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Division of Grants
Office of Grants Policy, Oversight, and Evaluation
Office of the Assistant Secretary for Financial Resources
Department of Health and Human Services

Submitted via <http://www.regulations.gov/>

Re: Notice of Proposed Rulemaking, RIN 0991–AC16

I. INTRODUCTION

This comment is submitted in opposition to the Department of Health and Human Services’ (“HHS”) proposed changes to anti-discrimination provisions of HHS’s Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Awards, RIN 0991–AC16, published in the Federal Register on November 19, 2019 (the “Proposed Rule”). We urge that the Proposed Rule be withdrawn in its entirety and that the existing rule remain in effect.

As an organization of 24,000 members, the New York City Bar Association’s mission is to equip and mobilize the legal profession to practice with excellence, promote reform of the law, and advocate for access to justice in support of a fair society. In doing so, the City Bar addresses a broad range of policy issues, which include civil rights, housing law, immigration and nationality law, social welfare law, disability law, and laws affecting children and families. The existing rule has proven critical to preventing discrimination against individuals and families who rely on or benefit from federal programs, particularly lesbian, gay, bisexual, transgender, and queer (“LGBTQ”) people. By eliminating important anti-discrimination protections, the Proposed Rule effectively licenses discrimination against many communities, and will, among other things, exacerbate poverty, homelessness, domestic violence, child abuse, and substance abuse. Because

of the breadth of harm encompassed by the changes in the Proposed Rule, the City Bar opposes the Proposed Rule in its entirety. Taxpayer dollars should not be used to sanction discrimination and harm the vulnerable.

II. THE PROPOSED RULE ALLOWS TAXPAYER DOLLARS TO SUPPORT DISCRIMINATION

Each year, HHS awards billions of taxpayer dollars in grants.¹ These funds support programs and services that serve some of the most vulnerable people in the United States, and provide individuals and families with desperately needed resources in times of crisis. HHS-funded services include foster care and adoption agencies, Head Start programs, domestic violence hotlines, child abuse prevention and response services, cancer screenings, sexually transmitted infection (“STI”) testing and treatment, community health centers, Meals on Wheels, substance abuse programs, food pantries, and emergency shelters.

These services are particularly important for LGBTQ individuals and families. LGBTQ people are disproportionately likely to live in poverty² and struggle with homelessness.³ Older LGBTQ adults experience high rates of social isolation and economic instability.⁴ And smoking and substance use rates are higher among LGBTQ communities.⁵ As a result, LGBTQ people are disproportionately likely to rely on federal benefits,⁶ including those funded by HHS. Additionally,

¹ U.S. Dep’t of Health & Human Servs., *Tracking Accountability in Government Grant Spending: Annual Report* (2018), <https://taggs.hhs.gov/2018AnnualReport>. (All links cited in this report were last checked on December 17, 2019).

² M. V. LEE BADGETT ET AL., UCLA SCHOOL OF LAW, *LGBTQ POVERTY IN THE UNITED STATES: A STUDY OF DIFFERENCES BETWEEN SEXUAL ORIENTATION AND GENDER IDENTITY GROUPS 2* (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/National-LGBT-Poverty-Oct-2019.pdf>.

³ In a national survey, 40% of homeless youth served by agencies identified as LGBTQ. LAURA E. DURSO & GARY J. GATES, UCLA SCHOOL OF LAW, *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 3* (2012), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Durso-Gates-LGBT-Homeless-Youth-Survey-July-2012.pdf>. In another national survey, one out of five respondents reported experiencing homelessness at some point in their lives because they were transgender or gender non-conforming. JAIME M. GRANT, ET AL., NATIONAL CENTER FOR TRANSGENDER EQUALITY & NATIONAL GAY AND LESBIAN TASK FORCE, *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 4* (2011), https://www.thetaskforce.org/wp-content/uploads/2019/07/ntds_full.pdf. Of the transgender and gender non-conforming respondents who tried to access a homeless shelter, 55% were harassed by shelter staff or residents and 29% were turned away altogether. *Id.*

⁴ MOVEMENT ADVANCEMENT PROJECT, *UNDERSTANDING ISSUES FACING OLDER LGBT ADULTS 14* (2017), <http://www.lgbtmap.org/file/understanding-issues-facing-lgbt-older-adults.pdf>

⁵ GRACE MEDLEY ET AL., SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *SEXUAL ORIENTATION AND ESTIMATES OF ADULT SUBSTANCE USE AND MENTAL HEALTH* (Oct. 2016), [https://www.samhsa.gov/data/sites/default/files/NSDUH-SexualOrientation-2015/NSDUH-SexualOrientation-2015.htm](https://www.samhsa.gov/data/sites/default/files/NSDUH-SexualOrientation-2015/NSDUH-SexualOrientation-2015/NSDUH-SexualOrientation-2015.htm).

