



State of California
Office of the Attorney General

XAVIER BECERRA
ATTORNEY GENERAL

November 9, 2018

The Honorable Donald J. Trump
President of the United States
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

The Honorable Alex M. Azar II
Secretary
U.S. Department of Health and Human
Services
200 Independence Avenue, SW
Washington, DC 20210

The Honorable Matthew G. Whitaker
Acting Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

The Honorable Betsy DeVos
Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

The Honorable Alexander Acosta
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: Federal Actions Threatening Non-Discrimination Protections

Dear Mr. President, Secretary Azar, Acting Attorney General Matthew Whitaker, Secretary DeVos, and Secretary Acosta:

According to recent media reports, the Administration is reportedly considering changes to federal law and policy to define sex as a biological, immutable condition assigned at birth.¹ The proposed actions are contrary to California and federal law and threaten the health, well-being, and economic security of individuals, families, and communities. Such a change would effectively deny the existence of transgender people and a large number of others who do not conform to traditional notions of binary gender identity. Such a move would remove these individuals from the coverage of federal antidiscrimination laws and trigger a host of other

¹ Erica L. Green, Katie Benner and Robert Pear, 'Transgender' Could Be Defined Out of Existence Under Trump Administration, N.Y. TIMES, Oct. 21, 2018, <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html>.

President Donald J. Trump
The Honorable Secretary Alex M. Azar II
The Honorable Matthew G. Whitaker
The Honorable Betsy DeVos
The Honorable Alexander Acosta
November 9, 2018
Page 2

negative impacts. For this reason, I urge you to abandon these harmful and discriminatory efforts.

As the Attorney General of California, it is my constitutional duty to safeguard the health and safety of our 40 million residents and to defend our state laws. California has been a leader in protecting civil rights and liberties for our thousands of transgender residents, working to ensure that individuals can work, learn, and receive care in a safe environment, free from discrimination. For example, we were one of the first states to explicitly protect transgender students in our schools. And, California has protected transgender people from workplace and housing discrimination for over a decade.²

Prohibiting Discrimination in the Provision of Healthcare

California has established strong protections in its healthcare laws and programs. Our regulations prohibit insurers from imposing an insurance premium based on an individual's identity as a transgender person.³ Further, state regulations prohibit private healthcare insurers from denying coverage for transition-related services if the same services are available when unrelated to gender transition.⁴ Finally, our state programs provide necessary medical care without discrimination based on gender identity. California's Medicaid program ("Medi-Cal") has prohibited exclusions of transition-related exclusions from its coverage since 2001, and Medi-Cal covers sex reassignment surgery when medically necessary.⁵ Moreover, California's public employee insurance benefits program ("CalPERS") provides coverage for all medically necessary care for transgender members.⁶

As numerous analyses and studies have concluded, the provision of such care is not burdensome or costly. For example, the California Insurance Commissioner determined that,

² Cal. Gov. Code §§ 12940(a), (b) (c), (d), (j)(1); 12944(a), (c); 12949; 12950(a)(2); 12950.1(c).

³ Cal. Code Regs. tit. 10 § 2561.2.

⁴ *Id.*

⁵ See Cal. Dep't of Health Care Servs., *Ensuring Access to Medi-Cal Services for Transgender Beneficiaries* (Oct. 6, 2016), <http://www.dhcs.ca.gov/formsandpubs/Documents/MMCDAPLsandPolicyLetters/APL2016/APL16-013.pdf> (discussing 2001 state court decision prohibiting Medi-Cal from categorically denying coverage for transgender people and reminding Medi-Cal managed care health plans that they must provide covered services to all Medi-Cal beneficiaries, including transgender beneficiaries, and including gender confirmation surgery, pursuant to Cal. Health & Saf. Code § 1365.5); see also *J.D. v Lackner*, 80 Cal. App. 3d 90, 95 (Cal. Ct. App. 1978) (recognizing that sex reassignment surgery may be medically necessary and ordering Medi-Cal to grant the treatment); Medi-Cal Update General Medicine, *Policy Clarification: Gender Identity Disorder*, Bulletin 465, (March 2013), <http://files.medi-cal.ca.gov/pubsdoco/bulletins/artfull/gm201303.asp#>.

⁶ *CalPERS, Nation's Largest Pension Fund, Covers Transgender Health Care*, TRANSGENDER LAW CENTER (June 20, 2013), <https://transgenderlawcenter.org/archives/8437>.

