NATIONAL HEALTH LAW PROGRAM

# *Protections for LGBTQ People with Behavioral Health Needs*

*By Abbi Coursolle and Rachel Holtzman*

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> *"The therapy to help with my PTSD was actually quite good and helped long term … However, I was constantly misgendered … I received greater support from other patients regarding my transition than I got from my therapists."*
> – Heather, transgender woman, quote from mentalhelp.net[1]

Access to behavioral health services is critical for lesbian, gay, bisexual, transgender and queer (LGBTQ) individuals in the United States.[2] There are more than 5.5 million LGBTQ people living in the United States.[3] Although our country has made great strides to protect the rights of LGBTQ people in the past few decades, many LGBTQ individuals continue to experience the negative impact of societal bigotry and discrimination.[4]

Unfortunately, the discrimination and stigma faced by LGBTQ people places them at a higher risk for behavioral health conditions, including mental health conditions and substance use Disorders (SUDs), than non-LGBTQ people.[5] Yet too often, seeking health care services, including treatment for their behavioral health conditions, puts LGBTQ people at risk of

* Many thanks to Craig Ismaili, 2L at Washington University, for his research and citation assistance with this paper.

[1] Mentalhelp.net, *Mental Health in the LGBT Community*, https://www.mentalhelp.net/mental-health-in-the-lgbt-community (last visited Mar. 19, 2019).

[2] There is no single definition for the LGBTQ community. The term LGBTQ encompasses sexual orientation, gender identity, and gender expression. People may consider themselves part of the community as a result of their attractions, behaviors, or overall identities. While some individuals may identify with a binary identity, others feel that their identity is less binary. When referring to gender identity, some individuals may identify as cisgender (when their gender identity aligns with the sex they were assigned at birth) or transgender (when their gender identity is different from the sex they were assigned at birth), while others identify as non-binary, gender non-conforming, genderqueer, or in another way. Further, some individuals experience fluidity in their identities. The term "LGBTQ" is used to represent the wide range of diverse sexualities, gender identities and gender expressions that exist along a spectrum.

[3] Jen Kates et al., Kaiser Family Found., *Health and Access to Care and Coverage for Lesbian, Gay, Bisexual, and Transgender Individuals in the U.S.* 3 (2018), http://files.kff.org/attachment/Issue-Brief-Health-and-Access-to-Care-and-Coverage-for-LGBT-Individuals-in-the-US.

[4] Although LGBTQ identities can largely influence someone's life, no identity exists in isolation. Instead, LGBTQ individuals live multi-dimensional lives, and often find that their identities interact with each other along racial, ethnic, and socioeconomic lines, as well as other factors such as age, immigrant status, ability status and rurality of residence. While this issue brief notes trends in the behavioral health needs and experiences of LGBTQ people, every individual's intersecting identities contribute to unique experiences that cannot be captured in an issue brief. For example, some LGBTQ individuals experience additional discrimination and prejudice based on their race, gender, disabilities, or other identities. *See, e.g.,* Nat'l LGBT Health Education Ctr., *Understanding the Health Needs of LGBT People* (2016), https://www.lgbthealtheducation.org/wp-content/uploads/LGBTHealthDisparitiesMar2016.pdf.

[5] Stephen E. Gilman et al., *Risk of Psychiatric Disorders Among Individuals Reporting Same-Sex Sexual Partners in the National Comorbidity Survey*, 91 AMER. J. OF PUB. HEALTH 933 (2001), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1446471/pdf/11392937.pdf.

experiencing discrimination or stigma, which can exacerbate their behavioral health conditions.[6]

The Affordable Care Act (ACA) put into place three key provisions that can help address the needs of LGBTQ individuals with behavioral health conditions:

- it provided more health coverage options, including expanded Medicaid;
- it prohibited health care discrimination on the basis of sexual orientation and gender identity; and
- it required most plans, including Medicaid plans, to provide behavioral health services in parity with medical and surgical benefits.

These provisions, now under attack by the Trump administration through efforts discussed below, are critical to supporting low-income LGBTQ people in obtaining the behavioral health services they need.

**Background: LGBTQ People Have an Increased Risk of Behavioral Health Conditions, Especially People who also Experience Other Forms of Discrimination and Stigma**

According to national data by the Substance Abuse and Mental Health Services Administration (SAMHSA), the LGBTQ community faces disproportionately high rates of behavioral health conditions, including both mental health conditions and substance use disorders.[7]

***The Particular Manifestations of Discrimination and Stigma are Correlated with Increased Behavioral Health Conditions Among LGBTQ People***

Much of the increased rates of behavioral health conditions experienced by the LGBTQ community is correlated with interpersonal, institutional and structural discrimination. Decades of research shows that individual and chronic experiences of discrimination lead to an increased risk of developing mental health conditions and substance use disorders, both by the individual who experienced discrimination as well as other members of their community who experience a spillover effect when the psychological effects of an event affect more people than just those who personally experienced that event.[8] While trends exist across groups, discrimination is very complex. It is therefore instructive to look at the specific forms of discrimination faced by various sub-groups within the broader LGBTQ community, as well as

[6] David J. Lick et al., *Minority Stress and Physical Health Among Sexual Minorities*, 8 PERSPECTIVES ON PSYCHOLOGICAL SCI. 521, 528, 535-36 (2013), http://www.sscnet.ucla.edu/comm/kjohnson/Lab/Publications_files/LickDursoJohnson.pdf.

[7] Grace Medley et al., SAMHSA, *Sexual Orientation and Estimates of Adult Substance Use and Mental Health: Results from the 2015 National Survey on Drug Use and Health* (2016), https://www.samhsa.gov/data/sites/default/files/NSDUH-SexualOrientation-2015/NSDUH-SexualOrientation-2015/NSDUH-SexualOrientation-2015.htm.

[8] Dan Gordon, *Discrimination can be harmful to your mental health,* UCLA (Jan. 13, 2016), http://newsroom.ucla.edu/stories/discrimination-can-be-harmful-to-your-mental-health.

the effect that discrimination has on the specific behavioral health needs of those respective sub-groups.

For example, transgender individuals experience disproportionate rates of psychological distress and other mental health conditions than their cisgender peers. Transgender individuals experience various barriers to seeking mental health services, including inability to pay for the cost of treatment, previous negative experiences seeking health care, and fear around mistreatment and stigma.[9] For example, in one survey, one in five transgender individuals reported that health care providers had blamed them for their health status.[10] Transgender people also face disproportionate rates of mistreatment, violence, and other forms of discrimination across education, employment, health, and the criminal justice system.[11] Consequently, the rates of serious psychological distress and suicidality among transgender people that are eight and nine times that of the general U.S. population, respectively.[12] Further, transgender people have used illicit drugs, nonmedical prescription drugs, and marijuana at rates three times higher than the general population.[13] LGBTQ people, however, have also expressed concern that there is not enough SUD treatment for transgender individuals.[14] Advocates working with transgender people must therefore be mindful of the role of discrimination on the behavioral health needs of transgender individuals, and must work to ensure spaces are inclusive of transgender identities, including ensuring the proper use of pronouns to not misgender the client, using clients' chosen names, and avoiding placing blame on the individual for their health status.

