UNITED STATES OF AMERICA
BEFORE THE DEPARTMENT OF HEALTH AND HUMAN SERVICES

NONDISCRIMINATION IN HEALTH PROGRAMS AND ACTIVITIES	))	RIN 0945-AA02

COMMENTS OF WHITMEN-WALKER HEALTH ON PROPOSED RULES TO IMPLEMENT SECTION 1557 OF THE AFFORDABLE CARE ACT

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Pursuant to the Notice of Proposed Rulemaking published in the Federal Register on September 8, 2015, 80 Fed. Reg. 54172 (the NPRM), Whitman-Walker Health ("WWH" or "Whitman-Walker") submits these comments on the proposed rules to implement the nondiscrimination provisions of Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116 (the ACA).

Whitman-Walker applauds the Department's comprehensive, far-reaching approach to addressing health care discrimination, which directly and indirectly harms individual and public health and contributes to serious health disparities in racial and ethnic minorities, women, persons with disabilities, children and the elderly, and lesbian, gay, bisexual and transgender (LGBT) persons. We submit comments to:

- support the Department's finding that discrimination against LGBT people in health care remains a serious problem of justice and of public health, that calls for a clear and powerful response in these rules;
- support the proposed rules addressing discrimination based on gender identity, with several additions which we believe are needed to strengthen those rules;
- provide the legal basis for expanding the rule prohibiting sex discrimination to protect lesbian, gay and bisexual people;
- propose a modification to the rules barring disability discrimination to specifically address discriminatory practices by health insurers;
- urge the Department not to expand religion-based exemptions from the nondiscrimination rules beyond those expressly stated or preserved in the ACA;

- support the proposed rules on language access; and
- urge the Department to extend its nondiscrimination rules to all federal agencies and to all health programs and activities of entities that receive federal financial assistance.

EXPERTISE AND INTEREST OF WHITMAN-WALKER HEALTH

Whitman-Walker Health is a community-based, nonprofit clinic offering primary medical care and HIV specialty care, mental health and addiction treatment services, dental care, medical adherence case management, and legal services to residents of the greater Washington metropolitan area. WWH has a special mission to the LGBT community, and to all Washington-area residents with HIV regardless of race, gender or sexual orientation. At its two sites – the Elizabeth Taylor Medical Center in Northwest and Max Robinson Center in Southeast – WWH is the medical home for approximately 20% of DC residents diagnosed with HIV. In calendar year 2014, Whitman-Walker provided health services to more than 14,700 unique persons. Approximately 6,500 of those individuals are our medical patients – WWH is their medical home.

Whitman-Walker's Legal Services Program was established in 1986 to provide *pro bono* legal assistance to people living with HIV on matters related to their diagnosis. In more recent years our work has expanded to include legal counsel and representation to LGBT individuals and families in the Washington, DC metropolitan area. Over the past three decades, WWH Legal Services has provided *pro bono* assistance to tens of thousands of individuals and families on a wide range of issues including: access to health care (Medicaid, Medicare, AIDS Drug Assistance programs, private and employer-sponsored health insurance, and DC, Maryland and Virginia programs); HIV and LGBT discrimination in health care, employment and public accommodations; disability income options for those too sick to work; immigration; wills, advance healthcare directives and powers of attorney; and medical privacy. We also assist transgender individuals with name and gender marker changes in their identity documents and other legal records, and with discrimination in employment

and in health insurance. In the most recent 12 months our legal staff and volunteers provided counsel and representation to 2,551 new clients.

WWH Legal Services has been very involved in the implementation of the Affordable Care Act in the District of Columbia. Since 2007 our Public Benefits Unit, which has been recognized as a model for other DC community health clinics, has screened all uninsured WWH patients for public medical program eligibility, including Medicaid, DC Healthcare Alliance and the AIDS Drug Assistance Program; enrolled eligible clients; and assisted with timely recertification to avoid any lapse in coverage. That unit has now been expanded to a Public Benefits and Insurance Navigation Unit, and additional staff have been hired, to help uninsured and under-insured DC residents understand their options under the new DC Health Benefit Exchange Authority. Whitman-Walker Legal Services was selected by the DC Health Benefit Exchange to provide the training for all of the new In-Person Assisters in the District.

Whitman-Walker's patient populations, and our legal clients, reflect the diversity of the Washington, DC metropolitan area, and our special commitment to the LGBT and HIV-affected communities. Of the more than 14,700 individuals receiving health services in 2014, 48% of those who reported their sexual orientation identified as gay, lesbian or bisexual; 6% identified as transgender; 44% identified as black and 14% as Hispanic. Of our medical patients, approximately one-half – 3,400 individuals – were living with HIV. Of our legal clients, approximately 40% identified as gay, lesbian or bisexual; 20% identified as transgender; 45% identified as black; 19% listed their ethnicity as Hispanic; and 50% were living with HIV.

Transgender and gender nonconforming individuals comprise a substantial and growing part of our patient and client base: approximately 6% of all those receiving health services; 13% of medical patients; 20% of persons receiving mental health services; 8% of those receiving substance abuse treatment services; and 20% of our legal clients.

As one of the oldest medical-legal partnerships in the country, WWH has substantial experience with the interrelationships between health care and the law. Our medical and mental health providers, community health workers and lawyers have seen first-hand the many health disparities from which LGBT persons suffer; the many barriers to adequate and affordable health care that LGBT persons and those living with HIV experience; and the continuing discrimination and stigma – including discrimination by health care providers and health insurers – that exacerbate health disparities and diminish the well-being of LGBT individuals and families and those living with HIV.

COMMENTS ON THE PROPOSED RULES

I. Discrimination Against LGBT People by Health Care Providers and Health Insurers Remains Widespread, With Substantial Harms to the Public Health.

The NPRM recognizes the central importance of Section 1557's prohibition of health care discrimination, not only as a matter of justice, but also as a matter of public health and the economic vitality of our nation:

> One of the central aims of the ACA is to expand access to health care and health coverage for all individuals. Equal access for all individuals without discrimination is essential to achieving this goal. Discrimination in the health care context can often lead to poor and inadequate health care or health insurance or other coverage for individuals and exacerbate existing health disparities in underserved communities. Individuals who have experienced discrimination in the health care context often postpone or do not seek needed health care; individuals who are subject to discrimination are denied opportunities to obtain health care services provided to others, with resulting adverse effects on their health status. Moreover, discrimination in health care can lead to poor and ineffective distribution of health care resources, as needed resources fail to reach many who need them. The result is a marketplace comprised of higher medical costs due to delayed treatment, lost wages, lost productivity, and the misuse of people's talent and energy.

80 Fed. Reg. at 54194 (footnote omitted). As we and many others documented in response to the Department's Request for Information in 2013, discrimination against LGBT individuals and families by individual and institutional health care providers, and health insurers, is widespread. This discrimination exacerbates the many health disparities that LGBT people suffer – by denying needed

care when it is sought; discouraging people from seeking care; and exacerbating the stress that results from still-pervasive anti-gay and anti-trans stigma. These disparities, which have been extensively documented,[1] include the following:

LGBT people generally are more likely than non-LGBT people to

- suffer from depression, anxiety and other mental health challenges;
- have considered or attempted suicide;
- report poor health generally and to suffer from a wide range of chronic health conditions;
- use tobacco, abuse drugs, and consumer excessive alcohol, which create risks of heart, lung and liver disease, hypertension, and certain cancers; and
- suffer from eating disorders that can endanger health.

Gay and bisexual men experience much higher rates of HIV infection, hepatitis B, and some other sexually transmitted infections, and higher rates of anal cancer.

Lesbian and bisexual women are more likely to be overweight or obese, which results in elevated risk of heart disease, hypertension, diabetes, cancer, and premature death; and are at higher risk of breast and gynecological cancers because they are less likely to receive regular mammograms, Pap tests, and pelvic exams.