President Donald J. Trump
The Honorable Secretary Alex M. Azar II
The Honorable Matthew G. Whitaker
The Honorable Betsy DeVos
The Honorable Alexander Acosta
November 9, 2018
Page 3

based on the experience of several cities and businesses that extended coverage to transgender members for all medically necessary care, ensuring equal access to health care regardless of gender identity would have an “insignificant and immaterial economic impact” on California businesses.⁷ The benefits to public health and to individuals significantly outweigh any cost associated with providing insurance coverage and medical care free of discrimination.

As California’s experience demonstrates, healthcare is better provided where it is equitable and free from discrimination. Any actions that the federal government takes to discriminate based on gender identity and sexual orientation in health care would be contrary to federal law. For example, when enacting the Health Care Rights Law, the 111th Congress—of which I was a member, and a signatory of the law—clearly prohibited sex discrimination in healthcare, including on the basis of gender identity and sexual orientation.⁸ The rumored federal proposal would contravene this law and would, I am confident, be reversed by the courts.

Prohibiting Discrimination in Schools and Workplaces

California civil rights and education laws explicitly prohibit discrimination on the basis of gender identity or transgender status, reflecting our state’s values.⁹ Our experience has shown that children succeed and thrive in an environment that is welcoming. Sadly, bullying and violence against transgender and gender nonconforming students persists, and sometimes school policies may contribute to these problems.¹⁰ Studies have shown that these youth are at elevated risk of adverse mental health outcomes, including depression, anxiety, substance abuse, and suicide.¹¹ These problems are present throughout the United States, necessitating federal action to protect our young people.

⁷ Cal. Dep’t of Ins., Economic Impact Assessment of Gender Nondiscrimination in Health Insurance 1–2, Reg. File No. REG-2011-00023 (Apr. 13, 2012), <http://transgenderlawcenter.org/wpcontent/uploads/2013/04/Economic-Impact-Assessment-GenderNondiscrimination-In-Health-Insurance.pdf> [hereinafter “California Assessment”]

⁸ Section 1557 of the Affordable Care Act (“ACA”).

⁹ See Cal. Educ. Code §§ 200 (setting forth “policy of the State of California to afford all persons in public schools, regardless of their . . . gender, gender identity, [or] gender expression . . . equal rights and opportunities in the educational institutions of the state”); 220 (prohibiting discrimination by state-funded entities based on, among other bases, gender, gender identity, or gender expression).

¹⁰ Ryan Thoreson, “*Like Walking through a Hailstorm*”: *Discrimination against LGBT Youth in US Schools*, HUMAN RIGHTS WATCH (Dec. 7, 2016), https://www.hrw.org/sites/default/files/report_pdf/uslgbt1216web_2.pdf.

¹¹ Centers for Disease Control and Prevention, *LGBT Youth* (Nov. 12, 2014), <http://www.cdc.gov/lgbthealth/youth.htm>; Youth.gov, *Behavioral Health*, <http://youth.gov/youth-topics/lgbtq-youth/health-depression-and-suicide> (as of Apr. 30, 2018).

President Donald J. Trump
The Honorable Secretary Alex M. Azar II
The Honorable Matthew G. Whitaker
The Honorable Betsy DeVos
The Honorable Alexander Acosta
November 9, 2018
Page 4

California adopted its protections against gender-identity discrimination in schools after legislators received reports of harms suffered by affected students, including students not drinking and eating during the school day to avoid having to use the restroom.¹² And, despite fearmongering about the negative consequences of such laws, California schools have not seen anything of the kind. For example, in 2013, the Los Angeles Unified School District—the second largest district in the country, with more than 640,000 K-12 students—reported to the California Legislature that the school district had “no issues, problems or lawsuits as a result of [a 2004] policy” requiring that students be allowed to use restrooms corresponding to their gender identity.¹³

Most courts that have considered the issue have interpreted Title IX, the federal civil rights law that bans gender discrimination on the basis of sex in education programs that receive government financial assistance, to prohibit anti-transgender bias.¹⁴ Again, I am confident that any action to the contrary by your Administration would be struck down by the courts.

