

October XX, 2018

Maya Noronha
Dept. of Health & Human Services
Office for Civil Rights
200 Independence Ave SW
Room 516E
Washington, DC 20201

Alejandro Reyes
Dept. of Education
Office of Civil Rights
400 Maryland Avenue SW
Room 4E213
Washington, DC 20202

RE: Nondiscrimination in Health Programs and Activities; Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Assistance (RIN 0945-AA11 & RIN 1870-AA14)

Dear Ms. Noronha and Mr. Reyes:

We are writing in regards to a recent plan reported by the New York Times to issue a notice of proposed rulemaking to clarify nondiscrimination protections in health programs and activities, the obligations of recipients of federal financial assistance in redressing sex discrimination, including complaints of sexual misconduct, and the procedures by which they must do so. We the undersigned organizations wish to share our concerns regarding the proposed administration plan to narrow the legal definition of sex to exclude transgender and intersex people. Specifically, the push to define gender as a “biological, immutable condition determined by genitalia at birth,” would eradicate federal recognition of the nearly two million transgender and the millions of intersex individuals in this country. **This is discrimination and would have devastating consequences for transgender, intersex, and gender expansive youth seeking to gain access to runaway and homeless youth, education, and other key federal programs.**

Department of Health & Human Services

The Runaway and Homeless Youth program administered by HHS has a more than 40-year history of prioritizing and serving these young people. The Runaway and Homeless Youth Program is made up of three components: the Basic Center Program (BCP), Transitional Living Program (TLP), and Street Outreach Program (SOP). The Basic Center Program provides temporary shelter, counseling, and after-care services to runaway and homeless youth under age 18 and their families. The BCP has served approximately 31,000 to 36,000 youth annually in recent years.¹ The Transitional Living Program is targeted to older youth ages 16 through 22 (and sometimes an older age), and has served approximately 3,000 to 3,500 youth annually in recent years.² The SOP provides education, treatment, counseling, and referrals for runaway, homeless, and street youth who have been subjected to or are at risk of being subjected to sexual abuse, sex exploitation, and trafficking. Each year, the SOP makes hundreds of thousands of contacts with street youth (some of whom have multiple contacts).

Some groups of young people are more likely to be vulnerable to and experience homelessness than others. Lesbian, gay, bisexual, transgender, and questioning (LGBTQ) and gender expansive youth are overrepresented in the homeless youth population, due often to experiencing negative reactions from their parents when they come out about their sexuality and gender identity. According to the Administration for Children and Families' Family and Youth Services Bureau Street Outreach Program Data Collection Study final report, 30% of youth experiencing homelessness surveyed reported being lesbian, gay, or bisexual and 6.8% reported being transgender.³ Though LGBTQ youth only make up

¹U.S. Congressional Research Service. Runaway and Homeless Youth: Demographics and Programs (RL33785; April 26, 2018), by Adrienne L. Fernandez-Alcantara. <https://fas.org/sfp/crs/misc/RL33785.pdf>.

² Id. at Congressional Research Service.

³ Administration for Children and Families and Youth Services Bureau Street Services Program. Data Collection Study, Final Report, 2-16. https://www.acf.hhs.gov/sites/default/files/fysb/data_collection_study_final_report_street_outreach_program.pdf.

approximately 7% of the general youth population,⁴ LGBTQ youth have a 120% greater risk than other young people of homelessness.⁵

Transgender youth often face unique and more severe types of discrimination and trauma.⁶ According to a 2015 national survey, nearly a quarter of transgender adults surveyed (N=27,715) reported experiencing housing discrimination related to their gender identity.⁷ Specifically, transgender women of color were more likely to report housing discrimination over the previous year, and participants who reported being kicked out of their family's homes due to their gender identity were almost twice as likely to report experiencing housing discrimination over the previous year. In addition, providers are more likely to report longer periods of homelessness for the transgender youth they serve.⁸ Additionally, 30% of respondents experienced homelessness over their lifetime, with substantially higher rates for transgender women of color.⁹

Traumatic experiences that transgender youth suffer can include multiple types of abuse, neglect, exposure to violence prior to and after becoming homeless. For example, researchers have found "statistically significant differences across seven of nine indicators of past trauma, with survey respondents reporting that a higher proportion of transgender youth - compared to non-transgender youth - had histories of harassment and bullying, intimate partner violence, family rejection, physical, sexual or emotional abuse, mental health issues, sexual exploitation, and alcohol or substance abuse."¹⁰

The fact that a disproportionately large percentage of homeless youth are LGBTQ, that they are especially vulnerable to abuse and discrimination, and they experience greater barriers than other homeless young people to accessing and receiving adequate services suggests that improved efforts are needed. Seeking to erase the identities of transgender youth by forcing them into a gender identity not chosen as their own will not serve as a catalyst for better access to HHS programs and services. Doing so will only serve as an additional barrier, negate current efforts to prevent and end youth homelessness, and is wholly inconsistent with the department's mission of enhancing the health and well-being of all Americans.