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[1] *E.g.,* U.S. Department of Health and Human Services, *Lesbian, Gay, Bisexual, and Transgender Health,* http://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health; U. Ranji, A. Beamesderfer, J. Kates, A. Salganicoff, *Health and Access to Care and Coverage for Lesbian, Gay, Bisexual, and Transgender Individuals in the U.S.,* Kaiser Family Foundation Issue Brief, April 23, 2015, http://kff.org/disparities-policy/issue-brief/health-and-access-to-care-and-coverage-for-lesbian-gay-bisexual-and-transgender-individuals-in-the-u-s, pp. 4-11; American Association of Medical Schools, IMPLEMENTING CURRICULAR AND INSTITUTIONAL CLIMATE CHANGES TO IMPROVE HEALTH CARE FOR INDIVIDUALS WHO ARE LGBT, GENDER NONCONFORMING, OR BORN WITH DSD: A RESOURCE FOR MEDICAL EDUCATORS (2014), available at http://offers.aamc.org/lgbt-dsd-health, pp. 14-17; Institute of Medicine, THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE: BUILDING A FOUNDATION FOR BETTER UNDERSTANDING (2011), available at https://www.iom.edu/Reports/2011/The-Health-of-Lesbian-Gay-Bisexual-and-Transgender-People.aspx, pp. 170-172 (childhood and adolescence), 231-233 (early and middle adulthood), 281-282 (later adulthood); 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), available at http://www.jointcommission.org/lgbt, Introduction, pp. 1, 2; Jaime M. Grant, Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, & Mara Keisling, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY, National Center for Transgender Equality and National Gay and Lesbian Task Force (2011), http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf.

Transgender persons suffer from very high rates of depression, anxiety and other mental health disorders, high rates of suicide, and very high risks of violence. Those who are on hormones need medical monitoring that they often do not receive.

Transgender women have very high rates of HIV and other sexually transmitted infections, and frequently do not receive medical screenings for prostate and testicular cancer even though they may be at risk.

Transgender men frequently do not receive medical screenings for breast and gynecological cancers even though they may be at risk.

LGBT young people are at particularly high risk of depression, other mental health disorders, and suicide, and young gay and bisexual men and transgender women are at very high risk of HIV and other sexually transmitted infections.

LGBT elders suffer from poorer mental and physical health and are more likely to struggle with alcohol and drug abuse; and are more likely to be isolated and less likely to seek medical care because of fear of stigma and discrimination.

Whitman-Walker health care providers, community health workers and lawyers continue to learn of many incidents of health care discrimination against LGBT people, such as the following:

- Our Legal Services Department currently is working on cases involving refusals by surgeons at three local hospitals to perform gender-affirming surgery on transgender individuals.

- We continue to see cases of health insurance plans that categorically exclude coverage of any "sex change" or "sex reassignment" procedures. In one case, the health insurer relied on a Maryland Insurance Administration regulation that specifically endorses exclusion of sex reassignment procedures from health insurance plans. That case was settled for our client, but to our knowledge the discriminatory provision remains in the health plan (and in the Maryland Insurance Administration's regulations).

- A young transgender man consulted a gynecologist in the Washington, DC area for removal of vaginal warts and for STD and cancer screening. The gynecologist and his staff were hostile and the doctor conducted a gynecological examination that was physically rough and painful and was experienced by the young man as abusive.

- Our transgender patients with Medicaid routinely experience initial denials of hormone prescriptions, on grounds that the treatment is "cosmetic" or not indicated for persons of the patient's birth sex. Our Legal Services attorneys spend substantial time and effort getting these routine denials reversed.

- Whitman-Walker receives a significant number of requests, from older LGBT individuals and couples, for referrals to home health services that do not discriminate against LGBT people. Many callers have experienced unpleasant if not frightening encounters with home

health workers who have become hostile on learning their sexual orientation, or have lectured them on their "sinfulness".

- A gay man with advanced pulmonary fibrosis experienced great difficulty, over more than a year, obtaining approval to be included as a candidate for a lung transplant at a nationally prominent medical center. Because he was single and had been sexually active in the past, the committee with approval power subjected him to repeated tests for HIV and for hepatitis, although he was negative. They also expressed skepticism about his potential for recovery because of his lack of a traditional "care network," even though his friends (including former romantic partners) submitted documentation of a detailed, carefully developed care plan. When he and his health care power of attorney threatened to bring a discrimination case, he was finally approved for a lung transplant, when he was very sick and had a life expectancy of only a few weeks. Because of his advanced illness, the transplant proved ultimately unsuccessful, and he died 13 months later, most of which time was spent in the hospital's ICU.

- Whitman-Walker referred a transgender woman patient to a local hospital for testing that was indicated based on her male birth sex. She encountered a mix of incomprehension and hostility from hospital medical staff, and as a result was "outed" as a transgender person to everyone in a crowded waiting room.

- A legal client who is a transgender man went to a local laboratory for a blood test to prove his biological relation to his son, for immigration purposes. The lab staff insisted that he must be the boy's father, not mother, because of his presentation and the lack of an intake form that permitted him to record both his current gender and his birth sex. A Whitman-Walker attorney had to intervene to ensure that the correct blood test was performed (the DNA tests are different for fathers and mothers.)

- Whitman-Walker attorneys represented an individual who identifies as gender neutral – neither male nor female – who went to a local hospital's mental health clinic for counseling. The intake person asked a number of hostile, personal and embarrassing questions, and never followed up with the client on the requested counseling appointment.

- Before receiving chest surgery, a transgender man was referred to the imaging center at a local hospital for a mammogram. The medical staff expressed puzzlement that a man would need a mammogram, and continued to express reservations and confusion even after he explained his situation. He was finally instructed to undress in the room where the imaging equipment was housed instead of in the privacy of the examination room. Halfway through the mammogram, the procedure was interrupted by another staff person, who said that the insurance carrier was rejecting the claim. The procedure was terminated after only one side of his chest had been imaged. He ultimately underwent top surgery without the mammogram.

II. The Proposed Rules Addressing Discrimination Against Transgender and Gender Nonconforming People Constitute a Major Advance; The Rules on Health Insurance Discrimination Should Be Strengthened to Realize Their Full Promise

Whitman-Walker applauds the Department's conclusion that discrimination based on gender identity is discrimination based on sex, within the meaning of Title IX and, therefore, under Section 1557. As carefully documented in the NPRM, this conclusion is amply supported by decisions of the federal appellate and trial courts and rulings and regulations issued by the Department of Education and the Equal Employment Opportunity Commission.

We believe that the proposed rules provide a sound basis for addressing discrimination against transgender and gender nonconforming persons by individual and institutional health care providers who are within the scope of Section 1557. In particular, the NPRM's clarification that prohibited gender identity discrimination includes not only outright refusals of care, but also failure to provide care that may be specifically indicated for a particular individual, such as a gynecological exam needed by a transgender man or a prostate or testicular exam needed by a transgender woman, is potentially life-saving. Similarly, the NPRM's prohibition of categorical exclusions of gender transition-related care in health insurance plans, and the clarification that individuals must be treated consistently with their gender identity in sex-segregated facilities and health services, should help end a wide range of discriminatory policies and practices that transgender individuals continue to face.

However, the wording in §§ 92.207(b) and (d) is so general that these provisions may fail to capture some insurance practices which, by purpose or in effect, discriminatorily restrict access by many individuals to needed transition-related care. For instance, many plans that do not contain blanket exclusions of all "sex reassignment" procedures and treatments still exclude genital surgery, and plans that are more inclusive commonly exclude revision work (labiaplasty and glans reconstruction). In addition, many insurers deny coverage of other specific treatments needed to complete an individual's transition on grounds that the procedure is "cosmetic" – either by relying

on general plan language excluding "cosmetic" procedures or requiring that a procedure or treatment by "medically necessary," or by specifically excluding certain procedures that may be cosmetic in many if not most cisgender persons but may be part of a medically recognized course of treatment for a transgender person. Examples of such procedures, which are categorically excluded as "cosmetic" in many plans and by many utilization reviewers, include:

- Surgeries of the head and face, such as hair transplant, scalp advancement, brow reduction, lip reduction or augmentation, rhinoplasty, cheek and chin contouring, jawline modification, blepheroplasty, and other facial feminization techniques for transgender women.

- Laser hair removal and electrolysis, on the face and elsewhere on the body.

