

October 24, 2017

Center for Faith-Based and Neighborhood Partnerships
Office of Intergovernmental and External Affairs
U.S. Department of Health and Human Services
Hubert H. Humphrey Building, 200 Independence Avenue SW
Washington DC 20201

Re: RFI Regarding HHS Funding of Faith-Based Organizations (HHS-9928-RFI)

Lambda Legal Defense and Education Fund, Inc. (Lambda Legal) responds here to the Request for Information (RFI) of the Department of Health and Human Services (the Department or HHS) regarding federal funding of religious and faith-based organizations with our strongest possible recommendation *against creation of additional permission to discriminate based on religion* in federally funded hiring, and *against any permission to discriminate against recipients of services* funded through HHS contracts and grants.

Lambda Legal is the oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of LGBT people and everyone living with HIV through impact litigation, policy advocacy, and public education. We have appreciated the Department's past work to increase access to affordable and high quality health care for lesbian, gay, bisexual, and transgender (LGBT) people and those living with HIV including through implementation and enforcement of Section 1557 of the Patient Protection and Affordable Care Act (ACA) and its ban on discrimination in federally funded health programs, services, and activities. We respond to this RFI because discrimination based on gender identity, gender expression, sexual orientation, and HIV status remain serious problems. Lambda Legal has made these problems a primary focus of its work spanning the last four decades and knows that continuing, robust enforcement of Section 1557 *without additional religious exemptions* is essential for continued reduction of this discrimination and the health disparities and other problems this discrimination causes.

Conversely, should the Department change its policies or practices to permit faith-based or other organizations—or religiously motivated employees of federally funded organizations—to discriminate on religious grounds against LGBT or HIV-positive individuals, or to withhold professionally warranted medical or social services for religious reasons, it would be immediately detrimental to the health and wellbeing of these populations. Such a result would contradict the Department's mission, which is “to enhance and protect the health and wellbeing of all Americans.”¹ Indeed, it would be contrary to one of

¹ STRATEGIC PLAN FY 2014-2018, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS), *available at*: <https://www.hhs.gov/about/strategic-plan/introduction/index.html#mission>.

the Department’s top priorities in service of that mission—to “eliminate[] disparities in health, as well as [to increase] health care access and quality.”²

Because the Department’s programs exist to benefit the recipients of services, not contractors or grantees, the possibility that the Department might reduce or remove protections for patients and other recipients of HHS-funded services is alarming and raises serious legal questions. In addition to questions of mission and statutory authority, rule changes to allow HHS contractors and grantees to decide on religious grounds rather than professional standards what services they will or won’t provide and to whom would present equal protection and Establishment Clause concerns, among other issues. It is among Lambda Legal’s top priorities to protect LGBT community members from discrimination, specifically including discrimination based on religion, and to address the constitutional implications when government intentionally facilitates such discrimination.³

Lambda Legal has joined comments submitted in response to this RFI by the Coalition Against Discrimination, and also endorses the comments submitted by the National Center for Transgender Equality, and the Children’s Defense Fund. We submit these separate comments to further reinforce why ***HHS should not adopt rule changes to permit religion-based conduct to the detriment of services recipients*** by providing additional information concerning two areas—medical services and services for youth in out-of-home care—in which discrimination against LGBT people remains pervasive, with significant harmful effects.

I. The Department Should Not Authorize Increases in Discriminatory Refusals of Medical Care By Faith-Based Institutions or Religiously Motivated Individuals.

A. Refusals of Care By Publicly Funded Religiously Affiliated Institutions Are Pervasive, Harmful, And Unjustified.

Sexual orientation, gender expression, and gender identity are personal characteristics now widely recognized legally as well as socially as improper bases for discrimination with respect to family relationships or, for example, workplace opportunities. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (sexual orientation and family relationships); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (gender expression and employment); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (sexual orientation and employment); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (gender identity and employment).

