

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.<sup>1</sup> This narrow definition would ignore the reality and existence of the nearly 2 million transgender Americans living across the country,<sup>2</sup> as well as the up to 1.7% of the population with variations in their sex characteristics (known as intersex),<sup>3 4</sup> 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 Association<sup>5</sup> and the American Psychiatric Association<sup>6</sup>—have for years confirmed that there is a complex medical spectrum of sex that

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<sup>1</sup> Green, E., Benner, K., and Pear, R. (October 21, 2018). “‘Transgender’ Could Be Defined Out of Existence Under Trump Administration.” *The New York Times*. <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html>

<sup>2</sup> Flores, A., Herman, J., Gates, G., and Brown, T. (June 2016). *How Many Adults Identify As Transgender In The United States*. The Williams Institute. <https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>

<sup>3</sup> Melanie Blackless et al., How Sexually Dimorphic Are We? Review and Synthesis, *12 American Journal of Human Biology* 151 (2000).

<sup>4</sup> Kim, SK. and Kim, J. “Disorders of sexual development.” *Korean J Urol.* 2012;53:1-8. Cited in American Medical Association. Report of the Board of Trustees [Patrice M. Harris, MD, MA, Chair] Supporting Autonomy for Patients with Differences of Sex Development (DSD) (Resolution 3-a16). 2016. <https://assets.ama-assn.org/sub/meeting/documents/i16-bot-07.pdf>

<sup>5</sup> American Medical Association. Medical Spectrum of Gender D-295.312. <https://policysearch.ama-assn.org/policyfinder/detail/spectrum%20gender?uri=%2FAMADoc%2Fdirectives.xml-D-295.312.xml>

<sup>6</sup> American Psychiatric Association. Gender dysphoria. *DSM-5*. Arlington, VA, 2013. <http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf>

includes genetic markers, internal and external anatomy, and gender identity, which may itself have a biological component.<sup>7</sup>

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.<sup>8</sup> 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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<sup>7</sup> 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*

<sup>8</sup> See, e.g., *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015) (holding that discrimination against hospital patient based on his transgender status constitutes sex discrimination under Section 1557 of the Affordable Care Act); *Flack v. Wis. Dep't of Health Servs.*, No. 3:18-cv-00309-wmc (W.D. Wis. July 25, 2018) (holding that a Medicaid program's refusal to cover treatments related to gender transition is "text-book discrimination based on sex" in violation of the Affordable Care Act and the Equal Protection Clause of the Constitution); *Cruz v. Zucker*, 195 F.Supp.3d 554 (S.D.N.Y. 2016) (holding exclusion invalid under the Medicaid Act and the Affordable Care Act); *Prescott v. Rady Children's Hosp.-San Diego*, 265 F.Supp.3d 1090 (S.D. Cal. Sept. 27, 2017) (holding that discrimination against transgender patients violates the Affordable Care Act); *Tovar v. Essentia Health*, No. 16-cv-00100-DWF-LIB (D. Minn. September 20, 2018) (holding that Section 1557 of the Affordable Care Act prohibits discrimination on the basis of gender identity); *Boyden v. Conlin*, No. 17-cv-264-WMC, 2018 (W.D. Wis. September 18, 2018) (holding that a state employee health plan refusal to cover transition-related care constitutes sex discrimination in violation of Title VII, Section 1557 of the ACA, and the Equal Protection Clause). Other federal courts have found that similar federal sex discrimination laws also prohibit anti-transgender discrimination. National Center for Transgender Equality. "Federal Case Law on Transgender People and Discrimination." <https://transequality.org/federal-case-law-on-transgender-people-and-discrimination>

of respondents had experienced public accommodations discrimination during the past year.<sup>9</sup> 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.<sup>10</sup> Discrimination acts as a barrier to accessing health care and contributes to worsening health disparities experienced by transgender people.<sup>11</sup> 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.<sup>12</sup> 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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<sup>9</sup> Reisner, S., White Hughto, J., Dunham, E., Heflin, K., Begenyi, J., Coffey-Esquivel, J., and Cahill, S. (July 2015). "Legal protections in public accommodations settings: A critical public health issue for transgender and gender nonconforming people." *Milbank Quarterly*. 1-32.

<sup>10</sup> James, S., Herman, J., Rankin, S., Keisling, M., Mottet, L., and Anafi, M. (2016). *The Report of the 2015 U.S. Transgender Survey*. Washington, DC: National Center for Transgender Equality

<sup>11</sup> Wang T, Cahill S (2018). Anti-transgender political backlash threatens health, access to care. *American Journal of Public Health*.

<sup>12</sup> Lee, P.A., et al., Global Disorders of Sex Development Update since 2006: Perceptions, Approach and Care. DOI 10.1159/000442975. *Horm Res Paediatr*, 2016.

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