December 19, 2019

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

Jennifer Moughalian
Acting Assistant Secretary for Financial Resources and
Acting Chief Financial Officer
U.S Department of Health and Human Services
Office of the Assistant Secretary for Financial Resources
200 Independence Avenue, S.W.
Washington, D.C. 20201

Re: RIN 0991–AC16 Office of the Assistant Secretary for Financial Resources; Health and Human Services Grants Regulation

Dear Secretary Azar and Acting Assistant Secretary Moughalian:

The National Health Law Program (NHeLP) has worked to improve health access and quality through education, advocacy and litigation on behalf of low-income and underserved individuals for over 50 years. We appreciate the opportunity to provide comments on proposed rule RIN 0991–AC16.

Given our history and commitment to ensuring access to health care and other essential services, we strongly oppose removing nondiscrimination requirements in HHS grant making, and the HHS Notification of Nonenforcement of Health and Human Services Grants Regulation (84 Fed. Reg. 63809, Nov. 19, 2019), which ceases enforcement of the nondiscrimination protections provided under 45 CFR § 75.300(c) and (d), including protections from discrimination based on sex, sexual orientation, gender identity, and religion.

The proposed rule will affect many HHS grants and contracts—worth over $500 billion—including outreach and enrollment activities for Medicaid and the Children's Health Insurance Program (CHIP), foster care, HIV prevention, community health care centers, energy assistance, programs funded under the Violence Against Women Act, and more. Organizations and contractors receiving federal funding would be free to discriminate against LGBTQ people, persons of faith, and secular Americans, which will cause great harm to these people and populations, and provide little if any benefit to HHS.

The proposed rule and notice of nonenforcement are nothing less than a license to discriminate and cause harm. They should be withdrawn.

Eliminating nondiscrimination requirements would harm Medicaid and CHIP enrollees

The proposed rule would broadly impact HHS grant-making and programs, including some aspects of the Medicaid program. Under current regulations, payments to states in the form of federal financial participation (FFP) would not, in most cases, be considered grants subject to the proposed rule.[1] However, more than 630 grants issued over the past several years by the Centers for Medicare & Medicaid Services (CMS) involve the Medicaid program.[2]

For example, Connect Kids to Coverage grants allow entities ranging from non-profits, community-based organizations, health care providers, and Indian tribes or tribal consortia to design and implement outreach campaigns to enroll persons eligible for Medicaid and CHIP.[3] If HHS funds grantees that discriminate against LGBTQ individuals and families or people who do not adhere to a particular faith tradition, it will reduce access to health care and increase already rising rates of uninsured children. Moreover, lowering access and enrollment for LGBTQ persons in particular will exacerbate health disparities, described more fully below.

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[1] See 45 C.F.R. § 75.502(i), stating that Medicaid payments to a subrecipient for providing patient care services to Medicaid-eligible individuals are not considered federal awards expended under this part unless a state requires the funds to be treated as federal awards expended because reimbursement is on a cost-reimbursement basis.

[2] See Grants.gov, Search Grants, https://www.grants.gov/web/grants/search-grants.html?keywords=medicaid (last visited Dec. 14, 2019).

[3] See, *e.g.*, CMS-1Z0-16-001 Connecting Kids to Coverage Outreach and Enrollment Cooperative Agreements (Jan. 20, 2016); MS-2D2-20-001 Connecting Kids to Coverage (CKC) HEALTHY KIDS AI/AN (Sept. 16, 2019).

Other Medicaid grant programs include $50,000,000 in capacity building grants to address the opioid crisis and substance use disorders (SUD).[4] Studies show that LGBTQ persons are disproportionately affected by SUD, in part, due to minority stress stemming from discrimination.[5] The proposed rule and notice of nonenforcement would not only limit SUD treatment access by potentially funding organizations and provider groups that discriminate against LGBTQ persons. It would contribute to the minority stress experienced by LGBTQ persons that helps lead to SUD. No one should be denied treatment for SUD or other conditions because of a person's sexual orientation, gender identity, religion, or other non-merit factor.