Yet some major religious denominations continue fervently to object to the existence, inclusion, and equal treatment of LGBT people. For example, the United States Conference of Catholic Bishops (USCCB) firmly claims a religious right to operate major medical programs and facilities according to

² *Id.*

³ *See, e.g., Barber v. Bryant*, Supreme Court Case No. 17-547, Petition for a Writ of Certiorari (filed Oct. 10, 2017) (presenting issues of standing to challenge on Establishment Clause and Equal Protection Clause grounds Mississippi law allowing religion-based discrimination against same-sex couples and transgender individuals), https://www.lambdalegal.org/in-court/legal-docs/ms_barber_20171010_cert-petition.

the Ethical Religious Directives for Catholic Health Care Services (ERDs), including rejection of the marriages of same-sex couples and the medical consensus about treatment of gender dysphoria.⁴

What results is the USCCB’s deeply problematic, religion-based insistence on denying family benefits and spousal recognition to both patients and employees with a same-sex spouse at Catholic facilities, and to forbid gender-transition care at such facilities.⁵ Other likely consequences include similar objections in Catholic hospitals and health programs in the many situations in which medical professionals with a same-sex spouse need that legal relationship recognized, such as to request leave pursuant to the Family and Medical Leave Act or to have their employer make Social Security payments that protect the spouse or to provide confirming documentation to enable Social Security disability payments for a dependent child of a married same-sex couple. Likewise, there is a significant risk that these institutions may object when patients and nursing home residents need a same-sex spouse respected for medical decision-making and visitation purposes.

The stakes are high for LGBT people because many faith-based institutions that could be eligible for expanded religious accommodations, were the Department to reduce current nondiscrimination requirements, are large agencies engaged in providing licensed professional services to the general public with substantial public funding. For example, Catholic Charities agencies of Pittsburgh and of Washington were among the petitioners seeking religious exemptions in *Zubik v. Burwell*.⁶ They are affiliated with Catholic Charities USA, a national network identified by *Forbes* as the fifteenth largest charity in the United States.⁷ It had revenues of \$4.5 billion in 2014, of which \$2.8 billion, or 62 percent, was taxpayer funded.⁸ With those funds, Catholic Charities agencies serve many of the most vulnerable members of our society, including those who are homeless, new immigrants, elderly, very low-income, or disabled, “*regardless of religious affiliation.*”⁹ These services consist of a broad range of *secular*

⁴ U.S. Conference of Catholic Bishops, *Nondiscrimination in Health Programs and Activities*, RIN 0945-AA02, 2, 4-13, 16-18 (Nov. 6, 2015) (criticizing HHS’s proposed rules to implement ACA Section 1557, which prohibits discrimination on various grounds including sex in federally funded health services and programs, which HHS proposes to interpret to cover forms of discrimination against LGBT people), <http://www.usccb.org/about/general-counsel/rulemaking/upload/Comments-Proposal-HHS-Reg-Nondiscrimination-Federally-Funded-Health.pdf> (“USCCB Section 1557 Comments”).

⁵ *Id.* at 9, n.17; *see also* U.S. Conference of Catholic Bishops, *Discrimination on the Basis Sex*, RIN 1250-AA05 (Mar. 30, 2015) (addressing proposed OFCCP rules governing federal contractors and employers covered by Title VII, the federal employment nondiscrimination law), <http://www.usccb.org/about/general-counsel/rulemaking/upload/Comments-Discrimination-Basis-of-Sex-March-2015.pdf>.

⁶ 578 U.S. ___, 136 S. Ct. 1557, 194 L. Ed. 2d 696 (2016).

⁷ *Forbes*, *The 50 Largest U.S. Charities, #15 Catholic Charities USA*, <http://www.forbes.com/companies/catholic-charities-usa>.

⁸ *Id.*

⁹ Catholic Charities USA, *About*, <https://catholiccharitiesusa.org/about> (emphasis added).

programs that assist close to nine million individuals annually¹⁰—including diverse health care services,¹¹ housing supports,¹² and disaster relief efforts.¹³

As the USCCB has confirmed, these large institutions now occupy a significant portion of the medical, nursing home, and rehabilitative marketplace.¹⁴ This means options are increasingly limited for members of the public whose needs are inconsistent with these religious views. This is particularly true for those in rural areas, in limited health networks and programs, and when the government chooses to fund these institutions to serve those who are most vulnerable. Given the religious rejection of LGBT-identified people as a class by Catholic doctrine, as enforced by public policies articulated by the USCCB, this population is at especially elevated risk for refusals of services and the respectful care that others receive without incident.

A significant contributor to this problem is mergers of secular hospitals with Catholic hospitals, during which the ERDs are applied to the entire merged hospital system as a requirement of the merger.¹⁵ A 2013 report by MergerWatch compiled data about these mergers during the 2001 to 2011 decade and yielded the following findings:

- Between 2001 and 2011, the number of Catholic-sponsored or -affiliated acute-care hospitals increased by 16%, while all other types of nonprofit hospitals declined in numbers.
- In 2011, 10 of the 25 largest health systems in the nation were Catholic sponsored.
- In 2011, these systems had combined gross patient revenues of \$213.7 billion, \$115 billion of which came from the publicly funded Medicare and Medicaid programs.¹⁶

The MergerWatch report concludes, based on the financial data and other data, that “Catholic hospitals have left far behind their humble beginnings as facilities established by orders of nuns and

¹⁰ Catholic Charities USA, *The Catholic Charities Network*, <https://catholiccharitiesusa.org/network>.

