

UNITED STATES OF AMERICA
BEFORE THE DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Assistant Secretary for Financial Resources;)
Health and Human Services Grants Regulation;) RIN 0991–AC16
Notice of Proposed Regulation)

**COMMENTS OF WHITMAN-WALKER HEALTH IN OPPOSITION TO PROPOSED
CHANGES TO NONDISCRIMINATION REQUIREMENTS IN 45 C.F.R. § 75.300(C)
AND (D), AND PROTEST OF NOTIFICATION OF NONENFORCEMENT**

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INTRODUCTION AND SUMMARY

Whitman-Walker Health (Whitman-Walker or WWH) hereby submits its opposition to the proposed rulemaking published on November 19, 2019, 84 Fed. Reg. 63831 (NPRM or Proposed Rule). Specifically, Whitman-Walker strongly objects to the unjustified, unlawful and harmful proposal to eviscerate the nondiscrimination obligations of HHS grantees contained in 45 C.F.R. § 75.300(c) and (d). Whitman-Walker also objects to the Notification of Nonenforcement published on the same day, 84 Fed. Reg. 63809, but announced by the

Department two weeks earlier, <https://www.hhs.gov/about/news/2019/11/01/hhs-issues-proposed-rule-to-align-grants-regulation.html>.¹

HHS is proposing to eliminate language that reflects longstanding Department policies, specifically identifying proscribed discrimination by recipients of HHS grants “based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation” – 45 C.F.R. § 75.300(c) – and providing that “[i]n accordance with ... Supreme Court decisions ... all recipients must treat as valid the marriages of same-sex couples” – § 75.300(d). That specific guidance would be replaced by very general language stating that grantees are required to not discriminate “to the extent doing so is prohibited by federal statute,” and that “HHS will follow all applicable Supreme Court decisions in administering its award programs. 84 Fed. Reg. at 63835. This language would provide vague and confusing notice to grant recipients and open the door to widespread discrimination. Without any justification or consideration of the harms likely to result, the NPRM would reverse clear, well-founded Department policies protecting lesbian, gay, bisexual and transgender (LGBT) persons from discrimination by HHS grantees in a staggeringly broad range of health and social service programs. This reversal threatens grave harm to individuals and families that remain particularly vulnerable to discrimination, and will undercut the Department’s own goals of eliminating or reducing health disparities and combatting the HIV and opioid epidemics. The reasons offered in the Proposed Rule for these startling departures from well-established nondiscrimination law and policy – alleged deficiency in the Regulatory Flexibility Act analysis when the current guidelines were issued in 2016, and concern about religious-based reasons a grantee might wish

¹ Whitman-Walker takes no position on the regulations other than 45 C.F.R. § 75.300(c) and (d) that are addressed in the NPRM and Notification of Nonenforcement.

to discriminate – are make-weights, and completely inadequate to meet the Department’s obligations under the Administrative Procedure Act.

INTEREST AND EXPERTISE OF WHITMAN-WALKER HEALTH

Whitman-Walker Health is a Federally Qualified Health Center serving the greater Washington, DC metropolitan area, with a particular mission to the LGBT community and to persons living with HIV of every sexual orientation and gender. Our more than 280 medical, behavioral health and dental professionals, lawyers and paralegals, support staff and administrators provide comprehensive primary and specialty HIV, Hepatitis C, and LGBT care, including medical, dental, mental health, substance use disorder treatment, community health, legal and insurance navigation services, and youth and family health and wellness-related support services. In 2018, Whitman-Walker provided health care services to more than 20,700 individuals.

Whitman-Walker’s patient population is quite diverse and reflects Whitman-Walker’s commitment to being a health care home for individuals and families that have experienced stigma and discrimination, or have otherwise encountered challenges in obtaining affordable, high-quality health care. We are nationally known as experts in HIV and Hepatitis C specialty care and in gender-affirming care for transgender and gender nonconforming persons. In calendar year 2018, 58% percent of our health care patients and clients who provided their sexual orientation identified as lesbian, gay, bisexual, or otherwise non-heterosexual, and 9% of our patients and clients—more than 1,800 individuals—identified as transgender or gender nonconforming. Our patients reflect the diversity of the Washington, DC metropolitan area: they include a wide range of races and ethnicities, nationalities and cultures, ages and income levels.

Our commitment to high-quality, welcoming, culturally competent care for the LGBT

community has made us a “go-to” health center for LGBT people in the surrounding states – not only from Virginia and Maryland, but also from Pennsylvania, West Virginia and Delaware. Many of these patients are unable to find nondiscriminatory, welcoming and competent care in their own communities.

Since the mid-1980s, Whitman-Walker has had an in-house Legal Services Department. Our attorneys and legal assistants provide information, counseling, and representation to Whitman-Walker patients, and to others in the community who are LGBT or living with HIV, on a wide range of civil legal matters that relate directly or indirectly to health and wellness – including access to health care and discrimination based on HIV, sexual orientation, or gender identity. Our legal staff includes nationally recognized experts in Medicaid, Medicare, the Affordable Care Act and health insurance law generally, HIV law, and LGBT law. In 2018, 52% of our legal clients who provided their sexual orientation identified as lesbian, gay, bisexual or otherwise non-heterosexual; 20% of our legal clients identified as transgender or gender nonconforming; and 50% were diagnosed with HIV.