⁶ Center for American Progress, *Protecting Basic Living Standards for LGBTQ People* (Aug. 13, 2018) <https://www.americanprogress.org/issues/lgbt/reports/2018/08/13/454592/protecting-basic-living-standards-lgbtq-people>.

LGBTQ couples are significantly more likely than straight and cisgender couples to adopt and foster children,⁷ often through HHS-funded adoption and foster care agencies.

The Proposed Rule would eliminate anti-discrimination provisions that currently apply to all HHS-funded programs and services and provide explicit protections to LGBTQ people. The existing non-discrimination provision reads:

It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation. Recipients must comply with this public policy requirement in the administration of programs supported by HHS awards.⁸

HHS proposes removing this non-discrimination requirement, and instead requiring contractors to comply only with existing statutory non-discrimination requirements. The Proposed Rule would revise § 75.300(c) to read: “It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services, to the extent doing so is prohibited by federal statute.”⁹ Statutory non-discrimination provisions in effect today are minimal and do not protect all the groups covered by the existing rule.¹⁰ Specifically, the proposed change would allow most programs receiving HHS grants to discriminate on the basis of sexual orientation and gender identity, and allow some to discriminate on the basis of sex or religion in delivering services.¹¹

⁷ Williams Institute, UCLA School of Law, *Same-Sex Parenting in the U.S.* (July 31, 2018), <https://williamsinstitute.law.ucla.edu/press/same-sex-parenting> (“[M]ost same-sex couples who are raising children have biological children (68%), but same-sex couples are significantly more likely than different-sex couples to be raising adopted or foster children. One in five same-sex couples (21.4%) are raising adopted children compared to just 3% of different-sex couples, and 2.9% of same-sex couples have foster children compared to 0.4% of different-sex couples.”).

⁸ 45 C.F.R. § 75.300(c) (2019).

⁹ 84 Fed. Reg. 63831, 63835 (proposed Nov. 19, 2019) (to be codified at 45 C.F.R. § 75.300(c)).

¹⁰ Discrimination based on race, color, and national origin is prohibited under Title VI of the Civil Rights Act, 42 U.S.C.S. § 2000d. Discrimination based on disability is prohibited under the Rehabilitation Act of 1973, 29 U.S.C.S. § 794. And discrimination based on age is prohibited by the Age Discrimination Act of 1975, 42 U.S.C.S §§ 6101-07. These statutes do not cover discrimination based on sex, religion, sexual orientation, or gender identity.

¹¹ A patchwork of federal laws and regulations provides some protection against discrimination on the basis of sex, religion, sexual orientation, and gender identity, but there are significant gaps. A federal regulation prohibits discrimination against any beneficiary or prospective beneficiary of an HHS-funded program based on that person’s religion. 45 C.F.R. 87.3(d). Because it protects only “beneficiaries” from discrimination, people who interact with HHS-funded programs but who are not considered “beneficiaries” of those programs would no longer be protected under the Proposed Rule. For example, prospective parents hoping to adopt a child (the “beneficiary”) through an HHS-funded child welfare agency could be rejected based solely on their faith. Sex discrimination is prohibited by statute in certain programs and contexts, including in education programs by Title IX, in healthcare services by the Affordable Care Act, and in domestic violence services by the Violence Against Women Act. *See* Title IX of the Education Amendments of 1972, 20 U.S.C.S. § 1681 et seq.; Patient Protection and Affordable Care Act, 42 U.S.C.S. § 18116; Violence Against Women Act, 34 U.S.C.S. § 12291(b)(13). However, many HHS-funded

The following examples of discriminatory actions would be permissible under the Proposed Rule: A Meals on Wheels program could refuse to deliver food to an elderly transgender man. Head Start programs could refuse to serve children with same-sex parents. An afterschool program could deny a transgender teen the opportunity to participate. Adoption and foster care agencies could keep children in government care rather than allowing them to be adopted by qualified same-sex couples or families with different religious beliefs than the agency.