- Surgeries involving the neck, such as cartilage reduction (modification of the Adam's Apple) and vocal feminization surgery.

- Breast augmentation and reduction.

- Other body contouring procedures, such as waist reduction, hip/buttocks implants, fat transfer, pectoral implants.

- Lessons/training to modify the vocal range.

Therefore, we believe that the following modifications are needed to **§§ 92.207(b)(4) & (5)** (new language in bold):

> (4) Categorically or automatically exclude from coverage, or limit coverage for, ~~all~~ health services related to gender transition**, including gender reassignment surgeries and other services or procedures described in the most current version of the recognized professional standard of medical care for transgender individuals**; or
>
> (5) Otherwise deny or limit coverage, or deny a claim, for specific health services related to gender transition if such denial or limitation results in discrimination against a transgender individual. **A denial or limitation results in discrimination if, inter alia, (a) a transgender individual is denied coverage for services to treat gender dysphoria even though substantially similar services are covered for treatment of other conditions, (b) a medically necessary service for treating gender dysphoria is denied solely because that service is designated as cosmetic when used to treat other conditions, (c) a transgender individual is denied access to medically necessary health services**

in accordance with the most current version of the recognized professional standard of medical care for transgender individuals.

We also submit that the language in **§ 92.207(d)**, intended to preserve the right of insurers to cover only medically necessary procedures and treatments, should be amended as follows (new language in bold):

> Nothing in this section is intended to determine, or restrict a covered entity from determining, whether a particular service is medically necessary **for the individual in question, taking into account the individual's specific situation and the recognized professional standard of medical care for transgender individuals,** or otherwise meets applicable coverage requirements in any individual case, **provided that the coverage requirements are consistent with Section 92.207(b)(5).**

III. The Proposed Sex Discrimination Rules Should Be Clarified and Expanded to Expressly Cover Discrimination Against Lesbian, Gay and Bisexual Individuals and Families

The NPRM states: "As a matter of policy, we support banning discrimination in health programs and activities … on the basis of sexual orientation," 80 Fed. Reg. at 54176, but notes that the case law is mixed, *id.,* and concludes, *id.* at 54177:

> The final rule should reflect the current state of nondiscrimination law, including with respect to prohibited bases of discrimination. We seek comment on the best way of ensuring that this rule includes the most robust set of protections supported by the courts on an ongoing basis.

There exists ample legal support for the Department of Health and Human Services to become a leader in this rapidly changing area of the law, and we urge it to exercise that leadership. Notwithstanding a long line of cases, stretching back to the 1970s, holding that Congress did not have sexual orientation discrimination in mind when it enacted statues to ban sex discrimination in employment in 1964 (Title VII) and in education in 1972 (Title IX), a number or recent decisions under Title IX and under Title VII[2] recognize that discrimination against lesbian, gay, and bisexual

[2] Title VII case law is relevant for determining the scope of the ACA's protection against sex discrimination under Title IX, because "[c]ourts have generally assessed Title IX discrimination

individuals is sex discrimination, because such discrimination is based on: (1) the sex of the individual subjected to discrimination; (2) the sex of a person or persons with whom the individual associates; and/or (3) the individual's non-conformance with sex stereotypes – including the stereotype that men should be sexually attracted to women and vice versa.

These recent decisions recognize the far-reaching implications of the Supreme Court's decisions in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) and *Price Waterhouse v. Hopkins*, 490 U.S. 288 (1989). In *Oncale,* the Court held that same-sex sexual harassment in the workplace could constitute sex discrimination under Title VII. Brushing aside extensive precedents in the lower courts, the Court declared (523 U.S. at 79-80):

> As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.

Similarly, that the legislators who enacted Title IX and Title VII may not have had discrimination against lesbians, gay men and bisexual people in mind does not determine the logic of the statutory language.

In *Price Waterhouse,* the defendants discriminated against the female plaintiff, not because she was a woman rather than a man, but because she was not sufficiently "ladylike". The Supreme Court endorsed a broad understanding of Title VII's prohibition "discrimination because of sex," declaring:

> [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."

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claims under the same legal analysis as Title VII claims." *Gossett v. Okla. ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1176 (10th Cir. 2001).

490 U.S. at 251 (citations omitted). In the wake of *Price Waterhouse,* the courts – and the EEOC and Department of Education in their enforcement of Title VII and Title IX, respectively – have adopted an increasingly broad and deep appreciation of discriminatory sex stereotypes, including stereotypes about sexual attraction and sexual behavior.

In contrast to the careful analysis by the EEOC and in recent court decisions expanding the interpretation of sex discrimination, recent decisions rejecting sexual orientation discrimination claims under Title IX and Title VII for the most part have cited older precedents without analysis, and failed to take account of the teachings of *Oncale* and *Price Waterhouse.*

A patient's sexual identity, sexual activities and sexual attractions are critical factors in her or his health, and full disclosure and frank communication between patient and health care provider on this as well as other subjects is essential to promoting a good patient-provider relationship and to ensuring adequate health care. Sexual orientation discrimination in health care is particularly corrosive to health and well-being. Patients typically are highly dependent upon their doctors and other health care providers, and discriminatory attitudes and disparate treatment by providers can have serious consequences. The final Section 1557 rules should clearly communicate, to health care providers and administrators, as well as to insurers and the general public, that discrimination based on sexual orientation is prohibited. Therefore, we urge that the final regulations be amended as follows. **The definition of "On the basis of sex" in § 92.4** should be amended to state (proposed new language in bold):

> *On the basis of sex* includes, but is not limited to, on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, **sexual orientation,** or gender identity.

The definition of "Sex stereotypes" in § 92.4 should be amended to state (new proposed language in bold):

> *Sex stereotypes* refers to stereotypical notions of gender, including expectations of how an individual represents or communicates gender to others, such as behavior, clothing,

> hairstyles, activities, voice, mannerisms, or body characteristics. These stereotypes can include expectations that gender can only be constructed within two distinct opposite and disconnected forms (masculinity and femininity), and that gender cannot be constructed outside of this gender construct (individuals who identify as neither, both, or as a combination of male and female genders). **These stereotypes also include gendered expectations related to aspects of an individual's sexual orientation, such as the sex of an individual's sexual or romantic partners.**

Finally, **§ 92.209, "Nondiscrimination on the basis of association,"** should be amended to read (new proposed language in bold):

> A covered entity shall not exclude from participation in, deny the benefits of, or otherwise discriminate against an individual or entity in its health programs or activities on the basis of the race, color, national origin, age, disability, or sex of an individual with whom the individual or entity is known or believed to have a relationship or association**, including a same-sex sexual or romantic relationship**.

A. Recent developments in Title IX jurisprudence support the conclusion that discrimination on the basis of same-sex sexual behavior and expression is discrimination on the basis of sex.

Courts and the Departments of Education and Justice have recognized, for many years, that harassment or other discrimination against a student based on the student's failure to conform to gender stereotypes implicates Title IX. Although older cases distinguish between discrimination based on, for instance, a male student's "effeminate" mannerisms, from discrimination based on the student's (actual or perceived) homosexuality, the courts are beginning to understand that the latter as well as the former constitutes discrimination based on sex.

In cases upholding Title IX claims for sex stereotyping on behalf of young people subjected to anti-gay harassment, a number of courts have recognized that the motivation for the harassment was not only the plaintiff's non-conforming mannerisms and presentation, but his or her actual or presumed attraction to the same sex. *E.g., Estate of Brown v. Ogletree,* No. 11-cv-1491, 2012 U.S. Dist. LEXIS 21968, *49-50 (S.D. Tex. Feb. 21, 2012), *modified on other grounds, Estate of Brown v. Cypress Fairbanks Ind. School Dist.,* 863 F.Supp.2d 632; *Riccio v. New Haven Bd. of Educ.*, 467 F. Supp. 2d 219, 226 (D. Conn. 2006); *Schroeder v. Maumee Bd. Of Educ.,* 296 F.Supp.2d 869, 879-80 (N.D. Ohio 2003);

Ray v. Antioch Unified School Dist., 107 F.Supp.2d 1165, 1170 (N.D. Calif. 2000). As these cases and many others document, such harassment usually consists not only of slurs and taunts about the student's mannerisms, but also (and primarily) slurs and taunts about his attraction to other males or her attraction to other females. Harassment based on the student's *sexuality* was harassment based on her or his *sex*. *Estate of Brown,* 2012 U.S. Dist. LEXIS 21968, at *49-50; *Riccio,* 467 F. Supp. 2d at 226; *Schroeder,* 296 F. Supp. 2d at 880; *Ray,* 107 F.Supp.2d at 1170.