Over the years, Whitman-Walker health care providers, lawyers and paralegals have encountered many instances of discrimination against our patients and legal clients by health care providers and staff outside of Whitman-Walker, based on sexual orientation, gender identity or HIV status. Our patients and legal clients, particularly those who are lower-income, depend on many other services that are financially supported by HHS grants, including senior services such as congregate meals, transportation, and other services provided by senior centers; childcare programs such as Head Start; substance use disorder treatment services; long-term care services; caregiver support to families with members who are people with disabilities or elders; and other family services, including foster care and adoption. These individuals and families remain at

substantial risk of discrimination based on their sexual orientation, gender identity, race, ethnicity, national origin, disability, or minority religious faith. By undercutting safeguards against discrimination by service providers that receive federal monies, the Proposed Rule directly threatens the health and well-being of our patients and clients. Moreover, by threatening curtailment or denial of services that are directly or indirectly related to health, the NPRM could threaten Whitman-walker directly by causing our patients to become sicker and more expensive and difficult to treat, and by driving more LGBT people to seek our financially-strapped services.

COMMENTS ON THE PROPOSED RULE AND NOTIFICATION OF NONENFORCEMENT

I. The Proposed Rule Provides Insufficient Guidance for Grantees and May Encourage Increased Discrimination

In place of specific enumeration of forms of prohibited discrimination in § 75.300(c) – “age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation” – as well as the directive that HHS-funded programs and services should not be denied or restricted based on other “non-merit factors,” the Proposed Rule substitutes very general language prohibiting “discrimination ... to the extent ... prohibited by federal statute.”² The NPRM further deletes any reference to appropriate treatment of same-sex marriages by grantees in § 75.300(d) with the very obvious but non-informative statement that “HHS will follow all applicable Supreme Court decisions in administering its award programs.”³ The NPRM makes its guidance even vaguer by referring to “the nondiscrimination statutes that Congress has adopted and made applicable to the Department’s programs” and also referring to the Religious

² 84 Fed. Reg. at 63835.

³ *Id.*

Freedom Restoration Act (RFRA)⁴ – which, as discussed in Part IV below, has little if any applicability to nondiscrimination conditions in federal contracts and grants.

This general language provides insufficient guidance to grantees as to what discrimination is impermissible. Express notice of protected categories is standard practice in federal, state and local government agencies, public and private employers, hospitals and other health care facilities, educational institutions, and public accommodations. Removal of those specific protected categories will confuse grantees and give the impression (whether intended or not) that HHS no longer prioritizes nondiscrimination by its grant recipients.

This problem is particularly acute with regard to grantee treatment of same-sex marriages. Given this relatively new area of the law, which is still misunderstood and still resisted in some quarters, it is important to clearly state the legal obligation not to discriminate against individuals and families receiving HHS-funded services based on marriage partner gender. A general declaration that HHS grant programs adhere to Supreme Court precedents says almost nothing to grantees.

II. The Proposed Deletion of Sexual Orientation and Gender Identity Nondiscrimination Threatens Substantial Harm to LGBT People and Those Who Are Dedicated to Serving Them, Damaging the Department’s Own Public Health Goals

It is clear from the NPRM that a primary target of HHS’ action is the protections in the current § 75.300 against discrimination based on gender identity and sexual orientation. This action threatens substantial harm to LGBT people.

It is a well-documented and much-discussed problem that LGBT individuals and families experience many barriers to receiving respectful, non-discriminatory, adequate health care. LGBT people seeking health care services frequently experience unwelcoming and disrespectful

⁴ *Id.* at 63833.

attitudes, and even discriminatory treatment and outright refusals of care. Widespread experiences of discriminatory treatment have been reported by LGBT people in many surveys;⁵ documented by the Institute of Medicine,⁶ the Joint Commission,⁷ the American Association of Medical Colleges,⁸ and a number of researchers;⁹ and discussed in numerous court cases.¹⁰

⁵ James SE, Herman JL, Rankin S, Keisling M, Mottet L, Anafi M, *The Report of the 2015 U.S. Transgender Survey* (National Center for Transgender Equality 2016), <http://www.ustranssurvey.org/report>, at 96-99, 108-111; National Senior Citizens Law Center *et al.*, *LGBT Older Adults in Long-Term Care Facilities: Stories From the Field* (2011), https://www.lgbtagingcenter.org/resources/pdfs/NSCLC_LGBT_report.pdf; Lambda Legal, *When Health Care Isn't Caring* (2010), www.lambdalegal.org/health-care-report.

⁶ Institute of Medicine (US) Committee on Lesbian, Gay, Bisexual, and Transgender Health Issues and Research Gaps and Opportunities. *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding* (National Academies Press 2011).

⁷ The Joint Commission. *Advancing Effective Communication, Cultural Competence, and Patient- and Family-Centered Care for the Lesbian, Gay, Bisexual, and Transgender (LGBT) Community: A Field Guide* (Oak Brook, IL 2011), <http://www.jointcommission.org/lgbt>.

⁸ Association of American Medical Colleges. *Implementing Curricular and Institutional Climate Changes to Improve Health Care for Individuals Who Are LGBT, Gender Nonconforming, or Born With DSD: A Resource for Medical Educators* (2014), <http://offers.aamc.org/lgbt-dsd-health>

⁹ Ranji U., Beamesderfer A., Kates J., Salganicoff A., *Health and Access to Care and Coverage for Lesbian, Gay, Bisexual, and Transgender Individuals in the U.S.*, Kaiser Family Foundation Issue Brief, April 23, 2015, <http://kff.org/disparities-policy/issue-brief/health-and-access-to-care-and-coverage-for-lesbian-gay-bisexual-and-transgender-individuals-in-the-u-s>, at 4-11; Stein GL, Bonuk KA. Original research: physician-patient relationships among the lesbian and gay community. *J Gay Lesbian Med Assoc.* 2001; 5(3): 87-93; Dean L, Meyer IH, Robinson K, Sell RL, et al. Lesbian, gay, bisexual, and transgender health: findings and concerns. *J Gay Lesbian Med Assoc.* 2000; 4(3): 101-151.

