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

RE: Nondiscrimination in Health Programs and Activities, Docket No: HHS-OS-2022-0012

Dear Secretary Becerra,

The American Psychiatric Association (APA), the national medical specialty society representing over 37,000 psychiatric physicians and their patients, would like to take the opportunity to comment on the Department of Health and Human Services' (HHS or the Agency) proposed rule, *Nondiscrimination in Health Programs and Activities*. We appreciate the Agency's commitment to supporting our nation's mental health through eliminating discrimination, increasing equity of services, and increasing the capacity of services; connecting more people to care and supporting an environment that encourages mental health. Our comments focus on supporting the Agency in strengthening 1557, reflecting recent developments in sex discrimination laws, to provide protections against discrimination while ensuring that increased administrative burdens do not unintentionally limit access to care for the most vulnerable populations.

Background

Section 1557 of the ACA is one of the government's most powerful tools to ensure access to and coverage of, health care in a nondiscriminatory manner. Previous versions of this rule have not explicitly provided protections based on sexual orientation or gender identity. The Agency has recently relied on Supreme Court opinions and rulings to apply protections to groups not included in previous iterations of the rule.

Days before the 2020 rule was published, *Bostock v. Clayton County (Bostock)* was decided, holding that discrimination on the basis of sexual orientation and gender identity constitutes prohibited discrimination because of sex under Title VII of the Civil Rights Act of 1964.¹ This ruling was not included in the 2020 rule. In March 2022,

¹ 140 S. Ct. 1731 (2020).

guidance was published, consistent with *Bostock*, that Section 1557 prohibits discrimination on the basis of gender identity in access to covered health programs and activities.²

Broader Implications for Mental Health and Access to Care

As the frontline physicians providing treatment for mental illness and substance use disorders, our goal is to ensure all patients have access to effective treatment and receive care that is meeting the patient where they are. In a February 2022 release, the National Institute on Drug Abuse (NIDA) reported that since the [COVID-19] pandemic began, public health officials have noted increased reports of mental distress for many populations, including individuals with no history of mental illness, younger adults, racial and ethnic minorities, essential workers, and unpaid adult caregivers.³ Moreover, NIDA states that addiction scientists have long understood that stress, trauma, mental illnesses and other types of mental distress make people more vulnerable to developing substance use disorders.⁴

To meet the Agency's goals to address issues of discrimination that contribute to negative health interactions and outcomes, trust and inclusion must be restored in the health care system. Authors of the article, *Perceived discrimination and health: A meta-analytic review*, found that even perceived discrimination can significantly relate to more negative mental health outcomes.⁵ Moreover, increased discrimination led to poorer mental health outcomes across races and genders. The effect was shown to be similar with regard to physical health as well.⁶ Creating consistent requirements for covered health programs and activities can lead to increased trust and processes for access to care by all beneficiaries.

Subpart B- Nondiscrimination Provision

Discrimination prohibited

APA supports the Agency's efforts to strengthen Section 1557 to be consistent with Federal case law and existing Federal civil rights enforcement to prohibit discrimination based upon a person's actual or perceived race, color, national origin, sex, age, or disability. Including on the basis of sex to include discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. As an organization, we train physicians to deliver culturally competent care to serve the needs of evolving, diverse, underrepresented patient populations. Clear communication is essential to delivering quality care and these provisions will aid in efforts to reduce disparities in mental health care.

² U.S. Dept of Health & Human Servs., HHS Notice and Guidance on Gender Affirming Care, Civil Rights, and Patient Privacy (Mar. 2, 2022), <https://www.hhs.gov/sites/default/files/hhs-ocr-notice-and-guidance-gender-affirming-care.pdf>.