Department of Education

According to a 2015 survey of nearly 28,000 adults, transgender people face high rates of mistreatment in K-12. Out of those who were out or perceived as transgender in K-12, nearly three quarters (77%) experienced mistreatment because of being transgender, including 54% who were verbally harassed, 24% who were physically attacked, and 13% who were sexually assaulted because of being transgender. Nearly one in five (17%) of students who were out or perceived as transgender in school left a K-12 school because the mistreatment was so bad. Respondents frequently reported that teachers and staff members, whose job in part includes ensuring student safety, often ignored or even contributed to the harassment and violence, and discriminatory school policies--such as policies that excluded transgender students from school activities, forced them to present according to the gender they were thought to be at birth, or subjected them to discipline because of their transgender status--further exacerbated the mistreatment reported by respondents. Mistreatment at school had a lifelong impact on many

⁴ Price, C., Wheeler, C., Shelton, J., & Maury, M. (Eds.). (2016). *At the Intersections: A collaborative report on LGBTQ youth homelessness*. True Colors Fund and the National LGBTQ Task Force.

⁵ Morton, M.H., Dworsky, A., & Samuels, G.M. (2017). *Missed opportunities: Youth homelessness in America*. National estimates. Chicago, IL: Chapin Hall at the University of Chicago.

⁶ Id. at Morton et al., 2017.

⁷ James, Sandy E., Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet, and Ma'ayan Anafi. 2016. *The report of the 2015 U.S. Transgender survey*. Washington, DC: National Center for Transgender Equality. Johnson, Guy, and Chris Chamberlain. 2008. "From youth to adult homelessness," *Australian Journal of Social Issues* 43 (4): 563-582.

⁸ Id. at James et al., 2016.

⁹ Id. at Choi et al., 2015.

¹⁰ Choi, Soon Kyu, Bianca D.M. Wilson, Jama Shelton, and Gary Gates. 2015. *Serving our youth 2015: The needs and experiences of LGBTQ youth experiencing homelessness*. Los Angeles, CA: Williams Institute with the True Colors Fund.

respondents, with respondents who faced mistreatment at school experiencing higher rates of homelessness, poverty, and psychological distress as adults. Further research has shown that while discrimination in school is profoundly harmful for transgender youth, transgender students who are affirmed and respected in school are more likely to thrive.¹¹

Title IX of the Education Amendments of 1972 (“Title IX”) prohibits sex discrimination in schools. It provides that “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.” Under Title IX, schools may not legally exclude, separate, or deny educational benefits to transgender and/or intersex students, nor treat transgender and/or intersex students differently than any other student.

Over the past twenty years, the vast majority of courts to have considered the issue—including five circuit courts¹² and dozens of district courts¹³—have reaffirmed that federal sex discrimination laws like Title IX prohibit discrimination based on transgender status, as does the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. These courts have determined that Supreme Court precedent holding that discrimination based on nonconformity to sex stereotypes is prohibited under sex discrimination laws necessarily means that transgender people are protected from discrimination.¹⁴ Specifically, courts have established that schools must treat students consistent with their gender identity, including when it comes to equal access to educational programs and facilities. By seeking to codify a definition of gender as “biological, immutable condition determined by genitalia at birth,” the federal government is promoting a definition that runs contrary to the law as well as our inherent bodily diversity.¹⁵ Forcing transgender, intersex, and/or gender expansive youth to identify by their gender assigned at birth is effectively punishing students because of their difference and seeking to erase their identities—and in the case of intersex youth, sometimes logistically fraught if not impossible. Such an act is wholly inconsistent with the Department of Education’s mission of promoting student achievement and is not consistent with legal precedent.

Seeking to codify a definition of gender that would erase transgender, intersex, and gender expansive identities is the most egregious attack on the rights of these students this administration has made to date, instilling fear among transgender and intersex youth and their families and encourage increased discrimination against them.

