

November 17, 2017

Kenneth Mayer, MD
Medical Research Director &
Co-Chair, The Fenway Institute

Jennifer Potter, MD
LGBT Population Health
Program Director &
Co-Chair, The Fenway Institute

FACULTY

Kevin L. Ard, MD
Adjunct Faculty

Abigail Batchelder, PhD, MPH
Affiliated Investigator

Katie B. Biello, PhD
Research Scientist

Aaron J. Blashill, PhD
Affiliated Investigator

Stephen Boswell, MD
Senior Research Scientist

Wendy Bostwick, PhD, MPH
Adjunct Faculty

Sean Cahill, PhD
Director of Health Policy
Research

Kerith J. Conron, ScD, MPH
Research Scientist

Brian Dodge, PhD
Adjunct Faculty

Holly Fontenot, PhD, RN,
WHNP-BC
Adjunct Faculty

Alex Keuroghlian, MD, MPH
Director, Education & Training
Programs

Douglas S. Krakower, MD
Adjunct Faculty

Lisa Krinsky, LICSW
Director of the LGBT Aging
Project

Matthew Mimiaga, ScD, MPH
Senior Research Scientist

Conall O'Cleirigh, PhD
Affiliated Investigator

Bisola Ojikutu, MD, PhD
Adjunct Faculty

David W. Pantalone, PhD
Behavioral Scientist

Jennifer Putney, MSW, PhD
Adjunct Faculty

Sari L. Reisner, ScD
Research Scientist

Steve Safren, PhD
Affiliated Investigator

S. Wade Taylor, PhD
Associate Research Scientist

Marcy Gelman, RN, MSN, MPH
Director of Clinical Research

Bonnie McFarlane, MPP Director
of Administration

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

Submitted via email to CFBNP@hhs.gov.

Public Comment regarding HHS Request for Information: Removing barriers for religious and faith-based organizations to participate in HHS programs and receive public funding

Please accept these comments regarding the Department of Health and Human Services Request for Information on behalf of the Fenway Institute at Fenway Health. We are grateful for this opportunity to provide comment. The Fenway Institute works to make life healthier for those who are lesbian, gay, bisexual, and transgender (LGBT), people living with HIV/AIDS, and the larger community. We do this through research and evaluation, education and training, and policy analysis. We are the research division of Fenway Health, a federally qualified health center that serves about 30,000 patients each year. We would like to provide the following comment regarding the Request for Information: *Removing barriers for religious and faith-based organizations to participate in HHS programs and receive public funding*.

We support faith-based organizations and understand that they can play an important role in healthcare. For example, Black churches have played a major role in promoting HIV screening and raising awareness of HIV. However, we are concerned that the language in the Request for Information echoes language in Attorney General Sessions' October 6, 2017 memo on religious liberty,¹ and language in state and federal religious refusal legislation, that is designed to allow discrimination against LGBT people in health care and other services, and in employment, under the guise of religious freedom.

Altogether 10 states have some form of religious refusal legislation that could authorize discrimination against LGBT people.² Seven of these 10 states have religious refusal laws that permit state-licensed child welfare agencies to refuse to place children with or provide services to LGBT people and same-sex couples if doing so would conflict with their religious beliefs.³ For example, Michigan passed a package of three bills in 2015 that allow publicly funded adoption organizations to refuse to serve people without penalty if the organization cites sincerely-held religious beliefs.⁴ Two states have religious exemption laws that allow businesses to refuse to serve married same-sex

¹ Attorney General Jeff Sessions. 2017, October 6. Federal law protections for religious liberty. Memorandum for all executive departments and agencies. Washington, DC. <https://www.justice.gov/opa/pr/attorney-general-sessions-issues-guidance-federal-law-protections-religious-liberty>

² Movement Advancement Project. 2017. State Religious Exemption Laws. Available online at: http://www.lgbtmap.org/equality-maps/religious_exemption_laws

³ *Ibid.*

⁴ Stern, M.J. June 11, 2015. Michigan Legislature Passes Bills Allowing Adoptions Agencies to Turn Away Gay Couples. *Slate*. Available online at: http://www.slate.com/blogs/outward/2015/06/10/michigan_legislature_passes_anti_gay_adoption_bills.html

couples, and three allow state and local officials to refuse to marry same-sex couples.⁵ Four states—Mississippi, Tennessee, Alabama, and Illinois—have religious refusal laws that allow medical professionals to refuse to serve LGBT people.⁶

