

September 11, 2023

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Director for Office for Civil Rights
U.S. Department of Health & Human Services
200 Independence Ave, S.W.
Washington, D.C. 20201

Submitted electronically via regulations.gov

Re: HHS Grants Notice of Proposed Rulemaking (RIN-0945-AA19)

Dear Director Rainer:

On behalf of the sixty-five undersigned organizations, we write in response to the Department of Health and Human Services notice of proposed rulemaking (RIN 0945-AA19) published in the Federal Register on July 13, 2023.¹ We thank you for your commitment to repromulgating provisions of the Uniform Administrative Requirements, Cost Principles, and Audit Requirements, 45 CFR part 75, and for the opportunity to comment on the proposed rule.

The 2016 HHS Grants Rule established clear nondiscrimination protections for individuals on the basis of age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation and clarified that grant recipients must treat as valid the marriages of same-sex couples.² These protections were critical for lesbian, gay, bisexual, transgender, queer, and intersex (“LGBTQI+”) individuals who too often experience discrimination in government-funded services. The Trump administration’s notice of nonenforcement and 2021 modified Grants Rule left substantial gaps in explicit federal protections against discrimination on the basis of religion or sex (including sexual orientation, gender identity, or sex characteristics) in a range of government-funded services. We support the Biden administration's commitment to repromulgating provisions of the Grants rule, in particular the proposal to add § 75.300(e) to codify critical interpretations from the Supreme Court’s decision in *Bostock v. Clayton County*.³

¹ In addition to a number of the organizations listed below, this comment was prepared with the assistance of Harper Jean Tobin, consultant for Family Equality, and Kristen Miller, Democracy Forward Foundation, counsel for Family Equality.

² 81 Fed. Reg. 89393 (Dec. 12, 2016).

³ While this comment focuses on discrimination based on sexual orientation, gender identity, and sex characteristics, we are clear that there are many other forms of sex discrimination, including discrimination based on sex stereotyping and on pregnancy and related conditions, including termination of pregnancy.

However, to ensure comprehensive non-discrimination protections for LGBTQI+ individuals accessing HHS grant-funded services, we urge HHS to:

- Explicitly enumerate and consistently interpret all sex discrimination prohibitions applicable to HHS grants;
- Add language to § 75.300(e) to cover all current and future laws that prohibit discrimination on the basis of sex;
- Expressly codify the prohibition of discrimination on the basis of sex characteristics in the regulatory text of § 75.300(e);
- Ensure clarity, uniformity, and transparency in the religious exemption process by adding specific requirements into the operating language; and
- Swiftly initiate rulemaking to adopt broad nondiscrimination protections in grant programs that are authorized by statutes that lack explicit nondiscrimination protections, but which have general rulemaking authority, such as Titles IV-B and IV-E of the Social Security Act.

As set forth below, it is urgent that HHS take steps to ensure comprehensive non-discrimination protections are in place for LGBTQI+ individuals in all HHS grant-funded programs and that HHS clarify the religious-exemption process.

I. HHS Should Maintain and Expand Proposed Provisions Regarding Sex Discrimination in the Final Rule.

While we explain further below why we strongly believe that the Department's program authorities allow it to go further, we support proposed § 75.300(e) to the extent that it highlights existing statutory nondiscrimination provisions, and expressly codifies critical interpretations of their scope. In this section, we explain that support and recommend several ways in which HHS should expand § 75.300(e). Specifically:

- The Department should ensure § 75.300(e) addresses the full scope of existing statutory and regulatory provisions on sex discrimination in HHS programs.
- The Department should codify the application of those statutory and regulatory provisions to discrimination on the basis of sexual orientation, gender identity, and sex characteristics ("SOGISC"), while making clear that this is not an exhaustive definition of sex discrimination.
- The Department should take additional, complementary steps to promote compliance with these civil rights guarantees.

A. The Final Rule should comprehensively address both Department-wide and program-specific statutory prohibitions on sex discrimination.

Regardless of any other clarification provided by other regulations or guidance, the Department should treat all sex-discrimination prohibitions applicable to HHS grants similarly in the current rulemaking. Thus, we urge HHS to explicitly enumerate them and expressly clarify that they reach discrimination on the basis of sexual orientation, gender identity, and sex characteristics

(“SOGISC”).⁴ These existing prohibitions include Title IX of the Education Amendments of 1972, Section 1557 of the Affordable Care Act (“ACA”), and Section 632 of the Community Economic Development Act of 1981, in addition to the thirteen other statutes enumerated in the NPRM.⁵

1. Application of Title IX to HHS programs and activities.

HHS should take this opportunity to codify its existing, correct interpretation that the Title IX statute prohibits discrimination on the basis of sexual orientation, gender identity, and sex characteristics in covered HHS programs. This would, in part, codify the May 2021 Notice of Interpretation of Title IX as applied to HHS programs.⁶ It would also provide the opportunity to codify Title IX’s application to discrimination on the basis of sex characteristics (which was not expressly discussed in the May 2021 notice). Codifying this interpretation of Title IX in this final rule would also be consistent with, and complement, the August 2022 Nondiscrimination in Health Programs and Activities proposed rule, which relied on but did not directly address Title IX.⁷

While the Department has never issued a robust set of illustrative examples of Title IX-covered programs and activities, various Department rules⁸ and guidance⁹ issued over the years with

⁴ We also recognize that these statutes reach other forms of sex discrimination, including discrimination on the basis of sex stereotyping and of pregnancy and related conditions, including termination of pregnancy.

⁵ We note that at least two other express statutory sex-discrimination prohibitions that relate to partly HHS-administered programs appear to pertain only to portions of those programs administered by other agencies, namely the Departments of Energy and Labor. *See* 42 U.S.C. § 603(a)(5)(I)(iii) (applying to Temporary Assistance for Needy Families work activities); 42 U.S.C. § 6870(a) (applying to Weatherization Assistance Program). The Department should work with these agencies to provide similar clarification of these statutes.

