

Disability Rights Education & Defense Fund



December 19, 2019

*via Electronic Submission
(regulations.gov)*

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

RE: Office of the Assistant Secretary for Financial Resources; Health and Human Services Grants Regulation (RIN 0991-AC16)

Dear Secretary Azar:

The Disability Rights Education and Defense Fund (“DREDF”) appreciates the opportunity to provide comment on the proposed Health and Human Services Grants Regulation. DREDF is a national cross-disability law and policy center that protects and advances the civil and human rights of people with disabilities through legal advocacy, training, education, and development of legislation and public policy. We are committed to increasing accessible and equally effective healthcare for people with disabilities and eliminating persistent health disparities that affect the length and quality of their lives. DREDF's work is based on the knowledge that people with disabilities of varying racial and ethnic backgrounds, ages, genders, and sexual orientations are fully capable of achieving self-sufficiency and contributing to their communities with access to needed services and supports and the reasonable accommodations and modifications enshrined in U.S. law.

DREDF has significant experience in health law and policy, given that disabled individuals need consistently available health care and long-term services and supports to live productive lives in their communities. Our comments below do not address the full breadth of the proposed rule. Rather, we focus on provisions with particular relevance to people with intersectional LGBTQI+ and disability identities.

I. Proposed Removal of Explicit Bases of Nondiscrimination Protections (45 C.F.R. § 75.300(c))

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In recognition that people with historically marginalized identities, including LGBTQI+ individuals, need explicit protections from discrimination in the range of programs that receive grants from the Department of Health and Human Services (“HHS”), the previous Administration codified 45 C.F.R. § 75.300(c), which makes clear that “[i]t 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.” Now, HHS proposes to eliminate these essential nondiscrimination references, instead replacing it with a provision vaguely providing that no person should be subjected to discrimination by HHS grantees “to the extent doing so is prohibited by federal statute.” DREDF strongly opposes this severe rollback in the language of the regulation, and encourages HHS to withdraw this proposal.

The current rule’s language provides vital protections to individuals who are at a high risk of exclusion from or discrimination in essential housing, education, food assistance, and health programs that receive HHS funding. For example, the current rule addresses the disproportionate number of LGBTQI+ youth experiencing homelessness;¹ the higher incidence of poverty,² substance use disorders,³ and reliance on federal benefits⁴ among LGBTQI+ individuals; and the economic instability, poorer health, and social isolation of older LGBTQ adults, many of whom have disabilities;⁵ among other issues.

¹ *At the Intersections: A Collaborative Resource on LGBTQ Youth Homelessness*, TRUE COLORS UNITE (2019), <https://truecolorsunited.org/wp-content/uploads/2019/04/2019-At-the-Intersections-True-Colors-United.pdf>.

² *LGBT Poverty in the United States: A study of differences between sexual orientation and gender identity groups*, WILLIAMS INST., UCLA SCHOOL OF LAW (Oct. 2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/National-LGBT-Poverty-Oct-2019.pdf>.

³ *Sexual Orientation and Estimates of Adult Substance Use and Mental Health: Results from the 2015 National Survey on Drug Use and Health*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN. (Oct. 2016), available at [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).

⁴ *Protecting Basic Living Standards for LGBTQ People*, CTR. FOR AM. PROGRESS (Aug. 2018), <https://www.americanprogress.org/issues/lgbtq-rights/reports/2018/08/13/454592/protecting-basic-living-standards-lgbtq-people/>.

⁵ *Understanding Issues Facing LGBT Older Adults*, MOVEMENT ADVANCEMENT PROJECT & SAGE (May 2017), <http://www.lgbtmap.org/policy-and-issue-analysis/understanding-issues-facing-lgbt-older-adults>.

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The current rule also ensured federal protections on the basis of all “non-merit factors”—beyond those afforded by the patchwork of federal civil rights laws protecting individuals on the basis of their race, national origin, sex, age, disability, or religion. The proposed rule sharply limits these protections, only referencing characteristics protected by existing “federal statute[s].” While the various federal laws do provide some protections against more limited forms of discrimination, there are differences in their text and judicial interpretations, creating inconsistent and unclear levels of protection. The current rule addressed this issue, ensuring that HHS-funded programs had clear and consistent guidance on what constitutes discriminatory practices.