Mississippi law HB 1523 allows people to refuse to provide services based on their personal belief that marriage is only between a man and a woman, that sex is properly reserved to such a marriage, and that male and female refer to a person's unchangeable sex determined by anatomy at birth.⁷ This law allows business and individuals to discriminate against LGBT people in a number of ways, such as refusing to provide sexual health care to a gay man, refusing to provide medically necessary gender affirmation treatments to a transgender patient, or denying counseling and fertility services to a lesbian couples, for example. It may also authorize government employees to discriminate against LGBT people. Tennessee law HB 1840 allows therapists and counselors to reject any patient who has “goals, outcomes, or behaviors” that would violate the “sincerely held principles” of the provider.⁸

In addition to these state laws, Congress is expected to take up the federal First Amendment Defense Act this session, which would allow people and businesses to refuse to serve or otherwise discriminate against people based on the religious belief that marriage is only between a man and a woman and that sexual relations are properly reserved to such a marriage.⁹ This would authorize widespread discrimination by individuals, service providers, and businesses against same-sex couples and LGBT people.

This recent wave of religious refusal legislation, passed in response to the *U.S. v. Windsor* (2013) and *Obergefell v. Hodges* (2015) U.S. Supreme Court rulings upholding the right of same-sex couples to marry, allows for discrimination against LGBT people under the guise of “free exercise” of religion. However, the right to religious freedom does not allow people the right to cause third party harm.¹⁰ The U.S. Constitution bars HHS from crafting “affirmative” accommodations within its programs if the accommodations would harm program beneficiaries. The Constitution dictates that “an accommodation must be measured so that it does not override other significant interests,”¹¹ “impose unjustified burdens on other[s],”¹² or have a “detrimental effect on any third party.”¹³

Denying services, including medical treatments, to LGBT people based on religious beliefs causes very real third party harm.

⁵ Movement Advancement Project. 2017. State Religious Exemption Laws. Available online at: http://www.lgbtmap.org/equality-maps/religious_exemption_laws

⁶ *Ibid.*

⁷ Mississippi House of Representatives. 2016. House Bill No. 1523.

<http://billstatus.ls.state.ms.us/documents/2016/pdf/HB/1500-1599/HB1523SG.pdf>

⁸ Tennessee State Legislature. 2016. An Act to amend Tennessee Code Annotated, Title 4; Title 49 and Title 63, relative to conscientious objections to the provision of counseling and therapy. Amendment No. 1. Available online at: <http://www.capitol.tn.gov/Bills/109/Amend/HA1006.pdf>

⁹ H.R.2802 – First Amendment Defense Act. 114th Congress (2015-2016). <https://www.congress.gov/bill/114th-congress/house-bill/2802>

¹⁰ NeJaime D, Siegel RB. 2015. Conscience wars: Complicity-based conscience claims in religion and politics. *Yale Law Journal*. 124: 2516-2591.

¹¹ *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005).

¹² *Id.* at 726.

¹³ *Id.* at 720, 722; *See also* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 (2014); *Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985) (“unyielding weighting” of religious exercise “over all other interests...contravenes a fundamental principle” by having “a primary effect that impermissibly advances a particular religious practice.”); *Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989) (religious accommodations may not impose “substantial burdens on nonbeneficiaries”).

Furthermore, LGBT people already experience widespread discrimination in healthcare,¹⁴ and this discrimination acts as a barrier to seeking necessary routine and emergency care.¹⁵ Religion has been invoked to deny LGBT people access to health care. For example, LGBT individuals have been denied appropriate mental health services and counseling¹⁶; a newborn was denied care because her parents were lesbians¹⁷; transgender patients have been denied transition-related medical care¹⁸; and an individual was denied his HIV medication,¹⁹ all because of someone else's religious beliefs. All of this contributes to the health disparities that disproportionately burden LGBT people.²⁰ A health care provider's religious beliefs should never determine the care a patient receives. In order to make meaningful progress in reducing these health disparities to "enhance and protect the health and well-being of all Americans," as is the mission of the U.S. Department of Health and Human Services, it is essential that anti-LGBT discrimination in healthcare be addressed explicitly.

