

May 17, 2019
Sherette Funn
Reports Clearance Officer
Department of Health and Human Services

RE: Proposed Revision to Civil Rights/Conscience and Religious Freedom Discrimination Complaint form, 0945-0002-60D

To Whom It May Concern:

The U.S. Department of Health and Human Services' (HHS) mission is to "improve the health and well-being of all Americans by providing essential health services and human services and by fostering sound, sustained advances in the sciences underlying medicine, public health, and social services." Its Office of Civil Rights (OCR) is tasked with upholding this mission by ensuring that individuals receiving services from HHS-funded programs are not subject to unlawful discrimination, and that the privacy and security of their health information is protected.

Recently, OCR's actions reveal that rather than fulfilling its responsibility to uphold the mission of HHS, it is pursuing a narrow agenda of expanding religious and moral exemptions at the expense of broader nondiscrimination and patient privacy. Just last month, OCR changed its mission and vision statements to position itself as a "law enforcement agency" tasked with "ensuring that HHS, state and local governments, health care providers, health plans, and others comply with federal laws that guarantee the protection of conscience and free exercise of religion and prohibit coercion and religious discrimination in HHS-conducted or funded programs" and that "protects that exercise of religious beliefs and moral convictions by individuals and institutions."¹

We, the undersigned, write to you to express grave concern about the Office of Civil Rights' reprioritization of religious and conscience over civil rights and patient privacy protections as most recently evidenced through the proposed changes to the "Civil Rights & Conscience and Religious Freedom Discrimination Complaint" form and urge HHS to return to the form it had used without change since 2013.

OCR has been making unnecessary changes to its complaint form to emphasize conscience and religious freedom complaints

From January 17, 2013 to November 7, 2017, OCR used the same form for civil rights discrimination complaints which adequately fulfilled the purpose of allowing OCR to collect the minimum information needed from individuals filing complaint so that it was then able to have a basis for the initial processing of those complaints. In November of 2017, three months prior to announcing the formation of the Conscience and Religious Freedom Division, OCR updated its complaint form to change one of the bases of discrimination from "Religion" to "Religion/Conscience" and added the text "the Church Amendments, the Coats-Snowe

¹ Rachel Bergman, "HHS Office for Civil Rights overhauled its mission and vision statements on its website," (Washington: Sunlight Foundation, 2019), available at: <https://sunlightfoundation.com/2019/05/01/hhs-office-for-civil-rights-overhauled-its-mission-and-vision-statements-on-its-website/>.

Amendment, the Weldon Amendment” to the list of authorities listed in the complaint form.² In the memo it submitted to explain the changes, it claimed it was simply making them to clarify “(a) the available longstanding existing basis of discrimination that a complainant may assert under federal law, and (b) the longstanding legal authorities under which OCR is currently enforcing federal conscience and religious freedom laws.”³ Even without the new form, or for that matter the promulgation of a new rule on “Protecting Statutory Conscience Rights in Health Care,”⁴ OCR acknowledged in the memo that it “has been enforcing these laws for years and in some cases decades.”⁵

The proposed changes only serve to put a greater emphasis on conscience complaints and are unnecessary

OCR’s latest proposed changes add “conscience and religious rights” as well as “conscience and religious freedom” to every mention of civil rights throughout the form. This addition serves no purpose other than to increase the form’s focus on these complaints. It also substantially expands the list of authorities section. Whereas the previous version included the Church Amendments, the Coats-Snowe Amendment, and the Weldon Amendment in its list of authorities, this version moves these to a new list of authorities solely focused on those involving religion and conscience. This new section of authorities includes Section 1553 of the Affordable Care Act, the Church Amendments, the Coats-Snowe Amendment, the Weldon Amendment, the Religious Freedom Restoration Act, and adds an incredibly broad and vague reference to “other Federal civil rights, conscience protections and religious liberty statutes.” Essentially, in this form OCR claims to have enforcement authority that far exceeds its actual authority.

OCR’s unnecessary changes to the form are its latest attempt to generate more conscience and religious freedom complaints

This form is OCR’s second attempt to amend its complaint forms to place a greater emphasis on conscience and religious liberty complaints. While these amendments are wholly unnecessary, taken in the context of OCR’s actions over the past year, their purpose is clearly to generate more complaints in this field and justify OCR’s increased focus on conscience and religious freedom complaints at the expense of civil rights and patient privacy enforcement. As an analysis by the Center for American Progress of HHS’s FY 2020 budget request revealed, the creation of an entire division to focus on these complaints and the amended forms have not resulted in the waves of religious and conscience complaints OCR anticipated.⁶ OCR historically received an average of 1.25 conscience-related complaints per year. Even with all of the resources it re-allocated to focus on this area, conscience and religious freedom complaints still comprised merely 2 percent of all complaints OCR received in FY 2018. Despite this miniscule share of

² 201710-0945-003

³ Memorandum from Harold Henderson, Deputy Executive Officer to Sherette Funn, OS/OCIO-PRA Reports Clearance Officer (Dec. 7, 2017) available at <https://www.reginfo.gov/public/do/DownloadDocument?objectID=79148701>.

⁴ 45 CFR Part 88

⁵ Memorandum from Harold Henderson, Deputy Executive Officer to Sherette Funn, OS/OCIO-PRA Reports Clearance Officer (Dec. 7, 2017).

⁶ Sharita Gruberg, “HHS Budget Would Fund Discrimination at Expense of Civil Rights Enforcement,” (Washington: Center for American Progress, 2019), available at: <https://www.americanprogress.org/issues/lgbt/news/2019/04/25/468377/hhs-budget-fund-discrimination-expense-civil-rights-enforcement/>.

OCR's total complaints, OCR requested over \$1 million in additional funding for its Conscience and Religious Freedom Division while requesting nearly \$10 million in cuts to enforcement for civil rights and patient privacy enforcement more broadly.

Conclusion

The new complaint form is part of OCR's reprioritization of conscience and religious complaints at the expense of civil rights protections for LGBTQ people, women, and other marginalized groups covered by federal nondiscrimination protections—such as people with limited English proficiency—, reproductive health services, and health care privacy rights for everyone. For the above reasons, the undersigned organizations oppose the proposed changes to the civil rights complaint form.

Sincerely,

American Atheists

American Civil Liberties Union

California LGBTQ Health and Human Services Network

The Center for American Progress

CenterLink: The Community of LGBT Centers

Compassion & Choices

Council for Global Equality

Defending Rights & Dissent

Equality North Carolina

FORGE, Inc.

Mazzoni Center

Movement Advancement Project

NARAL Pro-Choice America

National Asian Pacific American Women's Forum (NAPAWF)

National Center for Lesbian Rights

National Center for Transgender Equality

National Council of Jewish Women

National Equality Action Team (NEAT)

National LGBTQ Task Force

People for the American Way

Planned Parenthood Federation of America

Positive Women's Network-USA

Secular Coalition for America

Sexuality Information and Education Council of the United States (SIECUS)