

CONCERNED WOMEN *for* AMERICA

November 13, 2023

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services
200 Independence Ave, SW
Washington, DC 20201

Re: Discrimination on the Basis of Disability in Health and Human Service Programs or Activities
HHS-OCR-2023-0013

Dear Secretary Becerra,

The proposed rule, Discrimination on the Basis of Disability in Health and Human Service Programs or Activities (Rule), fails to justify or clarify inclusion of a new category of disability referred to as “gender dysphoria” under Section 504 of the Rehabilitation Act.

The Americans with Disabilities Act (ADA) defines disability as “a physical or mental impairment that substantially limits one or more major life activities of the individual.” By statute, it excludes “gender identity disorders not resulting from physical impairment.”

The DSM-5-TR defines “gender dysphoria” (in part) as “a marked incongruence between one’s experienced/expressed gender and assigned gender, lasting at least 6 months” and “associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.” This manual is not a government publication subject to legislative review and oversight.

In *Williams v. Kincaid* (45 F.4th 759 (4th Cir. 2002), *cert. denied*, 143 S. Ct. 2414 (2023)), a panel of the Fourth Circuit held that the term “gender identity disorder” contained in the ADA is a “now obsolete” term and that the diagnosis of gender identity disorder “no longer exists.” If you agree with this interpretation, why does the Rule retain the language “gender identity disorder” as an exclusion under Section 84.4 (g)(1)? Does the Department believe it is now “obsolete”? Are you seeking to overrule the court?

You state: “The Department agrees that restrictions that prevent, limit, or interfere with otherwise qualified individuals’ access to care due to their gender dysphoria, gender dysphoria diagnosis, or perception of gender dysphoria may violate section 504.” Yet, the Rule provides no official definition of or limitation on what constitutes “gender dysphoria” as a disability nor who is a “qualified individual” with gender dysphoria, and even extends application to an amorphous “perception of gender dysphoria.”

You propose to impose a sweeping new disability discrimination mandate for “gender dysphoria” which is nowhere settled in disability law nor adequately defined or justified in this Rule. By applying this mandate to Section 504 and threatening violations, this Rule imposes numerous unidentified impacts and liabilities and substantial new burdens which require response.

Proposed change defeats its stated purpose

The NPRM declares: “The Department is issuing this proposed regulation to offer clear and specific requirements to help recipients better understand their obligations under the law and to help individuals with disabilities better understand their rights.”

In the case of “gender dysphoria,” such “clear and specific requirements” are nowhere to be found.

Under the changes to Section 504 in this Rule, what exactly is “gender dysphoria”? Is it a mental health defect? Is it a birth defect? What exactly makes a person with gender dysphoria “disabled” – a physical limitation? A mental impairment? What precisely does such a disability entitle a person to claim under Section 504? Unlimited plastic surgery? A lifetime supply of cross sex hormones?

How does making gender dysphoria a disability under this Rule NOT mean every trans-identifying person is essentially disabled? What claim to “disability” by a trans identifying person would not be valid?

Is there a difference between a person who claims transgender status and a person with gender dysphoria? If so, what specifically is the difference? Does this difference mean a provider is not obligated to accommodate trans identification under Section 504 if not claimed as a disability under the Rule? If not, what is the statutory and legal obligation to make a discrimination claim if not a disability? (Note, the U.S. Supreme Court did not apply *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, (2020), to Section 504 or the ADA and it cannot be cited as justification. Nor is any executive order or policy preference not grounded in statute a legitimate claim.)

What exactly are the requirements to ensure consistent application of a gender dysphoria diagnosis that constitutes a disability? What medical treatments for a physical or mental impairment are required? Drugs? Surgeries? Castration? If there are none, how is the diagnosis not discretionary and, therefore, arbitrary and capricious?

The Rule states: “Department agrees that preventing and limiting access to care may violate Section 504.” The Department offers no definition of access to care or clarity about what constitutes an enforceable offense in the case of gender dysphoria disability. What is the meaning of “access to care” in this context? What constitutes access – any desired medical procedure? For what type of care? In what cases would it not be a violation?

