



## Guidance Relating to Nondiscrimination in Healthcare Services in Illinois

June 26, 2020

### Introduction

All Illinois residents have a right to be free from discrimination on the basis of sexual orientation and gender-related identity in their access to healthcare, including in the receipt of medical treatment, access to healthcare programs, and in obtaining health insurance.

In contrast to the strong protections under Illinois law, the federal government has taken steps to roll back nondiscrimination protections in the provision of healthcare. Specifically, on June 12, 2020, the U.S. Department of Health and Human Services (“HHS”) issued a [revised rule](#) (“2020 Final Rule”),<sup>1</sup> eliminating previously-existing protections against discrimination on the basis of sex stereotyping or gender-related identity pursuant to Section 1557 of the Affordable Care Act (“ACA”). The 2020 Final Rule is set to take effect on August 18, 2020.<sup>2</sup> The elimination of these key protections undermines a central purpose of the ACA, which is to expand the availability of and access to healthcare.

This guidance seeks to clarify the 2020 Final Rule’s impact on residents of Illinois, to identify the protections from discrimination that exist in State law, and to remind the healthcare community of their ongoing obligations to deliver healthcare services in a non-discriminatory manner.

### Implementing regulations under Section 1557 of the ACA: Nondiscrimination Protections

Prior to issuance of the 2020 Final Rule, similar to Illinois law, the implementing regulations of Section 1557 provided explicit protections for lesbian, gay, bisexual, transgender, and queer (“LGBTQ+”) individuals from discrimination in healthcare. In 2016, HHS promulgated a final rule, developed over the course of six years, interpreting Section 1557 of the ACA (“2016 Final Rule”) to provide broad anti-discrimination protections. The 2016 Final Rule defined “sex” as “an individual’s internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual’s sex assigned at birth.”<sup>3</sup>

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<sup>1</sup> See [Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority](#), 85 Fed. Reg. 37160 (June 19, 2020).

<sup>2</sup> On June 22, 2020, in *Whitman-Walker Clinic v. HHS*, Case No. 20 CV 01630 (D.D.C.), a coalition of LGBTQ+ clinics and organizations filed suit to block the 2020 Final Rule. See [https://www.lambdalegal.org/in-court/legal-docs/whitman\\_us\\_20200622\\_complaint](https://www.lambdalegal.org/in-court/legal-docs/whitman_us_20200622_complaint)

<sup>3</sup> See 45 C.F.R. § 92.206 (Equal program access on the basis of sex); 45 C.F.R. § 92.207 (Nondiscrimination in health-related insurance and other health-related coverage).

With respect to the provision of healthcare services, the 2016 Final Rule required that any covered entity:<sup>4</sup>

- (1) not discriminate “on the basis of sex” (to include gender identity and sex stereotyping) in providing access to healthcare programs and activities;
- (2) “treat individuals consistent with their gender identity”; and
- (3) not “deny or limit health services that are ordinarily or exclusively available to individuals of one sex, to a transgender individual based on the fact that the individual’s sex assigned at birth, gender identity, or gender otherwise recorded is different from the one to which such health services are ordinarily or exclusively available.”<sup>5</sup>

In addition, the 2016 Final Rule also prohibited covered entities from discriminating on the basis of sexual orientation or gender-related identity in providing or administering health-related insurance or other health-related coverage.<sup>6</sup>

Under the 2020 Final Rule, these nondiscrimination protections have been rolled back.<sup>7</sup> The prohibition of discrimination “on the basis of sex” has been narrowly interpreted in an attempt to exclude transgender, nonbinary, and gender nonconforming individuals from nondiscrimination protections in access to healthcare programs, activities, or health insurance. In addition, by reverting to a narrow interpretation of “sex,” the 2020 Final Rule seeks to eliminate the specific requirement that individuals be treated consistent with their gender identity. These changes open the door to discrimination on the basis of sexual orientation and gender-related identity, create a barrier to accessing necessary preventative healthcare, and exacerbate the already significant health disparities faced by LGBTQ+ individuals.

## Illinois Law Continues to Afford Protections Against Discrimination in Healthcare Services

Illinois law has and will continue to afford protection against discrimination in the provision of healthcare services and health insurance, regardless of an individual’s sexual orientation or gender-related identity. First, the Illinois Human Rights Act (“IHRA”) establishes the right to be free from discrimination on the basis of sex, sexual orientation, and gender-related identity in the full and equal enjoyment of services provided by places of public accommodations – which includes healthcare providers, healthcare programs

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<sup>4</sup> A “covered entity” means: (1) An entity that operates a health program or activity, any part of which receives Federal financial assistance; (2) An entity established under Title I of the ACA that administers a health program or activity; and (3) The [U.S. Department of Health and Human Services]. See 45 C.F.R. § 92.4.

