

# Health Care in Motion

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## Trump Administration Discrimination - Deep Dive Chapter Two – What is happening to Gender Identity protection?

On Friday, June 14, the Department of Health and Human Services (HHS) published a [proposed rule](#) that drastically restricts and erases non-discrimination protections for people in various health care settings. These protections were first defined by the Obama administration in 2016 after careful consideration of legal precedent, administrative action, and extensive public comment. Now, President Trump's HHS is proposing changes that will redefine non-discrimination protections set forth in Section 1557 of the Affordable Care Act (otherwise known as the Health Care Rights Law). At risk is anyone who relies on the health care system to treat patients in a fair and equitable manner, free from discrimination. In particular, transgender and gender non-conforming people who interact with the health care system are being targeted to have their rights stripped away.

*Health Care in Motion* has [kicked](#) off a series of deep-dive analyses to explain changes in the proposed rule and the rule's potential impact on communities that have been historically discriminated against. In this second installment, we take a closer look at how the proposed rule addresses (or rather fails to address) discrimination on the basis of gender identity and sex stereotyping. For advocates of access to health care, the [bottom line message](#) remains the same. Connect to the [national organizing effort](#) sponsored by the [Transgender Law Center](#) and the [National Center for Transgender Equality](#) as a means of lifting up your voice and adding to the ongoing fight.

### The Affordable Care Act & Interpreting “On the Basis of Sex”

In March 2010, the [Patient Protection and Affordable Care Act](#) (ACA) was passed by the 111<sup>th</sup> Congress and signed by President Obama. The law broadly reformed the health care system, and introduced robust consumer protections into the insurance and health care markets. Perhaps one of the most groundbreaking protections to be introduced, [Section 1557](#) of the ACA (Section 1557) extended four federal civil rights laws into the health care setting: title VI of the Civil Rights Act of 1964 (Title VI) (prohibiting race-based discrimination), title IX of the Education Amendments of 1972 (Title IX) (prohibiting sex-based discrimination), section 504 of the Rehabilitation Act of 1973 (Section 504) (prohibiting disability-based discrimination), and the Age Discrimination Act of 1975 (Age Act) (prohibiting age-based discrimination). Altogether, Section 1557 effectively prohibits health programs and activities that receive federal funding, such as hospitals that receive Medicaid payments, from discriminating on the basis of race, color, national origin, sex, age, or disability.

*“No person in the United States shall, **on the basis of sex**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...”*

Title IX, 20 U.S.C. §1681 (emphasis added).

Section 1557 was particularly groundbreaking with respect to sex-based discrimination. While Title VI, Section 504, and the Age Act had already applied to some health-related programs, Title IX had applied only to *educational*

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programs receiving federal funds. Thus, Section 1557 was the first time that discrimination on the basis of sex would be prohibited in federally-funded health programs and activities.

The road to making these protections meaningful was long. On August 1, 2013, the Department of Health and Human Services Office of Civil Rights published a [Request for Information](#) (RFI), calling for people to share examples where they or others faced [discrimination](#) in health programs and activities. The RFI specifically solicited examples of “sex discrimination (including discrimination on the basis of gender identity, sex stereotyping, or pregnancy).” The RFI resulted in over 400 comments, with over half from transgender individuals sharing their own experiences.<sup>1</sup>

Following receipt and review of these comments, HHS published a [proposed rule](#) on September 8, 2015. The proposed rule garnered nearly 25,000 additional comments (including from individuals, medical providers, legal services organizations, and medical-legal partnerships). HHS then published its [final rule](#) on May 18, 2016, formalizing protections against discrimination “on the basis of sex” in most health care settings. This 2016 rule interpreted Section 1557’s prohibition of discrimination “on the basis of sex” to encompass gender identity (defined 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”). The rule was [widely hailed](#) as a landmark recognition of gender identity as included within health care antidiscrimination protections for the first time in U.S. history.

