

May 22, 2020

## **Fenway Health Statement on Health and Human Services Final Rule: Nondiscrimination in Health and Health Education Programs or Activities (RIN 0945-AA11)**

Presented via teleconference with OMB OIRA Friday, May 22.

We are submitting a written statement on behalf of Fenway Health, a federally qualified health center in Boston, MA that serves 32,000 patients each year. The Fenway Institute works to make life healthier for those who are lesbian, gay, bisexual, and transgender (LGBT), people living with HIV, and the larger community. We do this through research and evaluation, education and training, and policy analysis. We strongly believe that this rule could result in increased discrimination in healthcare and create additional barriers to accessing necessary medical care for LGBT individuals and other vulnerable populations impacted by this rule. Furthermore, given the current global crisis with the COVID-19 pandemic, when access to healthcare is of paramount importance, it would be dangerous and irresponsible to finalize this rule.

### **Importance of Section 1557 nondiscrimination provisions:**

- The Section 1557 nondiscrimination rule represents a critical step by the federal government to expand health care access for LGBT people, especially for transgender, non-binary, and intersex people. In addition to explicitly prohibiting gender identity discrimination, it also prohibits some anti-gay/lesbian/bisexual discrimination that constitutes sex stereotyping. LGBT people face widespread discrimination in health care, such as being verbally or physically harassed or being denied treatment altogether.<sup>1</sup> This discrimination acts as a barrier to seeking necessary routine, preventive care as well as emergency care. The Section 1557 final rule is necessary to address discrimination in health care, which in turn helps to reduce LGBT health disparities.
- The 2015 U.S. Transgender Survey of nearly 28,000 transgender people found that in the last year, 33% of respondents had experienced anti-transgender discrimination in health care, and 23% of respondents chose to forego necessary health care due to fear of discrimination.<sup>2</sup> A 2018 survey by the Center for American Progress found that 14% of LGBT respondents who had previously experienced discrimination in health care avoided seeking necessary medical care, and 17% avoided seeking preventive care in the past year.
- The Joint Commission has required SOGI nondiscrimination policies as a criterion for accreditation for health care programs since 2011. The American Medical Association, American Psychological Association, National Association of Social Workers, and other

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<sup>1</sup> Lambda Legal. (2010.) When Health Care Isn't Caring: Lambda Legal's Survey of Discrimination against LGBT People and People with HIV. New York: Lambda Legal.

<sup>2</sup> James SE, Herman JL, Rankin S, Keisling M, Mottet L, Anafi M. (2016). The Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality.

health professional associations have endorsed SOGI nondiscrimination policies.<sup>3</sup> Numerous rulings by federal courts and the Equal Employment Opportunity Commission for more than 15 years have found that federal prohibitions on sex discrimination prohibit discrimination based on sexual orientation and gender identity.<sup>4</sup> Removing SOGI nondiscrimination regulations goes against the broad consensus of support for these policies in the health care system and in mainstream jurisprudence.

**The rule also removes SOGI nondiscrimination provisions from 10 other HHS rules and regulations:**

- The proposed removal of SOGI nondiscrimination provisions from these regulations governing Medicaid enrollment and services, state and federal health insurance exchanges, insurance coverage, Qualified Health Plans, and the Program of All-Inclusive Care for the Elderly (the PACE Program) would hurt LGBT people who have disproportionately benefited from many of these programs.
- PACE participants are vulnerable, nursing home eligible elders trying to stay in their homes as long as possible. LGBT elders experience high rates of social isolation,<sup>5</sup> and many LGBT elders have experienced discrimination in accessing health, aging, and disability services.<sup>6</sup> Social isolation correlates with depression, treatment nonadherence, and substance use. Rescinding nondiscrimination provisions from the PACE program will likely make many LGBT elders more fearful of discrimination in accessing health care and elder services. This will exacerbate social isolation among LGBT older adults and could negatively affect their health.
- A 2016 report by the Center for American Progress found that in 2014, Medicaid covered a significant portion (39%) of LGBT adults with incomes of 139% of the federal poverty level or less, and the uninsurance rate among low- and middle-income LGBT adults was much lower in Medicaid expansion states (18%) compared to non-expansion states (34%).<sup>7</sup> Removing nondiscrimination provisions from regulations governing Medicaid enrollment and services, insurance exchanges, and Qualified Health Plans would undermine progress that has been made in expanding insurance coverage and access to care for LGBT people.