⁶ Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972, 86 Fed. Reg. 27984 (May 25, 2021), <https://www.federalregister.gov/documents/2021/05/25/2021-10477/notification-of-interpretation-and-enforcement-of-section-1557-of-the-affordable-care-act-and-title-ix>.

⁷ Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47824 (Aug. 4, 2022), <https://www.federalregister.gov/documents/2022/08/04/2022-16217/nondiscrimination-in-health-programs-and-activities>. In that proposed rule, HHS discussed the interpretation of Title IX, but only in the context of adopting regulations to enforce Section 1557 of the ACA. The preamble discussed Title IX’s application to SOGISC discrimination, *id.* at 47829-30, 47858-60, but did not propose to amend the Department’s separate Title IX regulations, or otherwise adopt any regulatory text directly addressing Title IX. *See* 45 CFR Part 86.

⁸ For example, HHS regulations recognize that Title IX applies to certain activities/programs ranging from ACF’s Child Care Fund (45 CFR 98.13 §) and refugee resettlement assistance (45 CFR § 402.41) grants, to activities of Medicaid managed care entities (42 CFR §§ 438.3, 438.100).

⁹ *See, e.g.*, OCR, *Title IX of the Education Amendments of 1972* (updated Oct. 27, 2021), <https://www.hhs.gov/civil-rights/for-individuals/sex-discrimination/title-ix-education->

respect to particular programs reflect the statute’s broad reach. Unfortunately, such guidance regarding Title IX’s scope in Department programs has been more scattershot than comprehensive. Title IX applies to much or all of the activities in many Department programs, and it applies to educational components of even more programs. For example, Title IX applies broadly to many activities, including entire programs or elements of Administration for Children & Families (“ACF”) programs, administered by:

- The Office of Early Childhood Development (including the Office of Head Start and the Office of Child Care).
- The Office of Family Assistance (including family education programs such as Healthy Marriage & Responsible Fatherhood and vocational and training programs for tribal communities and TANF recipients).
- The Family and Youth Services Bureau (“FYSB”) (including Adolescent Pregnancy Prevention programs).
- The Children’s Bureau (including activities aimed at offering or ensuring access to education, outreach, or training, for children, youth, families, or staff).

In addition, beyond this final rule, the Department should update its existing, HHS-wide Title IX regulations.¹⁰ These regulations have not seen major updates since 2005 and have not been comprehensively updated since their adoption in 1975. HHS should update these rules through a future, separate rulemaking, consistent with its pending ACA Section 1557 rulemaking and the Department of Education’s pending Title IX rulemaking¹¹—including, but not limited to, incorporating Title IX’s application to SOGISC discrimination. Furthermore, HHS should work with other agencies, including the Departments of Justice and Education, to make these updates part of a larger update to the 2000 Title IX Common Rule (which did not include HHS).¹²

2. Application of Section 1557 of the Affordable Care Act to HHS programs and activities.

Similarly, the Department should also reference programs and activities covered by Section 1557 of the ACA in § 75.300(e). While this statute is the subject of another pending rulemaking, as with Title IX, the Department has never issued a robust list of illustrative examples of Section 1557 covered grant programs and activities. To date, Section 1557 implementation efforts by the Department and outside stakeholders have focused heavily on medical providers and insurers.

[amendments/index.html](#) (listing Head Start programs, parent education programs, clinical training programs, student health services, and health research grants as examples).

¹⁰ 45 CFR Part 86.

¹¹ Department of Education, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (July 12, 2022), <https://www.federalregister.gov/documents/2022/07/12/2022-13734/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

¹² Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52857, 52874 (Sep. 29, 2000), <https://www.federalregister.gov/documents/2000/08/30/00-20916/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

However, despite receiving far less attention, it is clear that Section 1557 also applies to a much wider range of HHS programs and activities, including many human service programs, or activities within programs, that are administered by ACF or by the Administration for Community Living (“ACL”), as well as behavioral health and related human service programs administered by the Substance Abuse and Mental Health Services Administration (“SAMHSA”).¹³

To ensure the greatest possible clarity for grant recipients, program participants, and other stakeholders, HHS should also enumerate Section 1557 in § 75.300(e).¹⁴

3. *Program-specific statutory sex-discrimination provisions:*

Community Economic Development Program. In addition to incorporating these major, cross-program nondiscrimination statutes into the final rule, the Department should also incorporate and enumerate at least one additional program-specific statutory provision: Section 632 of the Community Economic Development Act (“CEDA”) of 1981.¹⁵ The Community Economic Development (“CED”) program, which is administered by the Office of Community Services (“OCS”) in ACF, creates and expands businesses and job opportunities, complementing ACF’s TANF program. The CED program has funded over \$20 million in local development activities annually in recent years.¹⁶

Section 632 of the CEDA expressly prohibits discrimination in CED programs or activities “because of race, creed, color, national origin, sex, political affiliation, or beliefs.”¹⁷ This broad prohibition, by its terms, applies to all aspects of CED-funded programs and activities. Like Title

¹³ See, e.g., Administration for Community Living, *Webinar and Information on the Proposed Rule to Implement Section 1557 (Anti-discrimination Provisions) of the Affordable Care Act* (Aug. 1, 2022), [https://acl.gov/news-and-events/acl-blog/input-needed-proposed-rule-
implement-sec-1557-affordable-care-act](https://acl.gov/news-and-events/acl-blog/input-needed-proposed-rule-implement-sec-1557-affordable-care-act); Administration for Children and Families, ECD-ACF-PS2017-02: Policy Statement on Supporting the Development of Children who Are Dual Language Learners in Early Childhood Programs (2017), https://www.acf.hhs.gov/sites/default/files/documents/e cd/dll_guidance_document_final.pdf. See also Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47824 (Aug. 4, 2022), [https://www.federalregister.gov/documents/2022/08/04/2022-
16217/nondiscrimination-in-health-programs-and-activities](https://www.federalregister.gov/documents/2022/08/04/2022-16217/nondiscrimination-in-health-programs-and-activities) (“Examples of HHS programs that provide Federal financial assistance subject to this part include but are not limited to [six different types of CMS assistance], and HHS grant programs.”).