Similarly, LGBTQ people of color face a disproportionate amount of discrimination. Racial discrimination in patient-physician relationships lead to racial disparities in the quality of care that people of color receive.[15] Meanwhile, discrimination against LGBTQ individuals leads to significant minority stress among LGBTQ people. The combination of the two means LGBTQ people of color experience intersectional discrimination, based upon their LGBTQ identity as well as their racial or ethnic identity. This discrimination can result in mental health conditions. One recent survey found that serious psychological distress was experienced by 45 percent of

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[9] Jillian C. Shipherd et al., *Transgender Clients: Identifying and Minimizing Barriers to Mental health Treatment*, 14 J. GAY & LESBIAN MENTAL HEALTH 94 (2010).
[10] Lambda Legal, *When Health Care Isn't Caring* 11 (2014), https://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf.
[11] Sandy E. James, Nat'l Ctr. for Transgender Equal., *The Report of the 2015 U.S. Transgender Survey* (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf.
[12] *Id*. at 5.
[13] *Id*. at 113.
[14] Lambda Legal, *supra* note 10, at 11.
[15] Somnath Saha et al., *Patient-Physician Relationships and Racial Disparities in the Quality of Health Care*, 93 AM. J. PUB. HEALTH 1713 (2003).

Latinx transgender women respondents, and 41 percent of Black transgender women respondents.[16] Transgender and non-binary people of color have similarly high rates of suicidality, with 45 percent of Latinx transgender women, and 47 percent of Black transgender women, having attempted suicide at least once.[17] Advocates for LGBTQ people of color must +work in a way that acknowledges the effects of racism on the behavioral health needs of their clients.

In addition, LGBTQ people with HIV have an increased risk for behavioral health conditions. In the U.S, gay and bisexual men are the population most affected by HIV, accounting for two-thirds of new HIV diagnoses in the United States in 2016.[18] Being HIV positive can affect the mental health of gay and bisexual men who are living with HIV, and concerns about HIV status may also impact the mental health of those who are HIV negative but at high risk, and those whose loved ones have HIV or have died from HIV.[19] Among the most common mental health conditions among all people living with HIV is depression.[20] More broadly, an estimated one to 24 percent of people living with HIV have a serious mental illness, which is much higher than the rate among people without HIV, and these individuals are also frequently diagnosed with a substance use disorder.[21]Although access to anti-retroviral treatment and routine medical care can prevent many of the opportunistic infections that may otherwise threaten the lives of people living with HIV, and also prevent HIV transmission, the condition remains highly stigmatized. A recent study found that HIV stigma is associated with depressive symptoms and alcohol use among people living with HIV.[22] Together, the compounding stigma of HIV status and mental illness acts as one of the largest barriers to care for people living with HIV.[23] Further, socialized stigma leads many LGBTQ people who lost friends and loved ones to AIDS to feel a sense of disenfranchised grief – the feeling that one cannot openly express their grief

[16] Sandy E. James & Bamby Salcedo, Nt'l Ctr. for Transgender Equal., *2015 Transgender Survey: Report on the Experiences of Latino/a Respondents* (2017), http://www.transequality.org/sites/default/files/docs/usts/USTSLatinReport-Nov17.pdf; Sandy E. James et al., Nt'l Ctr. for Transgender Equal., *2015 Transgender Survey: Report on the Experiences of Black Respondents* (2017), http://www.transequality.org/sites/default/files/docs/usts/USTSBlackRespondentsReport-Nov17.pdf.
[17] James & Salcedo, *supra* note 16, at 21; James et al., *supra* note 16, at 19.
[18] Ctrs. for Disease Control & Prevention, HIV and Gay and Bisexual Men, https://www.cdc.gov/hiv/group/msm/index.html (last visited Mar. 21, 2019).
[19] Ctrs. for Disease Control & Prevention, Gay and Bisexual Men's Health: Mental Health, https://www.cdc.gov/msmhealth/mental-health.htm (last visited Apr. 10, 2019).
[20] U.S. Dep't of Health & Human Servs., Mental Health and HIV, https://www.hiv.gov/hiv-basics/staying-in-hiv-care/other-related-health-issues/mental-health (last visited Apr. 10, 2019).
[21] Am. Psychological Ass'n, HIV and psychiatric comorbidities: What do we know and what can we do?, https://www.apa.org/pi/aids/resources/exchange/2013/01/comorbidities (last visited Apr. 10, 2019).
[22] Dominica Hernandez et al., *Psychosocial Complications of HIV/AIDS-Metabolic Disorder Comorbidities Among Patients in a Rural Area of Southeastern United States*, 41 J. OF BEHAVIORAL MED. 441 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6063516.
[23] Nat'l Ass'n of State & Territorial Aids Directors, *Behavioral Health Integration within the HIV Continuum of Care* 1 (2018), https://www.nastad.org/sites/default/files/resources/docs/issue_brief_final.pdf.

because it will be minimized and invalidated, which is a risk factor for suicide.[24] As a result, it is important that advocates working with LGBTQ people with HIV are aware of the interplay of multiple stigmas, as well as the disenfranchised grief, that their clients may be experiencing, and the ways that these experiences effect their behavioral health needs and access to care.

LGBTQ people in areas of low concentrations of LGBTQ people also experience unique forms of discrimination. The location of one's residency also affects one's experiences, including discrimination and barriers they may face in accessing behavioral health and other health care services. When examining the U.S. LGBTQ population by state, the smallest rates of LGBTQ people live in the Southeast and parts of the Midwest.[25] Meanwhile, the Northeast and West coast have higher rates of LGBTQ people. Living in a region without a relatively large LGBTQ population can lead to less social support. Research shows that a lack of social support and social integration is related to mental distress within the LGBTQ community.[26] For example, a 2018 report by the Campaign for Southern Equality found that transgender and non-binary Southerners are often mistreated, or denied health care altogether, when they are open about their gender identities in health care settings in the South.[27] This discrimination leads to stress, anxiety, and other mental health concerns, and causes many transgender and non-binary Southerners to delay or completely forego care.[28] Advocates working with the LGBTQ community must be mindful of geography-specific factors affecting behavioral health and access to care.[29]

Further, LGBTQ people who are immigrants may face additional mental health stressors, as they may feel that they live in "dual shadows."[30] The National Latina Institute for Reproductive Health states that there are an estimated 904,000 LGBTQ immigrants in the U.S., 267,000 of

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[24] Nat'l LGBT Health Educ. Ctr., *Suicide Risk and Prevention for LGBTQ People* 5 (2018), https://www.lgbthealtheducation.org/wp-content/uploads/2018/10/Suicide-Risk-and-Prevention-for-LGBTQ-Patients-Brief.pdf.
[25] Am. Psychiatric Ass'n, *Mental Health Disparities: LGBTQ* 1 (2017), https://www.psychiatry.org/File%20Library/Psychiatrists/Cultural-Competency/Mental-Health-Disparities/Mental-Health-Facts-for-LGBTQ.pdf.
[26] Ning Hsieh, *Explaining the Mental Health Disparity by Sexual Orientation: The Importance of Social Resources*, 4 AM. SOCIOLOGICAL ASS'N 129, 146 (2014).
[27] Campaign for Southern Equality, *The Report of the 2018 Southern Trans Health Focus Group Project* 6 (2018), https://southernequality.org/wp-content/uploads/2018/12/2018SouthernTransHealthFocusGroupExecutiveReport.pdf?pdf=Exec-Report&source=LandingPageThumbnail.
[28] *Id*.
[29] *See generally* Movement Advancement Project, *Where We Call Home: LGBT People in Rural America* (2019), http://www.lgbtmap.org/file/lgbt-rural-report.pdf.
[30] Crosby Burns et al., Ctr. for Am. Progress, *Living in Dual Shadows: LGBT Undocumented Immigrants* (2013), https://cdn.americanprogress.org/wp-content/uploads/2013/03/LGBTUndocumentedReport-6.pdf.