¹¹ These include medical and dental care, hospice care, prescription drug support, prenatal care, screenings, addiction recovery, adult day services, nutrition, and infant and child care. See Catholic Charities USA, *Supporting Healthy Lives*, <https://catholiccharitiesusa.org/efforts/supporting-healthy-lives>.

¹² These include services to prevent homelessness by providing financial assistance, emergency shelter, and supportive housing for seniors, families, and people who are disabled or mentally ill. See Catholic Charities USA, *Sheltering Those In Need*, <https://catholiccharitiesusa.org/efforts/sheltering-those-in-need>.

¹³ These include providing cash assistance, food, water, personal care supplies, and cleaning materials. See Catholic Charities USA, *Providing Disaster Relief*, <https://catholiccharitiesusa.org/efforts/providing-disaster-relief>.

¹⁴ USCCB Amici Curiae Brief in *Zubik*, at 8-18, available at <http://www.scotusblog.com/wp-content/uploads/2016/01/Zubik-USCCB-brief.pdf>.

¹⁵ Comprehensive information about these mergers is available from MergerWatch, *Protecting Patients' Rights When Hospitals Merge*, <http://www.mergerwatch.org>.

¹⁶ Lois Uttley, et al., *Miscarriage of Medicine: The Growth of Catholic Hospitals and the Threat to Reproductive Health Care* (Dec. 18, 2013), available at <http://www.mergerwatch.org/storage/pdf-files/Growth-of-Catholic-Hospitals-2013.pdf>.

brothers to serve the faithful and the poor. They have organized into large systems that behave like businesses—aggressively expanding to capture greater market share. . . .”¹⁷

At Lambda Legal, we know that denials to LGBT people of necessary medical care and other equal treatment by religiously affiliated institutions are all too common now, even with nondiscrimination requirements ostensibly in place.¹⁸ The prospect of increased discrimination due to relaxation or lifting of the requirements that have been attendant to federal funding is deeply troubling. Given the mission of HHS, as established by Congress, any such rule changes would be manifestly improper.

It also should be noted that claims that the public will be left without adequate services if nondiscrimination and other protective standards are maintained on publicly funded institutions are not credible. Consider the example of the USCCB, which asserted in challenging the ACA’s contraceptive coverage rule that Catholic institutions would stop serving the public if required either to use an “opt out” process or to cease providing health insurance to their workers.¹⁹ Our secular government—including our courts—can and rightly does distinguish between *religious* services and religiously inspired *secular* services. Thus, in *Catholic Charities of Sacramento*, 85 P.3d at 89, the California Supreme Court enforced a state law requiring birth control coverage in health plans of religiously affiliated social service agencies as a sex equality measure, despite the agency’s religious free exercise claims, distinguishing such agencies from houses of worship and other inherently religious organizations.²⁰ Yet, Catholic Charities of Sacramento continued to operate in the state.²¹

¹⁷ *Id.* at 1.

¹⁸ For example, current Lambda Legal client Jionni Conforti was refused a medically necessary hysterectomy that his physician was prepared to perform because the local hospital where the physician had admitting privileges forbids all gender-dysphoria-related care on religious grounds. *Conforti v. St. Joseph’s Healthcare System*, No. 2:17-cv-00050-JLL-JAD (D.N.J. filed Jan. 5 2017), <https://www.lambdalegal.org/in-court/cases/nj-conforti-v-st-josephs>. See also LAMBDA LEGAL, WHEN HEALTH CARE ISN’T CARING: SURVEY ON DISCRIMINATION AGAINST LGBT PEOPLE AND PEOPLE LIVING WITH HIV (2010) (presenting results of first-ever national survey concerning refusals of care and other barriers to health care confronting LGBT people and those living with HIV), available at http://data.lambdalegal.org/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf. Of the nearly 5,000 respondents, more than half reported that they had experienced at least one of the following types of discrimination in care: (i) Health care providers refusing to touch them or using excessive precautions; (ii) Health care providers using harsh or abusive language; (iii) Health care providers being physically rough or abusive; (iv) Health care providers blaming them for their health status. *Id.* at 5, 9-10. For further discussion of the survey findings, see Letter of Jennifer Pizer *et al.* to Office of Civil Rights, U.S. Dep’t of Health & Hum. Svcs., responding to HHS Requests for Information 0945-AA02 & 0945-ZA01, pages 32-34 (Sept. 30, 2013) (“Pizer Sept. 30, 2013 Letter to HHS”), http://www.lambdalegal.org/in-court/legal-docs/ltr_hhs_20130930_discrimination-in-health-services.