Eliminating nondiscrimination protections would harm children, including those experiencing or at-risk for abuse and neglect

Children who are experiencing, or are at-risk for abuse and neglect are among the most vulnerable persons in any society. However, instead of providing these children and families with needed services and support, HHS has given a green light to discrimination. Such action would potentially harm all children due to a lack of family placements, and would particularly those who are LGBTQ by making them targets of discrimination.

Earlier this year, HHS granted South Carolina's federally funded Title IV-E Foster Care Program a "waiver" from nondiscrimination requirements.[6] The leading foster care provider in the state, Miracle Hill Ministries, which received more than $600,000 in federal and state funds, refused to place children with non-Protestant families. Miracle Hill Ministries turned down Jewish, Catholic, and LGBTQ applicants who sought to serve as foster parents or mentors.[7] This is unconscionable, especially since South

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[4] CMS-2C2-19-001 Substance Use Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities (SUPPORT) Act: Section 1003 Demonstration Project to Increase Substance Use Provider Capacity (Aug. 9, 2019).

[5] National LGBT Health Education Center, *Addressing Opioid Use Disorder among LGBTQ Populations* (Oct. 2018) at 2, https://www.lgbthealtheducation.org/wp-content/uploads/2018/06/OpioidUseAmongLGBTQPopulations.pdf.

[6] Letter from Steven Wagner, Principal Deputy Asst. Sec., Admin. for Children and Families, to Gov. Henry McMaster, Governor, South Carolina, Re: Request for Deviation or Exception from HHS Regulations 45 C.F.R. 75.300(c) (Jan. 23, 2019), https://governor.sc.gov/sites/default/files/Documents/newsroom/HHS%20Response%20Letter%20to%20McMaster.pdf.

[7] Greenville News, *In lawsuit, a Catholic mother from Simpsonville alleges discrimination by Miracle Hill* (Feb. 15, 2019), https://www.greenvilleonline.com/story/news/2019/02/15/greenville-miracle-hills-ministries-foster-agency-lawsuit/2881913002/; The State, *Same-sex couple sues SC after religious ministry says they cannot foster children* (May 30, 2019), https://www.thestate.com/news/politics-

Carolina faces a shortage in foster families for more than 4,000 children removed annually.[8]

By granting this waiver and proposing to expand its effect through the proposed rule and notice of nonenforcement, HHS prioritizes the religious beliefs of certain adoption and foster care agencies over the needs of children and youth in foster care. As a result, fewer foster homes are available due to discrimination against qualified potential parents, thereby increasing use of non-family placements (also known as congregate care) simply due to lack of options, not a young person's needs.

This is wrong. The cardinal rule of child welfare is that foster care and adoption decisions must always be made in the best interests of the child. High-quality foster parent training and recruitment is essential to ensure sufficient access to families with the necessary background and training in trauma, child development, and parenting skills. Considering the ongoing opioid epidemic and its impact on rising foster care placements, there is a significant need to expand recruitment broadly to meet growing need and to also better support and retain foster families and kinship caregivers. Allowing for discrimination against prospective foster and adoptive parents will deplete the supply of families that could provide a loving and therapeutic home to vulnerable children and youth.

When agencies discriminate against qualified prospective foster parents, children in foster care are denied family placements best suited to address their often complex care needs. One third of children in foster care have a chronic medical condition, and 60 percent of those under age 5 have developmental health issues.[9] Up to 80 percent of children entering foster care have a significant mental health need.[10] Ensuring access to appropriate and trauma-informed services is critical to meeting the needs of this vulnerable population.

The proposed rule and nonenforcement of the current nondiscrimination protections will also result in more discrimination against, and mistreatment of, LGBTQ youth in foster care. LGBTQ youth have special support needs that required trained, skilled, and

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government/article230978363.html; Angelie Davis, Greenville News, *Miracle Hill faces new level of scrutiny* (March 1, 2019), https://www.greenvilleonline.com/story/news/2018/03/01/miracle-hill-foster-care/362560002/.