who are undocumented.[31] LGBTQ immigrants face myriad barriers to accessing care, including federal laws and employment discrimination that prevents them from securing health insurance coverage, provider discrimination and bias, and a lack of competent care.[32] While experiences vary significantly based upon an immigrant's country of origin and the length of time they have lived in the United States, immigrant LGBTQ people of all ages are at risk for hate violence.[33] For undocumented LGBTQ immigrants, these risks are particularly acute, as undocumented LGBTQ people make up nearly one in five survivors of anti-LGBTQ hate violence.[34] LGBTQ immigrants must navigate a complex system of legal barriers to coverage, such as the 5-year bar to access public health insurance such as Medicaid and CHIP, and federal and state laws that prevent LGBTQ undocumented immigrants from ever accessing public health insurance or insurance coverage through the ACA marketplace.[35] Advocates working with LGBTQ immigrants must recognize that difficulty accessing health insurance further compounds mental health conditions among the LGBTQ immigrant community, as it often means delaying or foregoing care.[36]

LGBTQ youth may also face unique challenges. For many LGBTQ individuals, the damaging effects of discrimination and rejection start young. Research has found that family rejection of adolescents' sexual orientation and gender expression, including punitive and traumatic reactions from parents and caregivers, is closely correlated with the youth being eight times more likely to attempt suicide, six times more likely to report high levels of depression, and three times more likely to use illicit drugs, compared to peers from families with no or low levels of family rejection.[37] Other risk factors, including victimization and harassment in and out of the home, further contribute to the high rates of mental health conditions among LGBTQ youth.[38] One study found that the majority (57.6 percent) of LGBTQ students reported feeling unsafe at school because of their sexual orientation, and nearly three in four (71.5 percent) reported avoiding school functions because they felt uncomfortable or unsafe.[39] Further,

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[31] Nat'l Latina Inst. for Reproductive Health, *Queer Immigrants & the Affordable Care Act* (2018), http://latinainstitute.org/sites/default/files/Queer-Immigrants-and-Affordable-Health-Care.pdf.
[32] *Id*.
[33] Ctr. for Am. Progress, *How Police Entanglement with Immigration Enforcement Puts LGBTQ Lives at Risk* (2017), https://www.americanprogress.org/issues/lgbt/reports/2017/04/12/430325/police-entanglement-immigration-enforcement-puts-lgbtq-lives-risk/.
[34] *Id*.
[35] Equal. Archive, Undocuqueer Movement, https://equalityarchive.com/issues/undocuqueer-movement/ (last visited Mar. 21, 2019).
[36] Crosby Burns et al., Ctr. for Am. Progress, *Living in Dual Shadows: LGBT Undocumented Immigrants* 9 (2013), https://cdn.americanprogress.org/wp-content/uploads/2013/03/LGBTUndocumentedReport-6.pdf.
[37] Caitlin Ryan et al., *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*,123 PEDIATRICS ONLINE 205 (2009).
[38] The Nat'l Acad. of Sci., Eng'g, and Med., *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding* 157-59 (2011), https://www.nap.edu/read/13128/chapter/6.
[39] GLSEN, *The 2015 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* 12-13 (2016),

LGBTQ youth who experienced victimization at school because of their sexual orientation and/or gender identity reported higher levels of depression, and lower self-esteem and school belonging, than their peers.[40] This discrimination creates an environment of intimidation and stress, even for youth not directly targeted.[41] The resulting fear, depression, social ostracism and isolation is particularly concerning since adolescence is the age in which youth form the behaviors that carry on into adulthood. A 2018 study found that LGBTQ youth were more likely to vape (smoke electronic cigarettes), smoke cigarettes, drink, engage in heavy episodic drinking, and experience sexual-and-gender based harassment than their heterosexual and cisgender friends.[42] Consequently, LGBTQ youth are four times more likely to experience suicidal thoughts, self-harm, or attempt suicide, as are their non-LGBTQ peers, and among LGBTQ youth between 10-24 years old, suicide is one of the leading causes of death.[43] As such, advocates working with LGBTQ youth must consider their potential experiences of (or exposure to) victimization and other forms of discrimination when considering their behavioral health needs.

In addition, LGBTQ couples experience a variety of internalized and interpersonal stigmas associated with being in a same-sex partnership. These stigmas affect the mental health of same-sex couples. Until the 2015 *Obergefell v. Hodges* Supreme Court case, same-sex couples had no federal constitutional right to marriage.[44] This institutional discrimination was extremely harmful to individuals in same-sex couples. One longitudinal study found that same-sex couples who lived in a state with a constitutional amendment banning same sex marriage experienced increased mood disorders, generalized anxiety disorders, alcohol use disorders, and psychiatric comorbidities, compared to their peers in states without these bans.[45] Even the consideration of these bans increased distress. Research of the 2006 general election found increased rates of minority stress and psychological distress among LGB adults in same-sex couples in states with these constitutional bans on their ballots.[46] Further, same-sex couples who have children may experience stigma related to their parentage. Although longitudinal research shows that children of adoptive LGB parents have similar child behavioral adjustment

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https://www.glsen.org/sites/default/files/2015%20National%20GLSEN%202015%20National%20School%20Climate%20Survey%20%28NSCS%29%20-%20Full%20Report_0.pdf.

[40] *Id*. at 49.

[41] Nat'l LGBT Health Education Ctr., *supra* note 4, at 6.

[42] RWS Coulter et al., *The Effects of Gender- and Sexuality-Based Harassment on Lesbian, Gay, Bisexual, and Transgender Substance Use Disparities*, 62 J. ADOLESC. HEALTH 688 (2018).

[43] Nat'l Alliance on Mental Illness, LGBTQ, https://www.nami.org/find-support/lgbtq (last visited Mar. 19, 2019).

[44] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[45] Mark L. Hatzenbuehler et al., *The Impact of Institutional Discrimination on Psychiatric Disorders in Lesbian, Gay, and Bisexual Populations: A Prospective Study*, 100 AM. J. PUBLIC HEALTH 452 (2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2820062/.

[46] Sharon Scales Rostosky et al., *Marriage Amendments and Psychological Distress in Lesbian, Gay, and Bisexual (LGB) Adults*, 56 J. COUNSEL. PSYCHOL. 56 (2009), https://www.apa.org/pubs/journals/releases/cou-56-1-56.pdf.

in school as their peers with opposite-sex parents, parents in same-sex couples who experience stigma during their transition to parenthood are more likely to experience increased levels of depressive and anxious symptoms.[47] This may worsen any internalized stigma an individual may have, as social psychology explains that one's internalized stigma is heightened in the presence of stigma.[48] Advocates working with LGBTQ individuals in a LGBTQ couples must therefore recognize that historical and current instances of institutionalized and interpersonal discrimination may influence the types of behavioral health care that their clients seek and need.