¹⁹ *Id.*

²⁰ *Catholic Charities of Sacramento Inc. v. Superior Court*, 32 Cal.4th 527, 85 P.2d 67 (2004).

²¹ See *Catholic Charities of Sacramento*, <http://www.catholiccharitiessacramento.org>; see also Catholic Charities of California, Inc., <http://catholiccharities.org>. But see, e.g., Manya A. Brachear, *Agency takes over foster care in Rockford*, Chicago Tribune (June 16, 2011) (describing transfer of all caseworkers and other staff from Catholic Charities to independent agency with no disruption of services for children in state care when state law required

This is an appropriate result because, assuming the sincere religious inspiration of many who operate such agencies, their workforces as a whole are diverse, a great many of their workers do not share the same faith, and the services they provide (with and without public funding) are not inherently religious. And because such institutions serve the general public with public funds, unlike organizations that exist to perform religious functions for a particular congregation, the government has a responsibility to regulate them, including with nondiscrimination rules, to protect the public.

B. Religiously Motivated Refusals of Care and Other Discrimination by Individual Medical Care Providers Inflict Unjustifiable Harm To Patients.

In addition to stressing that HHS should not facilitate increased discrimination against LGBT people in publicly funded faith-based institutions, we must emphasize that HHS also should not change nondiscrimination rules that apply to federally funded secular medical settings in which individual licensed health care providers sometimes refuse to provide standard care based on the patient's sexual orientation, gender identity or HIV status, and assert a religious reason for that discrimination.²² Common examples of this problem include:

- Direct religious condemnation of patients based on sexual orientation or gender identity.²³
- Refusals of HIV care or of testing or other care for patients thought to be HIV-positive.²⁴
- Refusal of infertility care for patients based on objections to same-sex relationships.²⁵
- Sexual health care or relationship counselling for LGBT patients based on objections to same-sex relationships or gender transition.²⁶

equal treatment of same-sex couples), <http://www.chicagotribune.com/news/local/breaking/chibrknews-agency-replaces-catholic-charities-in-rockford-for-foster-care-20110616-story.html>.

²² See discussion in Letter of Jennifer Pizer *et al.* to Office of Civil Rights, U.S. Dep't of Health & Hum. Svcs., responding to HHS Requests for Information 0945-AA02 & 0945-ZA01, pages 32-34 (Sept. 30, 2013) ("Pizer Sept. 30, 2013 Letter to HHS"), http://www.lambdalegal.org/in-court/legal-docs/ltr_hhs_20130930_discrimination-in-health-services and Lambda Legal, WHEN HEALTH CARE ISN'T CARING (2010), http://data.lambdalegal.org/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf.

²³ For example, in *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156 (2d Cir. 2001), a visiting nurse claimed religious discrimination when fired for antigay proselytizing to home-bound AIDS patient. See also Pizer Sept. 30, 2013 Letter to HHS, page 33.

²⁴ For example, in *Stepp v. Review Bd. of Indiana Emp. Sec. Div.*, 521 N.E.2d 350, 352 (Ind. 1988), a lab technician refused to do tests on specimens labeled with HIV warning, asserting that "AIDS is God's plague on man and performing the tests would go against God's will."

²⁵ See, e.g., *North Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Superior Court (Benitez)*, 189 P.3d 959 (Cal. 2008) (physicians objected to providing infertility care to lesbian patient).

²⁶ See, e.g., *In re Shuffield* (physician's religious objection to providing sexual health care to gay man), <http://www.lambdalegal.org/in-court/cases/in-re-shuffield>; *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011) (counseling student refused on religious grounds to counsel patients in same-sex relationships, contrary to professional standards requiring nonjudgmental, nondiscriminatory treatment of all patients).

- Gender transition-related care.²⁷

Although at least some courts have confirmed that religious beliefs do not justify sexual orientation discrimination in health care,²⁸ problems persist even where case law is clear. Those discrimination problems tend to deter patients from returning regularly for care, which increases morbidity.²⁹ Given the mission of HHS, the Department must not take steps that unavoidably will exacerbate this public health problem by lifting the nondiscrimination rules that always should accompany taxpayer dollars to public-serving institutions.