In the 2016 rule, HHS acknowledged that a few commenters disagreed with their interpretations of the law, specifically their “interpretations of Title IX legislative history” and “reliance on previously adopted Federal agencies’ interpretations . . . and reliance on cases arising under Federal civil rights laws other than Title IX.”<sup>2</sup> HHS responded, at length, highlighting the acceptance of gender identity as meriting protection in jurisprudence, including the Supreme Court’s ruling that interpreted discrimination on the basis of sex to include sex stereotypes and other manifestations of gender. HHS also noted that “courts frequently look to case law interpreting other civil rights provisions, including Title VII [(employment law)], for guidance in interpreting Title IX.”<sup>3</sup>

## The Proposed Rule: Where did the Protections Go?

In the new proposed rule, HHS proposes to eliminate the very sections of regulation that explicitly protect the transgender and gender non-conforming community from discrimination in health programs and activities. Framed as a “restructuring” of the rule to address “duplicative, unduly burdensome, and confusing” regulation, the proposed rule simply deletes sections relating to gender identity or transition – at times with no explanation as to why a specific section was deleted or whether such a deletion indicates a shift in policy for the agency.

Perhaps the most jarring change is the deletion of the entire definitions section at the beginning of the 2016 rule, as we discussed in our previous [Health Care in Motion](#). In the 2016 final rule, HHS defined terms such as “gender identity,” “on the basis of sex,” and “sex stereotypes,” in part to clarify who is protected under the rule and to “reflect the current state of nondiscrimination law.”<sup>4</sup> Now, HHS’ introduction to its new proposal states that it will “eliminate the definitions section . . . [but] retain many key definitions explicitly in other sections or through incorporation by reference to relevant statutes or regulations.”<sup>5</sup> With this change, HHS is advancing a legal, political, and ideological

<sup>1</sup> Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. 54,172, 54,172 (Sept. 8, 2015).

<sup>2</sup> Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376, 31,388 (May 18, 2016).

<sup>3</sup> *Id.* at 31,388.

<sup>4</sup> *Id.* at 31,466-68.

<sup>5</sup> Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27,846, 27,860 (June 14, 2019).

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argument. It asserts that a broader understanding of the term “sex” is unwarranted because it understands sex, as referred to in Title IX, to be a binary term. HHS further argues that sex cannot apply to discrimination on the basis of sexual orientation or gender identity until Congress is clearer in its intent to do so. Despite its opposition to definitions found in the 2016 rule, HHS declined to offer a revised definition of sex, citing the Supreme Court’s pending cases, discussed below.

HHS’ restructuring of the rule goes beyond removal of the definition of “sex.” The proposal removes additional sections of the rule without explaining in detail how the removal of these sections reflect official shifts in policy, including:

- Section 92.206 “Equal program access on the basis of sex”,
- Section 92.207 “Nondiscrimination in health-related insurance and other health-related coverage”,
- Section 92.208 “Employer liability for discrimination in employee health benefit programs”, and
- Section 92.209 “Nondiscrimination on the basis of association”

For example, in the area covered by Section 92.206, HHS made clear in its 2016 final rule that “covered entities must treat all individuals consistent with their gender identity, including with regard to access to facilities.”<sup>6</sup> HHS had received several comments citing access to gender-specific facilities as “one of the most common and harmful forms of sex-based discrimination against transgender people.”<sup>7</sup> In the new proposed rule however, after taking the broad position that states are better equipped to address “issues of gender dysphoria or sexual orientation,” the agency includes a footnote warning that policies “resulting in unwelcome exposure to, or by, persons of the opposite biological sex where either party may be in a state of undress – such as in changing rooms . . . may trigger hostile environment concerns.”<sup>8</sup> The agency cites to a footnote in a Supreme Court case about a public college’s single-sex admission policy and to a single case in the Eleventh Circuit (handling appeals from federal courts in Alabama, Georgia, and Florida) about correctional settings. The Supreme Court footnote, in its entirety, states that adjustments required to afford privacy in living arrangements are manageable for military institutions. HHS fails to address case law around access to bathroom and other gender-specific facilities adequately (having only referenced them in a footnote of the preamble). It also neglects to detail whether the proposed deletions of Section 92.206 and other sections reflect a new position that the actions listed, including restricting access to gender-appropriate facilities, excluding categories of care in insurance coverage, or mistreating a person due to their partner’s identity, will no longer be considered discrimination under Section 1557.