¹⁰ *E.g.*, *Rumble v. Fairview Health Systems* (D. Minn. 2017); *Benitez v. North Coast Women's Care Medical Group* (Calif. 2008); *Miller v. Spicer* (D. Del. 1993). For additional examples of cases alleging LGBT discrimination in health care, *see, e.g.*, *Prescott v. Rady Children's Hospital*, <https://transgenderlawcenter.org/archives/case/prescott-v-rady-childrens-hospital-san-diego>; *Jones v. San Joaquin Community Hospital*. <http://www.nclrights.org/cases-and-policy/cases-and-advocacy/donna-jones-et-al-v-san-joaquin-community-hospital/>.

Explicit and implicit biases of health care professionals against sexual and gender minority people are all too prevalent.¹¹

Unequal treatment of LGBT people in the health care system is harmful to individual and public health. As documented by many authorities, LGBT populations suffer from numerous health disparities compared to non-LGBT people. For instance, LGBT individuals are more likely to suffer from depression, anxiety and other mental health challenges; report poor health generally and to suffer from a wide range of chronic health conditions; use tobacco, abuse drugs, and consume excessive alcohol, which create risks of heart, lung and liver disease, hypertension, and certain cancers; fare more poorly than others when undergoing cancer treatment; and suffer from eating disorders that can endanger health. In addition, gay and bisexual men, and transgender women, are at elevated risk for HIV and a range of other sexually transmitted infections; and lesbian and bisexual women are at higher risk of weight-related health problems.¹²

These numerous health disparities have many direct and indirect causes, including systemic discrimination and stigma that have resulted in poverty,¹³ caused many to be un- or

¹¹ Sabin JA, Riskind RG, Nosek BA. Health care providers' implicit and explicit attitudes toward lesbian women and gay men. *Am J Public Health*. 2015; 105(9):1831-1841.

¹² Institute of Medicine, *supra* n.6; The Joint Commission, *supra* n.7; American Association of Medical Colleges, *supra* n.8; Ranji et al., *supra* n.9; Dean et al., *supra* n.9.

¹³ Badgett MVL, Choi SK, Wilson BDM, *LGBT Poverty in the United States* (The Williams Institute 2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/National-LGBT-Poverty-Oct-2019.pdf>.

under-insured,¹⁴ and contributed to health-damaging internalized stress.¹⁵ However, discrimination and failure of many health care providers and institutions to provide clinically and culturally competent care to sexual and gender minorities is an important contributor to many of the health inequities that LGBT people suffer. Outright denials of care and inadequate care not only directly harm the LGBT patients who are subjected to such mistreatment; they also discourage LGBT people from seeking medical care, and from being forthcoming about their sexual or gender identity or sexual history in encounters with providers.¹⁶

HHS has recognized the pervasiveness and persistence of discrimination against LGBT individuals, in health care and in social determinants of health, such as employment, housing and education, and the resulting health disparities and poverty that undercut public health, *Lesbian, Gay, Bisexual and Transgender Health*, <https://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health> (last visited Dec. 17, 2019). The Department's *Healthy People 2030* initiative aims to “[e]liminate health disparities, achieve health equity, and attain health literacy to improve the health and well-being of all,” and to

¹⁴ Kates J, Ranji U, Beamesderfer A, et al, *Health and Access to Care and Coverage for Lesbian, Gay, Bisexual, and Transgender (LGBT) Individuals in the U.S.* (Kaiser Family Foundation Issue Brief 2018), <https://www.kff.org/disparities-policy/issue-brief/health-and-access-to-care-and-coverage-for-lesbian-gay-bisexual-and-transgender-individuals-in-the-u-s/view/print>.

¹⁵ Frost DM, Lehavot K, Meyer IH. Minority stress and physical health among sexual minority individuals. *J Behav Med* 2015. 38(1): 1-8. Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3895416>; Lick DJ, Durso LE, Johnson KL, Minority stress and physical health among sexual minorities. *Perspectives on Psychological Science* 2013. 8(5): 521-548. <https://doi.org/10.1177/1745691613497965>.

¹⁶ Institute of Medicine, *supra* n.6; The Joint Commission, *supra* n.7; American Association of Medical Colleges, *supra* n.8; Dean et al., *supra* n.9; Stein & Bonuk, *supra* n.9; Khalili J, Leung LB, Diamant AL, Finding the perfect doctor: identifying lesbian, gay, bisexual, and transgender-competent physicians, *Am J Public Health*. 2015; 105(6):1114-1119; Kitts RL. Barriers to optimal care between physicians and lesbian, gay, bisexual, transgender, and questioning adolescent patients. *J Homosexuality* 2010; 57(6): 730-747.

“[c]reate social, physical, and economic environments that promote attaining full potential for health and well-being for all.” Office of Disease Prevention & Health Promotion, *Healthy People 2030 Framework*, <https://www.healthypeople.gov/2020/About-Healthy-People/Development-Healthy-People-2030/Framework> (last visited Aug. 13, 2019).

Abandoning the requirement that recipients of HHS funds not discriminate in their health and social service programs on the basis of gender identity or sexual orientation undermines the Department’s own goals in *Healthy People 2030*.

Moreover, the Department’s nondiscrimination rules for grantees serve a critical function in restraining discriminatory incidents and practices. Whitman-Walker physicians, nurses and other medical providers, therapists and counselors, attorneys and paralegals, hear many accounts from LGBT patients and legal clients of discriminatory experiences in hospitals, clinics, doctors’ offices and other health care settings. These experiences are not only offensive and upsetting to our patients and clients; they also are damaging to health. Discriminatory incidents delay or deny needed health care, and discourage LGBT individuals from seeking care and from fully disclosing personal information that health care providers need for proper diagnosis and treatment. Patients come to Whitman-Walker sicker than they would otherwise be; their negative experiences outside WWH make them distrustful of health care providers and reluctant to fully engage in treatment; and also make it more challenging for WWH providers to make appropriate referrals for specialty care that we do not provide.