The recent case of *Videckis v. Pepperdine Univ.*, No. CV 15-00298 DDP (JCx), 2015 U.S. Dist. LEXIS 51140 (C.D. Cal. April 16, 2015), is particularly instructive. The case was brought by two members of the Pepperdine women's basketball team, who alleged that they had been harassed and forced off the team, in violation of Title IX, because of their lesbian relationship. Their coach "held a team leadership meeting where he … stated that lesbianism was a big concern for him and for women's basketball, that it was a reason why teams lose, and that it would not be tolerated on the team." *Id.* at *3. The plaintiffs initially alleged sexual orientation in their complaint, and Pepperdine moved to dismiss the claim, arguing that "Title IX only bans discrimination based on gender, and not discrimination based on sexual orientation." *Id.* at *18. The plaintiffs moved for leave to amend their pleadings to allege discrimination based on " 'stereotyped gender roles,' which would fall within the bounds of Title IX." *Id.* at *18-19.

The court granted the plaintiffs motion to amend their pleadings, but added that "the line between discrimination based on gender stereotyping and discrimination based on sexual orientation is blurry, at best, and thus a claim that Plaintiffs were discriminated against on the basis of their relationship and their sexual orientation may fall within the bounds of Title IX." *Id.* at *21-22. The court observed: "Recent case law from the Supreme Court and from the Ninth Circuit indicates that the bounds of Title IX may not be so narrow." *Id.* at *19-20 (*citing United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 483 (9th Cir. 2014); *Latta v.*

Otter, 771 F.3d 456, 479-495 (9th Cir. 2014)). Relying on these cases, the court declared that the law of sexual orientation discrimination "is rapidly developing and far from settled insofar as determining where sexual orientation discrimination lies within the framework of gender-based discrimination." 2015 U.S. Dist. LEXIS 51140, at *20.

Specifically, the *Videckis* court observed that in *SmithKline Beecham Corp.*, the Ninth Circuit "interpret[ed] *Windsor* to apply heightened scrutiny to classifications based on sexual orientation discrimination." *Id.* The court further noted that in *Latta*, Judge Berzon, in a concurring opinion, observed that "Idaho and Nevada's same-sex marriage proscriptions are unconstitutional not only because they discriminate on the basis of sexual orientation, but also because they discriminate on the basis of sex since: (1) they facially classify on the basis of gender, and (2) they are based in gender stereotypes." *Id.* The court concluded that these cases "suggest that the distinction between sexual orientation discrimination and sexual discrimination is illusory," because "a policy that female basketball players could only be in relationships with males inherently would seem to discriminate on the basis of gender," since "female players would be prevented from entering into relationships with other females because their chosen partner was female." *Id.* at *20-21. The court concluded that it "would be disinclined to give weight to older . . . cases that make a categorical distinction between gender-based discrimination and sexual orientation discrimination." *Id.* at *21.

B. Recent Title VII cases also support the conclusion that discrimination based on a plaintiff's homosexuality or bisexuality is sex discrimination.

1. The *Baldwin case.*

As the NPRM notes, the EEOC recently concluded that discrimination based on an individual's sexual orientation is necessarily sex-based discrimination under Title VII. *Baldwin v. Foxx*, Appeal No. 0120133080, Agency No. 2012-24738-FAA-03, 2015 EEOPUB LEXIS 1905 (July

16, 2015). In a detailed, careful analysis, the EEOC first noted that its conclusion follows logically from the very notion of disparate treatment because of an individual's sex:

> Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. "Sexual orientation" as a concept cannot be defined or understood without reference to sex. …
>
> Sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex. For example, assume that an employer suspends a lesbian employee for displaying a photo of her female spouse on her desk, but does not suspend a male employee for displaying a photo of his female spouse on his desk. The lesbian employee in that example can allege that her employer took an adverse action against her that the employer would not have taken had she been male. That is a legitimate claim under Title VII that sex was unlawfully taken into account in the adverse employment action.

2015 EEOCPUB LEXIS 1905, at **13-15. Secondly, the EEOC noted:

> Sexual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex. That is, an employee alleging discrimination on the basis of sexual orientation is alleging that his or her employer took his or her sex into account by treating him or her differently for *associating* with a person of the same sex. For example, a gay man who alleges that his employer took an adverse employment action against him because he associated with or dated men states a claim of sex discrimination under Title VII; the fact that the employee is a man instead of a woman motivated the employer's discrimination against him. …
>
> In applying Title VII's prohibition of race discrimination, courts and the Commission have consistently concluded that the statute prohibits discrimination based on an employee's association with a person of another race, such as an interracial marriage or friendship.

Id. at *17 (citations omitted). Lastly, the EEOC observed:

> Sexual orientation discrimination also is sex discrimination because it necessarily involves discrimination based on gender stereotypes. In Price Waterhouse, the Court reaffirmed that Congress intended Title VII to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." In the wake of Price Waterhouse, courts and the Commission have recognized that lesbian, gay, and bisexual individuals can bring claims of gender stereotyping under Title VII if such individuals demonstrate that they were treated adversely because they were viewed--based on their appearance, mannerisms, or conduct--as insufficiently "masculine" or "feminine." But as the Commission and a number of federal courts have concluded in cases dating from 2002

> onwards, discrimination against people who are lesbian, gay, or bisexual on the basis of gender stereotypes often involves far more than assumptions about overt masculine or feminine behavior.
>
> Sexual orientation discrimination and harassment "[are] often, if not always, motivated by a desire to enforce heterosexually defined gender norms." *Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002).* The Centola court continued:
>
> > In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. While one paradigmatic form of stereotyping occurs when co-workers single out an effeminate man for scorn, in fact, the issue is far more complex. The harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks, "real" men should date women, and not other men.
>
> Id.

Baldwin, 2015 EEOCPUB LEXIS 1905, at ** 20-22 (citations and footnotes omitted).

We submit that the EEOC's analysis in *Baldwin* should be followed by the Department in its final Section 1557 rules. All three strands of the *Baldwin* analysis find support in a growing number of federal court decisions under Title VII.

2. Court cases treating discrimination against gay, lesbian or bisexual persons as *per se* sex discrimination.

One way in which courts analyze whether sex discrimination has occurred in Title VII cases is by asking, "would the complaining [plaintiff] have suffered the harassment [or adverse action] had he or she been of a different gender?" *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) (*citing Barnes v. Costle*, 561 F.2d 983, 990 n.55 (DC Cir. 1977)). *See also Jennings v. Univ. of N.C.*, 482 F.3d 686, 723 (4th Cir. 2007) (observing that the same test is applied in Title IX sex discrimination cases). "So long as the plaintiff demonstrates in some manner that he would not have been treated in the same way had he been a woman, he has proven sex discrimination." *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1009 (7th Cir. 1999). Applying this rule, discrimination by a health care provider against, e.g., a male patient because the patient has male sexual partners or a male romantic partner would be sex

discrimination for the simple reason that the patient "would not have been treated the same way," *Bundy*, 641 F.2d at 942 n.7, had he been a female doing the same thing, *Shepherd*, 168 F.3d at 1009.

In *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212 (D. Or. 2002), the plaintiff's supervisor "allegedly became increasingly obsessed with the fact that" the plaintiff, a female employee, "was having an intimate relationship with a woman, and otherwise failing to comport with [the supervisor's] notions of how a woman ought to behave." *Id.* at 1217. The court denied the employer's motion for summary judgment, because terminating the employee on this basis violated Title VII's bar against sex discrimination. *Id.* at 1223-24. The court held that a "jury could find that [the supervisor] would not have acted as she (allegedly) did if Plaintiff were a man dating a woman, instead of a woman dating a woman. If that is so, then Plaintiff was discriminated against because of her gender." *Id.* at 1223.

