

July 13, 2020

Submitted electronically at www.regulations.gov

RE: Office of the Assistant Secretary for Financial Resources; Health and Human Services Grants Regulation (RIN 0991-AC16)

We are speaking today on behalf of the Fenway Institute at Fenway Health, a federally qualified health center in Boston, MA that serves 32,000 patients each year. The Fenway Institute works to make life healthier for those who are lesbian, gay, bisexual, and transgender (LGBT), people living with HIV, and the larger community. We do this through research and evaluation, education and training, and policy analysis. We strongly oppose the finalization of the proposed rule by the Department of Health and Human Services (HHS) titled “Office of the Assistant Secretary for Financial Resources; Health and Human Services Grants Regulation (RIN 0991-AC16).”

If finalized as is, this proposed rule would remove regulatory provisions that explicitly prohibit organizations that receive HHS grant funding from discriminating on the basis of sexual orientation, gender identity, sex, and religion. Under this dangerous and exceptionally broad rule, LGBT people, women, people of minority faiths, and non-religious people could face discrimination by a wide range of health and social service agencies that receive funding from HHS. This would put the health and well-being of millions of Americans at risk.

HHS awards more than \$500 billion in grant funding every year to provide critical services to millions of Americans. HHS grantees include organizations that provide a wide array of health and social services, including health care at federally funded community health centers, HIV and STI testing and prevention, refugee resettlement, elder care programs, childcare and after-school programs, community meal programs, and adoption and foster care services. These programs are vital to millions of Americans, especially for marginalized communities, including LGBT people, who already experience pervasive discrimination that acts as a barrier to accessing care and services.¹

Anti-LGBT discrimination is a major barrier to care and a key contributor to LGBT health disparities that are well documented in the scientific literature. Other factors contributing to LGBT health disparities are stigma, minority stress, and social isolation. LGBT people, especially youth, are disproportionately burdened by depressive symptoms and suicidality.^{2,3} LGBT elders experience high rates of social isolation (often related to not being married, not having children, being estranged from biological family, etc.) and high prevalence of disability.⁴

¹ Lambda Legal. 2010. *When Health Care Isn't Caring: Lambda Legal's Survey of Discrimination against LGBT People and People with HIV*. New York: Lambda Legal.

² Kann L, McManus T, Harris W et al. (June 2018). Youth Risk Behavior Surveillance—United States, 2017. *MMWR Surveill. Summ.* 2018; 67(8). <https://www.cdc.gov/healthyyouth/data/yrbs/pdf/2017/ss6708.pdf>.

³ James SE, Herman JL, Rankin S, Keisling M, Mottet L, & Anafi M. (2016). *The Report of the 2015 U.S. Transgender Survey*. Washington, DC: National Center for Transgender Equality.

⁴ Fredriksen-Goldsen K, Kim H, Barkan S, Muraco A, Hoy-Ellis C. (October 2013). Health Disparities among Lesbian, Gay, and Bisexual Older Adults: Results from a Population-Based Study. *Am J Public Health*. 103(10): 1802-1809.

As such, LGBT elders may be in greater need of formal elder care services, but at the same time, they may be less likely to access these services due to fear of anti-LGBT discrimination in elder services.⁵ LGBT people in general are more likely than cisgender, straight people to live in poverty (22% vs. 16%), with transgender people (29%), bisexual women (29%), and bisexual men (19%) experiencing the highest rates of poverty.⁶ Furthermore, LGBT people of color had significantly higher rates of poverty compared to their White counterparts.⁷ LGBT people are also more likely to have chronic conditions, such as cardiovascular disease, cancer, and HIV or AIDS.⁸ There is also emerging research about higher rates of sedentarism and pre-diabetes among LGBT youth, which could lead to diabetes later in life.⁹ These disparities in chronic and pre-existing conditions are especially troubling now because these conditions could increase the vulnerability of LGBT people to COVID-19.