Among the many recent incidents reported by our medical, behavioral health and legal services providers are the following:

- Whitman-Walker was recently contacted by a transgender woman suffering from tonsillitis. She wanted treatment but knew of no hospital or facility other than Whitman-Walker where she could go. The caller reported that in her suburban area, she and other transgender individuals she knows are routinely disrespected and poorly treated when

they seek medical care, and asked for advice on where transgender patients can receive good care.

- A gay man reported that he consulted a cardiologist for a heart issue. The cardiologist reviewed his medications and saw that one was Truvada – an antiretroviral medication that is used for “Pre-Exposure Prophylaxis” or “PrEP” – taken by persons who are not HIV-infected to avoid contracting HIV during sex. The cardiologist was startled and disapproving, and began lecturing the patient about what the cardiologist considered his inappropriate sex life.
- A transgender man, together with his girlfriend, consulted a fertility clinic about their options for pregnancy. Clinic staff told them that they would not help people like them.
- A transgender patient of WWH attempted to fill a prescription at a non-Whitman-Walker pharmacy for a hormone prescribed to assist in their gender transition, and was refused by the pharmacist.
- Our patients seeking to fill prescriptions for Truvada for PrEP have also been refused by some pharmacies.
- A gay man who is a long-term HIV survivor went to a local hospital emergency room after an accident that occurred during sex. He was treated with contempt by ER staff and was lectured about his sex life.
- A transgender individual went to a local hospital emergency room suffering from acute abdominal pain. The individual was subjected to intrusive, hostile questioning by ER personnel, loudly and in public, about their anatomy and gender identity.
- A transgender woman was scheduled to receive an ultrasound for cancer. The first radiological technician she encountered refused to perform the ultrasound. When she protested, a second technician performed the procedure, but mocked her openly.
- Transgender patients have reported to us that they have been in medical or mental-health crisis and called for an ambulance, and that the Emergency Medical Service personnel who have arrived on the scene have intentionally used pronouns inconsistent with their gender identity, even when the patients have asked them to stop and told them that their language was increasing their distress.
- A gay man who was engaged in sex, while under the influence of drugs, experienced a physical episode and was fearful he was having a heart attack. He called an ambulance, but the Emergency Medical Service personnel who arrived belittled him and his situation and refused to take him to an emergency room.
- Local hospitals and surgeons have refused to perform gender-transition-related surgeries on Whitman-Walker transgender patients, even when they routinely perform the

procedures in question on non-transgender patients, including in situations where the patient's insurance would cover the procedure or when the patient was able to pay for the procedure. This has happened with orchiectomies, breast augmentations, and breast reductions - procedures which are all routinely performed for treatment of cancer or for other reasons, not related to gender identity.

- A number of primary care physicians in our area have refused to prescribe hormone therapy for transgender patients seeking to transition from the sex they were assigned at birth to their actual gender identity. Many of these doctors have stated that they are not “comfortable” with such hormone therapy.
- Our providers have seen situations in which teenagers who are transgender or gender-nonconforming have presented at local hospitals with symptoms for which hospitalization was indicated, but their hospitalization was delayed and even denied because hospital personnel took them less seriously than they took other young people with similar presentations who were not transgender.
- Our transgender patients frequently report instances of being treated with disrespect and hostility by staff in doctors' offices, hospitals, and clinics. Frequently, staff at these facilities will refuse to address patients by their chosen names and gender pronouns, if these are not the same as the patients' legal names and sex assigned at birth, or if patients appear to be transgender. The persistent use of names and pronouns other than what the patients have requested appears intentional and intended to communicate strong disapproval of the patients.
- A transgender teenager was hospitalized after a suicide attempt. Hospital staff refused to address the teenager by the young person's preferred pronouns and gender throughout the teenager's hospital stay. This was experienced by the teenager as disapproval and contempt for the young person's gender identity. This discrimination exacerbated the teenager's acutely fragile state when the teenager was so desperately in need of health care providers' support and health care services free of judgment.
- A facility that specializes in inpatient mental health and substance-use disorder treatment, and which has explicit non-discrimination policies, nonetheless has significant trouble from nurses on weekend shifts (when the facility uses pool nurses rather than regular employees), who express strong disapproval of LGBT patients based on their religious beliefs or cultural upbringing. Despite the facility's non-discrimination policies, LGBT patients encounter hostility, expressions of disapproval, and lack of responsiveness to their needs or requests from these nurses. For patients hospitalized for mental or substance-use disorders, these experiences can activate their disorders.
- Whitman-Walker behavioral health staff often receive calls or other communications from LGBT persons expressing desperation about finding a therapist or substance use professional who will not discriminate against them because of their sexual orientation or gender identity.