In *Hall v. BNSF Ry. Co.*, 124 Fair Empl. Prac. Cas. (BNA) 1419, 2014 U.S. Dist. LEXIS 132878 (W.D. Wash. Sept. 22, 2014), the employer had a policy of denying employee benefits to legally married same-sex spouses. "When Mr. Hall married his partner, Elijah Uber, he (Hall) sought health benefits for him (Uber) under his employer's health plan." *Id.* at *2. The "[d]efendant denied coverage on the basis that its plan defined marriage as between one man and one woman and therefore provided coverage only for spouses of the opposite sex." *Id.* at *3. The plaintiff alleged that the employer denied benefits "based solely on the fact [its employee] Michael is male." *Id.* at *7. The plaintiff further alleged that, "[i]f [employee] Michael Hall were female, married to a male, [employer] BNSF would pay him the spousal health coverage benefits as it does to all employees who are female married to male spouses, or males married to female spouses." *Id.*

The defendant moved to dismiss this claim "as a matter of law because Mr. Hall [was] really alleging a claim of discrimination based on his "sexual orientation, not his sex, which cannot be maintained under Title VII." *Id.* at *6. The court denied the defendant's motion, because the

"[p]laintiff allege[d] disparate treatment based on his sex, not his sexual orientation, specifically that he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males." *Id.* at 9 (*citing In re Levenson*, 587 F.3d 925, 929 (9th Cir. 2009) (holding that it was impermissible sex discrimination to deny a federal employee benefits for his same-sex spouse); *Heller v. Columbia Edgewater Country Club*, *supra; Foray v. Bell Atlantic*, 56 F. Supp.2d 327, 329 (S.D.N.Y. 1999) (accepting that a claim of disparate treatment based on benefits to same-sex couples constituted discrimination based on sex)).

3. **Court decisions supporting sexual orientation discrimination as associational sex discrimination.**

In concluding that sexual orientation discrimination is a form of prohibited associational discrimination, the EEOC relied on a well-established line of cases holding that Title VII is violated when an employee is subjected to discriminatory treatment because of the race, national origin or sex of a person with whom he or she is associated. Courts first used this principle in Title VII in cases where an employee was subjected to discrimination because of the race of someone with whom the employee had a relationship. For example, in *Whitney v. Greater New York Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975), the court held that an employer who fired a white employee for having an African-American friend violated Title VII's prohibition against discrimination based on race. In *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986), the Eleventh Circuit held that a white plaintiff had been discriminated against because of race when he was fired for having an African-American wife. Such discrimination is impermissible regardless of the "degree of association," because the test focuses on whether or not discrimination happened due to race, not the nature of the relationship between the plaintiff and the third party. *Drake v. 3M Co.,* 134 F.3d 878, 884 (7th Cir. 1997). Courts have applied the same principle to discrimination based on an associate's national origin. *See, e.g., Reiter v. Ctr. Consol. Sch. Dist.*, 618 F.

Supp. 1458, 1460 (D. Colo. 1985) (holding that discrimination based on a woman's association with Latino persons in general was prohibited by Title VII under the relational discrimination theory). This principle applies even if one is discriminated against because of his or her association with a broad class of people rather than with a particular individual. *See id.* People who are discriminated against because of the race of someone with whom they associate are themselves considered to be a protected class. *See Holcomb v. Iona College*, 521 F.3d 130, 138-39 (2nd Cir. 2008).

This principle also applies to sex discrimination. In *Ventimiglia v. Hustedt Chevrolet,* Civ. No. 05-4149 (DRH) (MLO), 2009 U.S. Dist. LEXIS 24834 (E.D.N.Y. 2009), the court held that firing a man because of his association with a female coworker – which the employer suspected was an intimate relationship – amounted to discrimination because of sex. The firing constituted discrimination under Title VII because, "but for [the employee's] sex, male, his relationship with his co-worker, female, … would not have been an issue." *Id.* at *33.

Very recently, the EEOC's analysis of sexual orientation discrimination as associational sex discrimination was adopted by a federal court in *Isaacs v. Felder Services, LLC,* No. 2:13cv693-MHT, 2015 U.S. Dist. LEXIS 146663 (M.D. Ala. Oct. 29, 2015). The plaintiff in that case alleged that he had been fired (among other reasons) because he was gay and married to another man. Although the court ruled against the plaintiff because of a lack of evidence that discrimination had actually occurred, it declared:

> This court agrees … with the view of the Equal Employment Opportunity Commission that claims of sexual orientation-based discrimination are cognizable under Title VII. In [Baldwin v. Foxx], the Commission explains persuasively why "an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." Particularly compelling is its reliance on Eleventh Circuit precedent:
>
> > "Title VII ... prohibits employers from treating an employee or applicant differently than other employees or applicants based on the fact that such individuals are in a same-sex marriage or because the employee has [or is interested in having] a personal association with someone of a particular sex. Adverse action on that basis is, 'by definition,' discrimination because of the

> employee or applicant's sex. Cf. *Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986)* ('Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race [in violation of Title VII].')."

See also Andrew Koppelman, "Why Discrimination Against Lesbians and Gay Men is Sex Discrimination," *69 N.Y.U. L. Rev. 197, 208 (1994)* ("If a business fires Ricky ... because of his sexual activities with Fred, while th[is] action[] would not have been taken against Lucy if she did exactly the same things with Fred, then Ricky is being discriminated against because of his sex.").

Isaacs v. Felder Services, 2015 U.S. Dist. LEXIS 146663, **8-10. [3]

4. Court decisions allowing Title VII claims for same-sex discrimination based on a gender stereotype theory.

In the very recent case of *Isaacs v. Felder Services, supra,* the District Court also endorsed the EEOC's sex-stereotyping theory of sexual orientation discrimination:

> To the extent that sexual orientation discrimination occurs not because of the targeted individual's romantic or sexual attraction to or involvement with people of the same sex, but rather based on her or his perceived deviations from "heterosexually defined gender norms," this, too, is sex discrimination, of the gender-stereotyping variety. [*Baldwin*]; see also *Latta v. Otter, 771 F.3d 456, 486 (9th Cir. 2014)* (Berzon, J., concurring) ("The notion underlying the Supreme Court's anti-stereotyping doctrine in both *Fourteenth Amendment* and Title VII cases is simple, but compelling: '[n]obody should be forced into a predetermined role on account of sex,' or punished for failing to conform to prescriptive expectations of what behavior is appropriate for one's gender. See Ruth Bader Ginsburg, 'Gender and the Constitution,' 44 U. Cin. L. Rev. 1, 1 (1975). In other words, laws [and employment practices] that give effect to 'pervasive sex-role stereotype[s]' about the behavior appropriate for men and women are damaging because they restrict individual choices by punishing those men and women who do not fit the stereotyped mold. *Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 738, 123 S. Ct. 1972, 155 L. Ed. 2d 953 (2003).*").

Isaacs v. Felder Services, 2015 U.S. Dist. LEXIS 146663, at *10.

In *Deneffe v. SkyWest, Inc.*, No. 14-cv-00348-MEH, 2015 U.S. Dist. LEXIS 62019 (D. Colo. May 11, 2015), the plaintiff alleged that he did not fit his colleagues' stereotype of a male because:

"(1) he did not take part in male braggodicio about sexual exploits with women as the other male

[3] For a detailed discussion of the Title VII relationship cases, and their applicability to discrimination based on sexual orientation, *see* Victoria Schwartz, TITLE VII: A SHIFT FROM SEX TO RELATIONSHIPS, 35 Harv. J. Law & Gender 209, 246-58 (2012).

pilots did; (2) he did not joke about gays as other male pilots did, (3) he submitted paperwork to SkyWest designating his male domestic partner for flight privileges, a benefit offered only for family members and domestic partners; and (4) he traveled on SkyWest flights with his domestic partner." 2015 U.S. Dist. LEXIS 62019, at *15-16. He alleged that he suffered persistent harassment and an adverse job reference as a result. Though it was simply homosexual behavior that allegedly motivated the adverse treatment – not his appearance or physical mannerisms – the court held that he had stated a claim under Title VII of discrimination for "failure to conform to male stereotypes." *Id.* (*citing E.E.O.C. v. Boh Bros. Constr. Co.*, L.L.C., 731 F.3d 444, 456 (5th Cir. 2013) (permitting the plaintiff to rely on evidence that a supervisor viewed the claimant as "insufficiently masculine" to prove a Title VII claim). This case illustrates how some federal courts have found that the "line between discrimination based upon sexual orientation [and sex stereotyping] is difficult to draw and … some of the complained of conduct [may fit] within both rubrics." *Stewart v. Keystone Real Estate Grp. LP*, No. 4:14-CV-1050, 2015 U.S. Dist. LEXIS 40912, at *7-8 (M.D. Pa. Mar. 31, 2015) (*quoting Kay v. Independence Blue Cross*, 142 Fed. App'x 48, 51 (3d Cir. 2005) (Rendell, J., concurring).

