

Fenway Institute at Fenway Health comments in response to Request for Information Regarding Nondiscrimination in Certain Health Programs or Activities, a Proposed Rule by the Health and Human Services Department issued August 1, 2013

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Submitted at Regulations.gov on September 30, 2013.

Dear Mr. Rodriguez,

We write to comment on the Department of Health and Human Services' rulemaking for the nondiscrimination requirements in Section 1557 of the Affordable Care Act.

The Fenway Institute works to make life healthier for those who are lesbian, gay, bisexual, and transgender (LGBT), people living with HIV/AIDS, and the larger community. We do this through research and evaluation, education and training, policy analysis, and public health advocacy. We are the research division of Fenway Health, a federally qualified health center that serves about 22,000 patients each year. Half of our patients are LGBT and more than 2,000 are living with HIV.

The Fenway Institute **strongly urges HHS to issue a nondiscrimination provision to ensure LGBT Americans' ability to access nondiscriminatory health care in all settings, regardless of sexual orientation or gender identity.**

We believe that such a regulation would be consistent with other regulations HHS has published in order to implement the Affordable Care Act, such as the 2012 federal regulation that outlaws sexual orientation and gender identity discrimination by Qualified Health Plans traded on state Health Insurance Marketplaces.¹ This 2012 regulation protects against insurance discrimination on the basis of sexual orientation and gender identity, but not against discrimination in health care. Because there is no federal civil rights statute covering sexual orientation, in the absence of a federal sexual orientation health

¹ Rosenbaum S. Essential Health Benefits Update: Proposed Regulations Implementing the ACA; and Application of the Proposed EHB Regulations to Medicaid Benchmark Plans. Health Reform GPS. George Washington University's Hirsh Health Law and Policy Program and the Robert Wood Johnson Foundation. November 29, 2012. <http://healthreformgps.org/resources/essential-health-benefits-update-proposed-regulations-implementing-the-aca-and-application-of-the-proposed-ehb-regulations-to-medicaid-benchmark-plans/>. Accessed March 12, 2013.

care nondiscrimination regulation, lesbian, gay and bisexual people remain vulnerable to discrimination in health care in states without nondiscrimination protections.

Section 1557 explicitly refers to Title IX of the Education Amendments of 1972. Title IX, often used to protecting girls and women from sex discrimination in school sports, has been interpreted by the courts and HHS to also cover gender identity and, therefore, transgender people.² While Title IX protects the right of transgender people to access nondiscriminatory health care under the ACA, this is not widely understood. We therefore seek a federal nondiscrimination regulation that covers *both* sexual orientation and gender identity; such a regulation would help educate providers and clinical staff of the need to provide nondiscriminatory health care to LGBT patients.

Twenty-nine states do not have a sexual orientation nondiscrimination law, and 34 states do not have a gender identity nondiscrimination law. Some state sexual orientation and gender identity nondiscrimination laws outlaw employment discrimination, but not public accommodations discrimination, leaving LGBT people vulnerable to discrimination in health care in the absence of federal protection.

We believe that discrimination in health care on the basis of actual or perceived sexual orientation could be understood to be a form of sex discrimination related to sex stereotyping, as described on page 5 of your request for comment, and related to what are socially normative, heterosexual sex roles. Anti-gay discrimination could therefore plausibly be connected to Title IX of the Education Amendments of 1972.

Several recent decisions by the U.S. Equal Employment Opportunity Commission Office of Federal Operation (EEOC OFO) have found that discrimination on the basis of sexual orientation can constitute discrimination on the basis of sex when the discrimination is rooted in the complainant's failure or perceived failure to conform to gender stereotypes.³ In *Couch v. Department of Energy* (August 13, 2013), the EEOC OFO found that anti-homosexual slurs directed against an employee in the workplace constituted a form of "sex-based epithets" which falls within the scope of Title VII as a form of "gender stereotyping" sex discrimination. The EEOC OFO also found that discrimination and harassment based on "perceived sexual orientation" constitutes a form of "gender stereotyping" sex discrimination within EEOC jurisdiction.⁴

² Cianciotto J and Cahill S. *LGBT youth in America's schools*. Ann Arbor: University of Michigan Press. 2012. 63-65.

³ *Culp v. Transportation Security Administration*, EEOC Appeal No. 0720130012 (May 7, 2013), 2013 WL 2146756 (E.E.O.C.); *Dupra v. Department of Commerce*, EEOC Appeal No. 0120112052 (March 15, 2013), 2013 WL 1182329 (E.E.O.C.); *Jennings v. Department of Labor*, EEOC Appeal No. 0120112716 (February 25, 2013), 2013 WL 874649 (E.E.O.C.); *Baker v. Social Security Administration*, EEOC Appeal No. 0120110008 (January 11, 2013), 2013 WL 1182258 (E.E.O.C.); *Veretto v. U. S. Postal Service*, EEOC Appeal No. 0120110873 (July 1, 2011), 2011 WL 2663401 (E.E.O.C.); *Castello v. U.S. Postal Service*, EEOC Request No. 0520110649 (December 20, 2011), 2011 WL 6960810 (E.E.O.C.); *Rosa v. Department of Veterans Affairs*, EEOC Appeal No. 0120091318 (August 3, 2009), 2009 WL 2513955 (E.E.O.C.).