Programs funded by HHS serve countless families across the U.S. and are vitally important to the health and well-being of millions. It is imperative that these services remain available to any eligible person in need. Agencies receiving government grants to serve the public must not be allowed to pick and choose whom they will serve, nor should taxpayer dollars be used to fund discrimination.

Additionally, statutory non-discrimination provisions are scattered throughout numerous statutes. Though HHS claims the Proposed Rule will address the “regulatory burden and [] lack of predictability and stability for the Department and stakeholders” created by the existing rule,¹² this is unlikely to be true. By eliminating the single, clear statement about prohibited types of discrimination in the existing rule, the Proposed Rule will force HHS grantees to wade through federal law themselves, find and interpret the numerous, inconsistent statutory non-discrimination provisions, and make sense of their complex interactions. This will exacerbate rather than resolve confusion, instability, and regulatory burdens imposed on grantees.

programs are not covered by similar statutes and sex discrimination in these programs would be permissible under the Proposed Rule. There are very few statutes or regulations which directly prohibit discrimination on the basis of sexual orientation or gender identity; the only programs subject to such provisions are those funded under the Violence Against Women Act, the Family Violence Prevention and Services Act, and the Runaway and Homeless Youth and Trafficking Prevention Act. *See* Violence Against Women Act, 34 U.S.C.S. § 12291(b)(13); 45 C.F.R. 1370.5. Most HHS grantees are not funded under these statutes, and discrimination based on sexual orientation and gender identity will no longer be prohibited if the Proposed Rule is adopted. In certain cases, statutes prohibiting sex and disability discrimination may provide protection to LGBTQ individuals. Many courts have held that sex discrimination encompasses discrimination based on sexual orientation or gender identity. However, the current administration has taken the opposite position, as have other courts. A trio of cases pending before the Supreme Court will address whether Title VII’s prohibition on sex discrimination in employment includes discrimination on the basis of sexual orientation and gender identity. *See* *Altitude Express, Inc. v. Zarda*, No. 17-1623 (argued Oct. 8, 2019); *Bostock v. Clayton County, Georgia*, No. 17-1618 (argued Oct. 8, 2019); *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (argued Oct. 8, 2019). The outcome of this case will likely impact how lower courts, federal agencies, and HHS-funded programs interpret other statutes barring sex discrimination. Courts have also held that, in some cases, discrimination against transgender people constitutes discrimination based on disability. *See, e.g.,* *Blatt v. Cabela’s Retail, Inc.*, No. 5:14-cv-04822, 2017 U.S. Dist. LEXIS 75665 (E.D. Pa. May 18, 2017). However, both these approaches have limitations. The statutory interpretations underlying them are far from universally accepted; HHS grantees may not adopt them, and courts may not be receptive to them. And even if these interpretations are adopted, they would only afford protection to *some* LGBTQ people in *some* HHS-funded programs. Many LGBTQ people who rely on or benefit from HHS-funded programs would remain unprotected from discrimination.

¹² 84 Fed. Reg. at 63832.

III. THE PROPOSED RULE IS PROMULGATED IN VIOLATION OF FEDERAL LAWS

The Proposed Rule will negatively affect family well-being, and its promulgation therefore violates Section 654 of the Independent Agencies Appropriations Act of 1999, which was passed as part of the Treasury and General Government Appropriations Act of 1999.¹³ This statute requires:

“Before implementing policies and regulations that may affect family well-being, each agency shall assess such actions with respect to whether . . . the action strengthens or erodes the stability or safety of the family and, particularly, the marital commitment; . . . the action increases or decreases disposable income or poverty of families and children; . . . the proposed benefits of the action justify the financial impact on the family; [and] . . . the action establishes an implicit or explicit policy concerning the relationship between the behavior and personal responsibility of youth, and the norms of society.”¹⁴

With respect to every policy or regulation that “may affect family well-being,” the statute requires the head of each agency to “submit a written certification to the Director of the Office of Management and Budget and to Congress that such policy or regulation has been assessed in accordance with this section” and “provide an adequate rationale for implementation of each policy or regulation that may negatively affect family well-being.”¹⁵

Instead, HHS made only a conclusory statement that this rule will not negatively affect family well-being and provided no rationale for implementing the policy.¹⁶ HHS offered no evidence or analysis to support its conclusion. In fact, the Proposed Rule will likely have an enormous negative effect on family well-being. By eliminating anti-discrimination protections that apply to all HHS-funded programs and instead proposing to rely solely on anti-discrimination measures that may or may not be included in specific federal statutes, the Proposed Rule places millions of children and families in danger and may harm their wellbeing.