II. Discrimination in Social Services Provided to Children in Government-Funded Out-of-Home Care Violates Federal Law and Professional Standards Regarding Children’s Wellbeing.

A. Overview

Faith-based providers play an important role in the provision of social services to children in government-funded out-of-home care, such as child welfare and juvenile justice systems and housing and services for youth experiencing homelessness.³⁰ These faith-based providers include those who, consistent with professional standards, are affirming and supportive of all children they serve and have clear, explicit policies protecting children from discrimination on account of sexual orientation, gender identity and gender expression as well as race, religion, ethnicity, national origin, disability and veteran status, among other protected classes. Permitting any government-funded provider of social services to discriminate based on any aspect of a child’s identity is contrary to the constitutional rights of the child and harmful to their well-being.

Protection from discrimination by service providers is especially critical for children in out-of-home care, including children who identify as lesbian, gay, bisexual, transgender and questioning (LGBTQ), due to a few unique and significant factors. First, youth in out-of-home care are under the custody and control of government-funded providers due to being placed involuntarily by the state or

²⁷ See Pope Francis, *General Audience on Man and Woman* (Apr. 15, 2015) (rejecting gender transition as improper elimination of “the sexual difference between males and females” and as forbidden sterilization), https://w2.vatican.va/content/francesco/en/audiences/2015/documents/papa-francesco_20150415_udienza-generale.html, as quoted in U.S. Conference of Catholic Bishops, *Nondiscrimination in Health Programs and Activities*, RIN 0945-AA02, p. 9, fn. 17 (Nov. 6, 2015), <http://www.usccb.org/about/general-counsel/rulemaking/upload/Comments-Proposal-HHS-Reg-Nondiscrimination-Federally-Funded-Health.pdf>.

²⁸ See, e.g., *North Coast Women’s Care Med. Grp.*, 189 P.3d at 959 (physicians’ religious rights did not exempt them from state law’s ban on sexual orientation discrimination).

²⁹ Institute of Med., *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding*, at 14, 74-75 (2011) (requested by National Institutes of Health), <http://www.iom.edu/Reports/2011/The-Health-of-Lesbian-Gay-Bisexual-and-Transgender-People.aspx>; Dep’t Health & Hum. Svcs., *Lesbian, Gay, Bisexual, and Transgender Health* (2010), <http://www.healthypeople.gov/2020/topicsobjectives/2020/overview.aspx?topicid=25>; Agency for Healthcare Research and Quality, *National Healthcare Disparities Report*, at 241-256 (2012), http://www.ahrq.gov/research/findings/nhqrdr/nhdr12/nhdr12_prov.pdf.

³⁰ Federally-funded social service providers also provide significant services to unaccompanied minors and refugee children, but this comment will not focus on those systems of care.

because they have few, if any, options for housing or services due to life circumstances. These circumstances, combined with legal minority, eliminate or severely comprise a child's ability to have choice in who provides their services or access to other options to meet basic needs if current providers are discriminating against them. Second, youth in out-of-home care are uniquely vulnerable to discrimination and mistreatment due to prior life experiences. In the juvenile justice system, for example, the prevalence of youth exposed to trauma is believed to be higher than that of community samples of similarly aged youth.³¹ Third, government-funded systems of care are statutorily required to promote the well-being of youth and ensure their positive development, well-being and safety. As the Children's Defense Fund notes in its November 21, 2017 response to this RFI, the child welfare system is "designed to protect children, not exacerbate problems or trauma related to the child's system involvement."

Potential for discrimination and mistreatment is significant for LGBTQ youth given their overrepresentation in out-of-home care populations compared to non-LGBTQ peers. Available research using representative samples has shown that while young people who identify as LGBTQ comprise about 5-7% of the overall youth population,³² they make up almost one-fourth of those in the foster care system,³³ one-sixth of those in the juvenile justice system³⁴ and almost half of young people experiencing homelessness.³⁵ Any exemptions allowing any government-funded providers to put their own religious beliefs regarding sexual orientation, gender identity or gender expression ahead of the best interests of the children they serve would harm significant numbers of children. Due to general stigma, prejudice and misunderstanding, LGBTQ youth already face poorer outcomes in systems of out-of-home care and worse life outcomes in general.³⁶ Any service delivery to LGBTQ children that has the potential to treat them inequitably can only exacerbate these poor outcomes in addition to being inconsistent with nondiscrimination protections in federal law governing out-of-home care systems and professional standards for the care of children.