⁴ *Couch v. Department of Energy*, EEOC Appeal No. 0120131136 (August 13, 2013), 2103 WL 4499198 (E.E.O.C.).

An HHS nondiscrimination regulation covering sexual orientation and gender identity and health care would make it more likely that LGBT people will self-disclose to health care providers. Self-disclosure of sexual orientation and gender identity and the tracking of such data in electronic health records is a critical step toward better understanding and reducing LGBT health disparities.⁵

Surveys of both patients⁶ and providers⁷ indicate that prejudicial treatment occurs in clinical settings and that anti-LGBT attitudes among providers are widespread. Many LGBT people report discriminatory or culturally incompetent care, or fear such substandard care.⁶ The legacy of homosexuality and gender variance being treated as pathological by the psychiatric and medical professions has shaped LGBT communities' often negative and distrustful attitudes toward the health care establishment; this may be especially pronounced among older LGBT people.

In Healthy People 2020 the U.S. government committed for the first time to eliminate health disparities of LGBT people. These disparities include:

- Gay and bisexual men experience a high prevalence of sexually transmitted infections, including HIV, and high rates of behavioral health issues, including suicidal ideation and attempts, often related to stigma, discrimination, bullying and hate crimes.⁸
- Lesbians experience higher rates of obesity and being overweight, increasing their risk for cardiovascular disease, lipid abnormalities, glucose intolerance, and morbidity related to inactivity.⁹
- Lesbians and bisexual women experience cervical cancer at the same rate as heterosexual women, but are four to ten times less likely to get routine Pap tests to screen for cervical cancer.^{10,11}
- The Massachusetts Behavioral Risk Factor Surveillance Survey found poorer health among bisexual respondents compared with gay, lesbian,

⁵ Cahill, S., & Makadon, H. (2013, September). Sexual orientation and gender identity data collection in clinical settings and in Electronic Health Records: A key to ending LGBT health disparities. *LGBT Health*. 1(1). 1-8.

⁶ Lambda Legal. *When Health Care Isn't Caring: Lambda Legal's Survey of Discrimination Against LGBT People and People with HIV* (New York: Lambda Legal, 2010).

⁷ Smith D, Mathews W (2007). Physicians' attitudes toward homosexuality and HIV: Survey of a California medical society-revisited (PATHH-II). *Jnl Homosexuality*. 52(3-4):1-9.

⁸ Committee on Lesbian, Gay, Bisexual, and Transgender Health Issues and Research Gaps and Opportunities; Board on the Health of Select Populations; Institute of Medicine. *The Health of Lesbian, Gay, Bisexual, and Transgender (LGBT) People: Building a Foundation for Better Understanding*, Washington, DC: National Academies Press, 2011.

http://www.nap.edu/catalog.php?record_id=13128. Accessed July 6, 2011.

⁹ Boehmer U, Bowen DJ, Bauer GR. Overweight and obesity in sexual minority women: evidence from population-based data. *Am J Pub Health*. 2007; 97: 1134-1140. Cited in Mayer KH, Bradford JB, Makadon HJ, Stall R, Goldhammer H, Landers S. Sexual and gender minority health: What we know and what needs to be done. *Am J Public Health*. 2008; 98: 989-995.

¹⁰ Valanis BG, Bowen DJ, Bassford T, Whitlock E, Charney P, Carter RA. Sexual orientation and health: Comparisons in the Women's Health Initiative sample. *Arch Fam Med*. 2000;9(9):843-853.

¹¹ Kerker BD, Mostashari F, Thorpe L. Health care access and utilization among women who have sex with women: Sexual behavior and identity. *J Urban Health*. 2006;83(5):970-979.

and heterosexual respondents, as well as higher rates of mental health issues and smoking.¹²

- There are few providers well versed in the unique health care needs of transgender patients, creating a barrier to access to quality care. For example, most transgender women have a prostate and may be candidates for prostate screening if they are high risk (African American, family history of prostate cancer). Transgender men, even those who have had chest reconstruction surgery, may have residual breast tissue that warrants screening for breast cancer with mammography, and many transgender men have a cervix and should be screened for cervical cancer. These screenings should be done with sensitivity to the emotional discomfort they may evoke in transgender patients.¹³

