

October 31, 2015

Director Jocelyn Samuels

U.S. Department of Health and Human Services, Office for Civil Rights

Attention: 1557 NPRM (RIN 0945-AA02)

Hubert H. Humphrey Building, Room 509F

200 Independence Avenue SW

Washington, DC 20201

**Electronic Submission via <http://www.regulations.gov>**

Re: Comments on Proposed Nondiscrimination in Health Programs and Activities Rule, RIN Number 0945-AA02

Director Samuels:

The Institute for Science and Human Values thanks you for the opportunity to comment on the proposed rule on Section 1557 (Section 1557) of the Patient Protection and Affordable Care Act (ACA), clarifying prohibited discrimination in health services and activities. As an organization that works to ensure young people have access to a full range of reproductive and sexual health services, we are especially concerned with the impacts of the rule on youth between the ages of 15 and 25. We appreciate the expanded protections for LGBTQ (lesbian, gay, bisexual, transgender, and queer or questioning) people, people who speak English as a second language, and people with disabilities. However, we ask the Department of Health and Human Services (HHS) to prioritize young people and LGBTQ youth in the new anti-discrimination rule. We urge HHS to strengthen language prohibiting discrimination based on sexual orientation, and to include young people in prohibited age discrimination. Furthermore, we ask that HHS recognize that religion should not be a basis to perpetuate discrimination.

**Discrimination Because of Sex Includes Women, Transgender People, and Gender Nonconforming People**

We appreciate the broad protections that the proposed rule affords to women, transgender people, and gender nonconforming people by clearly defining discrimination based on sex. The proposed language of section 92.206, equal program access on the basis of sex, is an important step toward making sure that all people can access the health services they need. We further commend HHS for its clear definition of impermissible sex stereotyping that includes gender nonconforming people (people who do not identify as either male or female, within the constructed gender binary).

### **Prohibited Discrimination Should Include Sexual Orientation**

We urge the Department of Health and Human Services (HHS) to match these strong protections by explicitly including sexual orientation as a basis for impermissible discrimination. Though HHS cites courts' inconsistent treatment of sexual orientation as a protected class, recent history clearly shows that courts, the government, and the general public all strongly support the idea that people should not be discriminated against based on their sexual orientation. Recent research from the Williams Institute shows that employment discrimination against lesbian, gay, and bisexual people occurs with the same frequency as discrimination based on sex or race, showing a need for separate protective laws.<sup>1</sup> Protections have been extended to people in education<sup>2</sup> and employment<sup>3</sup> settings. Federal courts have said that discrimination based on sexual orientation deserves the same standard of scrutiny as discrimination based on sex.<sup>4</sup> And the Supreme Court recently upheld marriage equality for all people, asserting that “[i]t demeans gays and lesbians

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<sup>1</sup> Christy Mallory & Brad Sears, *Evidence of Employment Discrimination Based on Sexual Orientation and Gender Identity*, The Williams Institute (Oct. 2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Employment-Discrimination-Complaints-2008-2014.pdf>.

<sup>2</sup> See, e.g. “Dear Colleague” Letter, United States Department of Education Office for Civil Rights, October 26, 2010, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

<sup>3</sup> Executive Order 13672 (Pres.): Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity, 79 FR 42971 (adding sexual orientation and gender identity to categories of prohibited discrimination by federal contractors); Veretto v. U.S. Postal Service, EEOC Appeal No. 0120110873 (July 1, 2011), Castello v. U.S. Postal Service, EEOC Request No. 0520110649 (Dec. 20, 2011) (holding that LGB people may state a sex discrimination by sex stereotyping claim under Title VII).

<sup>4</sup> *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014) (holding that *heightened scrutiny applies to classifications based on sexual orientation*; and equal protection forbids striking juror on basis of sexual orientation) (emphasis added).

for the State to lock them out of a central institution of the Nation’s society.”<sup>5</sup> It is similarly demeaning for LGB people to be locked out of institutional healthcare because of discrimination—but it is also dangerous, and potentially life threatening. Harms from discrimination are even greater for LGBTQ young people, who may face violence at school or in their homes, may avoid seeking treatment for physical or mental health concerns, and may attempt self-harm or suicide at alarmingly high rates

### **Discrimination Rooted in Religious Beliefs Should Not Be Allowed**

HHS requested comment on whether religious exceptions to anti-discrimination laws should be maintained. We strongly urge HHS to refine exceptions to disallow religious refusals to health services. Many people are denied access to vital health services when service providers are allowed to refuse based on their own beliefs. Examples include a pharmacist refusing to sell emergency contraception to a young person, or a physician refusing to refer a patient to an abortion care provider. By barring people from accessing services, a religious conviction ceases to be a privately held conviction and becomes an imposition of religious will on another.