<sup>5</sup> See 45 C.F.R. § 92.206.

<sup>6</sup> See 45 C.F.R. § 92.207.

<sup>7</sup> While the 2020 Final Rule adopts a narrow interpretation of the protections provided by Section 1557, the ACA continues to clearly prohibit discrimination on the basis of sex. Building on longstanding federal civil rights laws, such as Title VI and VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975, Section 1557 unambiguously prohibits discrimination on the basis of race, color, national origin, sex, age, or disability. On June 15, 2020, three days after the adoption of the 2020 Final Rule, the U.S. Supreme Court issued an opinion finding that discrimination “on the basis of sex” under Title VII of the Civil Rights Act of 1964 encompasses discrimination on the basis of sexual orientation and gender-related identity. See *Bostock v. Clayton Cty., Ga.*, 590 U.S. \_\_\_, 2020 WL 3146686 (June 15, 2020).

and insurance coverage. Second, the Illinois Insurance Code prohibits discrimination in the offering of health insurance coverage based on actual or perceived gender identity or health conditions, or based on sexual orientation. Finally, the Illinois Administrative Code and Illinois contracts provide that Medicaid managed care health plans are prohibited from discriminating against individuals seeking healthcare for themselves or their families on the basis of sexual orientation or gender-related identity. The specific protections included under these Illinois mandates are further discussed below.

## I. Protection from Discrimination in Healthcare Under the Illinois Human Rights Act

The Illinois Department of Human Rights (“IDHR”) reminds all Illinoisans that under the [IHRA](#), people in Illinois may not be discriminated against because of their sexual orientation or gender-related identity when accessing healthcare services. This protection is rooted in Article 5 of the IHRA, which makes it a civil rights violation to “deny or refuse to another the full and equal enjoyment of the facilities, goods, and services of any place of public accommodation” on the basis of unlawful discrimination. 775 ILCS 5/5-102(A). Places of public accommodation include healthcare facilities - specifically, an “insurance office, professional office of a healthcare provider, hospital or other service establishment.” 775 ILCS 5/5-101(A)(6).

Pursuant to the IHRA, it is illegal for medical providers in Illinois to refuse to treat or to provide unequal treatment on the basis of a person’s sexual orientation or gender-related identity. Specifically, the IHRA forbids “unlawful discrimination” on the basis of “actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person’s designated sex at birth.” 775 ILCS 5/1-10(O-1) and (Q). These protections remain in place, regardless of the changes made by the 2020 Final Rule.

In the context of full and equal access to healthcare, examples of discriminatory treatment prohibited by the IHRA include, but are not limited to:<sup>8</sup>

- Refusing to admit or treat an individual because of the individual’s sexual orientation or gender-related identity;
- Forcing an individual to have intrusive or unnecessary examinations because of an individual’s sexual orientation or gender-related identity;
- Refusing to provide individual services that are provided to other patients because of an individual’s sexual orientation or gender-related identity;
- Not treating an individual according to the individual’s gender-related identity, including refusing to provide the individual access to restrooms consistent with an individual’s gender-related identity;
- Refusing to respect an individual’s gender-related identity in making room assignments;
- Harassing an individual or refusing to respond to harassment by staff or other patients because of an individual’s sexual orientation or gender-related identity;

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<sup>8</sup> See National Center for Transgender Equality, Know Your Rights in Health Care, <https://transequality.org/know-your-rights/health-care> (listing examples of discriminatory treatment by healthcare providers that are prohibited by law).

- Refusing to provide counseling, medical advocacy or referrals, or other support services because of an individual's sexual orientation or gender-related identity;
- Isolating an individual or depriving an individual of human contact in a residential treatment facility, or limiting participation in social or recreational activities offered to others because of an individual's sexual orientation or gender-related identity;
- Attempting to harass, coerce, intimidate, or interfere with an individual's ability to access healthcare because of an individual's sexual orientation or gender-related identity; and
- Refusing to offer insurance coverage to an individual because of an individual's sexual orientation or gender-related identity.

## Compliance and Filing a Complaint

The IDHR enforces the IHRA and investigates complaints of civil rights violations. The mission of the IDHR is to secure for all individuals within the State of Illinois freedom from unlawful discrimination. Anyone who believes they have experienced discrimination in a healthcare setting based on their sexual orientation or gender-related identity can contact IDHR to file a charge of discrimination by completing the [IDHR Complaint Information Sheet](#) and: 1) emailing it to [IDHR.Intake@illinois.gov](mailto:IDHR.Intake@illinois.gov), 2) faxing it to 312-814-6251, Attn: Intake Unit, or 3) mailing it IDHR, Attn: Intake Unit, 100 W. Randolph Street, Suite 10-100, Chicago, IL 60601. For more information, visit [www.illinois.gov/dhr](http://www.illinois.gov/dhr).