In contrast, the proposed rule would confuse and limit the types of discrimination that are impermissible for HHS grantees. As an organization committed to protecting the rights of people with disabilities, including LGBTQI+ people with disabilities, we are gravely concerned that this rollback will severely harm this intersectional group, as well as the larger LGBTQI+ community. While the proposed rule’s commentary skirts this issue, the clear aim of this rule is to eliminate protections against sexual orientation and gender identity discrimination—the only two characteristics in the current rule’s list that are not explicitly referenced in the applicable federal statutes. This targeted measure, which runs contrary to the growing consensus of federal courts that such traits are included within the meaning of “sex” discrimination,⁶ puts LGBTQI+ children, youth, and adults at risk.

For example, under the proposed rule, a community meal program could refuse to deliver food to disabled individuals who are LGBTQI+; an HIV prevention and education program could turn away LGBTQI+ people; a community health center could refuse to provide care to a disabled person who is LGBTQI+; a foster care agency could keep children in government care rather than allow them to be adopted by qualified same-sex couples; a community housing program could refuse to rent to an LGBTQI+ person with a disability; and a Head Start program could refuse to serve a child with a learning disability who has same-sex parents; among other injustices. Permitting practices such as these is not only cruel and inhumane, it is self-perpetuating. Entities applying for HHS grants may exclude certain groups because of unwarranted stereotypes about how certain individuals or groups behave or hold certain values. This proposed rule would encourage HHS grantees to act on these stereotypes, potentially further subjecting LGBTQI+ individuals to the kinds of demeaning and traumatic discrimination that they have experienced in the past, and depriving grantees and potential clients/patients the opportunity to overcome their stereotypes with individual human interactions. The proposed rule, in conjunction with HHS’s decision to not enforce the

⁶ *Federal Court Decisions*, MOVEMENT ADVANCEMENT PROJECT (Dec. 2019), https://www.lgbtmap.org/equality-maps/federal_court_decisions (last visited Dec. 13, 2019).

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regulations that were finalized in 81 FR 89393 (Dec. 12, 2016), have deeply divisive social and cultural consequences for our entire country. We stand in solidarity with LGBTQI+ communities in firmly rejecting this proposed rule and the invidious discrimination that it will permit.

II. Proposed Elimination of Regulation Explicitly Requiring HHS Grantee's to Follow the Supreme Court's Marriage Equality Decisions (45 C.F.R. § 75.300(d))

DREDF also opposes the proposed elimination of 45 C.F.R. § 75.300(d), which makes clear that, “[i]n accordance with the Supreme Court decisions in *United States v. Windsor* and in *Obergefell v. Hodges*, all recipients [of HHS grants] must treat as valid the marriages of same-sex couples.” The proposed rule seeks to replace this language with a vague statement that HHS will follow “all applicable Supreme Court decisions” in administering grants.

This proposed change would give an inappropriate and dangerous level of discretion to the Administration and its political appointees to decide which decisions are relevant to follow and which, like *U.S. v. Windsor* and *Obergefell v. Hodges*, HHS grantees are permitted to ignore. This change would create confusion among HHS grantees as to which obligations they are required to follow under the law. Furthermore, it seeks to undercut the legitimacy of Supreme Court precedent—a move that is, at its very core, contrary to long-established constitutional principles.

Most importantly, however, this proposal would harm the rights of same-sex couples who, just like every other American couple, deserve an equal opportunity to marry and participate in programs dependent on or benefitted by that marital status. At this day in age, the marriage rights of same-sex couples have been firmly established in American law, and there is wide public support for marriage equality.⁷ This proposal's attempt to undercut established law is unjust and, as described in the previous section to these comments, will result in further discrimination against same-sex couples in adoption and foster care agencies and in programs such as Head Start or those that provide child care. We stand firmly against the proposed change.

Thank you again for the opportunity to comment on the proposed rule. Please do not hesitate to contact us if you have any questions about the above.

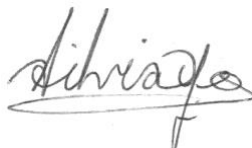
⁷ See *Attitudes on Same-Sex Marriage*, PEW RESEARCH CTR. (May 2019), <https://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/>.

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Sincerely,

Handwritten signature of Carly A. Myers in cursive script.

Carly A. Myers
Staff Attorney

Handwritten signature of Silvia Yee in cursive script.

Silvia Yee
Senior Staff Attorney