¹⁴ Moreover, as with Title IX, the Department should work with other agencies, including the Department of Justice, to adopt through separate rulemaking a Section 1557 Common Rule (perhaps combined with an updated Title IX Common Rule).

¹⁵ 42 U.S.C. § 9821.

¹⁶ Administration for Children & Families, CED Fact Sheet (accessed Aug. 22, 2023), <https://www.acf.hhs.gov/ocs/fact-sheet/ced-fact-sheet>.

¹⁷ 42 U.S.C. § 9821(a). Section 623(b) further elaborates on this prohibition by stating specifically that sex discrimination is prohibited with respect to employment in CED programs, and that enforcement of these employment protections is to be carried “in accordance with” Title VII of the 1964 Civil Rights Act.

IX, Section 1557 of the ACA, and the thirteen program-specific statutes enumerated in the NPRM, the holding and reasoning of *Bostock* and other Title VII precedents apply equally to section 632 of the CEDA. There is no indication to the contrary. Thus, Section 632 of the CEDA likewise prohibits discrimination on the basis of sexual orientation, gender identity, or sex characteristics.¹⁸

Violence Against Women Act. Additionally, some grants administered by the Centers for Disease Control and Prevention (“CDC”) appear to be covered by the statutory nondiscrimination provisions of the Violence Against Women Act (“VAWA”).¹⁹ This includes the Rape Prevention Education (“RPE”) program, which awards grants to state and territorial health departments and sexual assault coalitions for implementation and evaluation of sexual violence prevention efforts.²⁰ While the Justice Department has issued limited subregulatory guidance on VAWA’s nondiscrimination provisions, the Department has not addressed VAWA’s nondiscrimination provisions in regulations or guidance aimed at HHS grantees.

4. Accounting for regulatory nondiscrimination requirements.

Existing (and future) program-specific regulations should also be accounted for in § 75.300(e) as the Department has proposed to approach it. It is well settled that properly promulgated federal regulations constitute “Laws of the United States,”²¹ or in the language of the Uniform Administrative Requirements, “Federal Law,” as well as constituting “public policy requirements.”²² As further discussed below, the Department has, pursuant to various statutory program authorities, adopted nondiscrimination requirements, including with respect to sex discrimination, in various grant programs. The Department’s rules should make clear to grantees, participants, and other stakeholders that nondiscrimination requirements—like any other form of program requirement—may often be established by duly authorized regulation as well as by explicit statutory provisions, and that § 75.300 applies no less to those requirements.

To the extent that § 75.300(e) seeks to give notice to grantees and program participants of applicable nondiscrimination requirements, and their application to SOGISC discrimination, it should refer not only to “statutes” but also to “regulations.”

¹⁸ While this provides more than sufficient authority for the Department to codify program-specific protections for the CED program, Congress has delegated additional broad authority to the Secretary to adopt regulations to implement the CEDA through several provisions, including provisions that direct the Department: to ensure CED programs are operated “on an equitable basis,” 42 U.S.C. § 9806(b); to implement “such regulations as the Secretary may establish” for providing CED grants and ensuring programs will be appropriately designed to fulfill program purposes, 42 U.S.C. § 9807(a); and to approve and ensure all program objectives, goals, and priorities are consistent with those purposes, 42 U.S.C. § 9819(a).

¹⁹ 34 U.S.C. § 12291.

²⁰ 42 U.S.C. § 280b–1b.

²¹ *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 368–69 (1986); *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153–54 (1982); *United States v. Shimer*, 367 U.S. 374, 383 (1961)

²² 2 CFR § 200.300.

5. *Accounting for omitted or future nondiscrimination requirements.*

The Department seeks comment on “whether the Department should include language or guidance in § 75.300(e) to cover current or future laws that prohibit sex discrimination that are not set forth above.”²³ To best ensure the clarity, utility, and durability of this rule—and of other publications and communications to grantees and other stakeholders derived from the rule—the Department should do so. We recommend that HHS add language similar to the following to § 75.300(e) in the final rule:

Any other statute or regulation, not listed here, that applies in whole or in part to an HHS grant program or award, and that prohibits discrimination on the basis of sex.

The final rule should also include language to cover future laws that prohibit religious discrimination in programs.

B. The Final Rule should expressly codify the prohibition of discrimination on the basis of sex characteristics in the regulatory text of § 75.300(e).

We strongly support the Department’s explanation, in the preamble to the proposed rule, that prohibitions on sex discrimination such as those addressed by the rule apply to discrimination on the basis of sex characteristics, including intersex traits. We urge HHS to expressly enumerate this interpretation in the final regulatory text. Executive Order 14075 on “Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals” expressly directed HHS to “use the Department’s authorities to strengthen non-discrimination protections on the basis of sex, including sexual orientation, gender identity, *and sex characteristics*, in its programs and services.”²⁴ HHS should explicitly do so here.

1. *Explicit enumeration is critical to protect intersex children, youth, and adults who face discrimination and disparities.*

Explicitly enumerating the prohibition on discrimination on the basis of sex characteristics in HHS programs is important to ensure federal funding recipients implementing vital programs understand their obligations. This will result in inclusive policies, procedures, and staff training. It will also help ensure that program participants with intersex variations, and their families, better understand their rights and are encouraged to access services and benefits for which they are eligible.