### *Behavioral Health Needs of the LGBTQ Population Overall*

With regards to mental health conditions, LGBTQ individuals have an increased risk for conditions such as depression, anxiety, posttraumatic stress disorder, and suicidal thoughts.[49] This risk is attributed to a variety of psychosocial factors such as minority stress, the fear associated with coming out, frequent stressful life events, social isolation, and low levels of social support.[50] In fact, a systematic review of literature published between 1966 to 2005 found that the risk of depression and anxiety is 1.5 times higher for lesbian, gay men, and bisexual individuals than their non-LGB peers.[51] With regards to suicidality, the systematic literature review found that lesbian, gay men, and bisexual individuals of all ages are more than twice as likely to have attempted suicide than their non-LGB peers.[52] Meanwhile, research has also found that transgender individuals are more than 2.5 times more likely to have attempted suicide than their non-transgender peers.[53] When examining all mental health conditions together, one study found that the risk of experiencing any mental health condition is three times higher for LGBTQ individuals than their non-LGBTQ peers.[54]

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[47] Rachel H. Farr, *Does Parental Sexual Orientation Matter? A Longitudinal Follow-Up of Adoptive Families With School-Age Children*, 53 DEVELOPMENTAL PSYCHOL. 252 (2017); Abbie E. Goldberg & JuliAnna Z. Smith, *Stigma, Social Context, and Mental Health: Lesbian and Gay Couples Across the Transition to Adoptive Parenthood*, 58 J. COUNS. PSYCHOL. 139 (2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3081377.

[48] Gregory Herek et al., *Internalized Stigma Among Sexual Minority Adults: Insights from a Social Psychological Perspective*, 56 J. COUNSEL. PSYCHOL. 32 (2009), https://pdfs.semanticscholar.org/9d12/59019b149a1171493f4cd584e36fb957adc7.pdf.

[49] Gilman et al., *supra* note 5; Ilhan H. Meyer, Nat'l Inst. Health, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence* 1-39 (Nov. 9, 2007), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2072932/pdf/nihms32623.pdf.

[50] Meyer, *supra* note 49.

[51] Michael King, et al., *A Systematic Review of Mental Disorder, Suicide, and Deliberate Self Harm in Lesbian, Gay and Bisexual People*, 8 BMC PSYCHIATRY 70 (2008), https://bmcpsychiatry.biomedcentral.com/articles/10.1186/1471-244X-8-70.

[52] *Id*.

[53] Dejun Su et al., *Mental Health Disparities Within the LGBT Population: A Comparison Between Transgender and Nontransgender Individuals*, 1 TRANSGENDER HEALTH 12, 17 (2016) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5685247.

[54] Nat'l Alliance on Mental Illness, *supra* note 43. Similarly, SAMSHA estimates that over one in three (37%) of LGBTQ people have a mental health condition and 13 percent have a serious mental illness, compared to 17 percent and 4 percent of their peers, respectively. Medley et al., *supra* note 7.

Moreover, exposure to discrimination and prejudice create a psychosocial environment in which members of the LGBTQ community may turn to substances as a way to cope with social isolation, fear, stress, chronic anxiety, and other forms of distress. Consequently, SUDs affect LGBTQ adults and youth more than their non-LGBTQ peers. NAMI states that an estimated 20-30 percent of LGBTQ people have a SUD, and 25 percent have an alcohol use disorder, compared to approximately 10 percent of the general population.[55] In regards to heavy alcohol consumption among adults ages 18 and over, the Centers for Disease Control and Prevention (CDC)'s 2015 National Health Interview Survey found that bisexual individuals (47 percent) and gay or lesbian (34 percent) adults were more likely than heterosexual adults (23 percent) to have heavily consumed alcohol at least one day in the past year.[56] One 2008 study on alcohol, tobacco, and drug use among gay and bisexual men found that gay men are more than 12 times as likely to use amphetamines, and nearly 10 times as likely to use heroin, as are heterosexual men.[57] Another study found that LGBTQ adults are also more likely to use cocaine and hallucinogens than their peers.[58] Moreover, LGB youth are 90 percent more likely to use substances than their heterosexual peers.[59] However, despite the general trends and the majority of studies concluding that members of the LGBTQ community utilized alcohol and illicit drugs more than their non-LGBTQ peers, one 2012 literature review found that, the extent to which this was true differed by various factors such as age, stress level, how "out" someone is, and one's affiliation with LGBTQ culture.[60]

## The Importance of Health Coverage for LGBTQ People with Behavioral Health Needs

### *Discrimination Against LGBTQ People in Health Insurance Coverage Has Reduced, and Continues to Reduce, their Access to Care*

Along with the effect that centuries of institutionalized discrimination have had on the behavioral health of many LGBTQ people, it may also reduce their access to the coverage necessary to obtain the behavioral health treatment they may need. For example, research shows that transgender individuals are less likely to have health insurance coverage than their

[55] Nat'l Alliance on Mental Illness, *supra* note 43.
[56] Ctrs. for Disease Control & Prevention, *Sexual Orientation and Health among U.S. Adults: National Health Interview Survey* 2 (2015), https://www.cdc.gov/nchs/data/nhis/sexual_orientation/asi_2015_stwebsite_tables.pdf.
[57] David G. Ostrow & Ron Stall, *Alcohol, Tobacco, and Drug Use Among Gay and Bisexual Men, in Unequal Opportunity: Health Disparities Affecting Gay and Bisexual Men in the United States* 121, 125 (Richard J. Wolitski et al. eds., Oxford Univ. Press 2007).
[58] Medley et al., *supra* note 7.
[59] Michael P. Marshall et al., *Sexual Orientation and Adolescent Substance Use: A Meta-Analysis and Methodological Review*, 103 ADDICTION 546, 556 (2008), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2680081/pdf/nihms-101961.pdf.
[60] Kelly E. Green & Brian A. Feinstein, *Substance Use in Lesbian, Gay, and Bisexual Populations: An Update on Empirical Research and Implications for Treatment,* 26 Psychology of Addictive Behaviors 246-254 (2012), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3288601/.

cisgender peers, and that bisexual individuals are less likely to have health insurance coverage than their lesbian, gay, and heterosexual peers.[61]

Because the majority of U.S. residents receive health coverage through an employer, discrimination in employment has disproportionately limited LGBTQ individuals' ability to obtain coverage. Currently, 28 states have no employment non-discrimination state laws covering sexual orientation or gender identity, leaving 53 percent of the LGBTQ community living in states without protection against employment discrimination.[62] As a result, employers may feel unafraid to discriminate against employees who are LGBTQ, thereby limiting their access to employer-sponsored insurance coverage. For LGBTQ people in same-sex couples, disparate access to employer-sponsored insurance is a prominent barrier to health insurance coverage. Employer sponsored insurance is the most common source of health insurance coverage in the U.S., covering over half (56 percent) of the population in 2017 according to Census data.[63] While the *Obergefell v. Hodges* Supreme Court decision established the federal right for same-sex couples to be married in 2015, same-sex couples still experience unequal access to employer-sponsored insurance for same-sex spouses and partners. A 2018 issue brief by the Kaiser Family Foundation reported that, only 57 percent of firms around the country that offered health insurance coverage to opposite-sex spouses in 2017 also offered it to same-sex spouses. This disparate access is exacerbated for employees at small firms (of between 3-49 employees), as only two-thirds of workers in these firms in 2017 had access to health insurance coverage for same-sex spouses.[64] Further, coverage disparities for same-sex couples have had a particular effect on older adults in same-sex couples, who have had to navigate stresses for decades of how to pay for care (such as long term care) without access to insurance through their partner's employer.[65]