The rule also proposes to delete explicit gender identity and sexual orientation protections found in other HHS provisions, including rules related to insurance marketing, Marketplace operation, insurance agent and broker practices, the operation of Medicare [PACE](#) programs, Medicaid program requirements, and the agency’s own Title IX regulations. Most of these protections serve as an additional explicit reminder that certain entities are required to comply with non-discrimination rules. The proposed deletion of these safeguards highlights the many corners of the health care system where members of the LGBT community have previously faced discrimination and how impactful a re-interpretation of “on the basis of sex” would be for those seeking health care and coverage.

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<sup>6</sup> Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. at 31,428.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 27,874 n.179.

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## “On the Basis of Sex” in the Courts

At the core of this new proposal is the Trump Administration’s re-interpretation of sex-based discrimination. If readers are confused about the administrative agency whiplash, they have every reason to be. The different rules put out by HHS in 2016 and 2019 are competing interpretations of the health care law passed by Congress and implemented by a federal agency. Regulations of this sort are supposed to provide clarity to members of the public who are subject to the law. In this case, the meaning of “on the basis of sex” has been reduced to a political football fought over by successive presidential administrations.

In our system of government, the judicial branch is entrusted with the final word on what laws mean, and to [carry out that job as neutral arbiters](#). There is of course [much criticism of that platitude](#) as more meaningful in theory than it is in reality. Whatever your view, court interpretations of “on the basis of sex” in federal law hold great weight. In the absence of [new action from Congress](#) (an idea even President Trump once [supported](#) publicly), it will ultimately be the courts that determine whether discrimination against transgender individuals will continue to be legalized. To date, courts on all levels have approached the issue of determining what is considered discrimination “on the basis of sex.”

## Sex Stereotyping

One avenue that holds some promise for maintaining transgender health care protections is the legal concept of “sex stereotyping.” In 1989, the Supreme Court of the United States [ruled](#) that discrimination on the basis of sex (as prohibited in Title VII) included behavior based on expectations about how one should act or behave based on their sex. In doing so, the Supreme Court recognized that existing federal law prohibited discrimination on the basis of sex stereotypes. Ann Hopkins, an accountant at Price Waterhouse, was denied partnership and advised to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>9</sup> While the Supreme Court’s decision focused primarily on her employer’s standard of proof, the Court went out of its way to address Price Waterhouse’s insinuation that sexual stereotyping was not legally relevant.

*“As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for, [i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”*

Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

The Supreme Court ultimately sent the case back to the district court so it could decide if Price Waterhouse had argued successfully that it did not allow “sex-linked evaluations to play a part in the decisionmaking process.”<sup>10</sup> But the Court’s opinion has had a strong influence in the decades that followed because it acknowledged and endorsed the idea that discrimination on the basis of sex encompasses discrimination on the basis of sex-linked characteristics, including dress, personality, and appearance.

<sup>9</sup> Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989).

<sup>10</sup> *Id.* at 254-55.

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## Post-Price Waterhouse Understanding of Sex