- Our behavioral-health providers who regularly interview our transgender patients to assess their stage of gender transition and readiness for gender-affirming surgical procedures, or who provide psychotherapy for these patients, report that the large majority of the patients they meet with – as many as four out of every five – report incidents of mistreatment or discrimination by health care providers and staff at hospitals, other clinics, doctor's offices, and other facilities.
- A transgender woman who was about to have surgery at an area hospital for an inner ear condition (unrelated in any way to her transgender-related health care) was confronted and harassed by hospital staff objecting to her gender identity. She was repeatedly and intentionally referred to as “he” and as “a man” by staff in the radiology department when she went for a pre-surgical scan; by desk staff at the surgery center; and by the nurse preparing her for surgery. Several nurses talked about her with each other and laughed. One staff person refused to talk with the patient when she addressed them. Even the anesthesiologist, who she was expected to entrust with her life in one of her most vulnerable moments before surgery, mocked her and intentionally referred to her as a man. Health care providers are supposed to provide comfort to patients when they seek health care. Instead, the staff increased her fear just before her surgery because they showed complete disrespect and lack of care for the patient’s health and well-being.
- A transgender woman went to the office of an ophthalmologist at a local medical center for an eye exam. She arrived on time, filled out the initial paperwork, and then waited for about 45 minutes without being called for her appointment. The patient went to the desk to inquire, and was treated rudely by the staff. The staff then arbitrarily called a security guard to eject her from the office. As the patient spoke to the security guard, one of the clinic staff came to her and said, loudly and offensively, “Sir, your kind needs to go away. We’re not serving your kind.” She complained to the Office of the Chief Medical Officer and was eventually seen by the ophthalmologist on another day, after considerable effort by her and Whitman-Walker staff.
- A transgender woman was seen by a medical provider at Whitman-Walker, who examined her and determined she might have broken her ankle. She was sent to the Emergency Room at a Washington, DC hospital. She identified herself to the ER check-in staff as a woman and presented a driver’s license that contained a female gender marker. She then waited for a number of hours (she remembers five or six) without being examined. When she inquired about the delay, she was treated rudely and mis-gendered by ER staff. She was finally called from the waiting area, but was taken to the men’s dressing room, rather than the area for women patients, to undress and put on a gown for a scan. During the four or more hours before she received the scan, examination and treatment, she suffered very significant physical pain.
- A gay male patient with end-stage renal disease was confronted by a staff person at the dialysis clinic the patient attends regularly for care. The employee expressed a strong dislike for LGBT people and objected to being involved in the patient’s care at the clinic.

Some of these incidents appear to constitute discriminatory denials of care. In other incidents, care was ultimately provided, but providers or staff expressed dislike, even hostility, towards the patients. By eliminating HHS grantees' obligation not to discriminate based on gender identity and sexual orientation, the Department is sending a message to the health care industry and to the LGBT community that discrimination against LGBT patients is legally permitted and acceptable to HHS.

The resulting harms will impact Whitman-Walker itself, and other health centers that strive to care for LGBT people, as well as our patients. Escalating health care discrimination, and escalating fear of such discrimination, will result in increased demand for Whitman-Walker's services. Such increased demand will present considerable operational and financial challenges. Many of our services to current patients lose money, due to third-party reimbursement rates and indirect cost reimbursement rates in contracts and grants which are substantially less than our cost of service. Substantially increased demand for our services, driven by increased discrimination and fear of discrimination outside Whitman-Walker, would exacerbate that pressure. Increased demand for our services, driven by increased discrimination and fear of discrimination outside of Whitman-Walker, would exacerbate that pressure. We likely will be called upon to see more patients, at an increasing financial loss. We will also be called on to increase our education programs and community outreach to help those affected by discrimination encountered by HHS grantees to find the health care and other services that they need and assist them with their trauma resulting from the discrimination they encounter. As a result of the NPRM, Whitman-Walker will also need to devote more resources to working with outside providers and organizations to remind them of the importance of providing health care to all patients on non-discriminatory terms.

The Proposed Rule also will require Whitman-Walker, and other LGBT service providers, to reallocate resources in order to provide referrals to patients that we do not have the resources to treat either because we have reached our capacity for new patients or because the patient requires treatment in a specialty that we do not offer. The NPRM likely will make it significantly more difficult and resource-intensive to locate, monitor, and provide appropriate referrals.

III. The Proposed Rule Also Undercuts the Department’s *Ending the HIV Epidemic Initiative and the Strategy to Combat Opioid Abuse, Misuse, and Overdose*

In his State of the Union Address on February 5, 2019, President Trump announced an ambitious initiative to end the HIV epidemic in the United States in 10 years. The initiative initially will target specific communities – 48 counties, seven states, the District of Columbia and San Juan, Puerto Rico – where HIV incidence and prevalence are particularly high – and subsequently expand across the nation. The initiative’s announced strategies are:

- *Diagnose all individuals with HIV as early as possible.*
- *Treat people with HIV rapidly and effectively to reach sustained viral suppression.*
- *Prevent new HIV transmissions by using proven interventions, including PrEP and syringe services programs (SSPs).*
- *Respond quickly to potential HIV outbreaks to get needed prevention and treatment services to people who need them.*

What is “Ending the HIV Epidemic: A Plan for America”? <https://www.hiv.gov/federal-response/ending-the-hiv-epidemic/overview> (last visited Dec. 17, 2019).

The Department has correctly noted that the initiative must concentrate on the populations most heavily impacted by HIV, including “men who have sex with men [and] minorities, especially African Americans, Hispanics/Latinos, and American Indians and Alaska Natives.” *Id.* HIV prevalence and incidence also are very high among transgender people, particularly transgender women. Anthony S. Fauci, Robert R. Redfield, George Sigounas, et al.,

Ending the HIV Epidemic: A Plan for the United States, *J. Am. Med. Assn.* 2019; 321(9): 844-845; CDC. *HIV and Transgender People*, <https://www.cdc.gov/hiv/group/gender/transgender/index.html> (visited Aug. 9, 2019). The stigma and discrimination these populations face present substantial challenges to the Ending the Epidemic’s plan to engage them more deeply and broadly in HIV testing, treatment and prevention. The proposed curtailment of protections against discrimination on the basis of gender identity and sexual orientation by HHS grantees fly in the face of the agenda of the Ending the Epidemic initiative – as well as undercutting the Department’s overall goals of improving health care, eliminating health disparities and controlling costs.