[8] *Id.*

[9] Szilagyi, M. et al. (2015). Policy Statement: Health Care Issues for Children and Adolescents in Foster Care and Kinship Care. Pediatrics. 2015; 136, http://pediatrics.aappublications.org/content/pediatrics/136/4/e1131.full

[10] *Id.*

compassionate foster family placements. LGBTQ youth face high rates of bullying and other factors that contribute to health disparities such as higher rates of depression and suicidal ideation, higher rates of substance use, and more sexually transmitted and HIV infections.[11] Policies that single-out or discriminate against LGBTQ youth are harmful to social-emotional health and may have lifelong consequences.[12] All entities receiving federal funding, including those that are faith-based, should be welcoming to children who are members of the LGBTQ community to support their optimal health and well-being.

Moreover, "conversion" or "reparative therapy" is never indicated for LGBTQ youth or adults.[13] This type of therapy is not effective and may be harmful to LGBTQ individuals by increasing internalized stigma, distress, and depression.[14] NHeLP does not support the use of federal funds to promote approaches that do not treat LGBTQ youth as they do all others, that discriminate or condone discrimination against them, their families, or LGBTQ parents, or that support, condone, or provide "conversion" or "reparative therapy". We strongly oppose changing federal policy to allow discrimination that will target LGBTQ children, youth, and families.

Eliminating nondiscrimination protections would harm older adults

HHS-funded grant programs like senior centers, congregate meals, and adult daycare programs help older adults across the nation age with dignity, and without regard to the sexual orientation, gender identity, sex, or religion of the individuals seeking services. The federal government should be championing nondiscrimination protections, not advancing discrimination.

The impact of the proposed rule on the Older Americans Act (OAA) and some HHS block grant programs (such as the Low-Income Home Energy Assistance Program, or LIHEAP) is of particular concern. HHS administers much of the funding from this $1.6 billion program through grants to states and local entities; these grants support key services that enable older adults to age in place and live with dignity. HHS taxpayer-funded grantees should never be allowed to deny a transgender older woman a

[11] AAP Committee on Adolescence (2013). Policy Statement: Office-Based Care for Lesbian, Gay, Bisexual, Transgender, and Questioning Youth. Pediatrics. 2013; 132, https://pediatrics.aappublications.org/content/pediatrics/132/1/198.full.pdf.
[12] *Id.*
[13] AAP Committee on Adolescence (2013). Policy Statement: Office-Based Care for Lesbian, Gay, Bisexual, Transgender, and Questioning Youth. Pediatrics. 2013, https://pediatrics.aappublications.org/content/pediatrics/132/1/198.full.pdf.
[14] *Id.*

congregate meal because of her gender identity; to deny an older lesbian advice on falls prevention simply because of her sexual orientation; to deny an older bisexual man the same caregiver supports as straight caregivers; or to deny a same-sex couple energy assistance because of their relationship.

We cannot countenance government policies that would allow senior centers receiving taxpayer dollars to post a sign stating "No LGBTQ people may enter" or polices under which an OAA-funded transportation provider could preclude transgender older adults from riding in their van. Similarly, HHS-funded entities should not be permitted to deny vital services on the basis of religion. HHS-funded entities also should not be permitted to deny an older Muslim woman a congregate meal or an older Jewish man treatment for opioid addiction, for example.

Eliminating nondiscrimination protections would harm access to reproductive health services

HHS' nonenforcement notice and proposed repeal of nondiscrimination requirements in grant-making, and expanding the ability of religiously-affiliated providers to deny care, will likely impede access to reproductive health services. It is imperative that all individuals have access to comprehensive reproductive health services, sexuality education that empowers them to make informed, positive, and safe choices about healthy relationships, responsible sexual activity, and their reproductive health. This includes information about methods of contraception and sexual consent, and abortion access.

Eliminating nondiscrimination requirements in grant-making and expanding the ability providers to deny care will most severely impact those least able to seek health care elsewhere, including women living in rural areas and women of color, who already face disparities in care and provider discrimination during pregnancy and in accessing reproductive health services.

For example, pregnancy-related complications remain one of the ten leading causes of death for African-American women aged 15-34 years.[15] African-American women are three-to-four times more likely to die from pregnancy related complications than white women. Eliminating nondiscrimination requirements could put African-American women at increased risk of pregnancy-related complications.

