ Older adults who are limited English proficient (LEP), including over four million Medicare beneficiaries,⁴ face difficulties finding providers who speak their preferred language, especially for in-home supports and services, and often are forced to rely on family members to interpret for them.

The LGBTQ+ community also experiences significant health disparities. Lesbian, gay and bisexual older adults face higher rates of disability and mental health challenges; older bisexual and gay men face higher rates of physical health challenges; bisexual and lesbian older women have higher obesity rates and higher rates of cardiovascular disease; and transgender older adults face greater risk of suicidal ideation, disability, and depression compared to their peers.⁵

¹ Nat'l Women's Law Ctr., "Fact Sheet: Health Care Refusals Harm Patients: The Threat to LGBT People and Individuals Living with HIV/AIDS," (May 2014), available at https://nwlc.org/wp-content/uploads/2015/08/lgbt_refusals_factsheet_05-09-14.pdf.

² Kaiser Family Foundation, "Profile of Medicare Beneficiaries by Race and Ethnicity," (Mar. 9, 2016), available at <http://kff.org/medicare/report/profile-of-medicare-beneficiaries-by-race-and-ethnicity-a-chartpack/>.

³ Centers for Disease Control and Prevention, "The State of Aging and Health in America," (2013) at Figure 2, available at www.cdc.gov/aging/pdf/state-aging-health-in-america-2013.pdf.

⁴ CMS Office of Minority Health, "Understanding Communications and Language Needs of Medicare Beneficiaries," at 8 (Apr. 2017), available at www.cms.gov/About-CMS/Agency-Information/OMH/Downloads/Issue-Briefs-Understanding-Communication-and-Language-Needs-of-Medicare-Beneficiaries.pdf.

⁵ Karen I. Fredriksen-Goldsen, et al., *The Aging and Health Report: Disparities and Resilience Among Lesbian, Gay, Bisexual, and Transgender Older Adults* (Nov. 2011), available at www.lgbtagingcenter.org/resources/resource.cfm?r=419.

HIV disproportionately impacts the LGBTQ+ community and an increasing number of older adults.⁶

The 2019 rule also contributes to fear of discrimination by empowering and shielding providers who are prejudiced. Over half of LGBT adults fear discrimination in health care as they age and are especially concerned about neglect, abuse, and verbal or physical harassment in long-term care facilities.⁷ These concerns are even greater among Black and Latino LGBT adults and individuals who identify as non-binary.⁸ Unfortunately, these fears are based on reality. In *Stories from the Field*, we reported numerous cases where LGBT older adults experienced discrimination in long-term care facilities ranging from verbal and physical harassment, to visiting restrictions and isolation, to being denied basic care such as a shower or being discharged or refused admission.⁹


The harmful effects of discrimination are compounded for individuals who hold multiple disadvantaged identities. For example, an older adult who is gay might also have a disability and limited English proficiency, and may not have a choice of providers and therefore nowhere to go if they are refused care in the rural community where they live.

Conclusion

We support HHS's proposal to rescind the 2019 rule's purpose and definition sections that expanded the scope of religious and moral objections and increased barriers to care for older adults who already have limited provider choice and face discrimination. We reiterate the recommendations of the Leadership Conference on Civil and Human Rights to further clarify OCR's enforcement authority and the scope of the voluntary notice provision in the final rule.

Thank you for considering our comments. If any questions arise concerning this submission, please contact me at nkean@justiceinaging.org.

Sincerely,



Natalie Kean
Director, Federal Health Advocacy

⁶ See Ctrs. for Disease Control & Prevention, "HIV in the United States and Dependent Areas," (Sept. 2, 2022), available at www.cdc.gov/hiv/statistics/overview/ataglance.html; Ctrs. for Disease Control & Prevention, "Issue Brief: HIV and Transgender Communities," (Apr. 22, 2022), available at <https://www.cdc.gov/hiv/pdf/policies/data/cdc-hiv-policy-issue-brief-transgender.pdf>.

⁷ Angela Houghton, AARP Research, "Maintaining Dignity: Understanding and Responding to the Challenges Facing Older LGBT Americans," (Mar. 2018), available at <https://doi.org/10.26419/res.00217.001>.

⁸ *Id.*

⁹ Justice in Aging, *et al.*, *LGBT Older Adults in Long-Term Care Facilities: Stories from the Field* (updated June 2015), available at www.justiceinaging.org.customers.tigertech.net/wp-content/uploads/2015/06/Stories-from-the-Field.pdf.