Impact on Intersex Individuals

Intersex people—who compose up to 1.7% of the population—are born with sex characteristics that don’t line up with what society tends to think of as a typical “male” or “female” body.¹⁶ These differences are a

¹¹ Durwood, Lily & McLaughlin, Katie & R. Olson, Kristina. (2016). Mental Health and Self-Worth in Socially-Transitioned Transgender Youth. *Journal of the American Academy of Child & Adolescent Psychiatry*. 56. 10.1016/j.jaac.2016.10.016.

¹² See, e.g., *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018); *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017); *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217 (6th Cir. 2016); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

¹³ See, e.g., *Adams v. Sch. Bd. Of St. Johns Cty.*, 318 F.Supp.3d 1293 (M.D. Fla. Jul. 26, 2018); *Grimm v. Gloucester Cty. Sch. Bd.*, No. 4:15-cv-54 (E.D. Va. May 22, 2018); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp.3d 704 (D. Md. Mar. 12, 2018); *Prescott v. Rady Children’s Hosp.-San Diego*, 265 F.Supp.3d 1090 (S.D. Cal. Sept. 27, 2017); *A.H. ex rel. Handling v. Minersville Area Sch. Dist.*, No. 3:17-cv-391, 2017 WL 5632662 (M.D. Pa. Nov. 22, 2017); *Bd. of Ed. of Highland Local Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F.Supp.3d 850 (S.D. Ohio Sept. 26, 2016); *Roberts v. Clark Cty. Sch. Dist.*, No. 2:15-cv-00388, 2016 WL 5843046 (D. Nev. Oct. 4, 2016).

¹⁴ See *Price Waterhouse v. Hopkins* 490 U.S. 228 (1989) (rejecting the argument that the term “sex” in federal nondiscrimination laws refers only a person’s physical characteristics and holding that sex discrimination laws prohibit discrimination based on behavior, demeanor, appearance, and personality traits that do not conform to sex-related stereotypes); see also *Oncale v. Sundowner Offshore Oils Servs.*, 523 U.S. 75, 77 (1998) (holding that federal sex discrimination laws should be broadly interpreted and cover forms of discrimination that may not have been contemplated by Congress at the time the law was enacted).

¹⁵ *Price Waterhouse v. Hopkins* 490 U.S. 228 (1989)

¹⁶ Blackless, Melanie; Charuvastra, Anthony; Derryck, Amanda; Fausto-Sterling, Anne; Lauzanne, Karl; Lee, Ellen (March 2000). “How sexually dimorphic are we? Review and synthesis”. *American Journal of Human Biology*. 12 (2): 151–166.

part of the fabric of our human diversity and have existed throughout time.

There are many ways to be intersex. For example, some intersex people are born with XY chromosomes, internal testes, a vagina and vulva. Some are born with XX chromosomes, ovaries, and genitalia that does not match “typical” male or female appearance. There are many different genital, gonadal, hormonal, and chromosomal combinations. Some intersex people have chromosomes that are neither XX nor XY. Intersex people, like everyone, can have any sexuality and gender identity.¹⁷

While they are distinct identities, many people are both intersex and transgender. Intersex people face discrimination, especially in the form of surgical and hormonal interventions aimed at “correcting” their diverse sex traits. An incorrect federal definition of sex and gender as binary will exacerbate the violence and erasure intersex people already face.

Genitals do not determine gender. Intersex people are born with all kinds of genitalia, and their anatomy often does not line up with typical definitions. Chromosomes do not determine gender. The administration proposes that any dispute about one’s sex would be clarified using genetic testing, which would likely mean chromosomal testing. Intersex people often have chromosomes that do not line up in an expected way with their external sex organs, and can have chromosomal patterns that are not XX or XY. Intersex and transgender people know that chromosomes are a piece of trivia and a remnant from fetal development, not any meaningful predictor of gender identity. Any quest to find a bodily ‘marker’ of a marginalized sex, gender, or sexuality identity is not only false science, but fundamentally dangerous.

We thank you for your time and hope you will remain committed to ensuring that all youth - including transgender and intersex youth - have equal access to runaway and homeless youth, education, and other health-related services. Should any questions arise, please feel free to contact Justin T. Rush at (202) 796-7962 and justin@truecolorsfund.org or Gregory Lewis at (646) 586-9860 and gregory@truecolorsfund.org.

Sincerely,

True Colors Fund

¹⁷ Id. at Blackless et al., 2000.