***Medicaid has Helped LGBTQ People Obtain Necessary Health Coverage***

Many LGBTQ people are eligible for Medicaid. Medicaid is the country's largest health care program, providing high quality, affordable coverage to more than 75 million low-income individuals.[66] Medicaid provides vital health coverage for the estimated 1,171,000 LGBT adults

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[61] Kates et al., *supra* note 3, at 12, 14.
[62] Movement Advancement Project, Non-Discrimination Laws, http://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Mar. 20, 2019).
[63] Edward R. Berchick et al., United States Census Bureau, Health Insurance Coverage in the United States: 2017, https://www.census.gov/library/publications/2018/demo/p60-264.html (last visited Mar. 20, 2019).
[64] Kates et al., *supra* note 3, at 13. Such limitations may be unconstitutional. *See generally Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).
[65] Arlene Zarembka, Nat'l Res. Ctr. on LGBT Aging, Medicaid & the LGBT Community: Paying for Long-Term Care, https://www.lgbtagingcenter.org/resources/resource.cfm?r=63 (last visited Mar. 20, 2019).
[66] Robin Rudowitz & Rachel Garfield, Kaiser Family Found., *10 Things to Know about Medicaid: Setting the Facts Straight* 4 (2018), http://files.kff.org/attachment/Issue-Brief-10-Things-to-Know-about-Medicaid-Setting-the-Facts-Straight.

enrolled in the program, according to the Williams Institute.[67] The ACA expanded Medicaid by creating a new Medicaid eligibility category that expanded coverage to any low-income adult under 138 percent of the Federal Poverty Level.[68] The choice to adopt the Medicaid expansion was left to the states however, and as of April 2019, 36 states and D.C. had chosen to adopt Medicaid expansion, while 14 states had not.[69] As a result, over two million low-income uninsured adults fall into the "coverage gap," a situation where someone's income would have qualified them for Medicaid had their state chosen to adopt Medicaid expansion, but qualify neither for Medicaid nor for financial assistance on the marketplace.[70] Despite this gap in coverage for millions of people in the U.S. Medicaid expansion, as well as other aspects of the ACA's coverage reforms, increased health coverage among low-income LGBTQ individuals. A national survey conducted by the Center for American Progress found that, between 2013 and 2014, states that expanded Medicaid experienced a 10-percentage point drop in the uninsured rate of low-and-middle-income LGBTQ people, from 27 percent to 17 percent.[71] Meanwhile, the Center for American Progress found that the percent of LGBTQ adults with Medicaid coverage rose from 22 percent in 2013, to 28 percent in 2014.[72] In addition to Medicaid expansion, the ACA created marketplaces on which low-income adults (100-400 percent FPL) could purchase subsidized insurance. The ACA's coverage reforms led to a 25 percent decrease in the number of uninsured LGBTQ adults with incomes below 400 percent of the Federal Poverty Level between 2013 and 2014. Given the high rate of poverty within the LGBTQ community, particularly among LGBTQ people of color and transgender people, Medicaid provides essential coverage to the LGBTQ community.

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[67] Kerith J. Conron & Shoshana K. Goldberg, The Williams Inst., *LGBT Adults With Medicaid Insurance* 1 (2018), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Medicaid.pdf; s*ee also* Candace Gibson & Priscilla Huang, Nat'l Health Law Prog., *Fact Sheet: Medicaid & Reproductive Justice* (2018), https://9kqpw4dcaw91s37kozm5jx17-wpengine.netdna-ssl.com/wp-content/uploads/2018/08/Joint-NHeLP_Medicaid-and-RJ.pdf.

[68] Jane Perkins & Ian McDonald, Nat'l Health Law Prog., *50 Reasons Medicaid Expansion is Good for Your State* (2017), https://healthlaw.org/resource/issue-brief-50-reasons-medicaid-expansion-is-good-for-your-state.

[69] Kaiser Family Found., Status of State Action on the Medicaid Expansion, https://www.kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act (last visited Apr. 10, 2019).

[70] Rachel Garfield et al., Kaiser Family Found., The Coverage Gap: Uninsured Poor Adults in States that Do Not Expand Medicaid (2019), http://files.kff.org/attachment/Issue-Brief-The-Coverage-Gap-Uninsured-Poor-Adults-in-States-that-Do-Not-Expand-Medicaid.

[71] Kellan E. Baker et al., Ctr. for Am. Progress, *Moving the Needle: The Impact of the Affordable Care Act on LGBT Communities* 12 (2014), https://cdn.americanprogress.org/wp-content/uploads/2014/11/LGBTandACA-report.pdf.

[72] Laura E. Durso et al., Ctr. for Am. Progress, *LGBT Communities and the Affordable Care Act: Findings from a National Survey* 3 (2013), https://www.americanprogress.org/wp-content/uploads/2013/10/LGBT-ACAsurvey-brief1.pdf; Kellan E. Baker et al., Ctr. for Am. Progress, *Moving the Needle: The Impact of the Affordable Care Act on LGBT Communities* 7 (2014), https://cdn.americanprogress.org/wp-content/uploads/2014/11/LGBTandACA-report.pdf.

Medicaid can cover a wide range of behavioral health services. Many behavioral health services fall into coverage categories that states must cover in their Medicaid programs, including inpatient hospital services (e.g., inpatient psychiatric stays), outpatient hospital services (e.g., intensive day treatment offered by a hospital outpatient department), federally qualified health center services (e.g., individual or group therapy offered in an FQHC), physician services (e.g., psychiatric consultation), nurse practitioner services (e.g., mental health assessments conducted by a NP), and counseling and pharmacotherapy for cessation of tobacco use by pregnant women.[73] In addition, for individuals under 21, state Medicaid programs are subject to the early and periodic screening, diagnosis, and treatment (EPSDT) requirement, which mandates that state Medicaid programs provide any necessary health care, diagnostic services, treatment, and other measures, described in section 1396d(a) of the Medicaid Act, to "correct or ameliorate" physical and mental illnesses and conditions, whether or not such services are covered for adults in the state's Medicaid program.[74] States may also choose to offer additional services in their Medicaid programs like care furnished by licensed practitioners within the scope of their practice as defined by state law (e.g., MFT or LCSW services), prescription drugs, case management services, targeted case management services, and other diagnostic, screening, preventive, and rehabilitative services when recommended by a licensed practitioner (e.g., social skills training or community-based therapy services).[75]

While states have some flexibility as to the scope of behavioral health services that are covered in their Medicaid programs for adults, all states cover some behavioral health services.[76] Further, for adults in the Medicaid expansion population, the ACA mandates Medicaid coverage of mental health and behavioral health services as Essential Health Benefits (EHBs) in all Alternative Benefit Plans.[77] As a result, when low-income LGBTQ individuals are enrolled in Medicaid, they are more readily able to access needed behavioral health services. While we do not have access to information for LGBTQ Medicaid enrollees specifically, 2017 data published by the Medicaid and CHIP Payment and Access Commission shows that, over all, only 3.4 percent of all adults enrolled in Medicaid ages 19 - 64 reported being unable to access necessary mental health care due to cost, as opposed to 5.8 percent of