Similarly, in *Terveer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014), the plaintiff "alleged that he is 'a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles,' . . . that his 'status as a homosexual male did not conform to the Defendant's gender stereotypes associated with men under [his supervisor]'s supervision or at the [place of employment,' . . . and that 'his orientation as homosexual had removed him from [his supervisor's preconceived definition of male.' " 34 F. Supp. 3d at 116 (*quoting* the plaintiff's complaint). The employer moved to dismiss on grounds that "courts have generally required plaintiffs [alleging sex stereotyping] to set forth specific allegations regarding the particular ways in which an employee failed to conform to such stereotypes," stating how a "supervisor's conduct was motivated by judgments about plaintiff's behavior, demeanor or appearance." *Id.* at 115. The court

denied the defendant's motion, holding that even though the plaintiff did not claim discrimination based on his "demeanor or appearance," *id.*, he had sufficiently "alleged that Defendant denied him promotions and created a hostile work environment because of Plaintiff's nonconformity with male sex stereotypes," *id.* at 116, i.e., his homosexuality.

The court in *Boutillier v. Hartford Pub. Sch.*, No. 3:13cv1303 (WWE), 2014 U.S. Dist. LEXIS 134919, at *4 (D. Conn. Sept. 25, 2014), also applied the sex stereotype theory broadly to encompass "non-conforming gender behavior" beyond simply a plaintiff's physical presentation or mannerisms. In that case, the plaintiff claimed "that … discriminatory conduct commenced after certain individuals [on the job] became aware of her sexual orientation and that she was subjected to sexual stereotyping during her employment on the basis of her sexual orientation." *Id.* at *3-4. The court denied the defendant's motion to dismiss, holding that, "[c]onstrued most broadly, [the plaintiff] has set forth a plausible claim [under Title VII that] she was discriminated against based on her non-conforming gender behavior." *Id.* at *4. *See also Heller*, 195 F. Supp. 2d at 1224 ("a jury could find that [the supervisor] repeatedly harassed (and ultimately discharged) [the employee] because [the employee] did not conform to [the supervisor's] stereotype of how a woman ought to behave," i.e., that "a woman should be attracted to and date only men"); *Koren v. Ohio Bell Telephone Co.*, 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012) (holding that discrimination against employee because of behavior arising out of his same-sex marriage constituted impermissible gender stereotype discrimination); *Roadcloud v. City of Phila.*, No. 121 Fair Empl. Prac. Cas. (BNA) 550, 2014 U.S. Dist. LEXIS 769, at *10 (E.D. Pa. Jan. 6, 2014) (holding that harassment of lesbian employee for "signs of sexual conduct" off the job constituted impermissible sex discrimination based on gender stereotyping).

C. Court rulings that discrimination based on sexual orientation is not sex discrimination are conclusory or based on unsound reasoning.

The NPRM expresses concern that "[t]o date, no Federal appellate court has concluded that Title IX's prohibition of discrimination 'on the basis of sex' – or Federal laws prohibiting sex discrimination more generally – prohibits sexual orientation discrimination, and some appellate courts previously reached the opposite conclusion." 80 Fed. Reg. at 54176 (footnote omitted). We respectfully submit that none of the adverse rulings of the Courts of Appeals are persuasively reasoned.

As the EEOC recently observed, many cases in which the courts have declared that sexual orientation discrimination is not sex discrimination under title VII, or Title IX, simply are conclusory, or rely on a tautology:

> [M]any courts have gone to great lengths to distinguish adverse employment actions based on "sex" from adverse employment actions based on "sexual orientation." The stated justification for such intricate parsing of language has been the bare conclusion that "Title VII does not prohibit . . . discrimination because of sexual orientation." *Dawson v. Bumble & Bumble, 398 F.3d 211, 217 (2d Cir. 2005)* (quoting *Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000)).*

Baldwin, 2015 EEOPUB LEXIS 1905, at *24. Some adverse decisions by Courts of Appeals relied on circular reasoning. They rejected arguments by gay plaintiffs that discrimination against homosexuals was sex discrimination within the meaning of *Price Waterhouse,* because the discrimination was based on the fact that same-sex attraction and sexual activity violated sex stereotypes. The courts' reasoning was that such an argument, if accepted, would "bootstrap" sexual orientation discrimination into Title VII. *Vickers v. Fairfield Medical Center,* 453 F.3d 757, 763-65 (6th Cir. 2006), *cert. denied,* 551 U.S. 1104 (2007); *Kiley v. American Soc. for the Prev. of the Cruelty to Animals,* 296 F. Appx. 107, 110 (2d Cir. 2008), *cert. denied,* 558 U.S. 934 (2009). In other words, the plaintiffs could not succeed because Title VII does not cover anti-gay discrimination.

Some if not most of the adverse precedents reason that when the statutes were enacted decades ago, Congress was intending to outlaw "discrimination against women because they are women and against men because they are men …. In other words, Congress intended the term 'sex' to mean 'biological male or biological female,' not one's sexuality or sexual orientation." *Spearman v. Ford Motor Co.,* 231 F.3d 1080, 1084 (7th Cir. 2000), *cert. denied,* 532 U.S. 995 (2001), *citing and quoting Ulane v. Eastern Airlines, Inc.,* 742 F.2d 1081, 1085 (7th Cir. 1984). As the EEOC notes in *Baldwin,* 2015 EEOPUB LEXIS 1905, at *25, this reasoning does not survive the Supreme Court's ruling in *Oncale* that although Congress very likely was not thinking of male-on-male sexual harassment when Title VII was enacted, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." 523 U.S. at 79-80.

The *Spearman/Ulane* analysis of Title VII also is inconsistent with *Price Waterhouse.* If Title VII's prohibition against sex discrimination went no further than "discrimination against women because they are women and against men because they are men," *Spearman,* 231 F.3d at 1084, there would have been no basis for the plaintiff's claim in *Price Waterhouse:* she was discriminated against not because she was a woman, but because she was a woman who did not meet the stereotypes in the firm's partners' minds of how a woman should act. Just as *Oncale* teaches that the meaning of Title VII (and Title IX) lies in the actual words of the statute, not in the minds of the members of Congress when they voted for the law, so *Price Waterhouse* teaches that sex discrimination extends much further than simply preferring "biological men" over "biological women."

