



The Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness

223 Fourth Avenue, Tenth Floor
Pittsburgh, PA 15222
412.697.1311
pa-interbranchcommission.com

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The Honorable Alex M. Azar, II
Secretary
U.S. Department of Health & Human Services
200 Independence Avenue SW,
Washington, DC 20201

Re: HHS Docket No. HHS-OS-2019-0014, RIN 0991-AC16, Comments in Response to
Notice of Proposed Rulemaking: Health and Human Services Grants Regulation

Dear Secretary Azar:

Thank you for the opportunity to submit the following comments to the U.S. Department of Health & Human Services (“HHS” or “Department”) in response to its Notice of Proposed Rulemaking (“NPRM”) published in the Federal Register on November 19, 2019. Because the proposed amendments would (1) likely result in HHS grant administrators inconsistently and erroneously applying non-discrimination laws when making grant awards, (2) reduce permanency for children in the child welfare system, and (3) disproportionately and negatively impact LGBT people who depend on public welfare and public health services, the Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness (the “Commission”) strongly urges HHS to withdraw its proposed amendments to 45 CFR § 75.300 and rescind its accompanying Notification of Nonenforcement.

Introduction

The Commission was established in 2005 by the three branches of Pennsylvania’s government to implement the recommendations from a Pennsylvania Supreme Court study on racial and gender bias in the justice system. The final report from the study was completed in 2003, and contained chapters on fourteen topics, including perceptions and occurrences of racial, ethnic, and gender bias in the courtroom and discriminatory practices in the family court and juvenile justice systems, among others.¹ The Commission has expanded its areas of focus to include working to end discrimination

¹ See Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System, <http://www.pa-interbranchcommission.com>.

against LGBT Pennsylvanians in our courts and throughout the Commonwealth. To that end, the Commission has been actively involved in supporting legislation to amend the Pennsylvania Human Relations Act to extend housing, workplace, and public accommodation discrimination protections to LGBT Pennsylvanians, conducting training sessions to educate Pennsylvania attorneys and judges on anti-LGBT bias in jury selection, and working to amend statewide policy to address discrimination against LGBT youth in Pennsylvania's juvenile justice and child welfare systems.

1. Vague Non-Discrimination Provision in Section 75.300(c) of Proposed Rule Promotes Inconsistent and Erroneous Application of Non-Discrimination Laws in the Administration of HHS Grants

The current promulgation of 45 CFR § 75.300(c) provides HHS grant administrators and grant recipients with clear and unambiguous non-discrimination guidance by explicitly enumerating the bases upon which grant recipients may not discriminate against program beneficiaries. The proposed amendment to 45 CFR § 75.300(c) threatens the consistency and clarity the current rule provides by deleting the enumerated list of non-merit factors upon which HHS grant recipients are prohibited from discriminating.

Deletion of these non-merit factors will require individual HHS grant administrators to analyze multiple applicable federal non-discrimination statutes before making a determination as to whether a specific prospective HHS grant recipient's program meets HHS non-discrimination criteria. Not only will this practice create significant delays in the grant-making process resulting in government waste of time and resources, but it also will likely cause the applicable statutes to be applied inconsistently and erroneously. This is apt to lead to increased litigation against HHS and its grant recipients by program and services beneficiaries who are inadvertently discriminated against.

For example, Title VI of the Civil Rights Act of 1964, which prohibits discrimination in federally-assisted programs generally, merely states that, "[n]o person in the United States shall, on the ground of *race, color, or national origin*, be excluded from participation in, be denied the benefits of, or be subjected to, discrimination under any program or activity receiving Federal financial assistance."² Other federal statutes such as the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title IX of the Education Amendments of 1972 only protect against discrimination in the administration of federally-funded programs on the sole basis of disability, age, and sex, respectively.³

² Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000d (as amended) (emphasis added).

³ Rehabilitation Act of 1973, 29 U.S.C. § 794 (as amended); Age Discrimination Act of 1975, 42 U.S.C. § 6101; Education Amendments of 1972, Title IX, 20 U.S.C. § 1681.

Other federal statutes that pertain to the administration of specific types of HHS grants and public health and welfare programs prohibit discrimination on differing bases.⁴

Retaining the explicit non-discrimination provision in the current promulgation of 45 CFR § 75.300(c) is in the best interests of HHS, its grant recipients, and beneficiaries of grantees' programs and services for the following reasons: (1) it eliminates the risk that HHS grant administrators will erroneously award grants to recipients who do not comply with non-discrimination criteria and, thereby, eliminates the risk that HHS and grantees will be subject to discrimination lawsuits; (2) it prevents government waste; and (3) it furthers HHS' stated mission of "enhance[ing] and protect[ing] the health and well-being of *all* Americans."⁵

2. Disproportionate Adverse Impact on LGBT Americans

Currently, there are no federal statutes that explicitly prohibit discrimination on the bases of sexual orientation and gender identity or expression. Although many federal appellate courts have interpreted sex discrimination to include discrimination on such bases,⁶ no United States Supreme Court decisions, to date, have interpreted the term "sex" in federal non-discrimination statutes to encompass discrimination on the bases of sexual orientation and gender identity or expression.⁷ Accordingly, the proposed amendments