Like other LGBTQI+ populations, youth, and adults with intersex variations face discrimination in a variety of settings, which contribute to disparities in health and other outcomes. A growing

²³ Health & Human Services Grants Regulation, 88 Fed. Reg. 44750, 44753 (July 13, 2023), <https://www.federalregister.gov/documents/2023/07/13/2023-14600/health-and-human-services-grants-regulation>.

²⁴ Exec. Order No. 14,075, Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals §§ 5, 10 (June 15, 2022) (emphasis added), <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/06/15/executive-order-on-advancing-equality-for-lesbian-gay-bisexual-transgender-queer-and-intersex-individuals/>.

body of evidence in the US and internationally documents the prevalence and impacts of the social stigma and discrimination intersex youth and adults face across many domains of life and society. A recent national survey of LGBTQI+ adults found that 67% of intersex adults reported experiencing some form of discrimination in the past year. Most who reported discrimination also reported that it had a moderate or significant impact on their mental (68%), financial (57%), and physical (55%) well-being in the prior year.²⁵ Intersex children, youth, and adults face discrimination, stigma, and related barriers in many areas of life, including in health care,²⁶ education,²⁷ and employment.²⁸ Growing evidence links stigma and discrimination to mental and physical health disparities in intersex populations across the lifespan.²⁹ The potential for

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- ²⁵ Caroline Medina & Lindsay Mahowald, *Discrimination and Barriers to Well-Being: The State of the LGBTQI+ Community in 2022*, Center for American Progress (2023), <https://www.americanprogress.org/article/discrimination-and-barriers-to-well-being-the-state-of-the-lgbtqi-community-in-2022/>. See also Caleb Esteban, et al., *Quality of Life and Psychosocial Well-Being among Intersex-Identifying Individuals in Puerto Rico: An Exploratory Study*, *Int'l J. Environmental Res. & Pub. Health* 20(4): 2899 (2023).
- ²⁶ See, e.g., D. Haghghat, et al., *Intersex people's perspectives on affirming healthcare practices: A qualitative study*, *Social Science & Medicine* 116047 (2023); National Academies of Sciences, Engineering, and Medicine, *Understanding the Well-Being of LGBTQI+ Populations*, 370-70 (2020) (hereinafter NASEM 2020 Report); L. Zeeman & K. Aranda, *A Systematic Review of the Health and Healthcare Inequalities for People with Intersex Variance*, 17 *Int'l J. Envir. Res. & Pub.Health* 6533 (2020). See also Human Rights Watch, *I Want to be Like Nature Made Me: Medically Unnecessary Surgeries on Intersex Children in the US* 60 (2017); TIFFANY JONES, ET AL., *INTERSEX: STORIES AND STATISTICS FROM AUSTRALIA* 114 (2016); San Francisco Human Rights Comm'n, *A Human Rights Investigation into the Medical "Normalization" of Intersex People* (2005), <https://goo.gl/trBnGT>.
- ²⁷ See, e.g., The Trevor Project, *The Mental Health and Well-being of LGBTQ Youth who are Intersex* (2021), <https://www.thetrevorproject.org/wp-content/uploads/2021/12/Intersex-Youth-Mental-Health-Report.pdf>; Mandy Henningham & Tiffany Jones, *Intersex students, sex-based relational learning & isolation*, *SEX EDUC.* (2021); Jack D. Simons, et al., *Supporting Intersex People: Effective Academic and Career Counseling*, 14 *J LGBTQ Issues Couns.* 91-209 (2020); Brief of interACT: Advocates for Intersex Youth, et al., as *Amicus Curiae* in Support of Respondent, *Gloucester County School Board v. G.G. ex rel. Grimm*, No. 16-273 (U.S. Mar. 2, 2017); Tiffany Jones, *The needs of students with intersex variations*, 16 *Sex Educ.* 602 (2016).
- ²⁸ See, e.g., European Union Fundamental Rights Agency, *EU-LGBTI II: A long way to go for LGBTI equality* (2020); World Bank Group, Williams Instit. et al., *Life on the Margins: Survey Results of the Experiences of LGBTI People in Southeastern Europe* (2018), <https://openknowledge.worldbank.org/handle/10986/30607>; JONES, T., ET AL., *INTERSEX: STORIES AND STATISTICS FROM AUSTRALIA* 146-47 (2016); *Hughes v. Home Depot, Inc.*, 804 F.Supp.2d 223 (D.N.J. 2011);
- ²⁹ See, e.g., The Trevor Project Report *supra* note 27; NASEM 2020 Report, *supra* note 26, at 294-305; Amy Rosenwohl-Mack et al., *A national study on the physical and mental health of intersex adults in the U.S.*, *PLOS ONE* 15(10): e0240088 (2020); A.L.C. de Vries, et al., *Mental health of a large group of adults with disorders of sex development in six European*

discrimination and related barriers to critical services and supports is exacerbated by state laws that mandate scrutiny and discrimination in relation to individuals' sex characteristics, at the same time that more youth and adults are coming out publicly about their intersex traits.

2. *Explicit enumeration is consistent with applicable law, precedent, and prior rules and interpretations by HHS and other agencies.*

As previously discussed, Executive Order 14075 directs HHS to use its authority to “strengthen non-discrimination protections on the basis of sex, including sexual orientation, gender identity, and sex characteristics” in its programs.³⁰ Doing so is also consistent with applicable statutory text, precedent, and existing interpretations by HHS and other agencies. Moreover, HHS has explicitly enumerated sex characteristics discrimination in regulatory text in other recent proposed and final rules, as has the Department of Education under Title IX.

