



THE CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK, NY 10007

September 7, 2023

U.S. Department of Health and Human Services, Office for Civil Rights
Attention: HHS Grants Rulemaking (RIN-0945-AA19)
Washington, DC 20201

City of New York Comments on Proposed HHS Grants Rulemaking (RIN-0945-AA19)

The City of New York (NYC), including the Department of Social Services (DSS), the Department of Health and Mental Hygiene (NYC Health Department), the Mayor's Office of Equity, and the NYC Commission on Human Rights (CCHR), submits the following comments in response to the U.S. Department of Health and Human Services (HHS) Notice of Proposed Rulemaking (NPRM) to repromulgate and revise certain regulatory provisions of the HHS, Uniform Administrative Rule Requirements, Cost Principles, and Audit Requirements for HHS Awards.

New York City is home to the largest LGBTQIA+ community in the U.S. and a growing transgender, gender-nonconforming, and nonbinary community. These communities have unique health care needs, and people seeking care should not fear discrimination based on their sexual orientation and gender identity. Discrimination against LGBTQIA+ people is rampant in health care settings, leading to avoidance of care-seeking behavior, decreased access to services, lower quality of care, and poor health outcomes.

The proposed HHS regulations protect against discrimination in programs administered by recipients of federal funding. They also roll back draconian anti-LGBTQIA+ regulations issued under the Trump Administration and bring the HHS regulations into compliance with pivotal U.S. Supreme Court cases such as *Bostock v. Clayton County*,¹ which held that the prohibition of employment discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964 includes discrimination on the basis of sexual orientation and gender identity. Therefore, NYC applauds HHS's NPRM on this subject and believes that it is an important and necessary step in mitigating this discrimination and improving access to quality health care for LGBTQIA+ communities.

Indeed, elected officials across the U.S. continue to introduce record numbers of bills and other policies targeting LGBTQIA+ people. Nearly 500 anti-LGBTQIA+ bills have been introduced in 2023 alone, many targeting access to medically necessary gender-affirming care, including for

¹ See Decision at <https://casetext.com/case/bostock-v-clayton-county>.

young people. In response, the Biden Administration has issued executive orders and invested in programs and services that protect against sexual orientation and gender identity discrimination while advancing equality for LGBTQIA+ communities. Therefore, NYC commends HHS for proposing to codify these antidiscrimination protections in the Code of Federal Regulations so that LGBTQIA+ communities are better served by federal programs and federally funded health care delivery systems.

However, it is our position that the Biden Administration should go further and expand the NPRM to explicitly include “gender expression” in its proposed regulations. The *Bostock* decision held that Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of sex, also covers sexual orientation and gender identity. The Court reasoned that an employer who fires an individual on the basis of their sexual orientation or gender identity was doing so because of their sex. The Court came to this conclusion because the employer would not have fired someone of a different sex who had the same sexual orientation or gender identity.

The *Bostock* decision has implications for other federal laws that prohibit sex discrimination, such as Title IX of the Education Amendments of 1972, which applies to educational institutions that receive federal funding. In March 2021, the U.S. Department of Justice (DOJ) issued a memorandum entitled “Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972,”² which interprets Title IX to protect students from discrimination based on sexual orientation and gender identity, citing *Bostock* as support. The memorandum also states that the DOJ will enforce Title IX to prohibit discrimination on the basis of gender expression as well as transgender status.

In addition, many state and local governments have explicitly included gender expression as a protected category in their antidiscrimination statutes or ordinances. For example, New York State’s Human Rights Law³ and New York City’s Human Rights Law⁴ prohibit discrimination on the basis of actual or perceived gender identity or expression in employment, education, housing, places of public accommodation, and other areas. Based on the *Bostock* decision and related cases and laws, we believe the proposed regulation should also include the protection of gender expression. To that end, we suggest editing the proposed regulation to read as follows:

(e) In antidiscrimination statutes that HHS administers regarding sex or gender, the Department interprets those provisions to include a prohibition against discrimination on the basis of (1) actual or perceived gender, (2) actual or perceived sexual orientation, and (3) actual or perceived gender identity or gender expression....

NYC believes that these proposed changes would better clarify prohibited types of discrimination on the basis of sex by being as expansive as possible while still conforming to existing caselaw.

Finally, NYC recommends that HHS widely promote the protections set forth in the proposed rule once it is adopted. Agencies funded and people served by HHS programs and services must be made aware that discrimination against actual or perceived sexual orientation, gender identity,

² <https://www.justice.gov/crt/page/file/1383026/download>

³ <https://dhr.ny.gov/system/files/documents/2023/08/hrl.pdf>

⁴ <https://www.nyc.gov/assets/cchr/downloads/pdf/Title-8-Text-of-the-Law-3-2022.pdf>

or gender expression is prohibited. They should also understand that HHS is committed to strictly enforcing the rule.

Sincerely,



Molly Wasow Park
Commissioner
NYC Department of Social Services



Sideya Sherman
Commissioner
NYC Mayor's Office of Equity



Annabel Palma
Commissioner
NYC Commission on Human Rights



Ashwin Vasan, MD, PhD
Commissioner
NYC Department of Health and Mental Hygiene