³ National Institute on Drug Abuse, COVID-19 and Substance Use, Last Updated February 2022, <https://nida.nih.gov/research-topics/comorbidity/covid-19-substance-use>

⁴ *Id*

⁵ Pascoe, E. A., & Richman, L. S. (2009). Perceived discrimination and health: A meta-analytic review. *Psychology Bulletin*, 135(4), 531-554, Table 2. <https://doi.org/10.1037/a0016059>

⁶ *Id*

Equal Program Access on the Basis of Sex

APA supports expanding the 2016 rule and 2020 rule to include a section to clarify covered entities' obligation to ensure equal access to their programs and activities without discrimination on the basis of sex including pregnancy, sexual orientation, gender identity, and sex characteristics. As the Agency notes, discrimination is still experienced by transgender and gender non-conforming individuals as they seek basic medical care. Transgender people are asked unnecessarily invasive questions about their gender identity by clinicians and facility staff, physically or verbally abusive by clinicians and facility staff, and clinicians and facilities refused to see them at all due to their gender identity.⁷ LGBTQI+ individuals are at increased risk for HIV, obesity, conditions associated with tobacco, alcohol, and other substance use, and mental health conditions, including suicidal thoughts and are more likely to develop a disability at a younger age than heterosexual individuals.⁸

APA also supports the Agency for prohibiting the punishment of a clinician for providing clinically appropriate care when by not providing the care, the patient would face discriminatory practices. As APA noted in its Amicus Brief in *New York v. Department of Health and Human Services*, medical and mental health treatments related to gender transition are beneficial and medically necessary for many transgender patients.⁹ The Agency must provide clarity and certainty to clinicians and patients that care is safe and inclusive.

Network Adequacy

APA supports application of 1557 regulations to networks, even in the limited capacity it can be applied. Section 1557 can be one tool to help beneficiaries ensure that networks are doing everything in their power to get high quality clinicians in the network providing care to all beneficiaries, even those with high-cost treatment plans. We encourage the Agency to continue to work with its partners to align and enforce network adequacy standards in coordination with mental health parity requirements. In previous rule makings, HHS has expressed concern that stronger network adequacy standards could result in increasing the market power of some clinicians, resulting in higher cost of care to patients. However, instead what is happening is many of our mental health and substance use disorder patients cannot access care because there is simply no one in network to care for them. APA implores the Agency to look at the issues surrounding the lack of psychiatrists in networks and work with its partners to change the trajectory for the most vulnerable beneficiaries seeking care.

Nondiscrimination in the Delivery of Health Programs and Activities Through Telehealth Services

APA supports the addition of nondiscrimination in the delivery of health programs through telehealth services with a delayed implementation to allow providers to obtain platforms and networks that meet the requirements of 1557. With the increase in telehealth visits since the beginning of the COVID-19 pandemic, policies need to reflect the delivery of health care services. The use of telehealth visits has

⁷ 87 FR 47833 (August 4, 2022)

⁸ 87 FR 47833-34 (August 4, 2022)

⁹ *New York v. U.S. Department of Health and Human Services*. Brief Amicus Curiae, APA, et al. December 09, 2020. <https://www.psychiatry.org/getattachment/86db8c20-6c03-4e02-93ea-545e0d58de9f/amicus-2020-NY-v-HHS-No1-20-cv-05583-AKH.pdf>

increased access to mental and behavioral health visits for countless individuals throughout the country. However, for some, in-person visits will still be preferred for reasons such as comfort in being physically with a provider. Because of this hybrid approach taken by many clinicians, we request that the Agency delay implementation and provide education and assistance to clinicians and companies to ensure that the regulation can be met without undue burden causing delay in care to beneficiaries.

CMS amendments

APA supports the Agency's proposal to amend the 2020 rules and CMS regulations so that they again identity and recognize discrimination on the basis of sexual orientation and gender identity as prohibited forms of discrimination based on sex. Alignment of regulations will allow for clarity between all programs, including CHIP, Medicaid fee for service, and managed care programs. Experiences with acts of interpersonal discrimination have been found to contribute to poor mental health and physical health outcomes in children, adolescents, young adults, and adults. Within the health care setting, this can include making disparaging comments to a patient, or colleague about their weight, accented speech, name, or religious affiliation.¹⁰ As the Agency notes, aligning 1557 across programs and activities will protect vulnerable individuals across the lifespan.

Thank you for your review and consideration of these comments. If you have any questions or would like to discuss any of these comments further, please contact Brooke Trainum (btrainum@psych.org), Director Practice Policy.

Sincerely,



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CEO and Medical Director
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¹⁰ Walton, J. Discrimination and the Roll of the Clinician. *Pediatrics* (2021) 148 (6): e2021053619
<https://doi.org/10.1542/peds.2021-053619>