[73] *See* 42 U.S.C. § 1396a(a).
[74] *Id.* §§ 1396a(a)(43)(C), 1396d(r)(5); *see also id*. §§ 1396a(a)(10)(A), 1396d(a)(4)(B).
[75] *Id.* § 1396a(a).
[76] *See* Medicaid & CHIP Payment & Access Comm'n, *State Policies for Behavioral Health Services Covered under the State Plan* (2016), https://www.macpac.gov/publication/behavioral-health-state-plan-services; *see also* Kaiser Family Found., *Medicaid Behavioral Health Services Database* (2019), https://www.kff.org/data-collection/medicaid-behavioral-health-services-database.
[77] Cindy Mann, CMS, Dear State Medicaid Director (Nov. 20, 2012) (SMD # 12-003) (RE: Essential Health Benefits in the Medicaid Program), https://www.medicaid.gov/Federal-Policy-Guidance/Downloads/SMD-12-003.pdf.

their uninsured peers.[78] LGBTQ adults in Medicaid should similarly experience fewer cost barriers to accessing mental health services compared to their uninsured peers.

## Discrimination Against LGBTQ People with Behavioral Health Needs Can Hinder their Access to Necessary Care

### *Discrimination by Individual Health Care Providers and Institutions Against LGBTQ People Reduces their Access to Care*

Inequities in the behavioral health of the LGBTQ community are exacerbated by disparities in, and limited access to, high quality and non-discriminatory health care that remain despite advances made by the ACA. Experiencing discrimination increases the risk of an LGBTQ person developing a mental health condition or substance use disorder, and further, prevents LGBTQ people from receiving the care they need.

There is a longstanding history of discrimination against LGBTQ people seeking health care. The medical community misdiagnosed homosexuality as a mental illness until 1973.[79] Lingering trauma from these misdiagnoses, and subsequent forced treatment attempts against their will (such as electroshock therapy, aversion therapy, and castration), has continued to influence hesitancies among LGBTQ community members who fear facing ignorance, discrimination, and hostility (including abuse) from providers.[80] Even today, many LGBTQ individuals are referred for so-called "conversion therapy" that uses a variety of behavioral, psychoanalytic, cognitive, and other practices aimed at changing or reducing people's same-sex attraction or altering a person's gender identity.[81]

Beyond explicit attempts to misdiagnose or change their identities, many LGBTQ individuals continue to face discrimination by health care providers. In a 2009 survey of nearly 5,000 LGBT people, over half (56 percent) of all respondents, and 70 percent of transgender and gender-nonconforming respondents, reported experiencing at least one form of discrimination by health care providers, including providers using harsh or abuse language, providers refusing to touch the LGBT person, providers blaming the LGBT person for their health status,

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[78] Medicaid & CHIP Payment & Access Comm'n, *MACStats: Medicaid and CHIP Data Book* 136 (2018), https://www.macpac.gov/wp-content/uploads/2018/12/December-2018-MACStats-Data-Book.pdf.
[79] Nat'l LGBT Health Education Ctr., *supra* note 4, at 3.
[80] Nat'l Alliance on Mental Illness, *supra* note 43; Jerome Hunt, Ctr. for Am. Progress, *Why the Gay and Transgender Population Experiences Higher Rates of Substance Use: Many use to Cope with Discrimination and Prejudice* 5 (2012), https://cdn.americanprogress.org/wp-content/uploads/issues/2012/03/pdf/lgbt_substance_abuse.pdf.
[81] Nat'l Ctr. for Lesbian Rights, Born Perfect: The Facts About Conversion Therapy, http://www.nclrights.org/bornperfect-the-facts-about-conversion-therapy/ (last visited Mar. 21, 2019); *see* Substance Abuse & Mental Health Servs. Admin., *Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth* (2015), https://store.samhsa.gov/system/files/sma15-4928.pdf.

> I wanted to start hormones. And she was like, "I don't know about all of that." And I was just like, but could you refer me to someone who does? And she was like, "Well, there's nothing wrong with being a woman," and just really believed that it was from a place of hate for women, just internalized hate for women that was making me ask her this. And that was my first time like coming out to a medical professional.
>
> (28-year-old, Hispanic, queer, genderqueer person)

providers being physically abusive, and providers refusing to deliver care altogether.[82] This discrimination is further compounded by race and income level, as survey respondents of color and those from low-income households (defined as less than $20,000 per year) reported higher levels of discrimination and substandard care in almost every category.[83] In addition to overt forms of discrimination such as physical abuse, less overt forms of discrimination can similarly signal that the health care setting is not welcoming to, or sensitive to the needs of, LGBTQ individuals. In-depth interviews conducted with LGBTQ individuals who were Assigned Female At Birth (AFAB) found that many respondents identified outdated and non-inclusive protocol, such as cis- and heteronormative intake forms, as a barrier to them receiving necessary care.[84] Other respondents explained being misgendered, or having their identities invalidated, as reasons to not return to a clinic.

Specific discriminatory encounters with the health care system perpetuate, and heighten, fear and concern within the LGBTQ community around the receipt of health care.[85] Past experiences of discrimination, as well as a perceived threat of discrimination, can influence whether or not an LGBTQ individual seeks out the health care they need.[86] Consequently, LGBTQ individuals, especially transgender people, are more likely to avoid or postpone necessary medical care out of fear of discrimination, even when they were sick or injured.[87]

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[82] Lambda Legal, *supra* note 10, at 5.
[83] *Id.* at 5.
[84] Erin Wingo et al., *Reproductive Health Care Priorities and Barriers to Effective Care for Lesbian, Gay, Bisexual, Transgender, Queer People Assigned Female at Birth: A Qualitative Study*, 28 WOMEN'S HEALTH ISSUES 350, 350-357 (2018).
[85] Ctr. for Am. Progress, Discrimination Prevents LGBTQ People from Accessing Health Care, https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/ (last visited Mar. 20, 2019).
[86] *Id.*
[87] Jaime M. Grant et al., Nat'l Ctr. for Transgender Equal. & Nat'l Gay & Lesbian Task Force, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 72 (2015), http://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf; Ctr. for Am. Progress, Discrimination Prevents LGBTQ People from Accessing Health Care, https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/ (last visited Mar. 20, 2019).