³¹ Ford, Chapman, Hawke, and Albert, *Trauma Among Youth in the Juvenile Justice System: Critical Issues and New Directions* (2007), available at https://www.ncmhjj.com/wp-content/uploads/2013/10/2007_Trauma-Among-Youth-in-the-Juvenile-Justice-System.pdf.

³² Andrea Beth Katz, *LGBTQ Youth in the Juvenile Justice System: Overrepresented Yet Unheard*, Seton Hall Law School Student Scholarship Paper 503, available at http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1503&context=student_scholarship.

³³ Megan Martin, Leann Down & Rosalynd Erney, *Out of the Shadows: Supporting LGBTQ Youth in Child Welfare Through CrossSystem Collaboration* (2016), available at <https://www.cssp.org/pages/body/Out-of-the-Shadows-Supporting-LGBTQ-youth-in-child-welfare-through-cross-system-collaboration-web.pdf>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Bianca D.M. Wilson et al., *Sexual and Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles* (2014), available at https://williamsinstitute.law.ucla.edu/wpcontent/uploads/LAFYS_report_final-aug-2014.pdf.

B. Federal Law Nondiscrimination Protections for LGBTQ Children.

1. The U.S. Constitution.

Youth in child welfare custody and in out-of-home care in the juvenile justice system, including LGBTQ youth, have substantive due process rights under the Fourteenth Amendment, including rights to: personal security and reasonably safe living conditions; freedom from psychological harm, and from physical and psychological deterioration; adequate care, including the provision of certain services; and a reasonably suitable placement. Additionally, all LGBTQ youth, have the right to be treated equally as compared to their non-LGBTQ+ peers. Under the First Amendment, youth have the right to religious freedom; to be free from religious indoctrination; not to be forced to hide their identities because of others' religious objections; and to choose not to participate in religious activities that condemn homosexuality or gender-nonconformity. In addition, youth have the right to freedom of expression, including the right to express one's identity, which has been interpreted to be "speech" protected by the First Amendment.³⁷

2. Titles IV-E and IV-B of the Social Security Act.

The Federal Foster Care Program, authorized by Titles IV-E and IV-B of the Social Security Act, aims to support states in providing safe and stable out-of-home care for children until they are safely returned to their families of origin, placed permanently with adoptive families or guardians, or placed in other planned arrangements for permanency. Agencies receiving federal child welfare dollars are required to place children in a "safe setting that is the least restrictive (most family like) and most appropriate setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child[.]" In order for an agency to receive IV-E dollars, its State plan must document how it establishes and maintains standards for foster family homes and child care institutions that are "reasonably in accord with recommended standards of national organizations concerned with [such] standards." These standards include those related to admission policies, safety and protection of civil rights, among others.³⁸

3. Foster Care Independence Act (John H. Chafee Foster Care Independence Program).

The Chafee program provides services and support to children and youth aging out of foster care to make the transition to self-sufficiency. Agencies receiving funding under this program must ensure that children and youth "have regular, ongoing opportunities to engage in age or developmentally-appropriate activities." States and tribes must "use objective criteria . . . for ensuring fair and equitable treatment of benefit recipients."³⁹

³⁷ See M. Currey Cook, Christina Wilson Remlin, and Rosalynd Erney, *Safe Havens: Closing the Gap Between Recommended Practices and Reality for Transgender and Gender-Expansive Youth in Out-of-Home Care* (2017) for a summary of constitutional law protections and accompanying citations. Available at: https://www.lambdalegal.org/sites/default/files/tgnc-policy-report_2017_final-web_05-02-17.pdf.

³⁸ 42 U.S.C. § 675(5)(a); 54. 42 U.S.C. § 671(a)(10).

³⁹ Foster Care Independence Act of 1999, Pub.L. No. 106-169, 113 Stat. 1182 (1999).