[15] Cynthia Prather, et al., *The Impact of Racism on the Sexual and Reproductive Health of African American Women*, 25(7) J. Women's Health 664, 664-671 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4939479/.

Similarly, Asian American and Pacific Islander ("AAPI") women face disparities in accessing reproductive health care, which may be exacerbated by the elimination on nondiscrimination requirements in grant-making. Studies show that AAPI women use less effective, but more easily accessible contraceptive methods at higher rates compared to women of other races and ethnicities, placing AAPI women at greater risk of unintended pregnancy.[16] Disparities also exist among AAPI women regarding utilization of prenatal care; Laotian and Cambodian women are less likely than other racial and ethnic groups to receive early and adequate prenatal care.[17] One study found AAPI women are twice as likely to die from pregnancy-related causes, including embolism and pregnancy-related hypertension.[18]

Latina and Latinx persons also fact barriers to obtaining needed health care, including reproductive health services. For example, Latinas have the highest incidence of cervical cancer; and Latinas are diagnosed with cervical cancer at nearly twice the rate of non-Latina white women.[19] Immigrant Latinas also experience inequities because they have fewer employment opportunities that provide insurance coverage, may be ineligible for federally funded health coverage, face extreme poverty, and lack culturally and linguistically appropriate health care providers and services.

Instead of rolling back nondiscrimination protections that will create more barriers to care, HHS should be creating policies that ensure all individuals receive the health care they need, including contraception and related services, pregnancy-related care, abortion, and the other reproductive health services.

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[16] Jo Jones, et al., U.S. Dep't of Health & Human Servs., *Current Contraceptive Use in the United States, 2006-2010, and Changes in Patterns of Use Since 1995*, 60 Nat'l Health Statistics Report 1, 5 (Oct. 18, 2012), https://www.cdc.gov/nchs/data/nhsr/nhsr060.pdf.

[17] Lora Jo Foo, The Ford Found., Asian American Women: Issues, Concerns, and Responsive Human and Civil Rights Advocacy 106 (2002).

[18] Marcus T. Smith, *Fact Sheet: The State of Asian American Women in the United States*, Ctr. for Am. Progress (Nov. 7, 2013, 5:33 PM), https://www.americanprogress.org/issues/race/reports/2013/11/07/79182/fact-sheet-the-state-of-asian-american-women-in-the-united-states/.

[19] Cancer Action Network, *Cervical Cancer Incidence Rates Remain Higher in Hispanic/Latina Women* (2017), https://www.fightcancer.org/sites/default/files/FINAL%20-%20Hispanic%20Latinas%20and%20Cervical%20Cancer%2005.09.17.pdf.

How discrimination exacerbates health disparities for LGBTQ persons

LGBTQ people continue to face discrimination in many areas of their lives, including health care, on the basis of their sexual orientation and gender identity. It is a cruel irony that HHS Is seeking to greenlight grant-making to organizations and providers that discriminate, while HHS' Healthy People 2020 initiative recognizes, "LGBT individuals face health disparities linked to societal stigma, discrimination, and denial of their civil and human rights."[20]

LGBTQ people still face discrimination in a wide variety of services affecting access to health care, including reproductive services, adoption and foster care services, child care, homeless shelters, and transportation services – as well as physical and mental health care services.[21] In a recent study published in *Health Affairs*, researchers examined the intersection of gender identity, sexual orientation, race, and economic factors in health care access.[22] They concluded that discrimination as well as insensitivity or disrespect on the part of health care providers were key barriers to health care access and that increasing efforts to provide culturally sensitive services would help close the gaps in health care access.[23]

HHS' nonenforcement notice and proposal to remove nondiscrimination protections based upon sexual orientation and gender identity will lead to further discrimination against LGBTQ persons and worsen health disparities.