Finally, several of the Courts of Appeals have reasoned that Congress has, to date, rejected attempts to amend Title VII to include sexual orientation as an express protected group. *Kiley v. American Soc. for the Prev. of the Cruelty to Animals,* 296 F. Appx. At 109; *Medina v. Income Support Div.,* 413 F.3d 1131, 1135 (10th Cir. 2005); *Bibby v. Philadelphia Coca Cola Bottling Co.,* 260 F.3d 257, 261 (3d

Cir. 2001), *cert. denied,* 534 U.S. 1155 (2002). The EEOC's response to this argument is particularly instructive (2015 EEOPUB LEXIS 1905, at **27-29):

> [T]he Supreme Court has ruled that "[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990)* (citation omitted) (internal quotation marks omitted). The idea that congressional action is required (and inaction is therefore instructive in part) rests on the notion that protection against sexual orientation discrimination under Title VII would create a new class of covered persons. But analogous case law confirms this is not true. When courts held that Title VII protected persons who were discriminated against because of their relationships with persons of another race, the courts did not thereby create a new protected class of "people in interracial relationships." See, e.g., *Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 588-89 (5th Cir. 1998),* reinstated in relevant part, *Williams v. Wal-Mart Stores, Inc., 182 F.3d 333 (5th Cir. 1999)* (en banc). And when the Supreme Court decided that Title VII protected persons discriminated against because of gender stereotypes held by an employer, it did not thereby create a new protected class of "masculine women." See *Price Waterhouse, 490 U.S. at 239-40* (plurality opinion). Similarly, when ruling under Title VII that discrimination against an employee because he lacks religious beliefs is religious discrimination, the courts did not thereby create a new Title VII basis of "non-believers." See, e.g., *EEOC v. Townley Eng'g & Mfg. Co., 859 F. 2d. 610, 621 (9th Cir. 1988).* These courts simply applied existing Title VII principles on race, sex, and religious discrimination to these situations. Further, the Supreme Court was not dissuaded by the absence of the word "mothers" in Title VII when it decided that the statute does not permit an employer to have one hiring policy for women with pre-school children and another for men with pre-school children. See *Phillips v. Martin-Marietta, 400 U.S. 542, 543-44 (1971)* (per curiam). The courts have gone where the principles of Title VII have directed.

D. Conclusion

In construing the prohibitions against sex discrimination in Title IX and in Title VII of the Civil Rights Act of 1964, the courts and the federal agencies charged with interpreting and enforcing these statutes have noted that the statutory language is broad. In drafting the laws prohibiting sex discrimination, Congress did not "enumerate specific discriminatory practices," but instead drafted terms that are "unconstrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow." *Barnes v. Costle*, 561 F.2d 983, 994 (D.C. Cir. 1977) (*quoting Rogers v. EEOC*, 454 F.2d 234, 238 (5th

Cir. 1971)). The clear trend in Title IX and Title VII jurisprudence is toward recognizing protection for discrimination based on same-sex sexual behavior and expression. The regulations implementing Section 1557 should reflect this clear movement, critical to realizing the promise of the Affordable Care Act.

IV. The Proposed Rules Addressing Disability Discrimination in Health Insurance Need to Be Clarified

We applaud the NPRM's recognition that a health plan may engage in impermissible discrimination indirectly, for instance, through a plan design that treats persons with a certain disability adversely by imposing additional costs or barriers to treatment that are specific to that disability. 80 Fed. Reg. at 54189. There is evidence that some insurers are attempting to use discriminatory plan designs such as drug pricing tiers, unreasonable pre-authorization requirements, and other measures to discourage persons with certain disabilities from enrolling. For instance, there is evidence that some insurance companies in a number of states assigned HIV drugs to the highest co-payment "tier" – higher than the "tiers" for other, non-HIV drugs of comparable or even higher cost, with the effect of discouraging people with HIV from enrolling in those plans. Douglas B. Jacobs and Benjamin D. Sommers, USING DRUGS TO DISCRIMINATE — ADVERSE SELECTION IN THE INSURANCE MARKETPLACE, N. Eng. J. Med. 372:5 (2015), 399-402-.[4] A recent study of 84 health plans reveled that many of them placed medications commonly used to treat mental illness in the highest cost tier, and/or imposed special restrictions on access for those drugs. National Alliance on Mental Illness, A LONG ROAD AHEAD: ACHIEVING TRUE PARITY IN MENTAL HEALTH AND SUBSTANCE USE CARE (April 2015), *available at* http://www.nami.org/parityreport.

[4] We understand that this practice, by several insurance companies in Florida, is the subject of a pending complaint at the Department's Office for Civil Rights.

We request, therefore, that the proposed **§ 92.207(b)(2)** be modified as follows (additional text in bold):

> (b) Discriminatory actions prohibited. A covered entity shall not, in providing or administering health-related insurance or other health-related coverage:
>
> * * *
>
> (2) Employ marketing practices or benefit designs that discriminate on the basis of race, color, national origin, sex, age, or disability in a health-related insurance plan or policy, or other health-related coverage**, including but not limited to assigning drugs associated with a disability to a higher co-payment tier, or imposing pre-authorization or other restrictions on access on treatments associated with a disability, without a cost or clinical basis.**

V. There is No Need or Legal Basis for the Section 1557 Rules to Provide Exemptions Based on Alleged Burdens on Religious Exercise

The NPRM requests comments on what, if any, exemptions should be recognized in the final nondiscrimination rules for "sincerely held religious beliefs to the extent that those beliefs conflict with the provisions of the regulation." 80 Fed. Reg. at 54173. Whitman-Walker submits that the statute does not authorize creation of any religiously-based licenses to discriminate other than the exemptions that are specifically provided in the text of the ACA. Section 1557 promulgates a sweeping proscription of health care discrimination, "[e]xcept as otherwise provided for in this title (or an amendment made by this title)" – i.e., except as specifically provided in the ACA itself. 42 U.S.C. § 18116.

As the Department notes, *id.,* the ACA expressly states that no individual or entity is required to participate in or provide coverage for abortion, 42 U.S.C. § 18023(b)(4), and also provides that all "conscience exemptions" under other federal laws remain in effect, § 18023(c)(2).[5] These conscience exemptions are specific rather than broad in their scope: they apply to abortion

[5] *See also* Executive Order 13535, "Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act" (March 24, 2010), *available at* https://www.whitehouse.gov/the-press-office/executive-order-patient-protection-and-affordable-care-acts-consistency-with-longst.

and sterilization procedures;[6] insulate individuals in HHS-funded health service and research programs from participating in activities to which they have religious or moral objections;[7] permit Medicare Choice and Medicaid Managed Care Plans from providing or paying for counseling or referral services to which they object on religious or moral grounds;[8] and provide that Federal Employee Health Benefit plans and providers are not required to discuss treatment options to which they object.[9] During consideration of the ACA, the Senate rejected an amendment, proposed by Senator Brownback, which would have authorized individual and institutional health care providers, and health plans and insurance issuers, to refuse to provide or cover services as to which they had moral or religious objections. 155 Cong. Rec. S13,192-93 (Dec. 14, 2009) (SA 3201, introduced and tabled).

Three of the civil rights statutes incorporated into Section 1557 – Title VI (race, color, national origin); the Age Discrimination Act of 1975 (age); Section 504 of the Rehabilitation Act (disability) – contain no religion-based exemptions. Title IX does contain an exemption for "[an] educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization."[10] However, we

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[6] *E.g.,* the Church Amendments, 42 U.S.C. § 300a-7(b), (c) & (e); the Coates Amendment to the Public Health Services Act, 42 U.S.C. § 238n; the Weldon Amendment (Abortion Non-Discrimination Act), Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113235, § 507(d), 128 Stat. 2130, 2515 (2014).

[7] The Church Amendments, 42 U.S.C. § 300a-7(d).

[8] 42 U.S.C. § 1395w-22(j)(3)(B) (Medicare Choice plans); 42 U.S.C. § 1396u-2(b)(3)(B) (Medicaid Managed Care Organizations).

[9] 48 C.F.R. §1609.7001 (c)(7).

[10] 20 USC § 1681(a)(3). *See* the Department of Education's implementing regulations, 34 CFR § 106.12, and the Department of Justice's Title IX Legal Manual, http://www.justice.gov/crt/about/cor/coord/ixlegal.php.

submit that Section 1557 does not contemplate incorporation of the exemptions and limitations in Title IX – a statute applying to educational institutions – into the obligation not to discriminate in health care. The Department has recognized that many of the exemptions in Title IX, which were designed with educational institutions and programs in mind, are not applicable to health care and should not be incorporated into Section 1557 and its implementing regulations. 80 Fed. Reg. at 54173. We agree, and maintain that Title IX's exemption for religiously-controlled educational institutions and programs also should not apply to health care.