Discrimination against intersex people is necessarily and invariably motivated by sex-based considerations, whether related to how these individuals are sorted between binary sex categories, or to how their bodies vary from stereotypes or expectations associated with binary sex categories. This conclusion flows directly from *Bostock v. Clayton County*,³¹ and is supported by other precedents including *Price Waterhouse v. Hopkins*.³² Prior to *Bostock*, two federal courts recognized that discrimination based on variations in sex characteristics is inherently sex-based, while a decades-old case rejected this argument based on the same reasoning disapproved in *Bostock*.³³ In other cases, defendants did not dispute that anti-intersex bias was unlawful, or cases were resolved on other grounds.³⁴ At least one state agency issued pre-*Bostock* guidance that sex discrimination laws encompass anti-intersex bias.³⁵ No reported case law since *Bostock* has squarely presented discrimination claims by intersex people, though

countries, 81 PSYCHOSOMATIC MED. 629–640 (2019); Tiffany Jones T., *The needs of students with intersex variations*, 16 SEX EDUC. 602 (2016).

³⁰ Exec. Order No. 14075 § 5 (emphasis added).

³¹ 140 S. Ct. 1731 (2020).

³² 490 U.S. 228 (1989).

³³ *Compare Wood v. C.G. Studios, Inc.*, 660 F. Supp. 176, 177-78 (E.D. Pa. 1987) (rejecting what the court termed a claim of discrimination based on “gender-corrective surgery”), with *Hughes v. Home Depot, Inc.*, 804 F.Supp.2d 223 (D.N.J. 2011); *Kastl v. Maricopa County Community College District*, No. 02–1531, 2004 WL 2008954 (D. Ariz. June 3, 2004). The *Kastl* court later granted summary judgment to the employer on other, fact-specific grounds, 2006 WL 2460636 (D. Ariz. Aug. 22, 2006), *aff’d* 325 Fed. Appx. 492 (9th Cir. 2009).

³⁴ See, e.g., *Zzyym v. Pompeo*, 341 F.Supp.3d 1248 (D. Colo. 2018) (ruling for intersex passport applicant on APA claim and declining to reach equal protection claim), *vacated and remanded on other grounds*, 958 F.3d 1014 (10th Cir. 2020). See also *Estate of DiMarco v. Wyoming Dep’t of Corr.*, 300 F. Supp. 2d 1183 (D. Wyo. 2004) (ruling for intersex prisoner on due process grounds but rejecting equal protection claim based on intersex status, without considering sex discrimination), *rev’d on other grounds*, 473 F.3d 1334 (10th Cir. 2007).

³⁵ N.Y.S. Div. Of Hum. Rts., Guidance on Protections from Gender Identity Discrimination under the New York State Human Rights Law, 9 (2020), <https://dhr.ny.gov/sites/default/files/pdf/nysdhr-GENDA-guidance-2020.pdf>.

courts have increasingly recognized that intersex people exist and that bias against them raises questions of the applicability of sex discrimination laws.³⁶

HHS and other federal agencies have consistently adopted the view that discrimination based on sex characteristics, including intersex traits, is sex discrimination.

- Prior to *Bostock*, the Department of Health and Human Services (HHS) explained in the preamble to its 2016 ACA nondiscrimination final rule that sex discrimination includes discrimination based on sex characteristics, including intersex traits.³⁷
- Following *Bostock*, the Department of Justice updated its *Title IX Legal Manual* to clarify that the *Bostock* Court’s reasoning “applies with equal force to discrimination against intersex people.”³⁸
- DOJ applied this interpretation to several other federal funding statutes in a March 2022 memorandum.³⁹

³⁶ See, e.g., *A.C. v. Metro. Sch. Dist. of Martinsville*, ___ F.4th ___, 2023 U.S. App. LEXIS 19785, *21-22 (7th Cir. Aug. 1, 2023) (noting that “someone who is intersex” is “entitled to Title IX’s protections”); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 596, 615 (4th Cir. 2020) (noting “there are ... youth born intersex who do or do not identify with their sex-assigned-at-birth,” and this is one reason why some youth “do not have genitalia that match the binary sex listed on their birth certificate—let alone that matches their gender identity”); *id.* at 623 (Wynn, concurring) (“if the Board’s concern were truly that individuals might be exposed to those with differing physiology, it would presumably have policies in place to address ... intersex individuals who possess some mix of male and female physical sex characteristics and who comprise a greater fraction of the population than transgender individuals”); *Frappied v. Affinity Gaming Black Hawk*, 966 F.3d 1038, 1057 n. 3 (10th Cir. 2020) (noting the “framework requiring a comparison between male and female employees assumes that sex is binary,” but that “[t]his case does not raise, and we do not address, sex discrimination involving intersex or gender non-binary individuals”).

³⁷ Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31375, 31389 (May 18, 2016), <https://www.federalregister.gov/documents/2016/05/18/2016-11458/nondiscrimination-in-health-programs-and-activities> (explaining that “[d]iscrimination against intersex individuals is similarly motivated by perceived differences between an individual’s specific sex characteristics and their sex category (either as identified at birth or some subsequent time)”; that “discrimination based on anatomical or physiological sex characteristics ... is inherently sex-based”; that “[i]ntersex traits ... are ‘inextricably bound up with’ sex” such that “it is impossible to discuss intersex status without also referring to sex,” and that such discrimination “may also involve sex stereotypes”).

³⁸ US Department of Justice, *Title IX Legal Manual* (updated Aug. 12, 2021) (internal citations omitted), <https://www.justice.gov/crt/title-ix#Bostock>.

³⁹ DOJ Civil Rights Division, Interpretation of *Bostock v. Clayton County* regarding the nondiscrimination provisions of the Safe Streets Act, the Juvenile Justice and Delinquency Prevention Act, the Victims of Crime Act, and the Violence Against Women Act (Mar. 10, 2022), <https://www.justice.gov/crt/page/file/1481776/download>.

