



California Public Employees' Retirement System

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Melanie Fontes Rainer
Director, Office for Civil Rights
Department of Health and Human Services
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue SW
Washington, DC 20201

June 14, 2023

Subject: HIPAA Privacy Rule to Support Reproductive Health Care Privacy; RIN 0945-AA20

Dear Director Fontes Rainer,

On behalf of the California Public Employees' Retirement System (CalPERS), we thank you for the opportunity to provide comments on the Notice of Proposed Rulemaking, HIPAA Privacy Rule to Support Reproductive Health Care Privacy (Proposed Rule). CalPERS applauds the Administration's efforts to ensure the privacy of, and access to reproductive health care services for all Americans. We appreciate the Department of Health and Human Services' ongoing efforts as they align with our current goals and strategic priorities related to achieving equitable health outcomes and ensuring that our members have access to care when and where they need it. We write to express CalPERS enthusiastic support for the Proposed Rule and to provide a recommendation to expand the definition of "highly sensitive PHI".

CalPERS is the largest purchaser of public employee health benefits in California, and the second largest public purchaser in the nation after the federal government. Our program provides high-quality, comprehensive health care coverage for 1.5 million public employees, retirees, and their families. CalPERS offers active employees, retirees, and their dependents a wide selection of high-quality health plan offerings, which include health maintenance, preferred provider, and exclusive provider organization (HMO, PPO, and EPO) plans. We provide our participants seven out of state plan choices and have taken steps to ensure they continue to have access to all medically necessary reproductive health care services, including contraception and abortion services.

Following the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* (Dobbs), the State of California has, among other things, enacted legislation ensuring abortion access for all who seek it, including for those who travel from outside the state. In addition, as a state agency subject to the Governor's authority, CalPERS is prohibited from providing medical records, patient data, and other information with other states inquiring, investigating or seeking to impose civil,

criminal or professional liability for providing, securing or receiving reproductive health care services legally performed in California.

Although statewide efforts have made significant improvements in protecting reproductive health care decision-making, as a nation, there is a lack of uniformity, and uncertainty remains among patients, providers, and the larger health care community as to how this information can be shared or protected. By prohibiting the disclosure of protected health information (PHI) for purposes of investigating, prosecuting or suing patients, providers and others involved in facilitating legal reproductive health care, including abortion, this Proposed Rule would improve clarity and impose a level of uniformity that is a significant and vital step towards protecting the privacy of our members' reproductive health care decision-making and access to reproductive health care services, regardless of where they live and work. As a health benefits purchaser with participants residing in all fifty states, ensuring a baseline level of privacy regardless of where reproductive care is legally obtained, will further reduce CalPERS potential liability and health plan administration costs, and help to ensure access to medically necessary reproductive health care for all our members.

We join other entities in recommending the expansion of the definition of "highly sensitive PHI," to include sexual health and gender-affirming care or other health services supporting gender diverse individuals. Gender-affirming care is medically necessary for transgender, nonbinary, and other gender diverse individuals and should remain a treatment decision between a clinician and patient, yet many states are criminalizing the provision of health care for gender diverse individuals similar to reproductive health care. Moreover, transgender and nonbinary people often experience a variety of barriers to accessing health services, including overt discrimination, inadequate health insurance coverage, and legislative interference in the provider-patient relationship. Without appropriate protections for gender-affirming care and other types of care for transgender, nonbinary, and gender diverse individuals, authorities could use their PHI to target them, their families, and their clinicians. While California law prohibits insurers from denying, canceling, limiting, or refusing insurance coverage based on gender identity, expression or transgender status and requires California licensed health plans to cover medically necessary treatment and procedures for their transgender and nonbinary members, several states have enacted legislation or are considering enacting legislation prohibiting this care. We remain committed to providing equitable and compassionate care to our transgender and nonbinary members, including those living in states where their access to gender-affirming care may be restricted.

We thank you again for the opportunity to respond to this Proposed Rule. While California protects reproductive health care privacy and decision-making for its residents, this Proposed Rule would strengthen privacy protections for our out of state members, retirees, and their dependents. As you continue through the rulemaking process, we are happy to be a resource for you, so please do not hesitate to reach out.

Sincerely,

Don Moulds
Chief Health Director