## II. Protection Against Discrimination in Health Insurance

The Illinois Department of Insurance ("DOI") reminds all Illinois-licensed insurance companies that they must comply with State laws and regulations that prohibit discrimination in the offering and provision of health insurance coverage based on actual or perceived gender identity or health conditions, or based on sexual orientation. Specifically, as explained above, the [IHRA](#) prohibits unlawful discrimination on the basis of sex, sexual orientation, and gender-related identity, which includes services provided by health insurance issuers. In addition, the Illinois Insurance Code includes provisions that prohibit discrimination.<sup>9</sup> Therefore, despite the 2020 Final Rule, Illinois continues to protect all residents through State laws that prohibit discrimination in the offering of health insurance coverage based on actual or perceived gender identity or health conditions, or based on sexual orientation. The DOI enforces these protections in health insurance coverage offered by private insurance issuers, as detailed below.

### A. Prohibition on discrimination relating to sexual orientation or gender identity

In Illinois, no health insurance issuer shall refuse to issue any contract of health insurance or decline to renew a contract because of the sex, sexual orientation, or marital status of the insured or prospective insured. No company may establish different conditions, benefit options, or policy limits based on sex, sexual orientation, or marital status, nor require an applicant to submit to a medical examination for that reason. See 50 Ill. Adm. Code 2603.30.

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<sup>9</sup> These requirements do not apply to Medicare, Medicaid, or self-insured plans offered by a private employer. The DOI generally does not enforce the laws applicable to self-insured State or local government employee health plans.

Further, the Illinois Administrative Code prohibits group health insurance plans that provide comprehensive coverage from discriminating on the basis of an insured's or prospective insured's actual or perceived gender identity or on the basis that the insured or prospective insured is a transgender person. *See* 50 Ill. Adm. Code 2603.35. The Department of Insurance regulations specifically prohibit the following discriminatory conduct relating to gender identity:<sup>10</sup>

- Using policy exclusions that directly or indirectly discriminate based on gender identity or the fact that the insured is a transgender person;
- Using provisions that treat medical benefits for gender dysphoria differently than other medical conditions covered by the policy;
- Cancelling, limiting, or refusing to issue or renew an insurance policy because of an insured's or prospective insured's actual or perceived gender identity, or because the insured or prospective insured is a transgender person;
- Designating an insured's or prospective insured's actual or perceived gender identity, or the fact that an insured or prospective insured is a transgender person, as a preexisting condition for which coverage will be denied or limited;
- Using provisions that exclude from, limit, charge a higher rate for, or deny a claim for coverage for the surgical treatments for gender dysphoria; and
- Denying or limiting coverage, or denying a claim, for services due to an insured's actual or perceived gender identity, or because the insured is a transgender person, or is undergoing or has undergone gender transition. This includes healthcare services that are ordinarily or exclusively available to individuals of one sex.

### B. Expansion of rules to apply to both group and individual health insurance coverage

The DOI has recently proposed changes to its administrative rules to expand the protections against discrimination on the basis of gender identity so that such protections will apply to both group and individual health insurance coverage, other than grandfathered or excepted benefit policies. *See* 43 Ill. Reg. 14987 (Dec. 27, 2019). The DOI has also proposed adding new items to the list of prohibited discriminatory practices. Under the proposed rule, discrimination on the basis of gender identity in premium rates would be prohibited, as it currently is for sexual orientation, and this prohibition would apply to all types of health insurance coverage.<sup>11</sup>

### Compliance and Filing a Complaint

The DOI enforces the Illinois Insurance Code and will continue to examine and investigate insurance companies, as appropriate, to ensure compliance with Illinois law, and will otherwise address issues as they may arise through consumer complaints, external reviews, and other sources of information. Anyone who believes they have experienced discrimination based on their sexual orientation or gender-related identity in connection with health insurance coverage can:

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<sup>10</sup> The regulations do not apply to excepted benefits or grandfathered health plans.

<sup>11</sup> The proposed rule will not prohibit a company from determining whether a healthcare service is medically necessary under an individual's particular circumstances.