4. Juvenile Justice and Delinquency Prevention Act.

The Juvenile Justice and Delinquency Prevention Act (JJDP) established the Office of Juvenile Justice and Delinquency Prevention (OJJDP)⁸⁹ and established funding for state juvenile justice systems via block and discretionary grants and other provisions to support local and state efforts to prevent delinquency and improve the juvenile justice system. JJDP's nondiscrimination provision incorporates by reference 42 U.S.C. § 3789d(c)(1), which states: "No person in any State shall on the ground of race, color, religion, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under or denied employment in connection with any programs or activity funded in whole or in part with funds made available under this chapter."⁴⁰

5. The Runaway and Homeless Youth Act.

The Runaway and Homeless Youth Act (RHYA) authorizes community-based runaway and homeless youth projects to provide temporary shelter and care to runaway or otherwise homeless youth in need of temporary shelter, counseling and aftercare services. The Act, as amended and reauthorized by the Reconnecting Homeless Youth Act of 2008, states that services should be provided "using a positive youth development approach" and should ensure young people have a sense of "safety and structure, belonging and membership, self-worth and social contribution, independence and control over their life, as well as closeness in interpersonal relationships." Pursuant to the RHYA, HHS promulgated the Runaway and Homeless Youth Rule, which explicitly prohibits discrimination on account of sexual orientation and gender identity by runaway and homeless youth programs receiving federal funds.⁴¹

In addition to constitutional protections and those provided in statutes referenced above that serve as the basis for operation of and funding for the child welfare, juvenile justice system, and runaway and homeless youth systems of care, other federal laws and regulations protect LGBTQ youth in out-of-home care against discrimination. The ACA, Title IX of the Education Amendments of 1972, the Health and Human Services Grants Rule, the Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity Rule, and the Equal Access in Accordance With an Individual's Gender Identity in Community Planning and Development Programs all protect youth against discrimination on account of sex, sexual orientation or gender identity and cover various aspects of government-funded out-of-home care service provision.

⁴⁰ Office of Juvenile Justice & Delinquency Prevention, Legislation/JJDP Act, <https://www.ojjdp.gov/about/legislation.html>; Administrative authority, 42 U.S.C.A. § 5672(b) incorporating by reference prohibition of federal control over state and local criminal justice agencies; prohibition of discrimination, 42 U.S.C.A. § 3789d(c)(1).

⁴¹ Runaway and Homeless Youth, 42 U.S.C. 5701 (2012); Reconnecting Homeless Youth Act of 2008, Pub. L. 110-378, 122 Stat. 4069, codified as amended at 42 U.S.C. 5601, available at <https://www.gpo.gov/fdsys/pkg/PLAW-110publ378/pdf/PLAW110publ378.pdf>; Dep't of Health & Human Servs., Admin. for Children & Fams., Runaway and Homeless Youth, 81 Fed. Reg. 244 (Dec. 20, 2016) (to be codified at 45 C.F.R. pt. 1351), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-12-20/pdf/2016-30241.pdf>.

C. Professional Standards Forbid Discrimination Against LGBTQ Children.

Social science organizations and professional associations that establish professional standards for the treatment of children in care are clear that LGBTQ children must not be discriminated against and doing so is harmful to their well-being. In its November 21, 2017 response to this Request for Information, the American Academy of Pediatrics (AAP), clarifies that “[p]olicies that single out or discriminate against LGBTQ youth are harmful to social-emotional health and may have lifelong consequences.” Further, they emphasize that “[c]hildren, especially those who have been exposed to trauma and violence, should not be placed in settings that do not meet basic standards for children’s physical and mental health and that expose children to additional risk, fear, and trauma.” Significantly, AAP’s comment highlights a concern that permission to discriminate for faith-based reasons opens the door to attempts to “change” or “convert” LGBTQ youth and emphasizes that “‘conversion’ or ‘reparative therapy’ is never indicated for LGBTQ youth. This type of therapy is not effective and may be harmful to LGBTQ individuals by increasing internalized stigma, distress, and depression.” AAP urges “HHS to refrain from supporting grantees who do not treat LGBTQ youth as they do all others, who discriminate or condone discrimination against them, their families, or LGBTQ parents, or who support, condone, or provide conversion therapy.”

AAP together with 19 other prominent medical and mental health organizations submitted a brief to the Supreme Court of the United States in support of a transgender teen’s right to right access restroom facilities consistent with his gender identity. The brief summarized the consensus of the organizations that affirmation of identity is beneficial for the well-being of transgender youth. For example, the authors note that “transgender children who live in accordance with their gender identity in all aspects of life have lower rates of depression compared to transgender children who have not socially transitioned.” Importantly, the authors conclude that “[e]xclusionary policies perpetuate . . . stigma and discrimination . . . by marking transgender individuals as “others” who are unfit to use the restrooms used by everyone else. Indeed, the very existence of exclusionary policies targeting transgender individuals fosters stigma and discrimination.”