Further, experienced and perceived discrimination can affect how much an LGBTQ person chooses to disclose to their health care provider. This is especially troublesome within the behavioral health context, given that existing stigmas around behavioral health needs may further discourage full disclosure of one's needs and experiences. Given that an individual's relationship with their provider is so important for the individual to receive mental health care according to established standards of care, it is critical that LGBTQ individuals can receive care from providers and health care settings that are LGBTQ-inclusive and affirming.[88]

In some cases, the discriminatory beliefs of health care providers result in their refusing to provide LGBTQ people with necessary health care treatment at all. One survey found that at least eight percent of LGB people, and 27 percent of transgender people, have been refused needed care because of their LGBTQ identity.[89] Health care refusals are particularly prominent at religiously affiliated health care institutions, such as hospitals owned or operated by the Baptist Church, Church of Jesus Christ of Latter Day Saints, and the Catholic Church.[90] As a result, many LGBTQ people must navigate religious ideology and compromised care when seeking needed care for mental health conditions or substance use disorders at these hospitals. Further, LGBTQ people may be refused medically necessary care of other forms, such as Assisted Reproductive Technologies (ART) or gender affirming surgeries for transgender people, regardless of the LGBTQ person's wishes or religious beliefs.[91] These restrictions disproportionately affect the wellbeing of LGBTQ women of color, as women of color are more likely than their white peers to receive sexual health services at institutions governed by ERDs.[92]

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[88]Knowing how to find, and work with, LGBTQ-inclusive providers is an important step for diagnosing, treating, and preventing behavioral health concerns. *See* GLMA, Find a Provider, http://www.glma.org/index.cfm?fuseaction=Page.ViewPage&PageID=939 (last visited Mar. 21, 2019) (a provider directory of LGBTQ inclusive providers); *see also* Human Rights Campaign, Healthcare Equality Index, https://www.hrc.org/hei (last visited Mar. 21, 2019) (list of LGBTQ-inclusive health care organizations); Ass'n of LGBTQ+ Psychiatrists, AGLP Online Referral System, https://aglp.memberclicks.net/index.php?option=com_content&view=article&id=14&Itemid=74 (last visited Mar. 21, 2019) (online referral system for LGBTQ-inclusive providers); Substance Abuse & Mental Health Servs. Admin., *Know Your Rights: Parity for Mental Health and Substance Use Disorder Benefits* (2016), https://store.samhsa.gov/system/files/sma16-4971.pdf (pamphlet on parity for behavioral health benefits); Campaign for Southern Equal., *Insurance Coding Alternatives for Trans Healthcare* (2019), https://southernequality.org/wp-content/uploads/2019/03/InsuranceCoding.pdf (list of ICD-10 insurance codes and their corresponding diagnoses and treatments that may be relevant for transgender people); Out2Enroll, Out2Enroll, https://out2enroll.org/ (last visited Mar. 21, 2019) (LGBTQ-inclusive health insurance literacy, outreach and enrollment materials, including transgender-specific insurance guides by state).

[89] Lambda Legal, *supra* note 10, at 10.

[90] Kira Shepherd et al., Public Rights/Private Conscience Project at Columbia Law School & Public Health Solutions, *Bearing Faith: The Limits of Catholic Health Care for Women of Color* (2018), https://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/PRPCP/bearingfaith.pdf.

[91] *Id*.

[92] *Id*.

Unfortunately, most states have laws that allow medical providers to deny medical care because of religious reasons.[93] Additionally, the federal Weldon Amendment prohibits local and state governments, and federal programs and agencies, from "discriminating" against health care entities (including insurance companies) that refuse to provide or refer to abortion care. While the Weldon Amendment is not specific to LGBTQ individuals who might seek abortion care, it specifically impacts LGBTQ individuals due to their increased risk of experiencing discrimination in health care. A 2018 proposed HHS regulation, titled "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority," went even further, proposing to radically expand religious refusals by allowing a wider range of health care entities (including plan sponsors "not primarily engaged in the business of health care") to deny care on a basis beyond religious belief.[94] If finalized, this proposed rule would only make it more difficult for LGBTQ people to receive the care they need, behavioral health care or otherwise -- and could even make it difficult for their children to receive care. In Michigan, a pediatrician legally refused to provide a newborn check-up for the 6-day-old infant of two lesbian mothers.[95]

This blatant discrimination by health care providers can have a profound effect on the mental health of LGBTQ people.

***Anti-Discrimination Protections are Crucial for LGBTQ Individuals***

Before enactment of the ACA, LGBTQ individuals often had to rely on a confusing web of state and local laws to protect against sexual orientation and gender identity discrimination in health care settings. Section 1557 of the ACA became the first federal law to provide protections to LGBTQ individuals in health care settings. Sec.1557 provides that

> an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 …, title IX of the Education Amendments of 1972 …, the Age Discrimination Act of 1975 …, or section 504 of the Rehabilitation Act of 1973 …, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity

[93] Movement Advancement Project & Nat'l Ctr. for Transgender Equal., *Religious Refusals in Health Care: A Prescription for Disaster* (2018), http://www.lgbtmap.org/file/Healthcare-Religious-Exemptions.pdf.
[94] Nat'l Health Law Prog., *Re: RIN 0945-ZA03–Protecting Statutory Conscience Rights in Health Care; Delegations of Authority* (Mar. 27, 2018), https://healthlaw.org/resource/national-health-law-program-urges-hhs-to-withdraw-conscience-rights-rule.
[95] Abby Phillip, *Pediatrician refuses to treat baby with lesbian parents and there's nothing illegal about it*, WASH. POST (Feb. 19, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/02/19/pediatrician-refuses-to-treat-baby-with-lesbian-parents-and-theres-nothing-illegal-about-it.

> that is administered by an Executive Agency or any entity established under this title (or amendments).[96]

Although Sec. 1557 does not contain an explicit prohibition against sexual orientation or gender identity discrimination, it imports the protections against sex discrimination contained in Title IX. Decades of Title IX litigation has established that sexual orientation and gender identity discrimination are forms of sex discrimination, because they rely on sex stereotypes.[97]

Section 1557's implementing regulations explicitly define sex discrimination to include gender identity.[98] The regulations do not explicitly interpret sex discrimination to include discrimination on the basis of sexual orientation, though the preamble to the final rule

> concludes that Section 1557's prohibition of discrimination on the basis of sex includes, at a minimum, sex discrimination related to an individual's sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes. Accordingly, OCR will evaluate complaints alleging sex discrimination related to an individual's sexual orientation to determine whether they can be addressed under Section 1557.[99]

After these regulations were issued, however, several state attorneys general and religiously affiliated providers filed *Franciscan Alliance v. Burwell*, challenging HHS' Sec. 1557 regulations. In late 2016, a Texas judge issued a nationwide injunction barring HHS from enforcing the "rule's prohibition against discrimination on the basis of gender identity . . ." and stayed further court proceedings while HHS "reconsiders" the regulations at issue.[100] Although HHS has yet to issue a proposed rule to "reconsider" Sec. 1557, in 2017 HHS removed the words "gender identity" and "sex stereotypes," as well as associated training materials from its "Section 1557: Frequently Asked Questions" webpage.[101]

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[96] 42 U.S.C. § 18116.
[97] *See* Jen Lav, Nat'l Health Law Prog., *Section 1557 of the Affordable Care Act: Protections for Transgender Individuals in Health Care Settings 2-3* (2018) (collecting cases), https://healthlaw.org/resource/q-a-section-1557-of-the-affordable-care-act-protections-for-transgender-individuals.
[98] 45 C.F.R. § 92.4.
[99] Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31375, 31390 (May 18, 2016).
[100] *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 696 (N.D. Tex. 2016) (order on motion for preliminary injunction).
[101] Rachel Bergman, Web Integrity Project, *Language Removals Pertaining to Sex Discrimination from HHS's Office for Civil Rights Webpages about Section 1557 of the Affordable Care Act* (2018), http://sunlightfoundation.com/wp-content/uploads/2018/07/CCR-9-HHS-OCR-1557-180716.pdf; U.S. Dep't of Healthcare Servs., Section 1557: Frequently Asked Questions, https://www.hhs.gov/civil-rights/for-individuals/section-1557/1557faqs/index.html (last visited Mar. 19, 2019).