Because of these disparities, LGBT people are in need of the critical health and social support services that HHS grantee organizations provide. If this rule goes into effect and HHS grantees are allowed to discriminate based on sexual orientation and gender identity, these disparities will be worsened. Under this rule, LGBT people in need of medical care could be turned away from federally funded health centers and clinics. After-school programs like Head Start could refuse to serve LGBT youth or children of LGBT parents. Senior service centers could refuse to serve LGBT elders. The rule also extends beyond LGBT people, and it could also allow, for example, Catholic adoption agencies to refuse to place children with qualified and loving Muslim parents or single women. This rule would create a broad license to discriminate for agencies like Miracle Hill Ministries in South Carolina, a nonprofit homeless and foster care agency that received a special waiver from HHS to continue to receive federal grant funding even when they refused to place children with prospective parents who were Jewish.

This rule could also threaten to undermine the Ending the HIV Epidemic initiative. In this country, 70% of people living with HIV and newly diagnosed with HIV each year are gay and bisexual men and transgender women. Black and Latino gay and bisexual men experience the most striking disparities in the domestic HIV epidemic.¹⁰ This rule could threaten access to critical services provided by HHS grantees—including housing support, mental health and substance use treatment, and nutritional support—that help people living with HIV stay healthy and adhere to treatment. Treatment adherence is of critical importance in the Ending the HIV Epidemic initiative.

⁵ Stein G & Almack K. (2012). Care near the end of life: The concerns, needs and experiences of LGBT elders. In Ward, R., Rivers, I., Sutherland, M. (eds.), *Lesbian, gay, bisexual and transgender ageing: Biographical approaches for inclusive care and support*. London: Jessica Kingsley Publishers. 114-134.

⁶ Badget L, Choi S, Wilson B. (October 2019). *LGBT Poverty in the United States: A study of differences between sexual orientation and gender identity groups*. UCLA School of Law: The Williams Institute. Available at: <https://williamsinstitute.law.ucla.edu/publications/lgbt-poverty-us/>

⁷ *Ibid.*

⁸ Cahill S and Wang T (2020, June). Quality Innovation Network, Quality Improvement Organizations (QIN-QIO) Sharing Call: “Reducing chronic disease and health disparities in diverse LGBT populations.” National webinar.

⁹ Beach L, Turner B, Felt D, et al. (2018). Risk factors for diabetes are higher among non-heterosexual US high school students. *Pediatric Diabetes*, 19(7):1137-1146.

¹⁰ CDC (2018), HIV among African American Gay and Bisexual Men.

<https://www.cdc.gov/hiv/group/msm/bmsm.html>. Accessed January 22, 2018.

Homeless services, funding by HHS, are especially important to LGBT people, and especially for LGBT people of color. LGBT youth represent as much as 20-40% of homeless youth in some cities.¹¹ Data from the 2015 National Transgender Discrimination Survey show that 30% of transgender Americans have experienced homelessness at some point in their lives, and 12% in the past year.¹²

Before issuing the final rule, HHS should also take the time to carefully analyze the implications of the Supreme Court's recent decision in *Bostock v. Clayton Cty., Georgia*, No. 17-1618, 2020 WL 3146686 (U.S. June 15, 2020), which definitively ruled that Title VII of the Civil Rights Act's prohibition of discrimination on the basis of sex in employment necessarily includes discrimination against LGBT people.

Conservative Justice Neil Gorsuch, writing for the 6-3 majority, said that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."¹³ In this very strong ruling, the court upheld two decades of lower federal court rulings and Equal Employment Opportunity Commission rulings stating that anti-LGBT discrimination is sex discrimination.¹⁴ While *Bostock* was about employment, the logic expressed in the ruling has major implications for access to health care and social services. In his dissent, Justice Samuel Alito warned that the implications of the majority ruling are broad, because "[o]ver 100 federal statutes prohibit discrimination because of sex."¹⁵ It is only a matter of time before *Bostock* is interpreted to prohibit discrimination on the basis of sexual orientation and gender identity in health care and social services.