*Price Waterhouse* shifted the understanding of sex discrimination, with some courts applying a broader interpretation that extended Title VII's antidiscrimination protections to sexual orientation, and other courts slower to follow suit.<sup>11</sup> For example, the Seventh Circuit Court of Appeals (dealing with appeals from federal courts in Illinois, Indiana, and Wisconsin) had for many years clung to a narrow understanding of Title VII, limiting its understanding of sex as binary and as permanently assigned at birth.<sup>12</sup> In more recent years, however, the court has changed its tune. In *Hively v. Ivy Tech Community College of Indiana*, Kimberly Hively, a lesbian part-time, adjunct professor at Ivy Tech Community College, [filed a Title VII claim](#) against the college alleging that adverse employment actions were taken against her on the basis of her sexual orientation. Hively supported her claims of sex discrimination in two ways: 1) by showing that had her sex been different (i.e., if she had been a man in a relationship with a woman), the college would not have fired her nor denied her a promotion, and 2) by showing that the college was discriminating against her due to the sex of whom she was associated with. The court concluded that a gender non-conformity claim does not differ from a sexual orientation claim and that “[i]t would require considerable calisthenics to remove the ‘sex’ from ‘sexual orientation.’”<sup>13</sup> The Second Circuit Court of Appeals (handling appeals from federal courts in New York, Connecticut, and Vermont) took similar steps in *Zarda v. Altitude Express*, [extending protections](#) against sex-based discrimination to include sexual orientation.<sup>14</sup>

Even courts that have failed to extend Title VII's “on the basis of sex” language to sexual orientation explicitly have employed somewhat convoluted workarounds. For example, the First Circuit Court of Appeals (handling appeals for Maine, New Hampshire, Massachusetts, Rhode Island, and Puerto Rico) has embraced the widely discussed “sex-plus” theory of discrimination under Title VII. This theory, labeled as “heuristic” by the court, is a “judicial convenience” developed to ground liability even where all members of a disfavored class are not subject to discrimination.<sup>15</sup> It

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- <sup>11</sup> To date, no circuit court has interpreted Title VII to prohibit discrimination on the sole basis of sexual orientation. Courts generally recognize that discrimination on the basis of sexual orientation is prohibited if sex is a motivating or derivative factor, making such discrimination covered under the umbrella of sex discrimination protections. As some courts conclude, sexual orientation cannot be divorced from sex, as it directly relates to the sex(es) you may (or may not) be attracted to. While some circuit courts do not consider sexual orientation to be actionable under Title VII, they have broadened their interpretation of Title VII to include gender non-conformity. See *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1254 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 557 (2017) (“discrimination based on gender non-conformity is actionable, [though] Evans's *pro se* complaint nevertheless failed to plead facts sufficient to create a plausible inference that she suffered discrimination.”); *Smith v. Salem*, 378 F.3d 566, 574 (6th Cir. 2004) (“After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.”).
- <sup>12</sup> *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1085-87 (7th Cir. 1984) (“In our view, to include transsexuals within the reach of Title VII far exceeds mere statutory interpretation. Congress had a narrow view of sex in mind when it passed the Civil Rights Act, and it has rejected subsequent attempts to broaden the scope of its original interpretation. For us to now hold that Title VII protects transsexuals would take us out of the realm of interpreting and reviewing and into the realm of legislating.”).
- <sup>13</sup> *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 350 (7th Cir. 2017).
- <sup>14</sup> *Zarda v. Altitude Express*, 883 F.3d 100, 107-08 (2d Cir. 2018) (“But legal doctrine evolves and . . . [s]ince then, two circuits have revisited the question of whether claims of sexual orientation discrimination are viable under Title VII. . . . Taking note of the potential persuasive force of these new decisions, we convened en banc to reevaluate *Simonton* and *Dawson* in light of arguments not previously considered by this Court.”).
- <sup>15</sup> *Franchina v. Providence*, 881 F.3d 32, 53 (1st Cir. 2018).

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applies where “an employer classifies employees on the basis of sex plus another characteristic.”<sup>16</sup> It can be a confusing term, because it does not impose on plaintiffs any pleading requirements beyond simple sex discrimination. Instead, the theory is meant to bring under the umbrella of Title VII policies or behaviors that affect less than the entirety of the protected class. In *Franchina v. Providence*, the First Circuit held that a lesbian who was discriminated against could make out a “sex-plus” theory of discrimination on the basis of her sex plus her sexual orientation, based on the fact that she was subjected to behavior targeted at her because she was a gay woman:

“In sex-plus claims brought under Title VII ‘the simple question posed . . . is whether the employer took an adverse employment action at least in part because of an employee’s sex.’ And we see no reason why claims where the ‘plus-factor’ is sexual orientation would not be viable if the gay or lesbian plaintiff asserting the claim also demonstrates that he or she was discriminated at least in part because of his or her gender.”<sup>17</sup>