⁴ See e.g., Public Health Service Act, 42 U.S.C. §§ 295m-296g, 300w-7, 300x-57 (**only** prohibiting discrimination on the basis of **sex** in federally-assisted health training programs, **but** prohibiting discrimination on the basis of **age, race, color, national origin, disability, sex, or religion** in programs and activities funded by the Preventative Health and Health Services Block Grants, the Community Mental Health Services Block Grant, and the Substance Abuse Prevention and Treatment Block Grants); Small Business Job Protection Act of 1996, 42 U.S.C. § 1996b (prohibiting cover agencies and entities from discriminating on the basis of **race, color, and national origin** in child placement decisions in adoption and foster care); Social Security Act, 42 U.S.C. § 708 (prohibits discrimination on the basis of **age, race, color, national origin, disability, sex, or religion** in the Maternal and Child Health Services Block Grant); Community Services Block Grant Act, 42 U.S.C. § 9918 (prohibits discrimination on the basis of **race, color, national origin, or sex** in programs and activities funded by the Community Services Block Grant).

⁵ U.S. Dep't of Health & Human Serv., *About HHS*, <https://www.hhs.gov/about/index.html> (last visited Dec. 13, 2019) (emphasis added)

⁶ See e.g., *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018); *Bostock v. Clayton Cty. Bd. of Comm'rs*, 723 F. App'x 964 (11th Cir. 2018); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (*en banc*); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000); *Schwench v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

⁷ Currently, there are three cases pending in the United States Supreme Court on this issue; however, decisions on the cases have yet to be rendered. See *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No.

to 45 CFR § 75.300, which would eliminate the requirement that HHS grant recipients not discriminate against program beneficiaries on the bases of sexual orientation and gender identity, would permit the recipients to deny services to current or prospective LGBT beneficiaries. Permitting this type of discrimination will exacerbate current child welfare and public health crises, as well as severely impact the quality of life of low-income LGBT Americans and LGBT youth and elderly.

A. Reduction of Child Permanency and Harm to LGBT Youth in Foster Care

In 2018, 437,283 children were reported to be in foster care in the United States, of whom 125,422 are waiting to be adopted.⁸ These numbers demonstrate a need for more foster and adoptive parents in the United States to help these children establish permanency. The proposed amendment to 45 CFR § 75.300 runs contrary to this significant governmental interest in that it would permit HHS to award grants to child welfare agencies that discriminate against prospective adoptive and foster parents on the basis of their LGBT status. This change will reduce the overall pool of homes available to children in the foster care system. It will also result in more children being placed in congregate care, instead of in foster and pre-adoptive homes, which is contrary to Pennsylvania's public policy.⁹ Additionally, because recent studies have found that same-sex couples are more likely than heterosexual couples to adopt and foster children,¹⁰ the problem of finding adequate foster and adoptive homes for children in the child welfare system will be magnified if the proposed revisions to 45 CFR § 75.300 go into effect. A study conducted in 2018 found that one in five, or 21.4%, of all same-sex couples in the United States are currently raising adoptive children, compared to only 3% of all heterosexual couples; 2.9% of same-sex couples are fostering children compared to only 0.4% of heterosexual couples.¹¹

18-107 (2019); *Altitude Express, Inc. v. Zarda*, No 17-1623 (2019); *Bostock v. Clayton Cty. Bd. of Comm'rs.*, No. 17-1618 (2019).

⁸ U.S. Dep't of Health & Human Serv., Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau, *The AFCARS Report*, at 1, 4, <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport26.pdf> (last visited Dec. 13, 2019).

⁹ See Administrative Office of Pennsylvania Courts, Office of Children & Families in the Courts, *Mission and Guiding Principles for Pennsylvania's Child Dependency System* (2009) (available at [http://www.ocfcpacourts.us/assets/upload/Resources/Documents/GP%20Document%20to%20printer\(2\).pdf](http://www.ocfcpacourts.us/assets/upload/Resources/Documents/GP%20Document%20to%20printer(2).pdf)).

¹⁰ See e.g., Shoshana K. Goldberg and Kerith J. Conron, *How Many Same-Sex Couples in the U.S. are Raising Children?*, THE WILLIAMS INST. (2018) (available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Parenting-Among-Same-Sex-Couples.pdf>).

¹¹ *Id.*

Moreover, the proposed amendments to 45 CFR §§ 75.300(c) and (d) would harm children in foster care who identify as LGBT. Studies have shown that LGBT youth are at a higher risk of experiencing rejection, violence, and trauma than their heterosexual counterparts.¹² Under the proposed rule, LGBT foster children could be denied access to necessary social supports and health care services.