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<sup>3</sup> GLMA. (2019). GLMA Endorses Equality Act.

<http://www.glma.org/index.cfm?fuseaction=Feature.showFeature&featureID=846>

<sup>4</sup> U.S. Equal Employment Opportunity Commission (updated 2017). Examples of court decisions supporting coverage of LGBT-related discrimination under Title VII.

[https://www.eeoc.gov/eeoc/newsroom/wysk/lgbt\\_examples\\_decisions.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/lgbt_examples_decisions.cfm)

<sup>5</sup> Fredriksen-Goldsen K, Kim H, Barkan S, Muraco A, Hoy-Ellis C. (2013). Health disparities among lesbian, gay, and bisexual older adults: Results from a population-based study. *American Journal of Public Health*, 103(10), 1802–1809. doi:10.2105/AJPH.2012.301110

<sup>6</sup> Fredriksen-Goldsen K, Kim H, Emler C, Muraco A, Erosheva E, Hoy-Ellis C, Petry H. (2011). The aging and health report: Disparities and resilience among lesbian, gay, bisexual, and transgender older adults. Seattle, WA: Institute for Multigenerational Health.

<sup>7</sup> Baker K, McGovern A, Gruberg S, and Cray A. (2016). The Medicaid Program and LGBT Communities: Overview and Policy Recommendations. Center for American Progress. Available online at:

<https://cdn.americanprogress.org/wp-content/uploads/2016/08/08125221/2LGBTMedicaidExpansion-brief.pdf>

- Explicit federal prohibition of SOGI discrimination in health care is necessary because the Trump Administration has promoted anti-LGBT discrimination in a wide range of policy areas, including by implementing religion and “conscience”-based policies that could increase anti-LGBT discrimination in health care and other areas of society.<sup>8</sup> The HHS “Conscience Rule,” which was finalized and later blocked by courts last year, would have allowed providers and staff who have religious objections to certain procedures to refuse to participate. While the rule focuses on abortion, assisted suicide, and sterilization, the language of the rule mirrored the language of religious refusal laws in 12 states that authorize the denial of services, including health care, on the basis of religious or moral beliefs. Potential conduct protected by such religious refusal policies could include a refusal to provide care to LGBT people,<sup>9</sup> same-sex couples or spouses/partners,<sup>10</sup> and their children.<sup>11</sup>

**This non-emergency rulemaking should be suspended during the unprecedented COVID-19 National Emergency. Publishing a final rule at this time would:**

- Distract and burden already strained providers and insurers with understanding the rule changes during an unprecedented crisis. Under these circumstances, meaningful rulemaking, especially for rules focused on the health care sector, is practically impossible. This rule includes substantive changes to dozens of provisions applicable to hundreds of thousands of entities. Non-emergency rulemaking at this time will create additional complicated and unnecessary challenges to an already overwhelmed system.
- Create fear and confusion for patients – especially LGBTQ and minority patients – about access to COVID-19 testing and treatment. We are very concerned that the rule is likely to harm access to medical care for some of the populations most at risk in the present crisis. Sexual and gender minorities, people with limited English proficiency, and people with disabilities are among the most vulnerable to contracting and becoming seriously ill from COVID-19 and are the same populations that will be most impacted by this rule change. This rule will interfere with the federal strategy of combating this epidemic, especially testing, contact tracing, medical care for the seriously ill and telehealth.
- Encourage discrimination in access to COVID-19 testing and treatment

**This is especially concerning given that LGBTQ people may be at increased risk and disproportionately impacted by the COVID-19 pandemic:**

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<sup>8</sup> U.S. Department of Health and Human Services, Office of the Secretary (2019), 45 CFR Part 88 RIN 0945-AA10, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority. Final Rule. No date. Issued May 2, 2019. <https://www.hhs.gov/sites/default/files/final-conscience-rule.pdf>

<sup>9</sup> *Ward v. Wilbanks*, E.D. Mich. 2010

<sup>10</sup> The White House. Presidential Memorandum – Hospital Visitation. April 15, 2010. Available at: <http://www.whitehouse.gov/the-press-office/presidential-memorandum-hospital-visitation>.

