

December 19, 2019

Secretary Alex Azar  
United States Department of Health and Human Services  
Hubert H. Humphrey Building, Room 509F,  
200 Independence Avenue SW,  
Washington, DC 20201

**Re: RIN 0991-AC16**

Dear Secretary Azar:

The Jewish Council for Public Affairs (JCPA) strongly opposes the Department of Health and Human Services' ("HHS") proposed changes to 45 CFR §75.300 (the "proposed rule") permitting discrimination on the basis of religion, sex, gender identity, and sexual orientation throughout HHS grant-funded programs and services, supported by \$500 billion annually in taxpayer-funded grants and contracts. If this proposed rule is enacted, HHS grant recipients would be allowed to discriminate against beneficiaries and employees across a range of important programs—such as foster and adoption services, health and mental health and substance use treatment, and social service programs for food, shelter, elder care, and violence prevention—that assist millions of vulnerable people, including children and the elderly. In addition, we object to HHS' decision to no longer enforce existing protections before even completing the rulemaking process.

JCPA is the national hub of the Jewish community relations network, representing 125 local Jewish community relations councils and 17 national Jewish agencies, including the four main denominations of American Judaism (Orthodox, Reform, Conservative, and Reconstructionist). Together, we and our network advocate for a just and pluralistic American society, Israel's quest for peace and security, and human rights around the world in common cause with other civic, racial, ethnic, and faith-based leaders. For over 75 years, JCPA has given voice to Jewish values of fairness and justice. JCPA has long held that that federal government should never finance discrimination. There is simply no place for discrimination among federally-funded providers of critically needed health, behavioral health, and social services and supports for at-risk individuals. The receipt of federal funding is a privilege not a right, and federal taxpayer dollars should not be used to deny care and services to the most vulnerable people in our communities.

If HHS implements this proposed rule, discrimination on the basis of religion, sex, gender identity, and sexual orientation will surge in vital health care and social service programs, harming millions of Americans. Programs funded through HHS grants and contracts include those that enable older adults and people with disabilities to live in their communities, such as nutrition programs like Meals on Wheels and transportation programs, mental health and substance use treatment programs, cancer screenings, immunization programs, domestic violence hotlines, as well as adoption and foster care, to name just a few. Removing protections at a time when hate is on the rise is particularly troubling.

## **The Proposed Rule Will Permit Discrimination Based on Religion in HHS Grant-Funded Programs**

This proposed rule would significantly undermine existing regulatory protections against discrimination on the basis of religion in vital programs and services for millions of at-risk individuals and communities throughout the country. Currently, a patchwork of federal statutes, regulations and HHS policies prohibit HHS grant and contract recipients from discriminating on the basis of religion. The federal statutes alone, however, do not provide complete protection across all HHS grant programs.

The proposed rule seeks only to maintain civil rights protections in existing federal statutes, thereby effectively eliminating the protections against religious discrimination in some HHS grant programs where there is no such statutory protection. As a result, if the proposed rule is implemented, we believe that certain important HHS grant programs will be left with no protection against these forms of discrimination, including programs funded by the Older Americans Act and possibly other programs funded by the Community Services Block Grant, the Small Business Protection Act, the Low-Income Home Energy Assistance Program, and Federally Assisted Health Training Programs. This could impact programs for congregate meals, transportation assistance, and senior centers. Together, these programs provide billions of dollars in federal grants and contracts to entities providing critical services and supports. No federally-funded community health center, substance use treatment program, child placement agency, foster care agency, transportation service, congregate meal provider, or low-income energy provider should be permitted to refuse services to Jewish, Muslim, Catholic, Hindu or other clients because of their religion.

We acknowledge that the federal HHS faith-based regulation, 45 CFR 87.3(d), which prohibits religious discrimination by faith-based entities receiving HHS grant funds, might remain in place even if this proposed rule is implemented. However, the HHS faith-based regulation does not protect against religious discrimination by non-faith-based entities, nor does it cover all HHS programs. Moreover, the HHS faith-based regulation specifically only prohibits religious-based discrimination against program beneficiaries. However, there are instances where others who interact with these programs, but are not the direct program beneficiaries, could be subject to discrimination. For example, an evangelical Christian foster care agency could turn away prospective foster or adoptive parents because they are Jewish, Muslim, or Catholic—regardless of the child’s own faith. This is not simply a hypothetical scenario; indeed Miracle Hill in South Carolina has already done exactly that.