B. Harms to LGBT Older Americans

Due to decades of experiencing stigmatization and discrimination in employment, housing, public accommodation, access to health care, and access to family planning and the institution of marriage, elderly LGBT Americans experience social isolation and economic instability at higher rates than their heterosexual and cisgender counterparts.¹³ Consequently, many LGBT seniors rely on social services provided by HHS grant recipients, such as community meal programs, senior centers, and adult day care programs, to sustain themselves. Under this proposed rule, HHS grant recipients would be permitted to deny LGBT seniors access to these crucial services.

C. Harms to LGBT Individuals Depending Upon Community Public Health Services

The LGBT community faces a wide array of health disparities. According to a 2015 study conducted by the Substance Abuse and Mental Health Services Administration (“SAMHSA”) of HHS, LGBT adults are more likely to engage in cigarette smoking and have substance abuse disorders than heterosexual adults.¹⁴ Specifically, the study found that 32.2% of sexual minority adults were current cigarette smokers compared to 20.6% of sexual majority adults, and 15.1% of sexual minority adults had an alcohol or illicit drug

¹² See e.g., Laura E. Durso and Gary J. Gates, *Serving Our Youth: Findings from a National Survey of Service Providers Working with Lesbian, Gay, Bisexual, and Transgender Youth who are Homeless or at Risk of Becoming Homeless*, THE WILLIAMS INST. (2012) (available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Durso-Gates-LGBT-Homeless-Youth-Survey-July-2012.pdf>); Colleen Sullivan et al., *Youth in the Margins: A Report of the Unmet Needs of Lesbian, Gay, Bisexual, and Transgender Adolescents in Foster Care*, LAMBDA LEGAL (2001) (available at <https://www.ncjrs.gov/App/publications/Abstract.aspx?id=199978>); Philadelphia Lesbian and Gay Task Force, *Violence and Discrimination Against Lesbian and Gay People in Philadelphia and the Commonwealth of Pennsylvania* (1996).

¹³ Movement Advancement Project and SAGE, *Understanding Issues Facing LGBT Older Americans* (2017) (available at <http://lgbtmap.org/file/understanding-issues-facing-lgbt-older-adults.pdf>).

¹⁴ Grace Medley et al., *Sexual Orientation and Estimates of Adult Substance Use and Mental Health: Results from the 2015 National Survey on Drug Use and Health*, U.S. DEP'T OF HEALTH AND HUMAN SERV., SAMHSA (2016) (available at <https://www.samhsa.gov/data/sites/default/files/NSDUH-SexualOrientation-2015/NSDUH-SexualOrientation-2015/NSDUH-SexualOrientation-2015.htm>).

disorder in the past year compared to 7.8% of heterosexual adults.¹⁵ Moreover, members of the LGBT community are more likely to suffer from mental health disorders, such as depression, and to contract certain infectious diseases, namely HIV.¹⁶ Additionally, approximately 21.6% of the LGBT population in the United States lives below the poverty level, forcing many LGBT individuals to rely on community-based public health services for their basic health care needs.¹⁷ Under the proposed rule, low-income LGBT individuals with substance abuse disorders, mental health disorders, and infectious diseases may be denied access to critical health services by HHS-funded community health care providers. This discriminatory practice would likely have the unintended consequence of exacerbating the national drug and HIV epidemics, neither of which serve the public interest nor is consistent with the Department's *Strategy to Combat Opioid Abuse, Misuse, and Overdose* and the President's *Ending the HIV Epidemic: A Plan for America* initiative.

In closing, we urge HHS to withdraw its proposed amendments to 45 CFR § 75.300 and immediately rescind its accompanying Notification of Nonenforcement as a discriminatory and harmful change that would negatively impact already marginalized groups in our country. Just as with all Americans, access to programs that provide for life's basic necessities are crucial for the survival of children and LGBT individuals. Thank you for the opportunity to submit comments, and please do not hesitate to contact us if we can provide further information.

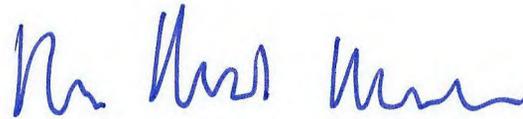
Respectfully,



Nora Winkelman, Esq.
Commission Co-Chair



Lisette M. McCormick, Esq.
Executive Director



Rhonda Hill Wilson, Esq.
Commission Co-Chair

¹⁵ *Id.*

¹⁶ See Caitlin Rooney et al., *Protecting Basic Living Standard for LGBTQ People*, CENTER FOR AMERICAN PROGRESS (2018) (available at <https://www.americanprogress.org/issues/lgbtq-rights/reports/2018/08/13/454592/protecting-basic-living-standards-lgbtq-people/>); *Depression in the LGBT Population*, HEALTHLINE, <https://www.healthline.com/health/depression/gay> (last visited Dec. 13, 2019); *HIV by the Numbers: Facts, Statistics, and You*, HEALTHLINE, <https://www.healthline.com/health/hiv-aids/facts-statistics-infographic> (last visited Dec. 13, 2019).

¹⁷ See M.V. Lee Badgett, *et al.*, *LGBT Poverty in the United States*, THE WILLIAMS INST. (October 2019) (available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/National-LGBT-Poverty-Oct-2019.pdf>).