Discrimination against the transgender community

The proposed rule would eliminate the express prohibition against discrimination based upon gender identity in HHS grant-making. While this would not affect statutory protections against sex discrimination, which include protections based upon someone's gender identity, it would give a greenlight to HHS grantees which want to deny services

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[20] *Healthy People 2020, Lesbian, Gay, Bisexual, and Transgender Health*, U.S. DEPT. HEALTH & HUMAN SERV., https://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health, (last accessed on Dec. 14, 2019).
[21] HUMAN RIGHTS WATCH, *All We want is Equality: Religious Exemptions and Discrimination against LGBT People in the United States*, (Feb. 2018), https://www.hrw.org/report/2018/02/19/all-we-want-equality/religious-exemptions-and-discrimination-against-lgbt-people.
[22] Ning Hsieh and Matt Ruther, HEALTH AFFAIRS, *Despite Increased Insurance Coverage, Nonwhite Sexual Minorities Still Experience Disparities In Access To Care* (Oct. 2017) 1786–1794.
[23] *Id.*

and care to transgender individuals.[24] Instead of weakening nondiscrimination protections for transgender persons, HHS should be rigorously enforcing such protections.

Discrimination impedes health care access for transgender persons, leading to significant health care disparities. A recent study determined that 29 percent of transgender individuals were refused to be seen by a health care provider on the basis of their perceived or actual gender identity and 29 percent experienced unwanted physical contact from a health care provider.[25] Transgender women, particularly women

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[24] Discrimination based on gender identity, gender expression, gender transition, transgender status, or sex-based stereotypes is necessarily a form of sex discrimination. See, *e.g.*, *EEOC v. R.G. & G.R. Harris Funeral Homes*, No. 16-2424 (6th Cir. Mar. 7, 2018); *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017) (Title IX and Equal Protection Clause); Doddsv. U.S. Dep't of Educ., 845 F.3d 217 (6th Cir. 2016) (Title IX and Equal Protection Clause); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (Title VII of the 1964 Civil Rights Act); Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004) (Title VII); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (Equal Credit Opportunity Act); *A.H. ex rel. Handling v. Minersville Area School District*, 3:17-CV-391, 2017 WL 5632662 (M.D. Pa. Nov. 22, 2017) (Title IX and Equal Protection Clause); *Stone v. Trump*, ---F.Supp.3d ---, No. 17–2459 (D. Md. Nov. 21, 2017) (Equal Protection Clause); Doe v. Trump, ---F.Supp.3d ---, 2017 WL 4873042 (D.D.C. Oct. 30, 2017) (Equal Protection Clause); *Prescott v. Rady Children's Hospital-San Diego*, ---F.Supp.3d ---, 2017 WL 4310756 (S.D. Cal. Sept. 27, 2017) (Section 1557); *E.E.O.C. v. Rent-a-Center East, Inc.*, ---F.Supp.3d ---, 2017 WL 4021130 (C.D. Ill. Sept. 8, 2017) (Title VII); *Brown v. Dept. of Health and Hum. Serv.*, No. 8:16DCV569, 2017 WL 2414567 (D. Neb. June 2, 2017) (Equal Protection Clause); *Smith v. Avanti*, 249 F.Supp.3d 1194 (D. Colo. 2017) (Fair Housing Act); *Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-cv-4945, 2016 WL 6134121 (N.D. Ill. Oct. 18, 2016) (Title IX); *Mickens v. Gen. Elec. Co.* No. 16-603, 2016 WL 7015665 (W.D. Ky. Nov. 29, 2016) (Title VII); *Fabian v. Hosp. of Cent. Conn.*, 172 F.Supp.3d 509 (D. Conn. 2016) (Title VII); *Cruz v. Zucker*, 195 F.Supp.3d 554 (S.D.N.Y. Jul. 5, 2016) (Section 1557); *Doe v. State of Ariz.*, No. CV-15-02399-PHX-DGC, 2016 WL 1089743 (D. Ariz. Mar. 21, 2016) (Title VII); *Dawson v. H&H Elec., Inc.*, No. 4:14CV00583 SWW, 2015 WL 5437101 (E.D. Ark. Sept. 15, 2015) (Title VII); *U.S. v. S.E. Okla. State Univ.*, No. CIV–15–324–C, 2015 WL 4606079 (W.D. Okla. 2015) (Title VII); *Rumble v. Fairview Health Serv.*, No. 14–cv–2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015) (Section 1557); *Finkle v. Howard Cty.*, 12 F.Supp.3d 780 (D. Md. 2014) (Title VII); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (Title VII); *Lopez v. River Oaks Imaging & Diagnostic Grp.*, Inc., 542 F.Supp.2d 653 (S.D. Tex. 2008) (Title VII); *Mitchell v. Axcan Scandipharm,* Inc., No. Civ.A. 05-243, 2006 WL 456173 (W.D. Pa. 2006) (Title VII); *Tronettiv. Healthnet Lakeshore Hosp.*, No. 03–CV–0375E, 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003) (Title VII); *Flack v. Wisconsin Dept. of Health Srvs.*, 18-cv-309, 2018 WL 3574875 (W.D. Wis. Jul. 25, 2018); *Boyden v. Conlin*, No. 17-cv264-WMC, 2018 (W.D. Wis. September 18, 2018); *Tovar v. Essentia Health*, No. 16-cv-00100-DWF-LIB (D. Minn. September 20, 2018); *Flack v. Wis. Dep't of Health Servs.*, 395 F. Supp. 3d 1001 (W.D. Wis. 2019).