The Proposed Rule also is inconsistent with the Department’s *Strategy to Combat Opioid Abuse, Misuse, and Overdose*, which seeks to “use[] the best science and evidence to directly address this public health emergency,” in part by “eliminat[ing] stigma associated with the disease” and “[i]dentify[ing] individuals who are at risk of opioid use disorder and mak[ing] available prevention and early intervention services and other supportive services.”¹⁷ Studies indicate that LGBT people are at especially high risk for opioid use disorder, and substance use disorders generally.¹⁸ For example, an analysis of the 2017 Youth Risk Behavior Survey found that transgender youth were more likely than their peers to have used drugs in their lifetime, including 36% who reported misusing prescription opioids (compared to 11.5% of non-transgender boys and 12% of non-transgender girls), and 26% who reported using heroin

¹⁷ *Strategy to Combat Opioid Abuse, Misuse, and Overdose: A Framework Based on the Five-Point Strategy*, <https://www.hhs.gov/opioids/sites/default/files/2018-09/opioid-fivepoint-strategy-20180917-508compliant.pdf>, at 3.

¹⁸ Brian Mastronianni, *Why the Risk of Substance Use Disorders is Higher for LGBTQ People* (Healthline June 28, 2019), <https://www.healthline.com/health/why-is-substance-abuse-worse-in-lgbtq-community#1>.

(compared to 2% of non-transgender boys and less than 1% of non-transgender girls).¹⁹ In addition, actual and anticipated discrimination in health care are associated both with delays in seeking care and with increased substance use among transgender people.²⁰ Research has also documented that a wide range of substance use disorders are more prevalent among lesbian, gay and bisexual persons and those expressing uncertainty about their sexual orientation.²¹ The Proposed Rule would undermine the goals of the Department's *Strategy* increasing risk factors for substance use and delayed care-seeking among a population already at heightened risk.

IV. The Proposed Rule and Notification of Nonenforcement Are Arbitrary and Capricious and Utterly Unsupported

In promulgating the current § 75.300 (c) & (d) in 2016, the Department declared:

... HHS proposes two changes to 45 CFR 75.300. First, HHS is codifying a prohibition in the provision of services of discrimination on the basis of age, disability, sex, race, color, national origin, religion, sexual orientation, or gender identity. This provision codifies for all HHS service grants what is already applicable for all HHS service contracts, as required by the HHS Acquisition Regulation (HHSAR) 352.237-74. The HHSAR provision makes explicit HHS's non-discrimination policy when obligating appropriations for solicitations, contracts and orders that deliver service under HHS's programs directly to the public. In order to ensure that this same provision applies equally to grants, HHS proposes an addition to make this explicit in the grants context.

* * *

¹⁹ Johns MM et al. Transgender identity and experiences of violence victimization, substance use, suicide risk, and sexual risk behaviors among high school students – 19 states and large urban school districts, 2017. *MMWR* 2019; 68(3): 67-71. Available at <https://www.cdc.gov/mmwr/volumes/68/wr/pdfs/mm6803a3-H.pdf>. See also James et al., *supra* note 5**Error! Bookmark not defined.** at 119 (finding higher rate of illicit drug use among transgender adults than the general adult population).

²⁰ Reisner SL et al. Substance use to cope with stigma in healthcare among U.S. female-to-male trans masculine adults. *LGBT Health* 2015; 2(4): 324-332. <https://www.liebertpub.com/doi/abs/10.1089/lgbt.2015.0001>; James et al., *supra* note 5**Error! Bookmark not defined.** at 216 (finding that 22% of transgender adults who went to a drug or alcohol treatment facility were denied equal treatment, harassed, or assaulted because of being transgender).

²¹ Boyd CJ, Veliz PT, Stephenson R, et al. Severity of alcohol, tobacco, and drug use disorders among sexual minority individuals and their “not sure” counterparts. *LGBT Health* 2019. 6(1): 15-22. <https://doi.org/10.1089/lgbt.2018.0122>.

In addition, HHS is codifying its implementation of the decisions in *U.S. v. Windsor*, 570 U.S. ___ (2013), 133 S.Ct. 2675 and *Obergefell v. Hodges*, 576 U.S. ___ (2015), 135 S.Ct. 2584. The HHS codification of its interpretation of these Supreme Court decisions ensures that same-sex spouses, marriages, and households are treated the same as opposite-sex spouses, marriages, and households in terms of determining beneficiary eligibility or participation in grant-related activities.

Because these two codifications are being proposed for consistency with law and current HHS policy, HHS believes that they are non-controversial, but nonetheless requests public comment. ...

Health and Human Services Grants Regulation: Notice of Proposed Rulemaking, 81 Fed. Reg. 45270, 45271 (July 13, 2016). In adopting the proposed language in its final rule, the Department noted that “all [comments received] were strongly supportive of the codification of the nondiscrimination provisions in HHS awards and the recognition of same-sex marriages.”

Health and Human Services Grants Regulation: Final Rule, 81 Fed. Reg. 89393, 89393 (Dec. 12, 2016).²² The Department further noted that the nondiscrimination language was consistent with its responsibilities under the Regulatory Flexibility Act:

The Regulatory Flexibility Act requires that an agency provide a final regulatory flexibility analysis or to certify that the rule will not have a significant economic impact on a substantial number of small entities. This final rule aligns 45 CFR part 75 with various regulatory and statutory provisions, implements Supreme Court decisions, and codifies long-standing policies thus clarifying and enhancing the provisions in HHS's interim final guidance issued December 19, 2014, and amended on January 20, 2016. In order to ensure that the public receives the most value, it is essential that HHS grant programs function as effectively and efficiently as possible, and that there is a high level of accountability to prevent waste, fraud, and abuse. The additions provide enhanced direction for the public and will not have a significant economic impact beyond HHS's current regulations.