In stark contrast to the consensus of experts, the Florida Conference of Catholic Bishops (FCCB), for example, has objected to explicit nondiscrimination protections for LGBTQ youth in government-funded child welfare group homes in Florida. FCCB “focused its objections mainly on how the proposed rules would deal with foster youth who identify as transgender. Executive director Michael Sheedy said the term itself represented a ‘tragic misconception’ that gender could be changed and that believing otherwise causes ‘profoundly negative consequences for many.’ The policy goal should be to promote the healthy development of children, including their sexual development, and acceptance of their gender rightly understood.”⁴²

Such religion-based ideas are inconsistent with science-based child care standards. Accordingly, the Child Welfare League of America and other national child welfare experts recommend that federally funded state and local child welfare agencies ensure that state-run child welfare programs and contracted direct service private providers affirm and support LGBTQ youth in their care and “[a]dopt and

⁴² <http://www.orlandosentinel.com/news/politics/os-lgbtq-foster-kids-rules-change-20160407-story.html>

implement written policies prohibiting discrimination on the basis of sexual orientation, gender identity, gender expression and HIV status.”⁴³

In the juvenile justice context, the Department of Justice’s Federal Advisory Committee on Juvenile Justice,⁴⁴ comprised of professionals from across the country and representing various roles and disciplines, issued recommendations in 2017 regarding the treatment of LGBTQ youth in juvenile justice settings. The committee recommended that the Office of Juvenile Justice and Delinquency Prevention “[i]ssue federal practice guidelines for how a model juvenile justice system would address the needs of LGBTQ/GNCT youth grounded in federal law, social science research, and relevant professional standards, that recommend states and localities:

(1) Adopt comprehensive policies explicitly protecting systems-involved youth from discrimination and mistreatment on the basis of actual or perceived sexual orientation, gender identity or gender expression (“SOGIE”), complete with clear accountability mechanisms; and

(2) Require that all personnel, contractors, and volunteers, as well as systems involved youth and their families, are informed of the policies outlined in section I.A.1 of these recommendations, understand, and comply with their provisions.”⁴⁵

D. Recommendation Concerning Federally Funded Child Welfare Services.

Numerous faith-based providers provide social services to children in out-of-home care in a manner that is consistent with the well-being of all of the children and families they serve. HHS should not permit a certain subset of faith-based providers to receive government funding while they engage in discriminatory conduct contrary to federal law and prohibited by professional standards regarding the health and well-being of children.

⁴³ Child Welfare League of Am., et al., *Recommended Practices to Promote the Safety and Well-Being of LGBTQ Youth and Youth at Risk of or Living with HIV in Child Welfare Settings* (2012), <https://www.lambdalegal.org/sites/default/files/publications/downloads/recommended-practices-youth.pdf>.

⁴⁴ The Federal Advisory Committee on Juvenile Justice (FACJJ) is an advisory body established by the Juvenile Justice and Delinquency Prevention Act of 1974, as amended (Section 223). It is supported by the Office of Juvenile Justice and Delinquency Prevention (OJJDP), a component of the Office of Justice Programs, U.S. Department of Justice. The role of FACJJ is to advise the President and Congress on matters related to juvenile justice and delinquency prevention, to advise the OJJDP Administrator on the work of OJJDP, and to evaluate the progress and accomplishments of juvenile justice activities and projects. FACJJ comprises representatives of the State Advisory Groups (SAGs) of the 50 states, the District of Columbia, and the 5 U.S. territories. (SAGs are appointed by the governors and assist their states in developing and implementing the juvenile justice plans their states are required to submit to OJJDP every 3 years in order to receive formula grant funds.). *See* <https://facjj.ojp.gov/>.

⁴⁵ Fed. Advisory Comm. on Juvenile Justice, *Recommendations of the LGBT Subcommittee: Advancing the Reform Process for LGBTQ/ GNCT Youth in the Juvenile Justice System* (2017), <https://facjj.ojp.gov/ojpasset/Documents/LGBT-Recommendations-Final-FACJJ.pdf>.



III. Conclusion

Religious liberty is a core American value, which Lambda Legal strongly affirms and upholds. However, the Department's duty to accommodate religious freedom must respect the limits imposed by the Establishment and Equal Protection Clauses, many federal statutes, professional standards, and other governing norms. On behalf of the communities we serve, Lambda Legal strongly recommends against the Department changing any rules, procedures, or contract or grant terms in ways that permit discrimination against or other harms to the populations for whom it is charged to care, whether in the name of religious freedom or otherwise.

Thank you for considering the information submitted in response to your inquiry.

Most respectfully,

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