- In May 2023, the Consumer Financial Protection Bureau adopted the same interpretation with respect to the Equal Credit Opportunity Act.⁴⁰

Moreover, recognizing that discrimination based on sexual orientation, gender identity, and sex characteristics are all inherently sex-linked, HHS and other agencies have rightly chosen to expressly enumerate each of these grounds in recent rulemakings:

- HHS expressly prohibited discrimination on the basis of “sex characteristics” in its 2021 Title X Family Planning Programs final rule.⁴¹
- HHS similarly proposed including “on the basis of ... sex characteristics, including intersex traits” in the definition of sex discrimination in its pending proposed rules under Section 1557 of the ACA.⁴²
- The Department of Education followed the same approach in its July 2022 proposed rule on Title IX, proposing to add “on the basis of ... sex characteristics” to its definition of sex discrimination.⁴³

Where, as here, HHS also proposes to adopt regulatory text clarifying the application of statutory protections to discrimination against LGBTQI+ people, it should do so as it did in the Title X Family Planning final rule and the Section 1557 proposed rule—by codifying that intersex-inclusive interpretation in regulatory text.

In summary, the Department has already adopted the view that the plain text of Title IX and the ACA, reinforced by Supreme Court precedent, prohibit discrimination on the basis of sex characteristics, including intersex traits. The same is true for the other statutory sex-

⁴⁰ Consumer Financial Protection Bureau, Small Business Lending Under the Equal Credit Opportunity Act (Regulation B), 88 Fed. Reg. 35150, 35166 (May 31, 2023), <https://www.federalregister.gov/documents/2023/05/31/2023-07230/small-business-lending-under-the-equal-credit-opportunity-act-regulation-b> (“[The Equal Credit Opportunity Act] makes it unlawful for any creditor to discriminate against any applicant with respect to any aspect of a credit transaction on the basis ... sex (including sexual orientation, gender identity, and sex characteristics.”). Because that rulemaking concerned data collection and did not otherwise amend regulatory text interpreting the Equal Credit Opportunity Act’s substantive prohibitions, this interpretation appeared in the final rule preamble.

⁴¹ Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services, 86 Fed. Reg. 56144, 56159, 56178 (Oct. 7, 2021), *codified at* 42 CFR § 59.5.

⁴² Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47824 (Aug. 4, 2022). The preamble explained that “discrimination based on anatomical or physiological sex characteristics (such as genitals, gonads, chromosomes, and hormone function) is inherently sex-based” and “[d]iscrimination based on intersex traits is similarly prohibited sex discrimination” because “[i]f their sex characteristics were different—i.e. traditionally ‘male’ or ‘female’—the intersex person would be treated differently.” *Id.* at 47858.

⁴³ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (July 12, 2022). As the preamble explained, “[d]iscrimination based on intersex traits is rooted in perceived differences between an individual’s specific sex characteristics and those that are considered typical for their sex assigned at birth,” and that “discrimination based on anatomical or physiological sex characteristics ... is inherently sex-based.” *Id.* at 41532

discrimination provisions governing HHS grant programs; all use functionally identical statutory language, and none contain any indications to the contrary. In other rulemakings, it has spelled out such protections clearly in regulatory text. Consistent with that approach, and with the President's directive in Executive Order 14075, and to provide greater clarity and consistency, it should do so here.

C. HHS should provide robust but non-exhaustive guidance on which programs and activities are covered by Title IX and Section 1557 of the ACA.

The 2000 Title IX Common Rule, in which the Department did not participate, required 20 other federal agencies with Title IX-covered programs to maintain and “periodically republish” illustrative, non-exhaustive lists of their covered programs.⁴⁴ While these lists are expressly non-exhaustive and not legally determinative, and many have become outdated, some have been updated recently,⁴⁵ and they have helped to clarify Title IX's broad reach for recipients, program participants, and other stakeholders. To date, it appears that if the Department or its predecessor agency ever promulgated such a list, there is no such guidance available today to help illustrate Title IX's scope of application to health and human service programs. Nor does robust, illustrative guidance exist for Section 1557 of the ACA.

As discussed above, both of these statutes sweep broadly, covering many HHS grant programs in their entirety, and covering large swaths of activities within other programs. Title IX and Section 1557 coverage are readily recognized when the recipients are schools, universities, hospitals, health insurers, or state or local health or education departments—but often overlooked when recipients are state or local government agencies, nonprofit organizations, or businesses charged with implementing health or educational components of HHS grants, especially under what are typically thought of as “human services” programs. As noted above, the Department has given occasional, limited guidance by way of a few isolated examples. But these handful of examples, spread over various rules, guidance documents, and other publications over the years, fail to provide clarity regarding the broad scope of activities under HHS grants—especially human service grants—that may constitute “education” or “health activities.” Thus, HHS should, through additional guidance or rulemaking, provide robust, illustrative, non-exhaustive guidance as to the breadth of HHS-funded programs and activities covered by these statutes.

⁴⁴ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52857, 52874 (Sept. 29, 2000). *See, e.g.*, 10 CFR Appendix A to Part 5 - Appendix A to Part 5 (2001) (“List of Federal Financial Assistance Administered by the Nuclear Regulatory Commission to Which Title IX Applies”); Department of State, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 66 Fed. Reg. 7528 (Jan. 23, 2001); Veterans Administration, 65 Fed. Reg. 79459 (Dec. 19, 2000); National Aeronautics & Space Admin., 65 Fed. Reg. 77673 (Dec. 12, 2000); Agency for International Development, 65 Fed. Reg. 76983 (Dec. 8, 2000); Department of Justice, 65 Fed. Reg. 70737 (Nov. 27, 2000); Environmental Protection Agency, 65 Fed. Reg. 70713 (Nov. 27, 2000).

⁴⁵ *See, e.g.*, Department of the Treasury, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 86 Fed. Reg. 37211 (July 14, 2021).

