



The Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness

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March 1, 2023

Andrea Palm, Deputy Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Re: Request to Rescind Notification of Nonenforcement re Dec. 2016 Health and Human Services' ("HHS") Grants Regulation

Dear Deputy Secretary Palm:

I hope this letter finds you well. My name is Lisette McCormick, and I am the Executive Director of the Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness. On behalf of our Commission, I am writing to urge HHS to rescind its policy currently inhibiting enforcement of the rules promulgated by the Department in December 2016 as part of 81 FR 89393.

Introduction

By way of background, the Interbranch Commission was established in 2005 by the three branches of Pennsylvania's government to implement the recommendations from a 2003 Pennsylvania Supreme Court study on racial and gender bias in the justice system.¹ The Commission has since expanded its areas of focus to include ending discrimination against LGBTQ+ Pennsylvanians in our courts and throughout the Commonwealth. To that end, the Commission is working with state legislators to ban use of the so-called LGBTQ+ "panic" defense and to expand non-discrimination protections for LGBTQ+ individuals in housing, employment, and public accommodations, among other initiatives. For example, one of our more recent initiatives was to draft and submit to the Pennsylvania Department of Human Services proposed regulatory amendments to the PA Code Chapters governing LGBTQ+ youth in out-of-home placements.

In 2019, our Commission also submitted to your Department formal comments in opposition to the changes to 45 C.F.R. § 75.300 proposed by the Trump administration (the "2019 proposal"). If they had been implemented, these changes would have enabled service providers to discriminate

¹ See the Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System, available at <https://pa-interbranchcommission.com/wp-content/uploads/2022/01/FinalReport.pdf>.

against individuals when providing HHS-funded services. In our comments, we explained that the former administration’s proposal would disproportionately and negatively impact LGBTQ+ people, who depend on the public welfare and public health services provided by HHS grant recipients.² We additionally requested that HHS rescind its accompanying Notification of Nonenforcement of the grants regulation promulgated in 2016, which uniformly prohibited discrimination by HHS contractors and grantees (the “2016 regulations”).³

In 2021, several LGBTQ+ service and advocacy organizations filed a legal challenge to the 2019 Trump administrative proposal. As a result of the litigation, HHS agreed to a court order by the U.S. District Court for the District of Columbia delaying the effective date of that proposal.⁴ As part of that stipulation, HHS also stated that it would undertake a review of the proposal and advise the court on the progress of that review. After the promulgation of several additional court orders (to which HHS also stipulated) that further stayed the rule’s implementation, the District Court formally remanded and vacated the 2019 proposal on June 29, 2022.⁵

To date, however, HHS has *not* rescinded its accompanying Notification of Nonenforcement of the 2016 regulations. Consequently, we are writing today to urge HHS to do so, thus providing for the robust enforcement of needed non-discrimination protections.

If the 2016 regulations are not enforced, LGBTQ+ youth, families and older persons will be left with a limited patchwork of non-discrimination protections, rendering them vulnerable to being denied critical services by HHS grantees.

The U.S. Department of Health and Human Services doles out approximately \$500 billion in grants each year.⁶ Those grants fund programs that provide essential health and welfare services to millions of individuals across the country.⁷ Among the recipients of these services are some of the most vulnerable members of society, such as LGBTQ+ children in foster care, youth experiencing homelessness, and older people in need of critical aging services.⁸ These vulnerable individuals are deserving of our most attentive forms of care, as they represent both the best of our past and the promise of our future.

² A copy of our comments in response to HHS Docket No. HHS-OS-2019-0014, RIN 0991-AC16 is available at <https://pa-interbranchcommission.com/wp-content/uploads/2021/10/HHS-comments.pdf>.

³ Health and Human Services Grants Regulation, 81 Fed. Reg. 89393 (Dec. 12, 2016).

⁴ Order, *Facing Foster Care et al. v. HHS*, No. 21-cv-00308 (D.D.C. Feb. 2, 2021) (order granting the parties’ stipulated motion to postpone the effective date), ECF No. 18.

⁵ Order, *Facing Foster Care et al. v. HHS*, 21-cv-308-JMC (D.D.C. June 29, 2022), ECF 44.

⁶ Amended Complaint at 2, *Family Equality v. Azar*, S.D.N.Y. (2020) (No. 1:2020cv02403) [hereinafter *Complaint*].

⁷ *Id.*

⁸ *Id.*

In 2016, HHS amended 45 C.F.R. § 75.300 to explicitly prohibit grant recipients from, among other things, subjecting individuals to discrimination on the basis of non-merit factors such as sex, gender identity, or sexual orientation.⁹ As HHS noted in its Grants Regulation Summary at the time, these amendments merely formalized existing law and previously uncodified agency policy.¹⁰ The 2016 regulations were also reflective of the stakeholder comments submitted to HHS in response to the provisions' publication. Notably, all of the comments strongly supported HHS codifying the straightforward requirement that, to receive grant funding, potential recipients must not withhold their services from or otherwise discriminate against individuals belonging to the enumerated list of protected classes.¹¹

In 2019, however, the Trump administration announced via a Notification of Nonenforcement that it would no longer honor the 2016 regulations.¹² By discarding clear and universally applicable requirements, the administration has left the beneficiaries of grant recipients' services at the mercy of a limited patchwork of lingering non-discrimination protections found in HHS programs' underlying statutes.¹³ It is up to grant recipients to decipher this muddled patchwork – a consequence that has caused substantial confusion among even well-meaning service providers, who must now devote substantially greater time and resources to ensuring that the people they serve are free from this type of discrimination.¹⁴

Among those individuals most keenly impacted by the former administration's policy of nonenforcement are LGBTQ+ people. As you are likely aware, LGBTQ+ youth are overrepresented in both the foster care setting and among youth experiencing homelessness.¹⁵ For instance, in a recent study on LGBTQ+ youth's experience in Cleveland-area foster care, 32% of participants reported a diverse sexual orientation and/or gender identity ("SOGI") – a figure that is more than three times the rate of queer youth in the general population.¹⁶

The primary reason for this over-representation is that LGBTQ+ youth are too frequently caught in a web of discrimination. When youth disclose their SOGI to family members, they can face verbal and physical harassment, which often results in youth's entry into the child welfare and

⁹ 81 Fed. Reg. 89393, 89395 (Dec. 12, 2016).