## More on the *Franciscan Alliance*

It is important to note what the *Franciscan Alliance* injunction does *not* do. It does not nullify established Title IX and Title VI case law holding that discrimination on the basis of sex includes discrimination due to transgender identify, nor does it affect the statutory protection of Section 1557. The Franciscan Alliance injunction has not stopped courts from enforcing these protections. For example, in *Prescott v. Rady Children's Hospital-San Diego*, a federal court denied the hospital's motion to dismiss a claim that it discriminated against a transgender boy.[1] Kyler Prescott was a 14-year-old transgender boy who sought hospital treatment for suicidal ideation. While Kyler was hospitalized, staff repeatedly referred to him as a girl and verbally harassed him, despite protests from him and his family. According to the complaint, the harassment was so severe and was causing Kyler such distress that Kyler's medical providers concluded he should be "discharged early because of staff conduct."[1] Five weeks later, Kyler died by suicide.[1] The hospital asked to stay the proceedings pending the outcome of Franciscan Alliance, but the court denied the stay, noting that, "the Court's decision under the ACA does not depend on the enforcement or constitutionality of the HHS's regulation."[1]

As long as the Franciscan Alliance injunction exists, HHS' administrative complaint process is not a viable route enforcing 1557 claims based on gender identity discrimination, and the fate of claims based on sexual orientation discrimination is unclear. Furthermore, courts that previously relied upon HHS' regulations to uphold claims of discrimination may be tempted to stay proceedings in light of HHS' statement that is "reconsidering" the regulation at issue.[1] Rather than moving to shore up protections for LGBTQ people in the face of this uncertainty, the Trump administration has been working through various methods to undermine the health rights of LGBTQ individuals.

## LGBTQ People with Behavioral Health Needs Must Have Access to a Full Range of Behavioral Health Services without Barriers to Access

### *For LGBTQ Individuals with Coverage, Incomplete or Limited Coverage of Behavioral Health Services Can Limit Access to Care*

For LGBTQ people with behavioral health needs, it is important to have access to a full range of services; it is not sufficient to have health insurance coverage, if the services someone needs are not covered under their insurance plan. For example, as of 2018, 10 states' Medicaid agencies do not cover Methadone for Medication Assisted Treatment (MAT) for Medicaid enrollees with Opioid Use Disorder, five do not cover Naloxone in at least one formula without prior authorization, six do not cover individual therapy, and 17 do not cover intensive outpatient therapy.[102] And even where services are covered, barriers still exist that disproportionately limit access to behavioral health care for LGBTQ people.

Some of these barriers may be due to miscommunication between state insurance commissioner's offices and insurance carriers in that state, while other barriers are due to a lack of sufficient network adequacy assessments.[103] All barriers, however, are detrimental to the behavioral health needs of people, and have a disproportionate impact on LGBTQ people who already face other barriers to care. For example, some LGBTQ people may not have ready access to LGBTQ-competent behavioral health treatment that might be available in a different state or region with more LGBTQ-inclusive providers. Meanwhile, transgender people may have to pay more for prescription medicine for a mental health condition, such as gender dysphoria-induced anxiety, than other health conditions. Other LGBTQ people may have a separate deductible for behavioral health services that is not a part of their overall deductible, may have a higher copay for mental health therapy than other non-behavioral health services, or may be denied SUD treatment that their doctor has prescribed.[104] Each of these barriers limits access to important care. There is great variation in coverage of behavioral health services in both private insurance and in Medicaid programs. In addition, provider training and availability ranges significantly from one plan and region to another. All of these barriers, unless addressed, will continue to threaten the health of LGBTQ individuals and others with behavioral health needs.

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[102] Kaiser Family Found., Medicaid Behavioral Health Services Database, https://www.kff.org/data-collection/medicaid-behavioral-health-services-database/ (last visited Apr. 11, 2019).
[103] Substance Abuse & Mental Health Servs. Admin., *Approaches in Implementing the Mental Health Parity and Addiction Equity Act: Best Practices from the States* (2016), https://store.samhsa.gov/system/files/sma16-4983.pdf.
[104] The Kennedy Forum, Parity Violation Examples, https://www.parityregistry.org/parity-violation-examples/ (last visited Apr. 11, 2019).

***Parity protections ensure that Medicaid and ACA coverage of behavioral health services is meaningful for LGBTQ individuals***

Access to health coverage is not enough to ensure that people get the behavioral health services they need. Laws must exist to ensure that LGBTQ individuals do not experience discrimination when seeking behavioral health care. Existing law is designed to help to ensure that many people with coverage through Medicaid or the ACA marketplace have access to a wide range of mental health and substance use disorder services.

The 2008 Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act (MHPAEA), built upon the Mental Health Parity Act of 1996, made important strides in ensuring parity. MHPAEA applies to most private plans, including those sold in the ACA marketplaces. While MHPAEA does not require plans to offer mental health or substance use disorder benefits, it does require that plans that offer those services must do so in parity with its coverage of medical/surgical benefits. The ACA went further to ensure that benefits covered for most enrollees in Medicaid and CHIP comply with this parity requirement.[105] In addition, as described previously, longstanding law requires Medicaid programs to cover all services necessary to correct or ameliorate physical or mental illnesses or conditions for beneficiaries under age 21. This provision requires states to offer a robust package of mental health and substance use disorder benefits for their youngest enrollees. Thus, in practice, LGBTQ enrollees in Medicaid should have access to a broad range of behavioral health services. These protections are particularly important for LGBTQ individuals who, as previously discussed, are at increased risks for stigma and discrimination in health care.

**Conclusion**

Even though LGBTQ people continue to face bigotry and discrimination that puts them at risk of developing mental health conditions and substance use disorders, they continue to self-advocate and build partnerships to improve their health and the health of their community members.[106] Yet, these grassroots efforts should not be taken as a substitute for needed systems-level change. As the movement for LGBTQ health equity continues, disparities will more rapidly diminish, and our society as a whole will grow stronger, if our health care and political systems, at the local, state, and federal levels, advance policies supporting the specific health needs of the LGBTQ community.

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[105] Cong. Research Serv., *Medicaid Alternative Benefit Plan Coverage: Frequently Asked Questions* 8 (2018), https://fas.org/sgp/crs/misc/R45412.pdf; CMS, *Frequently Asked Questions: Mental Health and Substance Use Disorder Parity Final Rule for Medicaid and CHIP* (2017), https://www.medicaid.gov/federal-policy-guidance/downloads/faq101117.pdf.

[106] Matt Cohen, *La Clínica del Pueblo Opens First LGBTQ Health Center Focused on Latinx In Maryland*, WASH. CITY PAPER (June 2, 2017), https://www.washingtoncitypaper.com/news/city-desk/blog/20863518/la-clnica-del-pueblo-opens-first-lgbtq-health-center-focused-on-latinx-in-maryland.

Only when the U.S. health care and health insurance systems affirm everyone's sexual orientation and gender identity, become responsive to the wide variety of behavioral health needs, and more sensitive to the intersectionality of people's identities will the health needs will LGBTQ people receive the high quality care that all people deserve.

Specifically, advocates must continue to work to enforce the legal protections in place that ensure LGBTQ people have access to health coverage, that they are not discriminated against in health care on the basis of sexual orientation or gender identity, and that when they have coverage, their coverage includes the full range of behavioral health services without improper limitations.