[25] Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care*, CTR. FOR AMERICAN PROGRESS, (Jan. 18, 2018), https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/?link_id=2&can_id=d90c309ac9b5a0fa50d294d0b1cdf0b2&source=email-rx-for-discrimination&email_referrer=&email_subject=rx-for-discrimination.

of color, face disproportionately high rates of HIV.[26] Additionally, the 2015 U.S. Transgender Survey found that 23 percent respondents did not see a provider for needed health care because of fears of mistreatment or discrimination.[27]

Moreover, gender-affirming care is not only medically necessary, but for many transgender people, it is lifesaving. The World Professional Association for Transgender Health guidelines provide that gender-affirming interventions, when sought by transgender individuals, are medically necessary and part of the standard of care.[28] The American College of Obstetricians and Gynecologists warns that failure to provide gender-affirming treatment can lead to serious health consequences for transgender individuals.[29]

The proposed rule repealing nondiscrimination requirements in grant-making, and the nonenforcement of current regulations, will setback significant progress and ultimately harm transgender individuals who need care.

Discrimination Based Upon Sexual Orientation

Many LGBTQ people face barriers to accessing health care and related services.[30] HHS' proposal to eliminate nondiscrimination requirements based upon sexual orientation would exacerbate discrimination and further impede health care access for LGB persons.

According to one survey, 8 percent of lesbian, gay, bisexual, and queer individuals had an experience within the year prior to the survey where a doctor or other health care provider refused to see them because of their actual or perceived sexual orientation and

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[26] More than 1 in 4 transgender women are HIV positive. Jen Kates et al., *Health and Access to Care and Coverage for Lesbian, Gay, Bisexual, and Transgender Individuals in the U.S*, KAISER FAMILY FOUND. 6 (2017), http://files.kff.org/attachment/Issue-Brief-Health-and-Access-to-Care-and-Coverage-for-LGBT-Individuals-in-the-US.

[27] NAT'L CTR. FOR TRANSGENDER EQUALITY, *The Report of the 2015 U.S. Transgender Survey* 5 (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf.

[28] *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*, WORLD PROF. ASS'N FOR TRANSGENDER HEALTH (2011), https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20(2)(1).pdf.

[29] *Committee Opinion 512: Health Care for Transgender Individuals*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS (Dec. 2011), https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Health-Care-for-Transgender-Individuals.

[30] Kates, *supra* note 26.

