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June 7, 2021

Robinsue Frohboese
Acting Director
Office of Civil Rights
U.S. Department of Health and Human Services
200 Independence Avenue S.W.
Washington, D.C., 20201

Dear Acting Director Frohboese:

The Bazelon Center for Mental Health Law writes to highlight a particular application of disability-based discrimination that merits inclusion in regulations implementing Section 1557 of the Affordable Care Act. The Bazelon Center is a national non-profit legal advocacy organization that advances equal opportunity for individuals with mental disabilities in all aspects of life, including health care, community living, employment, education, housing, parental and family rights, voting, and other areas.

We urge that new regulations implementing Section 1557 include greater clarity on how the benefit design of health care coverage may discriminate based on disability. While there are a variety of ways in which benefit design may discriminate based on disability, including through discriminatory utilization management criteria, benefit exclusions that target a particular disability, and adverse tiering of prescription drugs, all of which we hope will be addressed in the Section 1557 regulations, we would like to bring to your attention how health coverage benefit design may discriminate based on disability by creating needless segregation of people with disabilities.

As the U.S. Supreme Court has recognized, needless segregation is a form of disability-based discrimination. *Olmstead v. L.C.*, 527 U.S. 581 (1999). In fact, unnecessary segregation has impacted the lives of people with disabilities in ways that are as significant, if not more so, as other forms of disability-based discrimination in health care. Benefit design decisions can result in the needless segregation of people with disabilities, including by depriving them of the opportunity to receive needed services in integrated settings and offering those services only in segregated settings. Thus, it is

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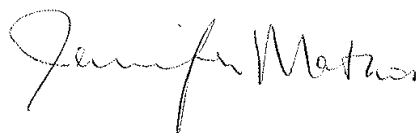
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important that regulations implementing Section 1557 prohibit covered entities from taking actions that result in the segregation of people with disabilities, including:

- covering a service or item for individuals in institutional or other segregated settings but not covering the same service or item for individuals living in their own homes or other community settings;
- covering a service or item in greater amounts for individuals in segregated settings;
- setting higher reimbursement rates for a service or item for individuals in segregated settings than for the same service or item for individuals in community settings;
- failing to ensure an adequate network of providers available to provide community-based services such that individuals with disabilities must receive the services they need in segregated settings due to the unavailability of community-based services;
- making Essential Health Benefits coverage decisions that result in people with disabilities being served in segregated settings rather than community-based settings (for example, failure to cover services essential for people with disabilities to live in community-based settings would violate Section 1557 if it results in individuals being served in segregated settings such as hospitals, nursing facilities, ICF/DDs, or board and care homes, and covering the services to support them in integrated settings would not be unduly expensive);
- setting reimbursement rates for Essential Health Benefits in a way that results in individuals with disabilities being served in segregated settings rather than appropriate community-based settings.

Thank you for your attention to this important issue. We are encouraged that OCR will be undertaking a new rulemaking process and are hopeful that people with disabilities will be able to exercise the rights that Congress afforded them in Section 1557 of the ACA.

Sincerely,



Jennifer Mathis
Director of Policy and Legal Advocacy

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