### **Young People Should be Included in Age Discrimination Protections**

While many age discrimination laws are enacted with older adults in mind, it is important to recognize the stigmatization of young people and adolescents.<sup>6</sup> Young people and older people experience discrimination differently, but it is well-documented that experiences of discrimination in both groups harm self-esteem, erode feelings of self-control, and can create negative expectations for the future.<sup>7</sup> Moreover, discrimination against young people has

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<sup>5</sup> Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015).

<sup>6</sup> Leslie A. Zebrowitz & Joann M. Montepare, “*Too Young, Too Old*”: *Stigmatizing Adolescents and Elders*, THE SOCIAL PSYCHOLOGY OF STIGMA 334, 335 (Todd F. Heatherton, et al. ed., 2000).

<sup>7</sup> Teri A. Garstka, Michael T. Schmitt, Nyla R. Brascombe, and Mary Lee Hummert, *How Young and Older Adults Differ in Their Responses to Perceived Age Discrimination*, 19:2 PSYCHOLOGY AND AGING 326, 327 (2004), available at [http://www.researchgate.net/profile/Michael\\_Schmitt8/publication/8485260\\_How\\_young\\_and\\_older\\_adults\\_differ\\_in\\_their\\_responses\\_to\\_perceived\\_age\\_discrimination/links/0f31753810c6f5afa6000000.pdf](http://www.researchgate.net/profile/Michael_Schmitt8/publication/8485260_How_young_and_older_adults_differ_in_their_responses_to_perceived_age_discrimination/links/0f31753810c6f5afa6000000.pdf).

tangible health consequences. Institutional and individual discrimination contributes to high morbidity and mortality rates among young people from historically marginalized groups.<sup>8</sup>

The American Academy of Pediatrics has identified young people as a group with distinct medical needs, especially accessing preventive services.<sup>9</sup> Most states have laws that explicitly allow people under the age of 18 to make many significant healthcare decisions without parental consent.<sup>10</sup> Expanding confidentiality laws allow young people to prevent disclosure of services to a primary on their insurance plan.<sup>11</sup> And any young person that has reached the age of majority has the indisputable right to consent to all health services for themselves. Discrimination faced by young people may act as a real barrier to their seeking care, resulting in poor health outcomes and increased risk of dangerous medical complications.

In summary, we ask that Section 1557 address the needs of young people in its prohibitions of age discrimination. We also ask that HHS explicitly prohibit discrimination based on sexual orientation, and narrow religious refusals so that all people may safely access the healthcare they need, without fear of stigma or barriers to access. We thank you again for reviewing these comments, and look forward to a final rule that prioritizes safe healthcare access for young people and LGBTQ youth.

Sincerely,

Toni Van Pelt

President and Public Policy Director

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<sup>8</sup> See Laura Davis & Urooj Arshad, *Adolescent Sexual Health and the Dynamics of Oppression*, Advocates for Youth (2010), [http://www.advocatesforyouth.org/storage/advfy/documents/adolescent\\_sexual\\_health\\_and\\_the\\_dynamics.pdf](http://www.advocatesforyouth.org/storage/advfy/documents/adolescent_sexual_health_and_the_dynamics.pdf).

<sup>9</sup> Jonathan D. Klein, et al., American Academy of Pediatrics Committee on Adolescence, *Achieving Quality Health Services for Adolescents*, 121:6 Pediatrics 1263 (2008).

<sup>10</sup> Guttmacher Institute, *State Policies in Brief: An Overview of Minors' Consent Law* (Oct. 1, 2015), [www.guttmacher.org/statecenter/spibs/spib\\_OMCL.pdf](http://www.guttmacher.org/statecenter/spibs/spib_OMCL.pdf); Guttmacher Institute, *State Policies in Brief: Minors' Access to STI Services* (Oct. 1, 2015), [http://www.guttmacher.org/statecenter/spibs/spib\\_MASS.pdf](http://www.guttmacher.org/statecenter/spibs/spib_MASS.pdf).

<sup>11</sup> For example, California's Confidential Health Information Act, S.B. 138 (2014). Codified in part at Cal.Civ.Code §56.107.