Structural barriers driving LGBT health disparities include a reluctance of LGBT patients to disclose their sexual orientation and gender identity, often due to fear that they will experience discriminatory treatment; a lack of providers trained to address the specific health care needs of LGBT people; lack of access to health insurance¹⁴; much lower rates of health insurance coverage for same-sex couples¹⁵; and a lack of culturally appropriate health care, including prevention services.¹⁶

Frequently, health care providers are uncomfortable providing care to LGBT people. Although anti-gay attitudes among providers appear to have declined significantly over the past two decades, a 2007 study found that 18% of doctors in California are “sometimes” or “often” uncomfortable caring for gay patients.¹⁷ Some of this discomfort may be related to lack of training in LGBT health issues. Only 24% of medical school deans recently surveyed considered their school’s overall coverage of LGBT material as “good” or “very good” on a 5-category Likert scale.¹⁸

The Fenway Institute and nearly 150 other LGBT, HIV and public health organizations recently urged the Office of the National Coordinator of Health Information Technology to mandate the gathering of sexual orientation and

¹² Conron, KJ, Mimiaga, MJ, Landers, SJ. A population-based study of sexual orientation identity and gender differences in adult health. *Am J Pub Health*. 2010; 100(10): 1953-1960.

¹³ Feldman J. Medical and surgical management of the transgender patient: What the primary care clinician needs to know. Makadon H, Mayer K, Potter J, & Goldhammer H (eds.). *Fenway Guide to Lesbian, Gay, Bisexual, and Transgender Health*. Philadelphia: American College of Physicians. 2008 372-373.

¹⁴ Cahill S. The role of antigay family amendments in the 2004 election. In Strasser M (ed.) *Defending Same-Sex Marriage, Volume 1. “Separate But Equal” No More: A Guide to the Legal Status of Same-Sex Marriage, Civil Unions, and Other Partnerships*. Westport, Connecticut: Praeger, 2007: 119-140.

¹⁵ Ponce N, Cochran S, Pizer J, Mays V: The effects of unequal access to health insurance for same-sex couples in California. *Health Aff*. 2010;29:1539–1548.

¹⁶ Mayer K, Bradford J, Makadon H, et al. Sexual and gender minority health: What we know and what needs to be done. *Am J Public Health*. 2008; 98: 989-995.

¹⁷ Smith, DM, Mathews, WC. Physicians’ attitudes toward homosexuality and HIV: Survey of a California medical society-revisited (PATHH-II). *Jnl Homosexuality*. 2007; 52: 1-9. Cited in Committee on Lesbian, Gay, Bisexual, and Transgender Health Issues and Research Gaps and Opportunities; Board on the Health of Select Populations; Institute of Medicine. *The Health of Lesbian, Gay, Bisexual, and Transgender (LGBT) People: Building a Foundation for Better Understanding*, Washington, DC: National Academies Press. 2011: 64.

¹⁸ Obedin-Maliver J, Goldsmith ES, Stewart L, et al. Lesbian, gay, bisexual and transgender-related content in undergraduate medical education. *JAMA*. 2011; 306: 971-977.

gender identity data in clinical settings as part of Stage 3 meaningful use guidelines. Data collection in electronic health records (EHR) is an essential step toward understanding, reducing and eventually eliminating LGBT health disparities, a goal outlined in Healthy People 2020.⁵ However, some have raised concerns about the lack of LGBT nondiscrimination protections in health care provision covering the entire health system.

An HHS regulation banning discrimination on the basis of actual or perceived sexual orientation and gender identity in health care would ensure that LGBT people are able to access the health care that they need free of fear of discrimination, or at least with recourse to justice should they experience such discrimination. They will be able to disclose their sexual orientation and gender identity to clinical staff without anxiety that they will be treated poorly as a result.

A federal nondiscrimination regulation would be consistent with steps taken by nongovernmental bodies to protect LGBT patients. The Joint Commission now requires hospitals it accredits to establish nondiscrimination policies that are inclusive of sexual orientation and gender identity and expression and to implement equal visitation policies.¹⁹ A nondiscrimination policy that covers sexual orientation and gender identity is an important baseline step for hospitals, clinics, and other health care organizations to take. Not only does it show a commitment that discrimination will not be tolerated, but it also helps to create a welcoming environment for LGBT patients. In connection with these new standards, in 2011 the Joint Commission published a field guide for hospitals and health care organizations “for creating processes, policies, and programs that are sensitive and inclusive of LGBT patients and families”.²⁰

Many health professional associations have begun to address matters of LGBT health, including adopting policies that ensure members of these associations do not discriminate against patients based on sexual orientation or gender identity.²¹ In addition, many of these associations have not only adopted policies that address LGBT health disparities, but also have taken positions in support of laws and public policies that ensure equal treatment for LGBT people as a means to improve the health and well-being of LGBT people and their

¹⁹ The Joint Commission. *Advancing Effective Communication, Cultural Competence, and Patient- and Family-Centered Care: A Roadmap for Hospitals*. 2010. Oak Brook, IL: Joint Commission Resources. Available at

<http://www.jointcommission.org/assets/1/6/ARoadmapforHospitalsfinalversion727.pdf>

²⁰ The Joint Commission. *Advancing Effective Communication, Cultural Competence, and Patient- and Family-Centered Care for the Lesbian, Gay, Bisexual, and Transgender (LGBT) Community: A Field Guide*. 2011. Oak Brook, IL: Joint Commission Resources.

