



A PROPOSED RULE BY THE TRUMP ADMINISTRATION WOULD STRIP AWAY VITAL NONDISCRIMINATION PROTECTIONS FOR HHS-FUNDED PROGRAMS & SERVICES

INTRODUCTION

Programs funded by the Department of Health and Human Services (HHS) serve millions of families across the U.S. and are vitally important to family health and well-being. In fact, HHS awards more than \$500 billion in grants each year to provide these critical services like food, healthcare, homeless shelters, elder care, violence prevention and more. Publicly funded services should be available to any eligible person in need. But a proposed rule by the Trump Administration would allow taxpayer-funded agencies to discriminate and pick and choose whom they will serve.

How is this the case? On November 1, the Trump Administration announced that it would not enforce HHS' central nondiscrimination regulation for federal awards. This HHS regulation requires HHS-funded service providers not to discriminate based on any non-merit factor including race, color, national origin, disability, sexual orientation, gender identity, sex, or religion.¹ The regulation also makes it clear that individuals in married same-sex couples are to be treated as married for all HHS grant programs. The Trump administration put forward a proposed rule that strips away these comprehensive nondiscrimination protections. Many of the enumerated categories in the HHS central nondiscrimination regulation are explicitly covered by the Civil Rights Act and other federal laws, meaning discrimination on these bases (race, color, national origin, disability, and age) would still be prohibited.² However, the new rule would allow service providers that receive HHS federal grant money for numerous programs to discriminate based on many other non-merit factors including sexual orientation, gender identity, sex, and religion.

This rule opens a can of worms. It strips away clear nondiscrimination protections, inviting service providers to take federal taxpayer dollars and turn people away from

health and human services just because of who they are. This could affect many programs older adults rely on for congregate meals, legal services, and transportation; Head Start programs for children; foster and adoption programs that help children; and more.

This broad license to discriminate with federal funds would not be limited to those who claim a religious objection to serving particular groups of people. Indeed, those who receive HHS grants wouldn't even have to give a reason why they want to discriminate; the Trump administration would simply allow it, no questions asked. A short 30-day comment period for this proposed rule closes on December 19.

CURRENT HHS NONDISCRIMINATION PROTECTIONS

The Department of Health and Human Services administers myriad programs ranging from Medicare and Medicaid to foster care to violence prevention to youth homeless shelters. Currently, a series of federal statutes, regulations, and HHS policies provide important nondiscrimination requirements for federally funded programs administered by HHS. The Civil Rights Act of 1964 prohibits discrimination in all government-funded services based on race, color, and national origin as does the Rehabilitation Act of 1973 prohibit discrimination based on disability, and the Age Discrimination Act of 1975 prohibits discrimination based on age—and these protections will remain in place for *all* HHS programs.³

¹ 45 CFR 75.300(c).

² Race, color, and national origin discrimination are prohibited under Title VI of the Civil Rights Act; the Rehabilitation Act of 1973 prohibits discrimination based on disability; and the Age Discrimination Act of 1975 prohibits discrimination based on age. These statutes do not cover sex, religion, sexual orientation, or gender identity.

³ Title VI, 42 USC 2000d et seq.

Notably, some HHS programs were never covered by the central nondiscrimination regulation and therefore won't be impacted. These include programs such as those authorized by the Omnibus Budget Reconciliation Act, which includes programs funded by Community Development Block Grant and Social Services Block Grant. Other programs are explicitly not covered by the central nondiscrimination regulation, including Temporary Assistance to Needy Families (TANF), Medicaid and Medicare, and programs funded through Child Care and Development Fund (CCDF) and others.⁴

The HHS' central nondiscrimination regulation requires prohibits discrimination based on non-merit factors beyond those mentioned above: sex, religion, and sexual orientation and gender identity. Yet many of the HHS programs covered by the central nondiscrimination may be covered by other nondiscrimination statutes or regulations or may have their own program-specific laws and program-specific regulations prohibiting discrimination based on sex, religion, and/or sexual orientation and gender identity. These statutory and regulatory protections would remain in place.