- Contact IDHR to file a charge of discrimination by completing the [IDHR Complaint Information Sheet](#) and: 1) emailing it to [IDHR.Intake@illinois.gov](mailto:IDHR.Intake@illinois.gov), 2) faxing it to 312-814-6251, Attn: Intake Unit, or 3) mailing it IDHR, Attn: Intake Unit, 100 W. Randolph Street, Suite 10-100, Chicago, IL 60601. For more information, visit [www.illinois.gov/dhr](http://www.illinois.gov/dhr).
- Contact DOI to file a complaint through the [IDOI Message Center](#).
- File a complaint by completing a [Consumer Health Care Complaint Form](#) and: 1) emailing it to [DOI.Complaints@illinois.gov](mailto:DOI.Complaints@illinois.gov), 2) mailing it to: Illinois Department of Insurance, Office of Consumer Health Insurance, 320 W. Washington St., Springfield, IL 62767, or 3) faxing it to (217) 558-2083. If you send the form by postal mail, keep your original documents and only send copies of information. For more information, visit <https://insurance.illinois.gov/>.

### III. Protection Against Discrimination in Medicaid Programs

The Illinois Department of Healthcare and Family Services (“HFS”) reminds all Illinoisans that the IHRA prohibits doctors, hospitals, healthcare providers, and Medicaid managed care health plans from discriminating against individuals seeking healthcare for themselves or their families on the basis of sexual orientation or gender-related identity. HFS is responsible for providing healthcare coverage for adults and children who qualify for Medicaid. Illinois Medical Assistance Program healthcare providers are required to deliver services in full compliance with all applicable provisions of State laws and regulations pertaining to nondiscrimination.

Despite the 2020 Final Rule, Illinois providers must continue to follow Illinois laws and regulations, including:

- The [Illinois Human Rights Act's](#) prohibition on discrimination;
- The Illinois Administrative Code, [89 Ill. Adm. Code 140.12](#), which requires medical assistance providers to provide supplies and services in full compliance with all applicable provisions of State and federal laws and regulations pertaining to nondiscrimination. As such, providers must continue providing services and supplies without discrimination on the basis of sex, sexual orientation, or gender-related identity;
- Section 9.1.22 of the [HealthChoice Illinois contract](#), which requires compliance with federal or state laws, regulations, and orders that prohibit discrimination based on sex, sexual orientation, and gender identity; and
- Section 9.1.22.1 of the HealthChoice Illinois contract, which requires the Medicaid managed care health plans to “take affirmative action to ensure that no unlawful discrimination is committed in any manner, including the delivery of services under this Contract.”

## Illinois Medicaid's Coverage of Gender-Affirming Surgeries and Services

As of January 1, 2020, HFS provides reimbursement for [gender-affirming surgeries and services](#) subject to the establishment of medical necessity and prior authorization. Specifically, HFS adopted amendments to its rules implementing the provision of gender-affirming surgeries and services to medical assistance program participants.<sup>12</sup> The 2020 Final Rule does not impact Illinois Medicaid's coverage of gender-affirming services.

## Compliance and Filing a Complaint

Medicaid clients who believe they have been discriminated against by doctors, hospitals, healthcare professionals, or in the provision of their insurance coverage, are encouraged to file a complaint by:

- Contacting IDHR to file a charge of discrimination by completing the [IDHR Complaint Information Sheet](#) and: 1) emailing it to [IDHR.Intake@illinois.gov](mailto:IDHR.Intake@illinois.gov), 2) faxing it to 312-814-6251, Attn: Intake Unit, or 3) mailing it IDHR, Attn: Intake Unit, 100 W. Randolph Street, Suite 10-100, Chicago, IL 60601. For more information, visit [www.illinois.gov/dhr](http://www.illinois.gov/dhr).
- Calling the Illinois Attorney General Healthcare Hotline at 1-877-305-5145 and/or filing a complaint using [this form](#); and
- Medicaid managed care health plan enrollees may file a grievance with their Medicaid managed care health plan explaining how they were discriminated against.

## Conclusion

Despite the federal government's adoption of the 2020 Final Rule implementing Section 1557 of the ACA, the significant legal protections in place in Illinois will ensure that Illinoisans remain protected from discrimination on the basis of sexual orientation and gender-related identity in access to healthcare and health insurance. The Illinois Department of Human Rights, the Illinois Department of Insurance, and the Illinois Department of Healthcare and Family Services will continue to monitor developments regarding the impact of 2020 Final Rule and will pursue all available options to protect against discrimination on the basis of sexual orientation or gender-related identity in the provision of healthcare, health insurance coverage, and participation in Medicaid under Illinois law.

In Illinois, we must work collectively to do everything possible to safeguard against discrimination in medical treatment and affirm our civil rights laws, which protect the dignity and equal worth of all persons.

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<sup>12</sup> See 89 Ill. Adm. Code Sections 140.412, 140.413, and 140.440.