Similarly, most federal circuit courts that have addressed anti-discrimination protections in the workplace have recognized that discrimination based upon “sex” under Title VII and related laws includes discrimination based upon gender stereotyping and/or gender nonconformity.¹⁵ The federal Equal Employment Opportunity Commission likewise takes the

¹² See Cal. Educ. Code § 221.5(f) (requiring schools to allow students to participate in athletic programs and use bathrooms consistent with the student’s gender identity)

¹³ Cal. Sen. Comm. on Educ., Bill Analysis: Assem. Bill No. 1266, at 8 (2013-2014 Reg. Sess.) (internet); see also L.A. Unified Sch. Dist., District Information (internet).

¹⁴ *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1047 (7th Cir. 2017) (holding that Title XI covers people who assert a gender identity in conflict with their sex); *G.G. ex rel. Grimm v. Gloucester County School Bd.*, 302 F. Supp. 3d 730, 747 (E.D. Va. 2018) (holding that discrimination on the basis of transgender status is per se actionable under a gender stereotyping theory under Title IX); *Dodds v. United States Dept. of Educ.* (6th Cir. 2016) 845 F.3d 217, 221 (holding that prohibiting transgender students restroom access corresponding to their identified gender was discriminatory); *contra Evancho v. Pine-Richland School District*, 237 F. Supp. 3d 267, 301 (W.D. Pa. 2017) (denying preliminary injunction seeking to prohibit discriminatory restroom access for transgender students); *Johnston v. U. of Pittsburgh of Com. System of Higher Educ.*, 97 F. Supp. 3d 657, 674 (W.D. Pa. 2015) (holding that Title IX does not prohibit discrimination on basis of transgender status because transgender is not a protected characteristic under the statute).

¹⁵ See *Equal Employment Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 572–73 (6th Cir. 2018), *petition for cert. filed* (U.S. July 20, 2018) (No. 18-107) (sex discrimination under Title VII includes gender identity); *Glenn v. Brumby*, 663 F.3d 1312, 1316–19 (11th Cir. 2011) (holding that terminating an employee because she is transgender violates the prohibition on sex-based discrimination under the Equal Protection Clause); *Kasti v. Maricopa Comm. Coll. Dist.*, 325 Fed. Appx. 492, 493 (9th Cir. 2009) (holding that Title VII prohibits discrimination against transgender people because they do not behave in accordance with an employer’s expectations for men or women); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 573–75 (6th Cir. 2004) (holding that transgender employee had stated a claim under Title VII); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (holding that a transgender individual could state a claim for sex discrimination under the Equal Credit Opportunity Act); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–03 (9th Cr. 2000) (holding that a transgender

President Donald J. Trump
The Honorable Secretary Alex M. Azar II
The Honorable Matthew G. Whitaker
The Honorable Betsy DeVos
The Honorable Alexander Acosta
November 9, 2018
Page 5

position that a “complaint of discrimination based on gender identity, change of sex, and/or transgender status is cognizable under Title VII.” *Macy v. Holder*, EEOC DOC 0120120821 (Apr. 20, 2012), 2012 WL 1435995, at *1. These protections are necessary. Like the issues faced by students at school, all too many transgender and gender nonconforming people face severe discrimination in the workplace. According to a recent survey, transgender individuals are more likely to face harassment and mistreatment at work, suffer an adverse job outcome, or be forced to hide their gender identity to avoid discrimination in the first place.¹⁶

California will not abide by any roll back of protections for those in our community whose gender identities do not conform to a binary identity assigned at birth. As with other efforts to turn back the clock on the civil rights advances of the last half century, the California Department of Justice stands ready to take any action necessary to protect our residents and uphold our State’s values.

Sincerely,

A handwritten signature in blue ink, appearing to read "Xavier Becerra", with a large, stylized flourish at the end.

California Attorney General

cc: Hon. Mick Mulvaney, Director, Office of Management and Budget

individual could state a claim under the Gender Motivated Violence Act); *contra Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007) (“discrimination against a transsexual [sic] based on the person’s status as a transsexual [sic] is not discrimination because of sex under Title VII”); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (per curiam) (“discrimination based on one’s transsexualism [sic] does not fall within the protective purview of [Title VII]”).

¹⁶ Jaime M. Grant, Lisa A. Mottet, Justin Tanis, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, NATIONAL CENTER FOR TRANSGENDER EQUALITY & NATIONAL GAY AND LESBIAN TASK FORCE (2011), http://endtransdiscrimination.org/PDFs/NTDS_Report.pdf.