Id. at 89394.

²² The Department noted that some commentators urged additional language to make protections for LGBT persons and other marginalized communities even stronger, but concluded that the language as proposed was sufficiently protective. *Id.* at 89393-94.

Codification of HHS policy prohibiting grantees from discriminating based on sexual orientation and gender identity has solid legal support. The overwhelming majority of courts that have been presented with the question of whether federal sex discrimination laws cover anti-transgender discrimination have ruled that they do. Those courts have relied on the undeniable fact that discrimination against someone because they are transgender, or have transitioned from sex assigned at birth to their true gender, is discrimination because of their sex, or discrimination because they do not conform to sex stereotypes or gender norms.²³ A number of courts also have concluded in Title VII cases that discrimination based on an individual's sexual orientation is discrimination because of sex. Such discrimination is because of the sex of the plaintiff/complainant him- or herself; because of the sex of the person(s) with whom the plaintiff/complainant is associated; and/or because of sex-based stereotypes.²⁴ As the

²³ *E.g.*, *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 1260 (2018); *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217 (6th Cir. 2016); *M.A.B. v. Board of Education of Talbot County*, 286 F. Supp. 3d 704 (D. Md. March 12, 2018); *Grimm v. Gloucester County School Board*, No. 4:15-cv-54 (E.D. Va. May 22, 2018); *Adams v. School Board of St. Johns County*, 318 F.Supp.3d 1293 (M.D. Fla. Jul. 26, 2018) (Title IX). *See also EEOC v. R.G.*, 884 F.3d 560 (6th Cir. 2018), *cert. granted*, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, et al.*, No. 18-107 (U.S. April 22, 2019); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (Title VII); *Boyden v. Conlin*, 341 F. Supp. 3d 979 (W.D. Wis. 2018); *Tovar v. Essentia Health*, No. 16-cv-00100-DWF-LIB (D. Minn. September 20, 2018); *Flack v. Wis. Dep't of Health Servs.*, No. 3:18-cv-00309-wmc (W.D. Wis. July 25, 2018); *Prescott v. Rady Children's Hosp.-San Diego*, 265 F.Supp.3d 1090 (S.D. Cal. Sept. 27, 2017); *Cruz v. Zucker*, 195 F.Supp.3d 554 (S.D.N.Y. 2016); *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015) (Section 1557); *Smith v. Avanti*, 249 F. Supp. 3d 1149 (D. Colo. 2017) (Fair Housing Act); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (Equal Credit Opportunity Act); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (Gender Motivated Violence Act). *And see Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (Equal Protection Clause).

²⁴ *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc), *cert. granted*, *Altitude Express, Inc. v. Zarda*, No. 17-1623 (U.S. April 22, 2019); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc); *EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834 (W.D. Pa. Nov. 4, 2016); *Winstead v. Lafayette Cty. Bd. of Cty. Comm'rs*, 197 F. Supp. 3d 1334 (N.D. Fla. 2016); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151 (C.D. Cal. 2015); *Isaacs v. Felder*, 143 F. Supp. 3d 1190 (M.D. Ala. 2015); *Hall v. BNSF Ry. Co.*, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014); *Terveer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014); *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032 (N.D. Ohio 2012); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002); *Centola v. Potter*, 183 F. Supp. 2d 403 (D. Mass. 2002).

Department is well aware, the U.S. Equal Opportunity Commission has concluded, based on careful analysis, that sex discrimination under Title VII includes discrimination based on gender identity or sexual orientation.²⁵

The Supreme Court is now considering whether Title VII's prohibition of sex discrimination covers discrimination based on sexual orientation and gender identity.²⁶ Regardless of the outcome of those cases, prohibiting HHS grantees from discriminating against LGBT people in the provision of health care, social services and child and family services advances fundamental federal goals of addressing health disparities, eliminating non-merit-based barriers to government-supported health care and social services, eliminating the HIV epidemic, and addressing the opioid epidemic.

HHS' purported reasons for abandoning this well-founded policy, frankly, are make-weights. The assertion that in the Department violated the Regulatory Flexibility Act in codifying the pre-existing nondiscrimination obligations of grantees is without substance. Section 75.300 (c) and (d) did not impose any new economic or operational burdens on grantees. These provisions simply restated and codified the fundamental directive not to discriminate based on non-merit factors, including sexual orientation and gender identity. The provisions did not impose any new or different administrative burdens on grant recipients, such as reporting or recordkeeping requirements. If HHS failed to submit the December 2016 Final Rule to the Small Business Administration, that minor procedural defect could easily be remedied, and in no way justifies eliminating pre-existing

²⁵ *Macy v. Holder*, 2012 EEOPUB LEXIS 1181, 112 FEOR (LRP) 257, (2012) (gender identity); *Baldwin v. Foxx*, 2015 EEOPUB LEXIS 1905; 116 FEOR (LRP) 2 (2015) (sexual orientation).

²⁶ *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, et al.*, No. 18-107; *Bostock v. Clayton County*, No. 17-1618; *Altitude Express, Inc. v. Zarda*, No. 17-1623.

nondiscrimination requirements, much less halting enforcement of existing nondiscrimination rules while the NPRM is pending,²⁷

The principal concern expressed by the Department regarding § 75.300 (c) and (d) is that it might burden the religious exercise rights of some grant recipients – for instance, child placement agencies with religious objections to placing children with applicants whose beliefs or family or marriage conflict with their own beliefs. The NPRM cites the Religious Freedom Restoration Act (RFRA) and a recent Federal District Court case out of Michigan, preliminarily enjoining the State of Michigan from enforcing newly-adopted State nondiscrimination policies, and HHS from enforcing its current nondiscrimination rules, against a Catholic agency providing adoption and foster placement services.²⁸ This concern provides no basis whatever for proposing to eliminate a nondiscrimination requirement applicable to all HHS grantees, including the many thousands of secular organizations and state and local government agencies with no colorable religious claim.