The May 2017 Presidential Executive Order Promoting Free Speech and Religious Liberty,²¹ as interpreted and implemented through Attorney General Sessions's October 6, 2017 memorandum on religious liberty,²² clearly authorizes and encourages anti-LGBT discrimination in health care and access to other services, at the hands of both private nonprofits and government agencies.

Among the sections of Sessions memo of greatest concern to LGBT people is the following:

... individuals and organizations do not give up their religious-liberty protections by providing or receiving social services, education, or healthcare; by seeking to earn or earning a living; by employing others to do the same; by receiving government grants and contracts; or by otherwise interacting with federal, state, or local governments.²³

This section, in the fourth of 20 principles outlined in the memo, ostensibly protects the right of organizations to discriminate against LGBT people and same-sex couples in healthcare and social services, including healthcare and services funded by government contracts. It could also be seen as protecting the right of government employees in a wide range of fields to refuse service to LGBT people, same-sex couples, unmarried heterosexual couples, and single-parent families. Finally, it authorizes faith-based

¹⁴ Lambda Legal. 2010. *When Health Care Isn't Caring: Lambda Legal's Survey of Discrimination against LGBT People and People with HIV*. New York: Lambda Legal.

¹⁵ Reisner SL, White Hughto JM, Dunham EE, Heflin KJ, Begenyi JBG, Coffey-Esquivel J, Cahill S. 2015. Legal protections in public accommodations settings: a critical public health issue for transgender and gender-nonconforming people. *The Milbank Quarterly*. 93(3): 484-515.

¹⁶ *Ward v. Wilbanks*, 09-CV-11237, 2010 WL 3026428 (E.D. Mich. July 26, 2010), rev'd and remanded sub nom. *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012), dismissed with prej. by *Ward v. Wilbanks*, 09-CV-11237 (E.D. Mich. Dec. 12, 2012) (case settled).

¹⁷ Phillip A. 2015, February 19. Pediatrician Refuses to Treat Baby with Lesbian Parents and There's Nothing Illegal About It, WASH. POST. <https://www.washingtonpost.com/news/morning-mix/wp/2015/02/19/pediatrician-refuses-to-treat-baby-with-lesbian-parents-and-theres-nothing-illegal-about-it/>

¹⁸ National Women's Law Center. 2014, May. Health Care Refusals Harm Patients: The Threat to LGBT People and Individuals Living with HIV/AIDS. Available online at: http://www.nwlc.org/sites/default/files/pdfs/lgbt_refusals_factsheet_05-09-14.pdf.

¹⁹ Complaint, *Simoes v. Trinitas Reg'l Med. Ctr.*, No. UNNL-1868-12 (N.J. Super. Ct. Law Div. May 23, 2012).

²⁰ Institute of Medicine. 2011. *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding*. Washington, DC: The National Academies Press. Available at: <http://www.iom.edu/Reports/2011/The-Health-of-Lesbian-Gay-Bisexual-and-Transgender-People.aspx>

²¹ Presidential Executive Order Promoting Free Speech and Religious Liberty. 2017, May 4. <https://www.whitehouse.gov/the-press-office/2017/05/04/presidential-executive-order-promoting-free-speech-and-religious-liberty>

²² Attorney General Jeff Sessions. 2017, October 6. Federal law protections for religious liberty. Memorandum for all executive departments and agencies. Washington, DC. <https://www.justice.gov/opa/pr/attorney-general-sessions-issues-guidance-federal-law-protections-religious-liberty>

²³ Ibid.

organizations to discriminate in hiring based on their religious beliefs, even in programming paid for by U.S. tax dollars and traditionally provided by secular non-profit organizations. This RFI and other actions the Administration has taken, such as the October 6, 2017 “religious liberty” memo issued by Attorney General Sessions, indicate that the Administration is poised to allow government-funded organizations to refuse to hire someone who does not act in accordance with particular religious beliefs. This could include someone who doesn’t regularly attend religious services, is married to a person of the same sex, undergoes a gender transition, gets divorced, uses birth control, or is pregnant and unmarried. Employment is a very basic social determinant of health. People who can’t find work struggle to afford basics such as food and shelter. All of this can affect an individual’s ability to provide for his or her basic needs, and can affect an individual’s health. The Department should reject such efforts. HHS grantees and contractors should not be allowed to discriminate against those they serve and employ.