By its express terms, the religious exemption in the text of Title IX applies only to educational institutions and educational programs, not to health care providers or health plans. The intent of the Title IX exemption is to protect religiously-controlled *educational* institutions and programs from requirements that violate their religious tenets: for instance, religious schools that believe that only men can be priests, rabbis or ministers are not required to admit women to training programs for the priesthood, rabbinate or ministry; a religious school whose tenets oppose sex outside of marriage can discriminate against unmarried pregnant students; religious schools based on certain tenets can limit female-male interactions in athletic programs, gymnasiums and swimming pools; and several religious schools have obtained exemptions under Title IX from requirements not to discriminate against transgender students in student housing, locker rooms and restroom facilities. Such exemptions are very different from an exemption that would allow a health care provider, health care center or hospital, or health plan to discriminate against patients or plan members on the basis of sex. Moreover, Section 1557's express incorporation of "[t]he enforcement mechanisms provided for and available under … title IX," 42 U.S.C. § 18116(a), reinforces the conclusion that Congress did not intend to incorporate the Title IX religious exemption, which is not mentioned.[11]

[11] Both Title IX and Section 504 of the Rehabilitation Act expressly incorporate the enforcement mechanisms of Title VI. However, the Supreme Court rejected arguments that this language incorporated Title VI's limitations on coverage of employment discrimination into Title IX and

As the NPRM notes:

> One of the central aims of the ACA is to expand access to health care and health coverage for all individuals. Equal access for all individuals without discrimination is essential to achieving this goal. Discrimination in the health care context can often lead to poor and inadequate health care or health insurance or other coverage for individuals and exacerbate existing health disparities in underserved communities.

80 Fed. Reg. at 54194. As noted in Part I above, discrimination against LGBT individuals and families by health care providers and in health insurance coverage has very serious, harmful consequences. Religiously-affiliated hospitals and health care systems occupy a large and growing percentage of health care markets, [12] and providing a broad exemption from Section 1557's proscription of sex discrimination by such institutions would threaten the health of increasing numbers of Americans.

Moreover, incorporating Title IX's exemption for religiously-controlled institutions and programs into Section 1557 would result in a strikingly imbalanced rule, since Title VI, the Age Discrimination Act, and Section 504 of the Rehabilitation Act contain no such exemption. Such an interpretation of Section 1557 would allow for discrimination in the case of sex that would be prohibited for race, color, national origin, disability and age. In addition, the Department would need to promulgate and administer regulations governing how a health care provider, institution or plan would apply for a religious authorization to discriminate on the basis of sex, and how such applications would be reviewed and decided. *See* 34 C.F.R. § 106.12 (regulations of the Department of Education); U.S. Department of Justice, *Title IX Legal Manual,*

Section 504, because such incorporation would have been inconsistent with the intent of those statutes. *North Haven Board of Education v. Bell,* 456 U.S. 512 (1982) (Title IX); *Consolidated Rail Corp. v. Darrone,* 465 U.S, 624 (1984) (Section 504).

[12] *See, e.g.,* Elizabeth B. Deutsch, EXPANDING CONSCIENCE, SHRINKING CARE: THE CRISIS IN ACCESS TO REPRODUCTIVE CARE AND THE AFFORDABLE CARE ACT'S NONDISCRIMINATION MANDATE, 124 Yale L.J. 2470, 2484-89 (2015); Douglas Nejamie and Reva B. Siegel, CONSCIENCE WARS: COMPLICITY-BASED CONSCIENCE CLAIMS IN RELIGION AND POLITICS, 124 Yale Law J. 2516, 2556-57 (2015)

http://www.justice.gov/crt/about/cor/coord/ixlegal.php. This would frustrate the Department's goal "to simplify and make uniform, consistent, and easy to understand the various nondiscrimination requirements and rights available under Section 1557," 80 Fed. Reg. at 54194.[13]

VI. The Proposed Language Access Rules Are Reasonable and Greatly Needed

Ensuring that our health services are fully accessible to persons with limited English proficiency, and that our health care providers and other staff are able to communicate fully with all of our patients, is critical to Whitman-Walker's mission. Approximately 10% of our patients have limited proficiency in English and need interpreter services. Over the past several years we have devoted considerable time and attention to developing and implementing a language access plan and training all staff in the details of that plan. The language access rules and guidelines proposed in the NPRM are consistent with our approach, and we applaud the Department for taking this important step to realize Section 1557's promise for persons with limited English proficiency due to their (or their families') national origin.

The NPRM's proposal to provide health care institutions and providers with substantial flexibility, taking into account patient mix, operational realities, size, costs, and other considerations, while holding them accountable for results, is wise. In our experience, many health care centers that serve large lower-income populations with always-limited funds will experience substantial

[13] As noted in the NPRM (80 Fed. Reg. 54173), Section 1557 does not displace the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA"). That statute provides that a federal law, even a law of general applicability, cannot "substantially burden a person's exercise of religion" unless "that application of the burden to the person … is in furtherance of a compelling governmental interest, and … is the least restrictive means of furthering that governmental interest." 42 U.S.C. § 2000bb-1. Challenges to Section 1557 under RFRA, by individuals or institutions claiming an impermissible burden on their religious exercise, should not succeed, because there is a compelling public interest in eliminating health care discrimination on the basis of sex, disability, race, color, national origin and age – 80 Fed. Reg. at 54194 – and that compelling interest would be undercut by exemptions that allow such discrimination to continue. *See Burwell v. Hobby Lobby Stores, Inc.,* 134 S. Ct. 2751, 2783 (2014) (noting that a challenge to federal laws prohibiting race discrimination in employment should not succeed under RFRA because "prohibitions on racial discrimination are precisely tailored to achieve [the] critical goal [of eliminating race discrimination]")

challenges in reaching the goal of full language transparency, and rigid requirements that may be economically and operationally unfeasible would be counterproductive.

We particularly applaud the NPRM's approach to interpreters in patient-provider encounters and communications. As the Department recognizes, when a provider is not fully conversant in the patient's language (many of our providers are proficient in Spanish, and several are proficient in French), reliance on a patient's friend or family member to interpret raises considerable problems. It is difficult to protect the patient's confidentiality, and full and frank communications on sensitive matters may be inhibited. Whitman-Walker's language access policy relies on trained, certified interpreters whenever possible; we discourage reliance even on other staff who may speak the language in question unless the staff member has been fully trained as an interpreter. Consistent with the proposed rules, the patient's informed decision controls, and no patient is required to use an interpreter if she or he objects.

The NPRM asks whether the Department should require health care institutions and providers to develop language access plans. We certainly believe that such plans should be encouraged. We recommend that a plan include:

- The languages for which in-person interpreter services are available, what vendors are used, and how much notice is needed for orders and for cancellations.
- The languages for which telephone and online interpreter services are available, what vendors are used, and how much notice is needed for orders and for cancellations.
- Which standard medical documents should be translated, and into which languages, and vendors to be used.
- Procedures for obtaining translation of patient-specific documents (e.g., prescription drug instructions, any other instructions that the provider wants to patient to have, appointment reminders)
- Requirements for testing the language proficiency of bilingual staff.

In addition, the language access plan should be reviewed and updated regularly (at least annually).

VII. The Department's Rules Under Section 1557 Should Apply to All Federal Agencies and to the Health Programs and Activities of All Recipients of Federal Financial Assistance

In Section 1557, Congress delegated to the Department the authority to "promulgate regulations to implement this section" – i.e., Section 1557 as a whole. 42 U.S.C. § 18116(c). The proposed rules, however, are limited to entities and programs receiving financial assistance *from the Department,* and health programs and activities *administered by the Department* (or ACA Title I entities). Proposed § 92.2. We respectfully urge the Department to extend the final rules to all agencies and recipients of federal financial assistance subject to Section 1557. Limitations on the full reach of the final regulations would thwart the promise of Section 1557 and leave too many Americans subject to the threat of health care discrimination without an effective remedy. In particular, the Department of Veterans Affairs provides health care to 8.76 million veterans each year.[14] There is no sound basis in law or policy not to apply these regulations to that agency's own activities and those of its grantees.

[14] Department of Veterans Affairs, "Providing Health Care for Veterans," http://www.va.gov/health.

CONCLUSION

Whitman-Walker Health urges the Department to expeditiously issue its proposed rules as a Final Rule, with the additions and modifications explained above.

Respectfully submitted,

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