¹⁰ *Id.* at 89393-94.

¹¹ *Id.*

¹² 84 Fed. Reg. 63809 (proposed Nov. 19, 2019).

¹³ *Complaint, supra* note 4, at 2, 15.

¹⁴ *Id.* at 2.

¹⁵ *Id.* at 21.

¹⁶ Instit. for Innovation and Implementation, Univ. of Maryland Sch. of Soc. Work, *The Cuyahoga Youth Count: A Report on LGBTQ+ Youth Experience in Foster Care* (2021), <https://theinstitute.umaryland.edu/media/ssw/institute/Cuyahoga-Youth-Count.6.8.1.pdf>

foster systems, or in homelessness.^{17, 18} Unfortunately, these systems can also be complicit in the victimization of LGBTQ+ youth, who are more than twice as likely as their non-LGBTQ+ peers to report being treated poorly by the foster care system alone.¹⁹

The poor treatment of LGBTQ+ youth often includes LGBTQ+ children experiencing little to no control over their lives, provoking youth to run away from the foster care system.²⁰ Once a child has absconded from foster care, they may seek out service programs that provide youth experiencing homelessness with emergency shelter, crisis intervention, food clothing, and medical care. However, these providers – many of whom receive grant money from HHS – have also historically been known to discriminate against LGBTQ+ youth by, for example, denying LGBTQ+ children services altogether or forcing them to accept housing arrangements, clothing, or other services that reject their SOGI.²¹

It goes without saying that one’s negative experiences as a child can inhibit his or her ability to develop healthfully as an adult. What is perhaps less widely known is the ability to quantify the burdens that LGBTQ+ youth carry with them into adulthood. One recent study on LGBTQ+ youth in the foster care system found, for example, that such youth are at a higher risk as adults for cardiovascular diseases, cancer, and obesity as compared to the general population.²² It is precisely because of these and other risk factors that older LGBTQ+ individuals depend on the social services provided by HHS-funded programs.²³ The agency’s Notification of Nonenforcement, however, imperils the older LGBTQ+ population by forsaking the codified non-discrimination protections otherwise available to them.²⁴

Conclusion

For these reasons, we urge HHS to rescind its 2019 Notification of Nonenforcement of the non-discrimination protections established by the 2016 regulations. Whether they require compassionate out-of-home care, a family, or critical aging services, LGBTQ+ individuals deserve

¹⁷ Vincent Pompei, Human Rights Campaign Foundation, *California LGBTQ Youth Report* (2019), <https://assets2.hrc.org/files/assets/resources/YouthReport-California-Final.pdf>.

¹⁸ *Complaint*, *supra* note 4, at 21.

¹⁹ Human Rights Campaign, *LGBTQ Youth in the Foster Care System* (2015), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/files/assets/resources/HRC-YouthFosterCare-IssueBrief-FINAL.pdf>.

²⁰ Theo G. M. Sandfort, Dep’t of Psychiatry, Columbia Univ. Vagelos Coll. of Physicians and Surgeons, *Experiences and Well-Being of Sexual and Gender Diverse Youth in Foster Care in New York City* (2019), <https://www.nyc.gov/assets/acs/pdf/about/2020/WellBeingStudyLGBTQ.pdf>.

²¹ *Complaint*, *supra* note 4, at 23.

²² Julia Alberth, Univ. of Wis. Sch. of Medicine and Pub. Health, *LGBTQ Youth Homelessness and Discrimination in the Foster Care System* (2020), <https://bettercarenetwork.org/sites/default/files/2021-04/AlberthFinal.pdf>.

²³ *Complaint*, *supra* note 4, at 27.

²⁴ *Id.*

the safeguards provided by a robust, clear, and universal regulatory scheme. HHS has the opportunity to restore that scheme, filling gaps in federal law *and* ensuring that the LGBTQ+ population does not have to rely on the aid of individual states, only 29 of whom presently have policies that prohibit discrimination in the foster care system based on one's SOGI.²⁵

Thank you for your time and consideration. If you have any questions or concerns regarding our request, please do not hesitate to contact us by phone, at (412) 298-9148, or by email, at lisette.mccormick@pacourts.us.

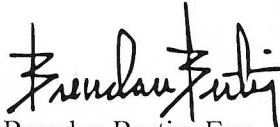
Sincerely,



Lisette McCormick, Esq.
Executive Director



Donald MacLeod
Chair, LGBTQ Rights
Committee



Brendan Bertig, Esq.
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Cc: Interbranch Commission Members
LGBTQ+ Rights Committee Members
Currey Cook, Senior Counsel and Youth in Out-Of-Home Care Project Director, Lambda
Legal

²⁵ Movement Advancement Project, *Foster and Adoption Laws* (last updated Feb. 28, 2023), https://www.lgbtmap.org/equality-maps/foster_and_adoption_laws.