II. HHS Should Codify Certain Requirements for the Religious Exemption Process in the Regulatory Text.

We applaud the Department for setting out a framework for the review of religious exemption requests under this proposed rule. Unfortunately, the Religious Freedom Restoration Act (“RFRA”) has too often been misinterpreted to require blanket exemptions and to harm third parties. Creating a “workable exemption process” for granting exemptions when required by law will address these misinterpretations and create clarity, uniformity, and transparency.

We appreciate that the proposed rule requires the Department to “assess whether there is a sufficient, concrete factual basis for making a determination and . . . apply the applicable legal standards of the relevant law.”⁴⁶ When determining whether to grant each exemption, the Department must establish with certainty that each recipient requesting an exemption has provided adequate information about its claim, and that there is sufficient factual information about the asserted burden and any harms to third parties and other significant interests prior to applying the applicable legal standard. We hope, however, that the Department will add additional important requirements into the operating language of the Final Rule as well.

First, the Department should state in the rule itself that it must engage in a case-by-case analysis. The Preamble clearly acknowledges this: “The U.S. Supreme Court has recognized that a fact-sensitive, case-by-case analysis of . . . burdens and interests is needed under RFRA.”⁴⁷ A case-by-case analysis allows the Department to “protect a recipient’s religious freedom rights and minimize any harm an exemption could have on third parties,”⁴⁸ and ensures there are no blanket exemptions.

Second, although the Preamble makes the important acknowledgement that the Department must account for harms to recipients and third parties in its analysis, the operating language in the proposed rule, once again, does not. The Establishment Clause commands that “an accommodation must be measured so that it does not override other significant interests,” “impose unjustified burdens on other[s],” or have a “detrimental effect on any third party.”⁴⁹ That requirement should appear in the operating language of the Final Rule as well.

Finally, we are pleased that the regulation will require written notification to a claimant that explains the scope, applicable issues, duration, and all other relevant terms of any exemption. We urge the Department to make this written determination public on its website. In addition to generally promoting transparency, this would provide guidance both to grant recipients and program participants regarding their rights and responsibilities, reducing confusion that can inhibit equitable access to services, particularly for the vulnerable populations the grants are designed to serve. It is important that individuals seeking to participate in the Department’s grant programs know whether the grant recipients will, in fact, provide the services they need and whether they will feel accepted and welcome by the entity. With publication, participants in HHS

⁴⁶ 88 Fed. Reg. at 44,760.

⁴⁷ 88 Red. Reg. at 44,755.

⁴⁸ 88 Red. Reg. at 44,755.

⁴⁹ *Cutter v. Wilkinson*, 544 U.S. 709, 720, 722, 726 (2005).

programs will be better informed to seek and receive the services they need, thereby minimizing burdens to third parties.

III. HHS Should Promulgate Additional Program-Specific Non-Discrimination Protections Using its Programmatic Rulemaking Authorities under the Social Security Act and Other Program Statutes.

In addition to enforcing existing statutory protections, HHS should swiftly initiate rulemaking to adopt broad nondiscrimination protections in grant programs that are authorized by statutes that lack explicit nondiscrimination protections, but for which Congress has delegated broad rulemaking authorities, such as Titles IV-B and IV-E and other programs under the Social Security Act.⁵⁰

Although all federal grant programs are subject to generally applicable statutes that bar discrimination on the basis of race, color, national origin, disability, and age,⁵¹ there are no federal statutes providing such universal protections against discrimination on the basis of religion or sex, including sexual orientation, gender identity, or sex characteristics in the grants-program context. And many authorizing statutes lack program-specific statutory protections against such discrimination. This is true, for example, of Titles IV-B and IV-E of the Social Security Act⁵² under which HHS transfers nearly \$10 billion per year to eligible states to subsidize child welfare services, such as foster care and adoption services.⁵³ Accordingly, there are no statutory protections that explicitly prevent HHS-funded child welfare agencies from discriminating against children and prospective foster or adoptive parents on the basis of religion, sex, sexual orientation, gender identity, or sex characteristics.⁵⁴

In the absence of explicit protections, participants in many HHS grant programs routinely experience discrimination that results in significant harms. For example, and as explained at great length elsewhere, LGBTQI+ youth are often subjected to harmful discriminatory behavior while in foster care or congregate care settings.⁵⁵ Likewise, prospective foster care and adoptive

⁵⁰ For the reasons outlined below, these statutory authorities make it unnecessary for HHS to rely on the “housekeeping statute” (5 U.S.C. § 301) to adopt such provisions.

⁵¹ See 42 U.S.C. § 2000d; 29 U.S.C. § 794(a); 42 U.S.C. § 6102.

⁵² See 42 U.S.C. § 671(a)(18).

⁵³ 42 U.S.C. §§ 621, 624, 670, 674.

⁵⁴ While many programs are covered by cross-program statutes such as Title IX and Section 1557 of the ACA, *supra* page 12, these protections have not been well understood or enforced because the recipients are not considered typical educational or health care institutions. Our recommendations to (1) clarify and codify by regulation where these cross-program statutes apply and (2) to use other statutory authorities to establish regulatory nondiscrimination requirements across key programs are complementary. Adopting both approaches will ensure that protections that are clear, consistent, and comprehensive. Doing so is essential to safeguarding program purposes, even for programs where protections may overlap in part.