As relevant here, the proposed rule (0991-AC16) would eliminate the existing prohibition on discrimination on the basis of "age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation" 45 C.F.R. § 75.300(c), and replace it with a prohibition on discrimination by grantees "to the extent doing so is prohibited by statute." 84 Fed. Reg. 63,831, 63,832. The proposed rule states that HHS "considers this proposed language for paragraph (c) appropriate because it affirms that HHS grants programs will be administered consistent with the Federal statutes that govern the programs, including the nondiscrimination statutes that Congress has adopted and made applicable to the Department's programs, RFRA, and with all applicable Supreme Court decisions."

Many statutes administered by HHS already prohibit discrimination on the basis of sex, but do not specifically include sexual orientation and gender identity or transgender status. At a

¹¹ Ray, N. (2007). *Lesbian, Gay, Bisexual and Transgender Youth: An Epidemic of Homelessness*. National Gay and Lesbian Task Force Policy Institute, National Coalition for the Homeless. <https://www.thetaskforce.org/lgbt-youth-an-epidemic-of-homelessness/>

¹² James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). *The Report of the 2015 U.S. Transgender Survey*. Washington, DC: National Center for Transgender Equality

¹³ Supreme Court of the United States. *Bostock v. Clayton County, Georgia*. Certiorari to the United States Court of Appeals for The Eleventh Circuit. No. 17-1618. June 15, 2020. https://www.supremecourt.gov/opinions/19pdf/17-1618_hfc1.pdf

¹⁴ U.S. Equal Employment Opportunity Commission. *Examples of court decisions supporting coverage of LGBT-related discrimination under Title VII. Updated 2017*. Available at https://www.eeoc.gov/eeoc/newsroom/wysk/lgbt_examples_decisions.cfm.

¹⁵ *Bostock v. Clayton County, Georgia*.

minimum HHS should revisit the rule to address the application of *Bostock*—namely to clarify that, for each of the statutes it administers, prohibited sex discrimination includes discrimination against LGBT people; or if it declines this legally correct application of *Bostock*, to provide an explanation as to the purported basis for distinction. We recommend HHS leave the 2016 Obama-era HHS grants rule, which is consistent with *Bostock*'s analysis of discrimination, in place.

Lastly, we were informed that OMB has said on previous calls with other stakeholder groups that they would attempt to post the rest of the public comments regarding the proposed rule online. However, as of this morning, the online docket still only has 18,423 of the 121,039 comments posted. This rule should not be finalized without the American public being able to properly view and respond to at least a majority of these comments in these OIRA meetings.

The programs funded by HHS should be available to all eligible people in need, regardless of their sexual orientation, gender identity, sex, or religion. This proposed rule would allow agencies to use taxpayer dollars to discriminate against already vulnerable and marginalized communities. LGBT Americans work hard and pay taxes just like everybody else. We should not be denied social services and health care funded by the U.S. government that we pay for in our taxes every paycheck. This is completely contradictory to the mission of HHS to improve the health and well-being of all Americans, including LGBT people, women, and people of minority faiths. It is also at odds with the vast majority of the US population that support sexual orientation and gender identity nondiscrimination protections. Nine in 10 American adults agree with the *Bostock* Supreme Court ruling, and say it should be illegal for employers to fire or refuse to hire people because they are lesbian, gay, or bisexual (90%) or transgender (89%).¹⁶ About 9 in 10 Americans also say it should be illegal for doctors or other health care providers to refuse to treat people because they are lesbian, gay, or bisexual (89%) or transgender (88%), and 85% say it should be illegal for health insurance companies to refuse to pay for health care services for people who are transgender.¹⁷

In a global pandemic when access to the health care and social services is of utmost importance, the last thing anyone should be doing is making it easier to discriminate based on religion, sex, or other factors. We strongly urge HHS to reconsider the finalization of this rule.

Sincerely,

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¹⁶ Kaiser Family Foundation (2020, June 24). Poll: Large Majorities, Including Republicans, Oppose Discrimination Against Lesbian, Gay, Bisexual and Transgender People by Employers and Health Care Providers (press release)

¹⁷ *Ibid.*