JCPA does not support a policy that gives license to discriminate on the basis of religion in any HHS grant programs.

## **The Proposed Rule Will Permit Discrimination Based on Sex in HHS Grant-Funded Programs**

As with discrimination on the basis of religion, the proposed rule will significantly undermine existing HHS protections against sex discrimination. The civil rights laws prohibiting

discrimination on the basis of sex in HHS grant programs also are covered by a patchwork of statutes, regulations, and policies, and there are gaps in the statutory protections. We are concerned that the proposed rule would effectively eliminate current protections against sex discrimination in vital HHS human services programs.

### **The Proposed Rule Will Permit Discrimination Based on Gender Identity and Sexual Orientation in HHS Grant-Funded Programs**

The proposed rule also seeks to eliminate the regulatory protection in 45 CFR §75.300 that prohibits discrimination on the basis of gender identity or sexual orientation. No similar protection exists in federal statute, meaning that if implemented, the proposed rule would sanction widespread gender identity and sexual orientation discrimination across all HHS grants programs. JCPA is gravely concerned about the ramifications, as LGBTQ+ individuals already face serious challenges in accessing and receiving care and assistance throughout their lives due to negative biases and homophobia. They also face increased rates of social isolation, risk of sexual assault and physical violence, and poverty, and often lack access to culturally competent services and supports along with other challenges (KFF, 2018). Moreover, they frequently encounter outright discrimination in accessing services.

Due in part to these obstacles, LGBTQ+ individuals have higher rates of unmet needs, especially mental health and substance use needs. Research has found that LGBTQ+ individuals are at elevated risk for some mental health and behavioral health conditions, including depression, anxiety, and substance misuse (KFF, 2018). According to the Trevor Project, LGBTQ+ youth also consider suicide at a rate almost three times higher than heterosexual youth. More than half a million will attempt suicide this year. LGBTQ+ individuals also suffer from higher rates of substance abuse than the population as a whole, and transgender individuals are especially vulnerable. In fact, one study found that transgender students are 2.5 times more likely to use cocaine or methamphetamine; they are also twice as likely to abuse prescription medications (such as prescription opioids or benzodiazepines) (The Trevor Project, 2019). LGBTQ+ older adults experience similar challenges (American Society on Aging, 2019).

HHS' proposal to strip away existing civil rights protections in the administration of HHS-funded programs that provide critical services to this population will sanction increased discrimination in the very programs these vulnerable people need most. If implemented, the proposed rule will exacerbate serious health, behavioral health and economic concerns in one of the most fragile populations.

### **Conclusion**

As HHS summarized in its notice of proposed rulemaking, it is attempting to achieve clarity and eliminate confusion in the civil rights protections governing HHS-funded grant programs and contracts. However, because the existing civil rights protections are a patchwork of overarching federal statutes, program specific authorizing statutes, regulations and policies, at a minimum the proposed rule greatly increases confusion as to what protections apply to which federal grant programs and which do not. Moreover, the proposed rule will undoubtedly undermine and eliminate much needed protections against discrimination in critical HHS programs serving some

of the most vulnerable members of our communities. We are gravely concerned that adopting this proposed rule will embolden those seeking to discriminate in vitally needed services. We believe that the existing nondiscrimination rule, which centralizes the categories of protections and clearly prohibits discrimination on the basis of religion, sex, gender identity, and sexual orientation by HHS grantees should be preserved in its current form. We therefore urge HHS to withdraw the proposed rule as well as the accompanying notice of nonenforcement, which, in practice, overturns existing policy even before the rulemaking process run its course.

Sincerely,

A handwritten signature in black ink, appearing to read "David Bernstein". The signature is fluid and cursive, with a large initial "D" and "B".

David Bernstein  
President & CEO  
Jewish Council for Public Affairs