*Price Waterhouse* has also brought the sex stereotyping theory to claims outside of Title VII. In 2011, the Eleventh Circuit Court of Appeals [interpreted](#) the Equal Protection Clause of the [Fourteenth Amendment](#) to include employment discrimination on the basis of sex. Plaintiff Vandiver Elizabeth Glenn had notified her employer of her intention to present as a woman, and was fired thereafter. The court held that “discriminating against someone on the basis of his or her gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause.”<sup>18</sup> The court noted that discrimination against transgender people is built on gender-based behavioral norms, and that courts have held repeatedly that people cannot be discriminated on the basis of stereotype or punished because of perceived gender non-conformity. Other courts, including the Seventh Circuit Court of Appeals, have followed suit.<sup>19</sup>

*“The nature of [discrimination on the basis of gender stereotype] is the same; it may differ in degree but not in kind, and discrimination on this basis is a form of sex-based discrimination that is subject to heightened scrutiny under the Equal Protection Clause.”*

Glenn v. Brumby, 663 F.3d 1312, 1319 (11th Cir. 2011).

*Price Waterhouse* and subsequent Title VII case law have also impacted how courts interpret protections in Title IX. At least four different circuit courts have held that Title IX protections against discrimination on the basis of sex extend to gender identity as well. In its drive to erase gender identity protections, HHS summarily dismisses this legal authority, in favor of advancing its own view – [a tactic that would be roundly frowned upon in the federal courts](#). Relevant case law includes the following:

- The Seventh Circuit Court of Appeals recognized that, as noted in other cases involving Title VII, “[b]y definition, a transgender individual does not conform to the sex-based stereotypes of sex that he or she was assigned at birth” and that a policy that punishes an individual for their gender non-conformance does so in violation of Title IX.<sup>20</sup>

<sup>16</sup> Chadwick v. WellPoint, Inc., 561 F.3d 38, 43 (1st Cir. 2009) (quoting 1 Barbara Lindemann & Paul Grossman, Employment Discrimination Law 456 (3d ed. 1996)).

<sup>17</sup> *Franchina*, 881 F.3d at 54 (internal citations omitted).

<sup>18</sup> Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011).

<sup>19</sup> See Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1051 (7th Cir. 2017), *cert. dismissed*, 138 S. Ct. 1260 (2018) (describing a school’s bathroom policy as treating “transgender students like Ash, who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently”).

<sup>20</sup> *Id.* at 1048.

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- The Third Circuit Court of Appeals (handling appeals from federal courts in Pennsylvania, Delaware, New Jersey, and the Virgin Islands), concluded that a school district’s sex-neutral bathroom policy allowing all students to use bathrooms that align with their gender identity did not discriminate on the basis of sex.<sup>21</sup>
- The Sixth Circuit Court of Appeals (handling appeals from Michigan, Ohio, Kentucky, and Tennessee) declined to stop a district court’s preliminary injunction that required a school district to allow a transgender girl to use female bathrooms.<sup>22</sup> The district court looked to prior decisions analyzing Title VII gender non-conformity claims, noting a decision that “expressly rejected a view of sex as a classification based purely on reproductive organs or sex assigned at birth.”<sup>23</sup>
- The Fourth Circuit Court of Appeals (handling appeals from federal courts in West Virginia, Virginia, Maryland, North Carolina, and South Carolina) deferred to Department of Education guidance on Title IX that required schools to allow transgender students to use restrooms and locker rooms consistent with their gender identity, but also acknowledged that the court “look[s] to case law interpreting [Title VII] for guidance in evaluating a claim brought under Title IX.”<sup>24</sup> (This judgment was later vacated due to the [withdrawal](#) of Department of Education [guidance](#).<sup>25</sup>)