⁵⁵ See, e.g., Laura Baams et al., *LGBTQ Youth in Unstable Housing and Foster Care*, 143 *Pediatrics* 3, 1-2 (2019),

https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6398424/pdf/PEDS_20174211.pdf.

parents have been turned away from HHS-funded child welfare agencies because of their religious beliefs, sexual orientation, or gender identities.⁵⁶

To address ongoing discrimination and the resulting harms, HHS should initiate rulemakings that adopt additional nondiscrimination protections in those programs that are authorized by statutes with general, programmatic rulemaking provisions.⁵⁷ Courts have repeatedly recognized the broad authority conferred by such provisions, which typically provide that agencies may publish rules that are “necessary and appropriate” to carry out the purposes of a statute.⁵⁸

This authority comfortably encompasses nondiscrimination protections, which are both consistent with and necessary to implement the relevant grant programs. First, such protections are necessary to ensure that program participants are able to access services mandated by statute. Moreover, in some cases—as is true of the Title IV-B and IV-E programs—such protections are necessary to ensure that grantees meet specific statutory requirements when providing services.⁵⁹ Second, preventing discrimination is consistent with statutory directives to promote the well-being of program participants. Because nondiscrimination protections are both consistent with and necessary to implement HHS grant programs, they are within the agency’s general rulemaking authorities over various programs.

Indeed, HHS has previously relied on these types of general rulemaking authorities to promulgate nondiscrimination protections. For example, under the Runaway and Homeless Youth Act—which is devoid of statutory nondiscrimination protections—the agency promulgated a 2016 rulemaking that prohibits grantees from discriminating against youth based on their “race, ethnicity, nationality, age, religion / spirituality, gender identity / expression, sexual orientation, socioeconomic status, physical or cognitive ability, language, beliefs, values, behavior patterns or customs.”⁶⁰ HHS relied on its general rulemaking authority, which provides that “the Secretary of Health and Human Services . . . may issue such rules as the Secretary considers necessary or appropriate to carry out the purposes of this subchapter.”⁶¹ Similarly, the Department has adopted nondiscrimination requirements for various other grant programs

⁵⁶ See, e.g., Lambda Legal, *Rogers v. United States Department of Health and Human Services*, <https://lambdalegal.org/case/rogers-v-us-department-health-human-services/> (last visited Aug 31, 2023) (summarizing litigation that resulted when a South Carolina child welfare agency refused to certify a lesbian couple as foster parents); Christine Hauser, *Tennessee Couple Says Adoption Agency Turned Them Away for Being Jewish*, *New York Times* (Jan. 22, 2022), <https://www.nytimes.com/2022/01/22/us/tennessee-jewish-couple-adoption.html>.

⁵⁷ See, e.g., 42 U.S.C. § 1302(a) (providing general rulemaking authority for the Social Security Act).

⁵⁸ See, e.g., *Merck v. U.S. Dep’t of Health & Human Servs.*, 962 F.3d 531, 537 (D.C. Cir. 2020) (the Social Security Act’s general rulemaking authority is “undoubtedly broad”).

⁵⁹ For example, Title IV-E requires states to adopt standards that ensure the protection of children’s civil rights. 42 U.S.C. § 617(a)(10). Broad non-discrimination protections will ensure that states meet such statutory requirements.

⁶⁰ 81 Fed. Reg. 93030, 93062 (2016) (codified at 45 CFR § 1351.22(a)).

⁶¹ 81 Fed. Reg. at 93030 (quoting 42 U.S.C. § 5702, which has since been transferred to 34 U.S.C. § 11202).

pursuant to statutory program authorities including grants for Title X Family Planning Services,⁶² the Child Care Fund,⁶³ Community Health Services,⁶⁴ and Migrant Health Services.⁶⁵

We urge HHS to do the same with respect to other grant programs where it has general rulemaking authority, beginning with Titles IV-B and IV-E of the Social Security Act.

IV. Conclusion

Thank you for taking the time to consider our views, and the impact these proposed revisions will have on the communities on whose behalf we advocate. We support the prompt finalization of the Proposed Rule, which we hope will include the recommended changes and enhancements discussed in this comment. Please do not hesitate to reach out to Laura Brennan, Child Welfare Policy Associate at Family Equality, at Lbrennan@familyequality.org with any questions.

Sincerely,

American Atheists

American Civil Liberties Union (ACLU)

American Humanist Association

Americans United for Separation of Church and State

CA LGBTQ Health and Human Services Network

Campus Pride

Center for Law and Social Policy (CLASP)

Center for the Study of Social Policy

CenterLink: The Community of LGBTQ Centers

Child Welfare League of America

Children's Rights

Connecticut Alliance of Foster and Adoptive Families

Equality California

⁶² 42 CFR § 59.5.

⁶³ 45 CFR § 98.20(b).

⁶⁴ 42 CFR § 51c.109.

⁶⁵ 42 CFR § 56.110.

Equality Illinois
EqualityMaine
Fair Wisconsin
Family Equality
Fenway Health
Florida Conference UCC
FORGE, Inc.
FosterClub
Gender Spectrum
Georgia Equality
HealthHIV
Hugh Lane Wellness Foundation
Human Rights Campaign
interACT: Advocates for Intersex Youth
Interfaith Alliance
Lambda Legal
The Leadership Conference on Civil and Human Rights
League of Women Voters of the United States
Loaves and Fishes
Los Angeles LGBT Center
Micki Washburn, PhD, LMSW, MA, LPC-S
Movement Advancement Project
NARAL Pro-Choice America
National Association of Counsel for Children
National Center for Transgender Equality

National Center for Youth Law
National Center on Adoption and Permanency
National Coalition for LGBTQ Health
National Council of Jewish Women
National Health Law Program
National Legal Aid & Defender Association
National Women's Law Center
NETWORK Lobby for Catholic Social Justice
New Ways Ministry
North American Council on Adoptable Children
Oregon Resource Family Alliance
Philadelphia Family Pride
Planned Parenthood Federation of America
Public Justice Center
Resolve New England
SAGE
Sisters of St. Joseph
Sojourners
St. Thomas More Catholic Student Parish
Tennessee Equality Project
The Pinta Pride Project Inc.
The Trevor Project
True Colors United
Unicorn Solutions LLC
Union for Reform Judaism

University at Albany School of Social Welfare

Whitman-Walker Institute