<http://www.jointcommission.org/assets/1/18/LGBTFieldGuide.pdf>. Accessed on April 28, 2013.

²¹ See, for example, Human Rights Campaign. Resources. Health and Aging. *Patient Non-Discrimination: LGBT-Inclusive Policy Statements from Healthcare Organizations*.

<http://www.hrc.org/resources/entry/patient-non-discrimination-lgbt-inclusive-policy-statements-from-health>. Accessed on May 21, 2013.

families.²² Many professional groups have endorsed nondiscrimination laws and policies as important to protect the health and well-being of LGBT people.²³

The U.S. government, under the leadership of President Obama and Secretary Sebelius, has taken unprecedented steps toward advancing legal equality for LGBT people and increasing their ability to access health care. Along with low-income people and people of color, LGBT people will disproportionately benefit from the ACA, as these groups are less likely to currently have health insurance or access regular care.²⁴ A key additional step that is still needed is a federal regulation guaranteeing the ability of lesbian, gay and bisexual people to access health care that does not discriminate against them. We also believe that explicitly banning discrimination in health care on the basis of gender identity, as HHS did regarding Qualified Health Plans traded in state Health Insurance Marketplaces, will reinforce the understanding of Title IX as covering gender identity and protect transgender people's ability to receive nondiscriminatory care as well.

The HHS website states that:

Section 1557 will help ensure that newly eligible individuals have equal access to health care benefits, including health insurance, made possible through the Affordable Care Act.

As Justice Anthony Kennedy wrote for the majority in *Romer v. Evans* (1996), referring to nondiscrimination laws that explicitly cover sexual orientation, “[e]numeration is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply”.²⁵ In other words, if a law or regulation doesn't explicitly prohibit sexual orientation discrimination, those providing a service do not know not to discriminate on that basis.

Secretary Hilary Clinton, speaking of LGBT nondiscrimination laws in her 2011 “gay rights are human rights” speech, said

progress comes from changes in laws. In many places, including my own country, legal protections have preceded, not followed, broader recognition of rights. Laws have a teaching effect. Laws that discriminate validate other kinds of discrimination. Laws that require equal protections reinforce the moral imperative of

²² A compendium of many of these policies is available at GLMA. Advocacy. Health Professions. *Compendium of Health Profession Association LGBT Policy & Position Statements*. <http://www.glma.org/index.cfm?fuseaction=Page.viewPage&pageId=1037&parentID=568&nodeID=1>. Accessed on May 21, 2013.

²³ See, for example, American Psychological Association. About APA. Policy Statements. *Discrimination Against Homosexuals*. <http://www.apa.org/about/policy/discrimination.aspx>. Accessed on May 21, 2013.

²⁴ Valanis BG, Bowen DJ, Bassford T, Whitlock E et al. Sexual orientation and health: Comparisons in the women's health initiative sample. *Arch Fam Med*. 2000;9(9):843.

²⁵ ROMER v. EVANS, ___ U.S. ___ (1996). ROY ROMER, GOVERNOR OF COLORADO, ET AL. PETITIONERS v. RICHARD G. EVANS ET AL. CERTIORARI TO THE SUPREME COURT OF COLORADO No. 94-1039.

equality. And practically speaking, it is often the case that laws must change before fears about change dissipate.²⁶

We believe that **a federal regulation from HHS banning discrimination on the basis of sexual orientation and gender identity in health care** will help further transform the U.S. health care system into one in which LGBT people can access quality, culturally competent health care the same way other Americans can. Such a regulation would send a clear message to providers and clinical staff that LGBT people deserve nondiscriminatory and affirming care. It would be in line with, and contribute significantly to, efforts to improve health care and reduce disparities. Such a regulation would close an important gap in nondiscrimination protections covering lesbian, gay and bisexual people, and clarify that transgender people are also entitled to nondiscrimination in health care.

Should you have any questions about this comment, please contact Sean Cahill, Director of Health Policy Research, at scahill@fenwayhealth.org or 617-927-6016.

Sincerely,

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²⁶ Secretary of State Hilary Clinton, "Remarks in recognition of International Human Rights Day," Geneva, Switzerland, December 6, 2011.
<http://www.state.gov/secretary/rm/2011/12/178368.htm>

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