

United States Senate

WASHINGTON, DC 20510

February 23, 2023

Dear Attorney General Merrick Garland, Assistant Attorney General Kristen Clark, and Disability Rights Section Chief Rebecca Bond:

I write to encourage the Department of Justice (DOJ) to extend its investigations of offenses under the American Disabilities Act (ADA) to include the practices of state medical license boards. Many of these boards ask physicians about their mental health and substance use or addiction history, beyond what is necessary to fulfill the purpose of screening physicians for current, debilitating cases of mental illness and substance use or abuse. These questions both discourage many applicants and licensed physicians from receiving care that they need, and they violate Title II of the ADA, which forbids public entities from discriminating against qualified individuals on the basis of disabilities, including mental health conditions. I know that you share my goals of protecting health privacy, encouraging a robust medical workforce, promoting mental health care, and enforcing the ADA, and so I write to ask you to prioritize this concern by issuing DOJ guidance and holding state medical boards accountable.

States oversee the qualifications of their physicians as part of the power to protect the health, safety, and welfare of its citizenry, but some of the questions that many state medical boards ask of physicians on their initial licensure exams and renewals are, according to the American Psychiatric Association, the American Medical Association, and the Federation of State Medical Boards, irrelevant to assessing current ability to practice. In fact, several peer-reviewed journal articles estimate that two-thirds of state medical boards violate Title II of the ADA with personal, taxing, and unnecessarily broad questions about doctors' psychiatric history.^{1,2,3} The repercussions are not just a matter of law, but they also inform the practices of hospitals, health plans, and malpractice insurance companies, and impact the medical well-being of physicians.

A 2019 study⁴ looked at initial medical licensing processes in all states to determine if qualified applicants who report mental illness experience discrimination and to identify the most physician-friendly states for mental health.

The authors ranked Alaska as the worst of all states when it came to invasiveness of mental health questions on initial licensing applications with 25 yes-or-no questions including:

1 Schroeder, et al., Do State Medical Board Applications Violate the Americans With Disabilities Act?. *Academic Medicine* 84(6):p 776-781, June 2009. | DOI: 10.1097/ACM.0b013e3181a43bb2.

2 Dyrbye et al., Medical Licensure Questions and Physician Reluctance to Seek Care for Mental Health Conditions. *Mayo Clinic Proceedings* 92(10):p 1486-1493, October 1, 2017. | DOI: 10.1016/j.mayocp.2017.06.020.

3 Jones et al., Medical Licensure Questions About Mental Illness and Compliance with the Americans With Disabilities Act. *Journal of the American Academy of Psychiatry and the Law Online* 46(4):p 458-471, December 2018. | DOI: 10.29158/JAAPL.003789-18.

4 Wible, Pamela, and Arianna Palermini, Physician-Friendly States for Mental Health: A Comparison of Medical Licensing Boards. *Qualitative Research in Medicine and Healthcare* 3(3):p 107-119, December 22, 2019. | DOI: 10.4081/qrmh.2019.8649.

“Have you ever been diagnosed with, treated for, or do you currently have: followed by a list of 14 mental health conditions including depression, seasonal affective disorder, and “any condition requiring chronic medical or behavioral treatment.”

The District of Columbia asks two questions, both unrestricted in time and the second “broad and subjective given that one anonymous and unsubstantiated complaint can lead to a physician [Physician Health Program] referral and undermine a doctor’s career”:

“Have you ever entered into a monitoring program for purposes of monitoring your abuse of alcohol, drugs, or other controlled substances?”

“Have you ever entered into a monitoring program for purposes of monitoring your professional behavior including recordkeeping, billing, boundaries, quality of care or any other matter related to the practice of your profession?”

Georgia’s application does not directly ask impairment or mental health questions, but requires three separate peer references to answer whether the physician has or had in the past any mental or physical illnesses or personal problems that interfere with their medical practice. “Personal” problems are open to interpretation and there’s no indication that any assertions contained in these references must be substantiated by evidence.

