



UNITED STATES COMMISSION ON CIVIL RIGHTS

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December 7, 2018

Alex M. Azar II
Secretary of Health and Human Services
U.S. Department of Health and Human Services
200 Independence Ave, S.W.
Washington, D.C. 20201

Also sent via email to secretary@HHS.gov

Dear Secretary Azar:

The U.S. Commission on Civil Rights writes to urge the Department of Health and Human Services not to narrowly define gender to a biological, immutable condition determined at birth.¹ We are concerned that such a definition will have serious negative impacts on the health, welfare, and civil rights of members of the transgender community. Defining federal protections barring discrimination on the basis of sex to exclude protections for transgender people runs counter to longstanding legal precedent and will leave transgender people vulnerable to unlawful discrimination.²

Approximately 1.4 million Americans identify themselves as transgender³ and are widely recognized by the medical community as facing barriers to accessing high-quality medical care.⁴ The transgender community is a uniquely vulnerable community and many of the Commission's recent investigations highlight the discrimination and significant health, social, and economic barriers they face. For instance, in our report on workplace discrimination against the lesbian, gay,

¹ Erica L. Green *et al.*, "Transgender" Could Be Defined Out of Existence Under Trump Administration, *New York Times* (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html>.

² *E.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018); *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1047 (7th Cir. 2017), cert. dismissed sub nom. *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker ex rel. Whitaker*, 138 S. Ct. 1260 (2018); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Adams v. School Board of St. Johns Cnty.*, 318 F.Supp.3d 1293 (M.D. Fla. 2018); *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F.Supp.3d 704 (D. Md. 2018); *Prescott v. Rady Children's Hospital San Diego*, 265 F.Supp.3d 1090 (S.D. Cal. 2017); *Equal Employment Opportunity Comm'n v. Rent-a-Center East, Inc.*, 264 F.Supp.3d 952 (C.D. Ill. 2017); *Smith v. Avanti*, 249 F.Supp.3d 1149 (D. Colo. 2017); *Evancho v. Pine-Richland Sch. Dist.*, 237 F.Supp.3d 267 (W.D. Pa. 2017).

³ Andrew R. Flores *et al.*, *How Many Adults Identify as Transgender in the United States?*, The Williams Institute (June 2016), available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>.

⁴ *See, e.g.*, American Academy of Pediatrics, Jason Rafferty, AAP Committee on Psychosocial Aspects of Child and Family Health, AAP Committee on Adolescence, AAP Section on Lesbian, Gay, Bisexual and Transgender Health and Wellness, *Ensuring Comprehensive Care and Support for Transgender and Gender Diverse Children and Adolescents*. *Pediatrics*. 2018;142(4):e20182162, available at <http://pediatrics.aappublications.org/content/pediatrics/142/4/e20182162.full.pdf>.

bisexual, and transgender (LGBT) community, we found LGBT “workers have faced a long, serious, and pervasive history of official and unofficial employment discrimination by both federal, state, and local governments and private employers.”⁵ Our research indicated “workplace discrimination can drastically increase psychological stress and other mental health problems.”⁶ “[M]any transgender workers report experiencing hostile work environments where they are often mistreated, harassed, physically or sexually assaulted, forced to present as a gender they do not identify with, asked inappropriate questions, and deliberately taunted by the use of incorrect pronouns by their coworkers.”⁷ Our report also found:

[M]any transgender individuals consider themselves underemployed because they are overqualified for their position. For example, transgender people report often taking such jobs because of difficulties of being hired. According to a 2011 report, transgender respondents who were unemployed have nearly double the rate of engaging in survival sex work, four times the rate of homelessness, and 85 percent more incarceration compared to those who were employed. In addition, they are disproportionately more likely to be HIV positive, smoke, use drugs or drink heavily, and have multiple suicide attempts.⁸

Our most recent report on police practices also highlighted the trauma members of the transgender community experience because of disparate treatment and harassment from law enforcement:

Members of the transgender community reported frequent harassment by law enforcement. The report found that 59 percent of transgender respondents reported being stopped by police and being “profiled as sex workers when they were conducting routine daily tasks in the neighborhood.” Of those individuals stopped, 51 percent of all LGBT respondents and 61 percent of transgender respondents reported that they had been physically or verbally harassed, and some also reported sexual abuse by police officers including being “forced to perform sexual acts under threat of arrest.”

