

September 23, 2022

Melanie Fontes Rainer
Director
Office for Civil Rights
U.S. Department of Health and Human Services
Attention: 1557 NPRM (RIN 0945-AA17)
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue, SW
Washington, DC 20201

Dear Director Rainer:

On behalf of the 162,000 members of the American Dental Association (ADA), we are writing to you in regards to the Notice of Proposed Rulemaking (NPRM) on Section 1557, Nondiscrimination in Health Programs and Activities.

The ADA strongly supports nondiscrimination in health care and equal access to care for all patients without regard to race, color, national origin, sex, age, religion, or disability. However, we think that the NPRM's proposals are not necessarily the best or most effective way of ensuring nondiscrimination. Before the Department finalizes the Section 1557 requirements, we ask that it further study the the impact of these requirements on health care access, including dental access.

As further explained below, we are also concerned about the regulatory burdens the NPRM's requirements will place on dentists.

Purpose and Effective Date

The possible regulatory burden on dentists is particularly concerning because the proposed effective date of these requirements is only 60 days after publication of the final rule. Health insurance issuers would have longer to implement the changes, and the same courtesy needs to be extended to dental offices—which have to comply with the requirements imposed on them by insurance companies, as well as by the government. Most dental practices are small businesses that do not have the large staff necessary to familiarize themselves with the Section 1557 requirements and make the changes in a short amount of time.

Remedial Action

The ADA is concerned about the Department's proposal to reinstate the 2016 rule's requirements regarding remedial action. The 2016 rule said that if a health program or activity has discriminated, the Office for Civil Rights (OCR) may require the recipient to take remedial action to overcome the effects of the discrimination. This remedial action may be with respect to (1) individuals who are no longer participants in the health program or activity, or (2) individuals who would have been participants in the health program or activity had the discrimination not occurred. ADA urges OCR to limit the application of remedial action to individuals who either (1) applied to participate but were unable to participate due to alleged discrimination, or (2) who

had been participants but are no longer participants due to alleged discrimination. Failure to adopt such limits could unfairly expose dentists to spurious and potentially devastating claims by individuals who would not have been participants notwithstanding any alleged discrimination.

Policies and Procedures

The Association believes that the requirement in § 92.8 to develop and implement written Policies and Procedures would be overly burdensome for dental offices. The Department should continue the previous rulemaking's flexibilities to allow covered entities to develop these policies and procedures voluntarily, based on the dental office's needs (as well as their patients' needs).

Training

The ADA is concerned about the new training requirement in § 92.9. We appreciate the Department's efforts to reduce the burden of this requirement by applying it to only relevant staff, and to only the covered entity's Policies and Procedures. However, the lack of specification on the training requirements (including their content and length), could be confusing to dental offices who are trying to implement the requirements. Additionally, requiring documentation of the training would impose more paperwork requirements on the dental offices.

Notice of Availability of Language Access Services and Auxiliary Aids and Services

§ 92.11 requires that the Notice of Availability be provided in English and at least the 15 most common languages spoken by Limited English Proficiency (LEP) individuals in the relevant state or states. In its comments on the 2020 rule, the ADA estimated that dental offices had spent \$240 million on these requirements. We continue to be concerned about these costs, and think that given the small staff size of most dental offices, it would be more effective for them to concentrate on providing information in the language(s) other than English that are spoken among their patients or potential patient pool. This is widely variable across the country, with some dental offices never encountering patients who do not speak English while others may encounter patients who speak languages not listed in the state's top 15 spoken languages. And while we appreciate that the Department tried to propose alternative, optional methods, we think that these alternatives would be just as burdensome. Putting the burden on the dental offices to offer their patients, on an annual basis, the opportunity to opt out and requiring documentation of that opt-out, would be confusing for dental offices and patients alike.

Meaningful Access for Limited English Proficient Individuals

The ADA recommends that the Department retain the four-factor test. Dental practices must have flexibility in achieving compliance with requirements for access by individuals with LEP because of their limited resources and patient populations.

Additionally, we are glad that the Department has proposed allowing a dental practice to use a non-qualified interpreter in emergency situations. However, we ask the Department to provide that same emergency exception for using bilingual staff as interpreters, or for performance standards for video remote interpreting. Dental offices have small staffs, but their staff is also often diverse, and dental offices should be able to use their staffers' skills in different languages when needed in emergency situations. The NPRM also says that video remote interpreting has to be over a dedicated high-speed, wide-bandwidth video connection or wireless connection. That standard may be difficult to meet for dental offices in rural areas. And it may be especially difficult to meet that standard in an emergency such as a natural disaster that disrupts access to the high-speed connection.

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Effective Communication for Individuals with Disabilities

The NPRM's sections on effective communication for individuals with disabilities, accessibility of information and communication technology for individuals with disabilities, and requirement to make reasonable modifications require covered entities to comply with Americans with Disabilities Title II rules, rather than Title III rules. To help reduce the burden, confusion, and complexity of compliance, ADA urges OCR to require recipients of federal financial assistance to comply with the requirements of Title III, rather than Title II, of the Americans with Disabilities Act if the recipient is otherwise covered by Title III. Requiring small practices to comply with both Title II, for Section 1557 purposes, and Title III, for Americans with Disabilities Act purposes, is burdensome, confusing, and unnecessarily complex. The burden on small practices of complying with both Title II and Title III would likely outweigh any benefit to individuals with disabilities.

Scope of Application and Application to Excepted Benefits and Short-Term Limited Duration Insurance

§ 92.207 applies to all of a health insurer's programs and activities when providing health insurance, including excepted dental benefits. The ADA agrees with the Department that the issuers of excepted dental benefits should be held to the same standard as dental offices.

Thank you for the opportunity to comment on the Section 1557 NPRM. We look forward to continuing to work with the Department. Should you have any questions, please contact Ms. Roxanne Yaghoubi at yaghoubir@ada.org.

Sincerely,

Cesar R. Sabates, D.D.S.
President

Raymond A. Cohlma, D.D.S.
Executive Director

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