7 percent experienced unwanted physical contact and violence from a health care provider.[31]

Fear of discrimination causes many LGB people to avoid seeking health care, and, when they do seek care, LGB people are frequently not treated with the respect that all patients deserve. The study *When Health Care Isn't Caring* found that 56 percent of LGB people reported experiencing discrimination from health care providers – including refusals of care, harsh language, or even physical abuse – because of their sexual orientation.[32] Almost ten percent of LGB respondents reported that they had been denied necessary health care expressly because of their sexual orientation.[33] Delay and avoidance of care due to fear of discrimination compound the significant health disparities that affect the lesbian, gay, and bisexual population. These disparities include:

- LGB individuals are more likely than heterosexuals to rate their health as poor, have more chronic conditions, and have higher prevalence and earlier onset of disabilities.[34]
- Lesbian and bisexual women report poorer overall physical health than heterosexual women.[35]
- Gay and bisexual men report more cancer diagnoses and lower survival rates, higher rates of cardiovascular disease and risk factors, as well as higher total numbers of acute and chronic health conditions.[36]
- Gay and bisexual men and other men who have sex with men (MSM) accounted for more than half (56 percent) of all people living with HIV in the United States, and more than two-thirds (70 percent) of new HIV infections.[37]

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[31] Mirza, *supra* note 25.
[32] LAMBDA LEGAL, *When Health Care Isn't Caring: Lambda Legal's Survey of Discrimination Against LGBT People and People with HIV* 5 (2010), http://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf.
[33] *Id.*
[34] David J. Lick, Laura E. Durso & Kerri L. Johnson, *Minority Stress and Physical Health Among Sexual Minorities*, 8 PERS. ON PSYCHOL. SCI. 521 (2013), http://williamsinstitute.law.ucla.edu/research/health-and-hiv-aids/minority-stress-and-physical-health-among-sexual-minorities/.
[35] *Id.*
[36] *Id.*
[37] CTRS FOR DISEASE CONTROL & PREVENTION, *CDC Fact Sheet: HIV Among Gay and Bisexual Men* 1(Feb. 2017), https://www.cdc.gov/nchhstp/newsroom/docs/factsheets/cdc-msm-508.pdf.

- Bisexual people face significant health disparities, including increased risk of mental health issues and some types of cancer.[38]
- Lesbian and bisexual women report heightened risk for and diagnosis of some cancers and higher rates of cardiovascular disease.[39]

LGBTQ persons and their families face significant barriers in accessing care. One pediatrician in Alabama reported that "we often see kids who haven't seen a pediatrician in several years, because of fear of being judged, on the part of either their immediate family or them [identifying as LGBTQ]".[40] If turned away by a health care provider, 17 percent of all LGBTQ people, and 31 percent of LGBTQ people living outside of a metropolitan area, reported that it would be "very difficult" or "not possible" to find the same quality of service at a different community health center or clinic.[41]

LGBTQ individuals already experience significant health disparities. Allowing HHS grant funds to flow to clinics and providers that discriminate against LGB people will deny medically necessary care and exacerbate these disparities.

Conclusion

We note that HHS fails to provide any reasonable justification for its proposed rule and notice of nonenforcement to rollback nondiscrimination protections. Nothing significant has changed since these rules were promulgated in 2016. Instead, HHS merely cites as justification for the change a preliminary injunction in a pending court case in Michigan.[42] At the very least, HHS should wait until those and other proceedings, including the challenge to the HHS nondiscrimination "waiver" have been fully resolved before promulgating a final rule.[43] The proposed change is unnecessary and will cause great harm.

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[38] HUMAN RIGHTS CAMPAIGN ET AL., *Health Disparities Among Bisexual People* (2015), http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/assets/resources/HRC-BiHealthBrief.pdf.
[39] Kates, *supra* note 26 at 4.
[40] HUMAN RIGHTS WATCH, *supra* note 21.
[41] Mirza, *supra* note 25.
[42] *See* 84 Fed. Reg. 63832, citing to *Buck v. Gordon*, No. 1:19-CV-286, 2019 U.S. Dist. LEXIS 165196 (W.D. Mich. Sep. 26, 2019)
[43] E.g., *Rogers v. United States Department of Health and Human Services, et al.*, Case No. 6:19-cv-01567-TMC (D.S.C. 2019), ECF No. 1.

We appreciate the opportunity to provide comments. If you have any questions, please contact me at (202) 289-7661 or via email (turner@healthlaw.org).

Sincerely,

Wayne Turner
Senior Attorney