A 2013 research study by the National Coalition of Anti-Violence Programs found that 48 percent of LGBT hate crime survivors reported that they had experienced police misconduct. They found that transgender women were four times more likely to experience police violence compared to overall survivors. Transgender people overall were seven times more likely to experience physical violence when interacting with the police compared to cisgender survivors and victims.⁹

⁵ U.S. Comm’n on Civil Rights, *Working for Inclusion: Time for Congress to Enact Federal Legislation to Address Workplace Discrimination Against Lesbian, Gay, Bisexual, and Transgender Americans* 4 (Nov. 2017), available at https://www.usccr.gov/pubs/docs/LGBT_Employment_Discrimination2017.pdf [hereinafter *Working for Inclusion*].

⁶ *Id.* at 60.

⁷ *Id.* at 18.

⁸ *Id.*

⁹ U.S. Comm’n on Civil Rights, *Police Use of Force: An Examination of Modern Policing Practices* 53 (Nov. 2018), available at <https://www.usccr.gov/pubs/2018/11-15-Police-Force.pdf>.

As the Commission’s research makes clear, it is critical that this community has the same level of access to health care and health services that all Americans have. By adopting such a narrow definition of gender, the Department will effectively be erasing the identities of transgender people and endangering their access to health care that meets their unique needs. Such a definition sends a message that the transgender community should not exist, fosters and encourages prejudice inconsistent with our core national values,¹⁰ and will have additional serious implications if adopted across other federal agencies.

Such a narrow definition would also be contrary to the good judgment of many federal courts that have ruled on this very issue in interpreting federal civil rights laws and whose opinions are binding in their jurisdictions. For instance, in a case challenging a transgender boy’s exclusion from a boy’s locker room, the U.S. Court of Appeals for the Seventh Circuit pointed out that Title IX does not use the term “biological” as a modifier of “sex,” and went on to hold that a “policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX.”¹¹ Similarly, the U.S. Court of Appeals for the Sixth Circuit rejected an employer’s arguments that Title VII’s bar on sex discrimination was limited to biological sex and held that “discrimination on the basis of transgender and transitioning status violates Title VII.”¹² The Commission calls on the Department of Health and Human Services to reject any plans it may have to narrowly define gender and to work to ensure the civil rights of members of the transgender community are protected. We request the opportunity to meet with you or your staff at your earliest convenience to discuss this urgent issue.

We look forward to your response.

Sincerely,



Catherine E. Lhamon, Chair



Patricia Timmons-Goodson, Vice-Chair

¹⁰ See U.S. Comm’n on Civil Rights, *The U.S. Commission on Civil Rights Condemns the Announced Military Ban on Transgender Individuals* (August 18, 2017), https://www.usccr.gov/press/2017/Statement_08-18-2017_Transgender.pdf (statement on proposed military ban on transgender individuals).

¹¹ *Whitaker*, 858 F.3d at 1047, 1049-50.

¹² *Equal Employment Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 574–75.



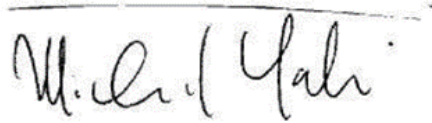
Debo Adegbile, Commissioner



David Kladney, Commissioner



Karen K. Narasaki, Commissioner



Michael Yaki, Commissioner

cc:

Roger Severino, Director, Office for Civil Rights, U.S. Department of Health and Human Services
House Energy and Commerce Committee and Health Subcommittees
Senate Health, Education, Labor, and Pensions Committee