For example, allowing homeless services agencies to reject LGBTQ families or families with LGBTQ children “increases . . . poverty of families and children.”¹⁷ Permitting Head Start and afterschool programs to deny entry to children of LGBTQ parents or who are LGBTQ themselves will force low-income families to choose between paying for costly childcare, leaving work to care for their children, or leaving their children unsupervised. This “erodes the stability or safety of the family” and “increases or decreases disposable income or poverty of families and

¹³ Independent Agencies Appropriations Act of 1999, Pub. L. No. 105-277 § 654, 112 Stat. 2681-528.

¹⁴ *Id.* at 2681-529.

¹⁵ *Id.*

¹⁶ 84 Fed. Reg. at 63835.

¹⁷ § 654(c)(4), 112 Stat. at 2681-259.

children.”¹⁸ Effectively sanctioning the exclusion of LGBTQ children or families from domestic violence and child abuse services creates a grave risk of violence, “erod[ing] the stability or safety of the family.”¹⁹ And allowing foster care and adoption agencies to refuse to work with otherwise-qualified LGBTQ parents will leave children in state custody when they could be forming safe, stable, loving families.

Further, the existing rule mandates all grantees must “treat as valid the marriages of same-sex couples.”²⁰ The Proposed Rule would eliminate this requirement.²¹ It is difficult to imagine a rule that more obviously “erodes the stability . . . of the family and, particularly, the marital commitment.”²² It is clear the Proposed Rule “may affect family well-being,” as defined in the statute. Thus, HHS must, pursuant to Section 654, reevaluate its conclusion to the contrary, and publish the evidence it relies upon in doing so.

Because the Proposed Rule “may negatively affect family well-being,” HHS is obligated to provide an “adequate rationale” for its adoption.²³ It failed to provide any rationale justifying the risks posed to children and families, let alone an “adequate” one. Thus, the promulgation of this rule contravenes the requirements of Section 654 of the Treasury and General Government Appropriations Act of 1999.

Additionally, by flouting this procedural requirement, the Proposed Rule was promulgated “without observance of procedure required by law” and therefore violates the Administrative Procedure Act.²⁴ The promulgation of the Proposed Rule is unlawful, and should be withdrawn.

¹⁸ § 654(c), 112 Stat. at 2681-259.

¹⁹ *Id.*

²⁰ 45 C.F.R. § 75.300(d) (2019) (“In accordance with the Supreme Court decisions in *United States v. Windsor* and in *Obergefell v. Hodges*, all recipients must treat as valid the marriages of same-sex couples. This does not apply to registered domestic partnerships, civil unions or similar formal relationships recognized under state law as something other than a marriage.”).

²¹ 84 Fed. Reg. at 63835 (to be codified at 45 C.F.R. § 75.300(d)). Note that same-sex marriages remain legal under *Obergefell v. Hodges*, 574 U.S. 1118 (2015) and that it is illegal under *Pavan v. Smith*, 137 S. Ct. 2015 (2017) to deny at least certain government benefits to married same-sex couples but provide them to married opposite-sex couples.

²² § 654(c), 112 Stat. at 2681-259.

²³ § 654(d)(1), 112 Stat. at 2681-259.

²⁴ Administrative Procedure Act, 5. U.S.C. § 706(2)(D).

IV. CONCLUSION

This Proposed Rule would enable discrimination against vulnerable people, and violates the requirements of Section 654 of the Treasury and General Government Appropriations Act of 1999 and APA § 706(2)(D). We urge HHS to withdraw the Proposed Rule, and instead preserve and enforce the existing rule.

Respectfully submitted,

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Civil Rights Committee

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Lesbian, Gay, Bisexual, Transgender, and Queer Rights Committee