These kinds of questions go far beyond conditions that could impair qualified individuals and may require comprehensive disclosure of one’s medical and professional history.

Even though physicians face an inordinate amount of stress—their burnout rate is 50%, twice the general working population’s level⁵—many avoid seeking mental health support due in part to these questions. In one survey of women physicians experiencing mental health difficulties, 44% of respondents who did not seek treatment cited licensure questions as a reason why.⁶ In another survey of surgeons who experienced suicidal thoughts over the previous year, 60% said the questions would make them more reluctant to seek help.⁷ Physicians have had one of the highest suicide rates of any profession, and the pandemic has exacerbated suicide risk factors.⁸ Troublingly, there have also been reports of unwanted mental health support or assessments as physicians have reported retaliatory inquiries into physical, mental, or emotional health and referrals to impaired practitioner programs.

5 Yates et al., Physician Stress and Burnout. *The American Journal of Medicine* 133(2):p 160-164, September 11, 2019. | DOI: 10.1016/j.amjmed.2019.08.034.

6 Gold et al., “I would never want to have a mental health diagnosis on my record”: A survey of female physicians on mental health diagnosis, treatment, and reporting. *General Hospital Psychiatry* 43: p 51-57, November-December 2016. | DOI: 10.1016/j.genhosppsych.2016.09.004.

7 Shanafelt et al., Special Report: Suicidal Ideation Among American Surgeons. *Archives of Surgery* 146(1)p. 54–62, January 17, 2021. | DOI: 10.1001/archsurg.2010.292.

8 Kakarala, Sophie E. and Prigerson, Holly G., Covid-19 and Increased Risk of Physician Suicide: A Call to Detoxify the U.S. Medical System. *Front Psychiatry* 13: February 9, 2022. | DOI: 10.3389/fpsy.2022.791752. PMID: 35222114; PMCID: PMC8864162.

The DOJ oversees professional licensing bodies and has previously intervened when those bodies violated Title II of the ADA. For example, in 2014, the DOJ advised the Vermont Human Rights Commission about the unlawful nature of questions by state law boards about mental health history. Later that year, the DOJ investigated the Louisiana state law board for questions that violated Title II of the ADA. The DOJ also staked out a similar position in the case of state medical boards, writing in a 1993 *amicus curiae* brief before the U.S. District Court for the District of New Jersey that the New Jersey Boards of Medical Examiners' "focus on past diagnoses and treatment of disabilities rather than conduct cannot be deemed justified." Nevertheless, to our knowledge, the DOJ has yet to open an investigation into a state medical board for violating Title II.

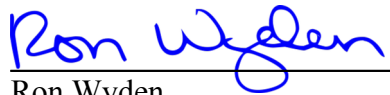
I urge the DOJ to investigate state medical boards' compliance with the ADA. The DOJ should also issue guidance on 28 C.F.R. § 35.130 to clearly state that state medical boards cannot ask inappropriate medical licensing and application questions, especially questions related to mental health history. In the interim, I ask that you provide me with complete answers to the following questions by March 16th, 2023:

- Does the DOJ have additional information, beyond the scholarship mentioned above, about the extent and different ways state medical boards may be violating Title II of the ADA? If so, please explain what it has learned.
- Has the DOJ's Civil Rights Division been engaged on this issue during the last several years? If so, please explain what work they are doing.
- Does the DOJ stand behind its 1993 *amicus curiae* brief in *Medical Society of New Jersey v. Jacobs*? If so, can it commit to publishing a version of it in the form of subregulatory guidance?
- How will the DOJ ensure that all state medical boards comply with the law and affected applicants or physicians have recourse?
- Has the DOJ examined similar issues when it comes to residency programs and hospital privileges?

I also ask that you brief my personal office staff members Jenni Katzman and Kevin Wu on these questions.

Thank you for your attention to this important matter.

Sincerely,



Ron Wyden
United States Senator



Jeffrey A. Merkley
United States Senator



Cory A. Booker
United States Senator