Thus, understanding the impact of the proposed Trump Administration rule to roll back the central nondiscrimination regulation is not simple or easy. Rather, understanding the impact of the Trump Administration rule requires a program-by-program analysis.

Religion-Based Discrimination

Federal faith-based regulations prohibit discrimination in HHS programs against a program beneficiary or a prospective program beneficiary based on religion or a religious belief.⁵ However, in some instances, discrimination against individuals who are not beneficiaries is not prohibited under federal law, other regulations, or HHS policies except through the central nondiscrimination regulation. Hence, there are instances when discrimination based on religion against individuals who are not the direct beneficiary (such as family members) could be permitted if the central nondiscrimination regulation were rolled back.

Sex-Based Discrimination

Among the important federal laws prohibiting discrimination based on sex, including in some HHS programs are Title IX in the context of education,⁶ the Affordable Care and Patient Portability Act in the context of health-related services;⁷ the Family Violence Prevention and Services Act and the Violence Against Women Act in the context of emergency shelter and related assistance to victims of domestic violence and their children. Yet there are HHS programs that do not fall under these laws and which

are currently covered by the central nondiscrimination rule. Absent the central rule's prohibition on discrimination based on sex,⁸ discrimination based on sex could be permitted.

Sexual Orientation and Gender Identity Discrimination

Only two major areas of HHS programming have explicit nondiscrimination protections for sexual orientation and gender identity. Regulations issued by HHS in 2016 (effective 2017) prohibited discrimination in Family Violence Prevention and Services Act (FVPSA)-funded programs based on gender identity and sexual orientation.⁹ Similarly, the Runaway and Homeless Youth Prevention Act regulations prohibit discrimination based on sexual orientation and gender identity. One other program, the Violence Against Women Act, also prohibits discrimination based on sexual orientation and gender identity.¹⁰ However, there are exceptions to the rule; the majority of programs funded through that Act are administered by the Department of Justice and are not covered by HHS's central nondiscrimination rule. Because there currently no explicit prohibitions on sexual orientation and gender identity discrimination in federal laws that govern HHS-administered programs, the current HHS central nondiscrimination rule provides critical protections for LGBTQ people across a wide swath of HHS-funded programs.

The existing patchwork of protections for religion, sex, and sexual orientation and gender identity in federal laws and program-focused regulations is why the HHS central nondiscrimination rule is so critical to ensure that all who are eligible for vital HHS-funded programs can access them. Additionally, the central nondiscrimination rule ensures that non-merit factors are not taking into consideration to unfairly exclude someone from an HHS-funded program.

⁴ 45 CFR 75.101.

⁵ 45 CFR 87.3(d).

⁶ 20 USC 1681-1688.

⁷ 42 USC 18116.

⁸ Many courts have held that sex discrimination includes discrimination based on sexual orientation and gender identity, as well as discrimination based on sex stereotyping. The current administration has argued that existing federal sex discrimination protections do not include protections based on sexual orientation and gender identity, however.

⁹ 45 CFR 1370.5.

¹⁰ 45 CFR 1351.22.

HOW MIGHT HHS' \$500B IN TAXPAYER DOLLARS BE USED TO DISCRIMINATE?

Each year, HHS grants more than \$500 billion to states, cities, nonprofits, and other entities that then provide vital services and programs to millions of people across the country. Examples of these programs foster and adoption programs; childcare programs like Head Start; and senior services like congregate meals, rides, and legal services. The Trump Administration's new rule stripping existing protections from the HHS central nondiscrimination rule could enable and legalize the following types of discrimination:

Allowing Discrimination Based on Religion

In most HHS programs, discrimination based on religion is currently prohibited and will continue to be despite this proposed rule change.¹¹ However, this nondiscrimination provision only applies to direct beneficiaries of an HHS program. This means HHS service providers can still discriminate in some cases based on religion against those who interact with their programs but are not direct beneficiaries. These include HHS programs designed to provide support to children in the child welfare system where the child is the beneficiary, not a parent or prospective parent. Potential impacts could include:

- A prospective foster or adoptive parent being turned away from an HHS-funded child welfare agency because they aren't the "right" religion. Because the children in state care are the "beneficiaries," discrimination against prospective parents would be permitted if the umbrella nondiscrimination protections are rescinded. For example, an evangelical Christian child placement agency that receives HHS grants could turn away Jewish, Muslim or Catholic families seeking to provide a home to a child. This rule would create a license to discriminate for agencies like Miracle Hill in South Carolina, which has already done exactly this.
- An agency could place a child of a minority faith (or a nonreligious child) with a foster family that restricts the child's ability to practice their faith.

Allowing Discrimination Based on Sex

Sex discrimination can include treating women unfairly or refusing to serve men because they are caregivers or don't conform to stereotypes. Many courts have ruled that discrimination based on sex can also include discrimination based on gender identity and sexual orientation. That said, there are several HHS programs that do not include sex protections. These include Older Americans Act programs administered by the Administration for Community Living such as congregate meals, transportation assistance, and

senior centers. So, if the Trump Administration's proposed rule goes into effect, sex nondiscrimination protections would be stripped from some HHS human services programs. Potential impacts could include:

- A senior services center could continue to receive government funding while ignoring sexual harassment of women it serves.
- An agency providing caregiver support to family members of people with disabilities or older adults could refuse to assist a male caregiver for failing to conform to sex stereotypes about who typically acts as a caregiver.

Allowing Discrimination Based on Sexual Orientation and Gender Identity

As noted above, many courts have ruled that discrimination based on sex includes discrimination based on gender identity and sexual orientation. That said, the Trump Administration and some HHS grantees have argued against that interpretation. This stance by the administration, combined with the lack of *explicit* nondiscrimination protections for sexual orientation and gender identity in most HHS programs, means that LGBTQ people and their families are disproportionately likely to experience discrimination by entities that are permitted to continue receiving HHS funding while discriminating.

Potential harms could include:

- Children of same-sex parents, or a transgender child, could be denied enrollment in Head Start.
- Community meal programs designed to support older adults could refuse to deliver food to older Americans who are LGBTQ.
- A SAMHSA PATH grantee could deny an individual assisting with repairing their home or finding new housing because they or their partner or child are LGBTQ.¹²
- A senior services center could continue to receive government funding while turning away LGBTQ people or treating married same-sex couples as unmarried.

Allowing Discrimination Based on Other Non-Merit Factors

The Trump Administration is proposing to roll back the only HHS nondiscrimination regulation that protects all needy individuals and families from discrimination in HHS grant programs based on any non-merit factor. Repealing this rule means even if a person is fully eligible to be served

¹¹ 45 CFR. 87.3(d).

¹² 42 USC 290cc-33.

by an HHS-funded program, they could be turned based on factors such as their political views, appearance, regional or cultural background, status as a survivor of domestic violence, veteran status, or profession.

THIS ROLLBACK OF PROTECTIONS IS PART OF A SYSTEMATIC EFFORT TO PERMIT DISCRIMINATION

For the past two and a half years, the Trump Administration has repeatedly pushed to increase the ability of government agencies, staff, and government-funded agencies and contractors to be allowed to discriminate. Past actions have pushed to allow healthcare providers ranging from doctors to orderlies changing sheets and hospitals and health clinics to deny care to patients because of religious objections; federal contractors to shirk existing workplace protections that ensure discrimination is not permitted based on religion, sexual orientation, or gender identity; and considering rolling back policies that explicitly protect LGBTQ people from being turned away from homeless shelters. This new proposed rule is the latest in these efforts to use the immense government budget to advance discrimination in many areas of life. It follows other efforts to permit discrimination against women, LGBTQ people and their families, people of minority faiths, and others in every aspect of the federal government from education to health care to childcare and meal services.