Because there is, according to the Trump-Pence Administration, no compelling interest to prohibit discrimination against LGBT people and same-sex couples,²⁴ even government employees who object to homosexuality, bisexuality, and/or being transgender could discriminate in the provision of taxpayer-funded health care and social services, at least according to the Attorney General’s October memo.

The following language, included in a section of Session’s memo about “Agencies Engaged in Contracting and Distribution of Grants,” also raises concerns about anti-LGBT discrimination in services and hiring:

Absent unusual circumstances, agencies should not condition receipt of a government contract or grant on the effective relinquishment of a religious organization’s Section 702 exemption for religious hiring practices, or any other constitutional or statutory protection for religious organizations. In particular, agencies should not attempt through conditions on grants or contracts to meddle in the internal governance affairs of religious organizations or to limit those organizations’ otherwise protected activities.²⁵

It is important that language in the Attorney General’s religious liberty memo regarding faith-based organizations and religious beliefs not be interpreted to mean that those providing health care and other services with HHS funding can discriminate against LGBT people or same-sex couples, or to refuse to provide care to them based on religious beliefs. Free exercise of religion does not include the right to discriminate against others. Instead, discrimination on the basis of sexual orientation and gender identity in healthcare should be explicitly prohibited by HHS regulation. It’s important that all people be able to access health care and related services. Given the proliferation of religious refusal laws around the country, the U.S. government must underscore the importance of ensuring that all people be able to access health care and related services. “[L]iberty and justice for all” means “all,” not only heterosexual and non-transgender people. Organizations that would deny services to LGBT people or same-sex couples, or that would refuse to hire LGBT people to provide health and human services that are not of a religious nature, should not be able to utilize HHS funding in order to do so.

²⁴ U.S. Department of Justice. 2017. No. 16-111. In the Supreme Court of the United States. *Masterpiece Cake Shop, Ltd., et al., Petitioners, v. Colorado Civil Rights Commission, et al.* On writ of certiorari to the Colorado Court of Appeals. Brief for the United States as Amicus Curiae Supporting Petitioners. <https://www.documentcloud.org/documents/3988525-16-111-United-States.html>

²⁵ Attorney General Jeff Sessions. 2017, October 6. Federal law protections for religious liberty. Memorandum for all executive departments and agencies. Washington, DC. <https://www.justice.gov/opa/pr/attorney-general-sessions-issues-guidance-federal-law-protections-religious-liberty>

The focus of HHS programs should be to assist individuals in need of critical services and supports by increasing access to health care, supporting individual decision making and informed consent, and prohibiting discrimination in the provision of human services. Given the significant threat posed to the health and well-being of millions of vulnerable individuals, as well as the lack of any statutory authority for doing so, HHS should abandon this attempt to allow providers, health plans, or other entities to be able to use religion to engage in taxpayer-funded discrimination. Instead, we urge HHS to turn its focus to addressing health disparities and ensuring equal access to services regardless of race, color, national origin, religion, sex, gender identity, sexual orientation, age, or disability.

Thank you for the opportunity to provide feedback. If you have any questions about this comment, please feel free to reach out to Sean Cahill, PhD, at scahill@fenwayhealth.org, or Sophia Geffen at sgeffen@fenwayhealth.org.

Sincerely,

Stephen Boswell, MD, FACP
President and Chief Executive Officer
Fenway Community Health Center

Kenneth Mayer, MD, FACP
Co-chair and Medical Research Director, The Fenway Institute
Director of HIV Prevention Research, Beth Israel Deaconess Medical Center
Professor of Medicine, Harvard Medical School

Jennifer Potter, MD
Co-chair, The Fenway Institute
Director of Women's Health, Fenway Health

Sean Cahill, PhD
Director of Health Policy Research
The Fenway Institute

Sophia Geffen
Project Manager
The Fenway Institute

Tim Wang, MPH
Health Policy Analyst
The Fenway Institute