<sup>11</sup> Phillip A. (2015, February 19). “Pediatrician Refuses to Treat Baby with Lesbian Parents and There’s Nothing Illegal About It.” *Washington Post*. <https://www.washingtonpost.com/news/morning-mix/wp/2015/02/19/pediatrician-refusestotreat-baby-with-lesbian-parents-and-theres-nothing-illegal-about-it/>

- Research shows that LGBTQ people are more likely to have chronic conditions, such as cardiovascular disease, cancer, and HIV or AIDS.<sup>12</sup> A 2017 Center for American Progress survey found that 65% of LGBTQ people have chronic conditions.<sup>13</sup> Lesbian and bisexual women are more likely than heterosexual women to be overweight or obese.<sup>14</sup> There is also emerging research about higher rates of sedentarism, pre-diabetes, and diabetes among LGBTQ youth, which could lead to diabetes later in life.<sup>15</sup> LGBTQ older adults experience higher rates of disability than heterosexual, cisgender older adults.<sup>16</sup> LGBTQ people across the age spectrum are more likely to smoke<sup>17</sup> and vape,<sup>18</sup> and to use substances.<sup>19</sup> These disparities intersect with racial and ethnic health disparities. All of these conditions and risk behaviors could increase the vulnerability of LGBTQ people if they are exposed to SARS-CoV-2.
- LGBTQ people disproportionately work in jobs that are considered essential; they may therefore be more likely to be exposed to the coronavirus. A Human Rights Campaign Foundation analysis of 2018 General Social Survey data found that 2 million LGBTQ people work in restaurants and food services (15% of all LGBTQ adults), 1 million work in hospitals (7.5%), and half a million work in retail (4% of LGBTQ adults). Additionally, LGBTQ suffer economic disparities that place many in living environments that may make it harder to maintain social distancing.<sup>20</sup>

Because of this, we strongly urge OMB OIRA to reconsider finalizing this rule. Thank you for taking the time to speak with us. If there are any other questions please feel free to reach out to us.

Sincerely,

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<sup>12</sup> Cahill S and Wang T (2020, June). Quality Innovation Network, Quality Improvement Organizations (QIN-QIO) Sharing Call: “Reducing chronic disease and health disparities in diverse LGBT populations.” National webinar.

<sup>13</sup> Baker K, Singh S, Mirza SA, and Laura E. Durso (2017, July 6). *The Senate Health Care Bill Would Be Devastating for LGBTQ People*. Washington, DC: Center for American Progress. <https://www.americanprogress.org/issues/lgbtq-rights/news/2017/07/06/435452/senate-health-care-bill-devastating-lgbtq-people/>

<sup>14</sup> Boehmer U, Bowen DJ, Bauer GR. (2007). Overweight and obesity in sexual minority women: Evidence from population-based data. *Am J Public Health* 97:1134–1140.

<sup>15</sup> Beach L, Turner B, Felt D, et al. (2018). Risk factors for diabetes are higher among non-heterosexual US high school students. *Pediatric Diabetes*, 19(7):1137-1146.

<sup>16</sup> Fredriksen-Goldsen, K. I., Kim, H.-J., Emlert, C. A., Muraco, A., Erosheva, E. A., Hoy-Ellis, C. P., . . . Petry, H. (2011). *The aging and health report: Disparities and resilience among lesbian, gay, bisexual, and transgender older adults*. Seattle: University of Washington

<sup>17</sup> Lee JG, Griffin GK, Melvin CL. (2009). Tobacco use among sexual minorities in the USA, 1987 to May 2007: A systematic review. *Tob Control* 18:275–282.

<sup>18</sup> Washington R, Cahill S. (2019, June). “Do e-cigarettes represent a harm reduction approach for the LGBT community? How do we reduce disparities in use?” National LGBTQ Health Conference, Emory University, Atlanta. Concurrent session—substance use.

<sup>19</sup> Song YS, Sevelius JM, Guzman R, Colfax G. (2008). Substance use and abuse. *The Fenway Guide to Lesbian, Gay, Bisexual and Transgender Health*. Philadelphia: American College of Physicians. 2008. 209-247.

<sup>20</sup> Whittington C, Hadfield K, Calderón C (2020, March). *The lives and livelihoods of many in the LGBTQ community are at risk amidst COVID-19 crisis*. Washington, DC: Human Rights Campaign Foundation.

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