November 5, 2018

Attorney General Jeff Sessions
U.S. Department of Justice

Secretary Alex Azar
U.S. Department of Health and Human Services

Secretary Betsy DeVos
U.S. Department of Education

Dear Attorney General Sessions, Secretary Azar, and Secretary DeVos,

The undersigned health organizations, which serve millions of patients across the country, write to express concern regarding the Trump Administration’s plan to narrowly define sex under various federal laws as a binary-only, immutable condition determined by genitalia at birth and potentially by genetic testing, as reported in The New York Times on Sunday, October 21, 2018.1 This narrow definition would ignore the reality and existence of the nearly 2 million transgender Americans living across the country,2 as well as the up to 1.7% of the population with variations in their sex characteristics (known as intersex),3 4 and in doing so, could have wide-reaching public health consequences by weakening nondiscrimination protections for transgender and intersex people in health care, education, and elsewhere.

According to news reports, the Department of Health and Human Services memo reportedly proposes to establish a uniform definition of sex—either male or female, unchangeable, and determined by genitalia at birth—under Title IX of the Education Amendments Act of 1972, which prohibits discrimination on the basis of sex. This definition would effectively erase federal recognition of transgender people, whose gender identity differs from the sex that they were assigned at birth, and runs contrary to medical science. Professional medical and health organizations—such as the American Medical Association5 and the American Psychiatric Association6—have for years confirmed that there is a complex medical spectrum of sex that

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includes genetic markers, internal and external anatomy, and gender identity, which may itself have a biological component.  

Gender identity and assigned sex at birth can be different one from the other, and that difference needs to be recognized in order to effectively guarantee access to care for transgender people. The reported memo’s narrow definition of sex also ignores the existence of intersex people, who are born with sex characteristics, such as anatomy or chromosomes, that do not fit the typical male/female binary definition set forth in the reported memo. Transgender and intersex people have existed throughout time and have unique health needs and lived experiences, necessitating that health care providers recognize these needs and differences as a part of providing high quality, affirming, and culturally competent care. The proposed definition of sex would instead ignore the existence of these populations, which in turn could worsen the health disparities experienced by transgender and intersex individuals and promote discrimination.

This narrow definition of sex is clearly aimed at excluding transgender and intersex people from necessary nondiscrimination protections on the basis of sex, including Section 1557, the nondiscrimination provision of the Affordable Care Act. Over the past two decades, federal courts have ruled in dozens of cases that anti-transgender discrimination is prohibited by federal sex discrimination laws, including the Affordable Care Act. A definition of sex from federal agencies that differs from established medical and legal understandings will likely cause substantial confusion and uncertainty for patients, health care providers, and state and local governments. To the extent that such a definition permits or requires schools, employers, or other institutions to demand medical records, examinations, or tests, it could also infringe on constitutional and statutory protections for private medical information.

These nondiscrimination protections are necessary, given that discrimination against transgender people is widespread. A 2013 survey of 452 transgender Massachusetts residents found that 65%

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7 See, e.g. American Academy of Pediatrics: Rafferty J, AAP COMMITTEE ON PSYCHOSOCIAL ASPECTS OF CHILD AND FAMILY HEALTH, AAP COMMITTEE ON ADOLESCENCE, AAP SECTION ON LESBIAN, GAY, BISEXUAL, AND TRANSGENDER HEALTH AND WELLNESS. Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents. Pediatrics. 2018;142(4): e20182162

of respondents had experienced public accommodations discrimination during the past year. This discrimination was significantly associated with adverse physical and mental health outcomes. Anti-transgender discrimination is especially problematic when it occurs in health care facilities. 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. Discrimination acts as a barrier to accessing health care and contributes to worsening health disparities experienced by transgender people. The Affordable Care Act’s nondiscrimination protections were a critical step forward in combatting discrimination in health care and reducing barriers to access for this vulnerable and marginalized population.

Protection for intersex individuals is necessary as well, given that children with intersex traits (sometimes referred to as differences of sex development, or DSD), have variations in their physical characteristics, such as chromosomes, gonads, or genitalia, that challenge traditional binary concepts of sex and gender. The spectrum of variation in genital appearance can complicate the initial assignment of an infant as male or female, and physicians may rely on additional test results regarding karyotype, hormonal function, and imaging of internal reproductive organs. No one of these traits can conclusively determine an individual’s sex, and many intersex individuals are “gender diverse”: their gender identity, expression, or perception may not conform to expected norms and stereotypes for their assigned sex.

The mission of the U.S. Department of Health and Human Services is to enhance and protect the health and well-being of all Americans. As such, HHS and other federal agencies should not restrict nondiscrimination protections in ways that will likely worsen health outcomes and disparities experienced by transgender and intersex individuals. As organizations committed to improving the health of everyone in this nation, we urge you to reverse this destructive and counterproductive course of action. It runs counter to decades of medical science and legal jurisprudence.

Sincerely,

Academy of Eating Disorders
AGLP: The Association of LGBTQ Psychiatrists
American Academy of Nursing
American Academy of Pediatrics
American Association for Geriatric Psychiatry
American College Health Association
American College of Physicians

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American Medical Student Association
American Medical Women’s Association
American Nurses Association
American Psychiatric Association
American Psychological Association
American Public Health Association
California LGBT Health and Human Services Network
Callen-Lorde
Clinicians for Progressive Care
Denver Prevention Training Center
Doctors for America
Endocrine Society
Fenway Health
GLMA: Health Professionals Advancing LGBTQ Equality
HIV Medicine Association
Howard Brown Health
National Association of Social Workers
National LGBT Cancer Network
National Physicians Alliance
New York State American Academy of Pediatrics, District II
Physicians for Reproductive Health
Piedmont Health Services
Progressive Doctors
RAD Remedy
Society for Physician Assistants in Pediatrics
Society for the Psychological Study of Social Issues
Society of General Internal Medicine
The Lesbian, Bisexual, Gay and Transgender Physician Assistant Caucus
Unites States Professional Association for Transgender Health
Whitman-Walker Health
World Professional Association for Transgender Health