## Section 1557

As explained above, the ongoing battle over Section 1557 is built on top of the underlying interpretation of Title VII and Title IX. It took more than six years from passage of the ACA for HHS to issue the final rule interpreting Section 1557. In the interim, Section 1557 itself was utilized by advocates to provide protections for transgender patients who were discriminated against in various health settings. In 2015, Jakob Rumble [filed a lawsuit](#) against a Minnesota hospital and emergency room physicians who had misgendered him and subjected Rumble to other discriminatory treatment in violation of Section 1557. The district court looked both to *Price Waterhouse* (“Because the term ‘transgender’ describes people whose gender expression differs from their assigned sex at birth, discrimination based on an individual’s transgender status constitutes discrimination based on gender stereotyping.”<sup>26</sup>) and prior agency guidance (released before the final rule). The court concluded that Rumble had a plausible Section 1557 claim and thus denied the hospital and doctors’ motion to dismiss. That case eventually settled.

Lower federal courts in California and Wisconsin have held similarly. In 2017, Katharine Prescott [filed a complaint](#) on behalf of herself and her transgender son who committed suicide shortly after a traumatizing emergency room visit at Rady Children’s Hospital-San Diego.<sup>27</sup> Prescott claimed that the hospital violated Section 1557 due to the staff’s repeated and intentional misgendering of her son. The district court looked to Title VII and Title IX case law and determined that “discrimination on the basis of transgender identity is discrimination on the basis of sex” and that “the ACA [affords] the same protections.”<sup>28</sup> In a more recent case, two transgender Medicaid patients [filed a complaint](#) against the Wisconsin Department of Health Services for failure to cover medically-necessary transition-

<sup>21</sup> Doe by & through Doe v. Boyertown Area Sch. Dist., 897 F.3d 518 (3d Cir. 2018), *cert. denied*, 2019 U.S. App. Lexis 3666 (U.S. May 28, 2019) (No. 18-658).

<sup>22</sup> Dodds v. U.S. Dept. of Education, 845 F.3d 217 (6th Cir. 2016).

<sup>23</sup> Bd. of Educ. of Highland Sch. Dist. v. U.S. Dept. of Educ., 208 F. Supp. 3d 850, 868 (S.D. Ohio 2016).

<sup>24</sup> G.G. v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 718 (4th Cir. 2016), *vacated*, 137 S. Ct. 1239 (2017).

<sup>25</sup> Gloucester Cty. Sch. Bd. v. G.G., 137 S. Ct. 1239 (2017) (vacating judgment and remanding the case back to the Fourth Circuit in light of new Department of Education guidance).

<sup>26</sup> Rumble v. Fairview Health Serv., 2015 U.S. Dist. LEXIS 31591, at \*4 (D. Minn. Mar. 16, 2015).

<sup>27</sup> Prescott v. Rady Children’s Hosp.-San Diego, 265 F. Supp. 3d 1090 (S.D. Cal. 2017).

<sup>28</sup> *Id.* at 1099.

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related surgeries.<sup>29</sup> In a decision that preliminarily enjoined the state Medicaid program's exclusions, the district court referred to the *Price Waterhouse* and the Seventh Circuit's *Hively* opinions to reason that discrimination on the intent to process of changing sex was necessarily discrimination on the basis of sex, even if statute did not encompass discrimination on the basis of gender identity.<sup>30</sup>

## On the Horizon

The history of judicial understanding of sex discrimination since *Price Waterhouse* has thus been a story of gradual evolution, with legal advocates building the case for protection against gender identity in federal law step by step. This has been a difficult road.<sup>31</sup> At its inception, courts nearly universally rejected sexual orientation and gender identity as protected under Title VII and Title IX. Employing persuasive argument and persistence, advocates have succeeded in gradually turning this tide, as evidenced by the court decisions described above. Whether the final stage of this change comes in [the Supreme Court](#) or in [Congress](#), advocates have great hope that the end of this marathon journey can be achieved.