Moreover, the NPRM is wrong to invoke RFRA as justification for eliminating its policy of nondiscrimination based on sexual orientation and gender identity, and to imply that RFRA might limit grantee obligations under federal civil rights laws and policies.²⁹ As the Supreme Court noted in *Burwell v. Hobby Lobby Stores, Inc.*, in response to an argument that its expansive interpretation of RFRA might justify race discrimination by an employer,

²⁷ As previously noted, Whitman-Walker takes no position regarding the other regulations at issue in the NPRM and Notification of Nonenforcement.

²⁸ 84 Fed. Reg. at 63832, citing *Buck v. Gordon*, No. 1:19-CV-286, 2019 U.S. Dist. LEXIS 165196, 2019 WL 4686425 (W.D. Mich. Sept. 26, 2019).

²⁹ See 84 Fed. Reg. at 63833 (asserting that the statement in the proposed § 75.300(c) that grantees must not discriminate “to the extent doing so is prohibited by federal statute” incorporates RFRA as well as nondiscrimination statutes).

“prohibitions on racial discrimination are precisely tailored to achieve [the government’s compelling interest in combatting race discrimination in employment].” 573 U.S. 682, 733 (2014). Subsequent to *Hobby Lobby*, the Sixth Circuit concluded, in a searching analysis, that RFRA provided no defense for an employer who fired a transgender employee, because complying with federal nondiscrimination law did not substantially burden the employer’s religious practice, and the government has a compelling interest in eradicating discrimination and Title VII is the least restrictive means to advance that interest. *EEOC v. R.G.*, 884 F.3d 560, 583-97 (6th Cir. 2018), *cert. granted on other grounds, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, et al.*, No. 18-107 (U.S. April 22, 2019).

The Department’s proposal to essentially gut the nondiscrimination mandates in § 75.300 (c) and (d) is unsupported and unsupportable. The Notification of Nonenforcement is even less defensible. The APA requires that, before a rule change can go into effect, the agency must (1) provide for public notice and comment,³⁰ (2) publish a final rule stating the “basis and purpose” of the rule,³¹ including responding to all significant concerns raised in public comments,³² and (3) provide at least 30 days notice of the effective date of the rule change, absent good cause or another exception.³³ Adoption of a rule that is effectively immediately, without going through this process, is lawful only “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure

³⁰ 5. U.S.C. § 553(b)-(c).

³¹ 5. U.S.C. § 553(c)

³² *See, e.g., Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 94 (2015) (“An agency must consider and respond to significant comments received during the period for public comment.”).

³³ 5 U.S.C. § 553(d).

thereon are impracticable, unnecessary, or contrary to the public interest.”³⁴ The simultaneous issuance of a proposal to repeal a rule and a notice of nonenforcement coterminous with the rulemaking is the functional equivalent of an Interim Final Rule. HHS has made no finding of “good cause ... that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” In fact, there is no good cause for the Notification of Nonenforcement. HHS has not pointed to any concrete harm caused by the continuing effect of the current nondiscrimination rules while the NPRM proceeding is pending. To the contrary, declaring that nondiscrimination obligations of HHS grantees will not be enforced threatens considerable harm.

CONCLUSION

The proposal to drastically restate fundamental HHS policy prohibiting discrimination by grantees, in a way that dilutes that policy with vague general language, sends a distressing signal that the Department no longer prioritizes nondiscrimination and will result in increased levels of discrimination, undermining key federal public health goals. The clear targeting of protections for LGBT people, not only through a proposed rule eliminating those protections, but also through a declaration that the existing rule will not be enforced in the interim, is arbitrary and threatens an already-targeted community with grave harm. The Department’s effort to endorse anti-LGBT discrimination through its “conscience protection” rule has been vacated by three Federal District Courts as unlawful.³⁵ HHS has proposed to rewrite its nondiscrimination rules

³⁴ 5 U.S.C. § 553(b)(B).

³⁵ *State of Washington v. Azar*, No. 2:19-cv-00183-SAB, 2019 U.S. Dist. LEXIS 203304, 2019 WL 6219541 (E.D. Wa. Nov. 21, 2019); *City and County of San Francisco v. Azar*, No. C 19-02405 WHA, 2019 U.S. Dist. LEXIS 203347, 2019 WL 6139750 (N.D. Ca. Nov. 19, 2019); *State and City of New York v. Dept. of Health and Human Services*, No. 19 Civ 4676 (PHE), 2019 U.S. Dist. LEXIS 193207, 2019 WL 5781789 (S.D. N.Y. Nov. 6, 2019).

under Section 1557 of the Affordable Care Act to eliminate protections for LGBT people by eliminating provisions addressing discrimination based on gender identity and presentation, sexual stereotyping and association. That pending proceeding has generated substantial opposition to the changes being proposed.³⁶ The Department should abandon its drastic, completely unsupported attempt to accomplish the same result by eviscerating basic nondiscrimination principles applicable to recipients of hundreds of millions of dollars of HHS funds, providing essential services to millions of Americans, without even the benefit of standard notice-and-comment rulemaking.

We urge the Department to adhere to the current § 75.300 (c) and (d) and to promptly rescind its Notification of Nonenforcement.

Respectfully submitted,

A handwritten signature in cursive script that reads "Daniel Bruner".

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³⁶ *Nondiscrimination in Health and Health Education Programs and Activities: Notice of Proposed Rulemaking*, 84 Fed. Reg. 27846 (2019).