By asserting “gender dysphoria” is now a disability (i.e., not under the exclusion), how does this Rule NOT declare every trans identifying person effectively disabled? What proof of gender dysphoria is required? Who must diagnose? Who must certify diagnosis?

No clarity is possible by sowing confusion and imposing arbitrary rules. Declaring a new class of disability based on political policy preferences by cherry picking a court decision and citing authority for broad application of the ADA, which expressly retains a related exclusion, requires proving a high bar of legal legitimacy.

A disability cannot be claimed when convenient and denied otherwise. Neither can “gender dysphoria” be diagnosed when convenient and denied otherwise. There must be a clear set of standards that are objective and enforceable, otherwise the rule creates more chaos and uncertainty that is sure to cause more pain in an area of law that is crying out for stability and predictability.

The Department must provide objective, enforceable standards for determining when, if, and how a claim for gender dysphoria is a disability under this Rule. Without concrete, objective standards for classifying gender dysphoria as a disability, the Rule is arbitrary and capricious.

Proposed change is debilitating

The irony of this misguided proposal is that this Rule not only declares trans identifying people disabled, but the treatment you advocate as health care - what you claim as “gender affirming care”- disables people in practice.

In this Rule, “reproductive systems” are identified as a major life activity. The Rule states: “‘Major life activities’ includes not only activities such as caring for oneself, seeing, hearing, and walking, but also includes the operation of a major bodily function such as the functions of the immune system, normal cell growth, and reproductive systems.”

Taking puberty blockers and cross sex hormones can permanently disable the reproductive system. They render infertility and can permanently sterilize. Surgically removing healthy sex organs or chemically impairing them for the purpose of accommodating a trans identity directly disables a major life activity for a lifetime.

There are a growing number of heartbreaking cases, several lawsuits now in court, resulting from a harmful ideology that tells young girls they must be boys if they experience strong discomfort with their own bodies. [Chloe Cole](#) and [Kayla Lovdah](#) in California, [Prisha Moseley](#) in North Carolina, [Luka Hein](#) in Nebraska are among these cases. Regret from gender dysphoria deception and medical treatments that physically impair and disable reproductive systems, including breastfeeding, is only growing.

Unfortunately, under your leadership, what the Department is precipitating is a gender identity crisis, physically impairing many young people from natural maturation by labelling them transgender and promoting life altering, disabling treatment. You are misleading an entire generation into believing they were “born in the wrong body” and that “transgenderism” is normal, without any of the traditional scientific data needed to back such transcendental change.

How exactly does the Rule incorporate the responsibility and bear the costs of wrongful disability to reproductive systems to correct misleading “gender dysphoria” diagnoses? This must be taken fully into account.

Unidentified, uncalculated, unreasonable burdens

The regulatory burden and impact on small entities of this sweeping gender dysphoria disability mandate, including liability and litigation, must be calculated, and defended for this Rule to pass scrutiny under the Administrative Procedures Act. The Rule fails to provide any analysis.

The Department must analyze the regulatory and small entity costs specifically of adding gender dysphoria as a disability and rendering people with gender dysphoria disabled. This is a major Rule change that requires a full analysis of the regulatory impact and compete cost/benefit analysis.

As the nation’s largest public policy organization for women, we are alarmed about the unintended impact to reproductive capacity and precipitating treatments through a disability diagnosis in ways that damage the body’s natural development often requiring multiple medical procedures and surgeries must be calculated. You must also quantify the actual costs and quantifiable benefits of including gender

dysphoria as a disability. Finally, the impact and cost to people diagnosed with gender dysphoria who later seek to realign with their actual sex and seek to restore their normal bodily functions also must be included. Are these services to “detransition” covered? They need to be if the Department is to be consistent. But this, of course, creates a whole host of other issues that you have not even begun to consider.

It would be unconscionable to the hundreds of thousands of women I represent, that you would move along with a Rule that claims to protect the disabled but results in disabling the most vulnerable. The ill-conceived proposition proposed here which mandates disability accommodations that lead to disabling major life activities like reproduction, labels gender confusion as a disability, and encourages a disability diagnosis rather than resolution from gender dysphoria should be thoroughly discarded from this Rule.

Sincerely,

Penny Young Nance
CEO and President
Concerned Women for America