In the past two months, the Supreme Court has agreed to [hear arguments](#) in three cases involving employment law. Two cases, [Zarda v. Altitude Express](#) and [Bostock v. Clayton County, Georgia](#), have been consolidated and ask whether the prohibition of discrimination because of sex in employment law extends to discrimination on the basis of sexual orientation. [R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission](#), on the other hand, looks at gender identity, asking whether discrimination against transgender people is prohibited under the umbrella of sex discrimination due to either their status as transgender or as a form of sex stereotyping. These cases are set to be heard by the Court in the next term, with a decision likely to be released during the build up to the 2020 presidential election.

While the cases before the Supreme Court undoubtedly will affect interpretations of “on the basis of sex” in Title IX, it remains unclear whether the Supreme Court's rulings would apply automatically to the health care setting. On the one hand, as seen above, courts often look to Title VII case law for guidance when deciding Title IX claims. On the other hand, the two laws are different in substance and structure, and at times have been treated independently from each other.<sup>32</sup> For example, one could argue that education and health care are distinguishable from employment in many ways. While employment law covers only a subsection of adults who are able to find and maintain work in the United States, education and health care are much more universal and cover more vulnerable communities. Anti-discrimination protections in education and health care provide necessary protections for minors not otherwise afforded by employment law. Transgender youth too often face [harassment and assault](#) (including sexual harassment, aggression, and cyberbullying) in schools due to their gender identity, with [70%](#) of transgender youth facing similar treatment in health care settings. Indeed, while the Supreme Court agreed to hear three cases challenging non-discrimination protections in employment law, it [declined to hear](#) the Third Circuit's Title IX case about a school bathroom policy.

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<sup>29</sup> *Flack v. Wis. Dep't of Health Serv.*, 328 F. Supp. 3d 931 (W.D. Wis. 2018).

<sup>30</sup> The court looks to *Schroer v. Billington* for support, citing the case for its analogy to discrimination on the basis of religious conversion. *Id.* at 949.

<sup>31</sup> Unfortunately, while acknowledging *Price Waterhouse's* sex stereotyping theory, not all circuit courts have extended sex discrimination protections to sexual orientation and gender identity. See e.g., *Prowel v. Wise Bus. Forms*, 579 F.3d 285 (3d Cir. 2009); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007).

<sup>32</sup> See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) (“Title VII, however, is a vastly different statute from Title IX” (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283-84, 286-87 (1998))).



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## Where Do We Go From Here?

The vague reversals contained in the proposed rule will undoubtedly impact access to health care. If promulgated as proposed, the explicit descriptions of discrimination in health programs and activities included in the 2016 final rule will be no more. In several cases, insurers have [removed categorical exclusions](#) and affirmatively covered medically necessary treatment of gender dysphoria in compliance with the 2016 rule. Explicit protections from discriminatory insurer practices are important for the many transgender and gender non-conforming people who rely on health care coverage sold by insurers who must comply with the rule. The United States Transgender Survey found that [more than one-quarter](#) of respondents went to a [health Marketplace](#) to buy insurance. Additionally, [32%](#) received health care coverage through Medicaid or Medicare, or bought coverage directly from an insurer or on a Marketplace. With the mere elimination of these requirements, insurers and consumers alike will face confusion as to whether the agency would consider previously-prohibited insurer practices as discriminatory. In the face of such ambiguity, [transgender lives remain under direct threat](#).

The proposed rule includes a 60-day comment period for members of the public to weigh in. The submitted comments (due on August 13, 2019) will form the administrative record that HHS must meaningfully consider prior to finalizing any changes. To ensure that your voice is heard, we encourage you to visit the various portals ([Protect Trans Health](#), [ActionLink](#), and the [Task Force](#)) that are collecting individual stories and comments about discrimination faced in health care settings or [submit your comment directly to HHS](#).

While we wait for the rulemaking process to run its course, remember that rules are merely interpretations of a particular law by a particular agency. Agencies cannot rewrite statutes and are bound by law to promulgate regulations that meet certain standards. In a continuation of our series of deep-dive analyses, tune in next time when we tackle the justifications HHS put forth for the proposed rule and analyze whether these drastic changes were necessary or not.

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