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MHLAC Comments on Nondiscrimination in Health Programs and Activities
Docket ID: HHS-OCR-2015-0006, **RIN** 0945-AA02
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Mental Health Legal Advisors Committee (MHLAC) is an agency under the Massachusetts Supreme Judicial Court. MHLAC provides legal representation to persons with psychiatric challenges and counsels families, the courts, and the legislature on mental health legal matters.

We support the inclusion of disability discrimination in the anti-discrimination provision of § 92.101. We also support § 92.205, which requires the provision of reasonable modifications to policies, practices, and procedures when such modifications are necessary to avoid discrimination on the basis of disability. We do, however, suggest that specific examples of prohibited practices and reasonable modifications be included in the regulations.

Section 92.101

Unfortunately, providers often do not recognize discrimination against persons with psychiatric disabilities as readily as one would hope. For example, practice groups refuse to treat individuals with or perceived to have psychiatric disabilities unless they see a mental health professional. If the individual refuses to submit to mental health evaluation or treatment, she or he is refused any treatment by the practice group, sometimes despite long-standing relationships with a specialist within that medical group. Such a policy effectively removes from persons with psychiatric disabilities the ability to exercise their right to refuse treatment: 'give us your head or we won't treat your body.' **A person should never be denied treatment for one condition unless they submit to treatment for another condition.** Such policies should be included as an example of an impermissible disability discrimination.

Another form of disability discrimination that should be highlighted is the failure to provide appropriate physical health care to persons with psychiatric disabilities. There is ample evidence of how mental health diagnoses result in inadequate physical health care. S. Fendell, *The Unintended Results of Payment Reform and Electronic Health Records*, 10 J. Health & Biomed. L. 173, 190-194 (2014). It is common knowledge that persons with psychiatric disabilities die an average of 25 years earlier than persons without such issues. Part of the reason for that horrifying statistic is that, due to stigma, physical health care providers attribute physical symptoms to

mental conditions if the patient has a psychiatric diagnoses or the provider sees psychiatric medications in the patient's electronic health record. Given the serious consequences of such discrimination, we recommend the regulations specifically note that **failure to provide testing, treatment, and other appropriate physical health care to persons with psychiatric disabilities due to a mental health diagnosis is a form of disability discrimination**. We also suggest that the regulations note that providers can seek to avoid the likelihood of this type of discrimination by taking steps to ensure persons the right of self-identification, i.e. the ability of a patient to choose with which health care providers to share mental health diagnoses and other mental health information. See *id.* at 199 and http://teradact.com/TeraDactor.html (last accessed 11/2/15) for examples electronic health records approaches to facilitate the ability of patients to self-identify.

Section 92.205

Just as providers frequently fail to recognize discrimination against persons with psychiatric disabilities, so they fail to conceive of appropriate accommodations to provide access to services. For example, if an individual suffers from depression, it may be difficult for that person to arrange transportation and engage in the activities of daily living necessary to attend the appointment. Rather than penalize the individual, reasonable accommodations should be put in place to facilitate engagement in treatment. A reasonable accommodation might be to arrange the transportation for the individual and engage a peer support counselor to go to the individual's home to assist with arising, dressing, and traveling to the appointment. Accountable care organizations have an interest in lowering health care costs. Reducing missed appointments, which waste provider time and increase the likelihood of untreated ailments which result in costly future treatment, makes such an accommodation potentially reasonable as well as desirable. While whether or not an accommodation is reasonable is a fact-based issue, we suggest that **examples of accommodations such as this one should be included in the regulation to promote a deeper and fuller consideration of what is a reasonable accommodation for a person with a psychiatric disability**.

Respectfully submitted,

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