

April 2, 2024

**EO 12866 Meeting
“Rulemaking on Discrimination on the Basis of Disability
in Health and Human Services Programs or Activities”
RIN 0945-AA15**

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Thank you for the opportunity¹ to provide comments on OIRA’s review of the Department of Health and Human Services’ (HHS) proposed rule, “Discrimination on the Basis of Disability in Health and Human Service Programs or Activities,” RIN 0945-AA15 (“Proposed Rule”).² My name is Eric Kniffin. I am a fellow at the Ethics and Public Policy Center and a member of the HHS Accountability Project. I also served as an attorney in the DOJ Civil Rights Division under Presidents George W. Bush and Obama. I have also been involved in extensive civil rights litigation against HHS as counsel for the Becket Fund for Religious Liberty and in private practice, including successful lawsuits against HHS’s contraception mandate and HHS’s original Section 1557 transgender mandate.

This comment draws in significant part on the public comment that I filed last November in response to this Proposed Rule.³ For the reasons set out below, and as set out in more detail in my November 13, 2023, public comment to HHS, the proposed rulemaking is laudable in many regards. As the parent of a special needs son who passed away in 2021, I support and am grateful for the Proposed Rule’s efforts to add helpful clarity to Section 504’s prohibition on discrimination on the basis of disability in the healthcare context. I encourage HHS to do more to apply the same conviction and clarity to two related scenarios: infants with disabilities and disabled persons considering assisted suicide.

Unfortunately, the same careful analysis and effort to provide clarity is lacking with regard to the Proposed Rule’s claim that people with gender dysphoria qualify for protections under Section 504. This claim does not withstand scrutiny, HHS does not provide any indication

¹ As OMB cancelled a previous EO 12866 meeting it scheduled with EPPC on another rule, we are glad you are willing to hear EPPC scholars’ input on this rule. See Rachel N. Morrison, *Biden and Becerra Kill Democratic Norms in Rush to Fund Big Abortion*, National Review, Oct. 8, 2021, <https://www.nationalreview.com/bench-memos/biden-and-becerra-kill-democratic-norms-in-rush-to-fund-big-abortion/>.

² 88 Fed. Reg. 63392 (Sept. 14, 2023).

³ EPPC Scholar’s Comment Regarding “Discrimination on the Basis of Disability in Health and Human Service Programs or Activities,” RIN 0945-AA15 (Nov. 13, 2023), <https://eppc.org/wp-content/uploads/2023/11/EPPC-HHS-Disability-Pub-Comment-2023-11-13.pdf/> (EPPC Public Comment).

that it has thought through this claim's implications, and says nothing about the enormous religious liberty problems such a claim would create. I urge HHS to drop this effort.

To the extent that HHS is determined to persist in this regard, I outline below additional legal requirements that HHS must meet before finalizing its proposal.

1. The Proposed Rule misinterprets *Bowen v. American Hospital Association*.

- As I noted in my public comment, the Proposed Rule in the main does an admirable job of affirming the inherent dignity of every human life. I am grateful that HHS has taken this care to apply the broad prohibition against discrimination on the basis of disability in Section 504 and apply it to specific situations where disabled persons have faced discrimination. The Proposed Rule is all the more powerful because it provides compelling examples of instances where healthcare providers have or have not honored these principles, where they have succeeded or failed to properly value the lives of persons with disabilities.
- The Proposed Rule identifies four specific areas in which persons with disabilities often face discrimination in the healthcare context. These areas are listed on page 63,396 of the Proposed Rule and each is described in more detail in the following pages:
 - Organ Transplants;
 - Denial of Life-Sustaining Care;
 - Crisis Standards of Care; and
 - Participation in Clinical Research.
- More broadly, the Proposed Rule warns that Section 504's prohibition on discrimination is not limited to situations where providers are making decisions about medical treatments. It also includes "the provision of advice and the process of providing information to comply with informed-consent requirements established by state law and otherwise."⁴ "For example, a covered hospital may not repeatedly request that a patient with a disability (or the patient's legally authorized representative) consent to a do-not-resuscitate order, where it would not make such repeated requests of a similarly situated nondisabled patient."⁵
- I was surprised and disappointed, however, the Proposed Rule did not speak as forcefully to the rights of infants with disabilities. It seems that HHS's relative silence in this crucial area is based on its interpretation of the Supreme Court's 1986 decision in *Bowen v. American Hospital Association*, 476 U.S. 610 (1986). However, as explained below, and as addressed in greater detail in my public comment, HHS's summary of *Bowen* is inaccurate and unjustified.⁶
 - a. HHS properly notes that *Bowen* was a plurality decision.**
 - First, HHS is correct to note that the Supreme Court did not issue a controlling decision in the *Bowen* case. In such cases, "when 'a fragmented Court decides a case and no single

⁴ *Id.* at 63407.

⁵ *Id.* at 63408.

⁶ EPPC Public Comment at 5-10.

rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”⁷

- I agree with HHS’s assessment that the “narrowest grounds” among the concurring justices in *Bowen* limits the injunction “to cases in which the Department sought to require medical treatment despite a lack of parental consent.”⁸

b. HHS would not be bound by *Bowen* were it to develop a better factual record.

- HHS is incorrect, however, in treating *Bowen* as a hard ceiling on its ability to develop regulations protecting the rights of infants or other children with disabilities.
- The Proposed Rule notes that the Supreme Court’s plurality decision was based “on the particular facts of that case.”⁹ The *Bowen* plurality itself also noted on several occasions that its judgment that the regulations at issue were unlawful under the APA was predicated on its judgment that HHS had failed to develop the factual record:

In sum, there is nothing in the administrative record to justify the Secretary’s belief that “discriminatory withholding of medical care” in violation of § 504 provides any support for federal regulation.¹⁰

Although a hospital’s selective refusal to report instances of medical neglect of handicapped infants might violate § 504, the Secretary has failed to point to any specific evidence that this has occurred. The 49 actual investigations summarized in the preamble do not reveal *any* case where a hospital either failed, or was accused of failing, to make an appropriate report to a state agency.¹¹

[T]he Secretary’s basis for federal intervention is perceived discrimination against handicapped infants in violation of § 504, and yet the Secretary has pointed to no evidence that such discrimination occurs.¹²

- The Proposed Rule does not appear to reflect the fact-bound nature of the Court’s decision. HHS states that HHS is not retaining paragraphs (b)-(e) of § 84.55 “because they are subject to an injunction [in *Bowen*] declaring invalid and enjoying enforcement of those provisions.”¹³ **That is misleading. The *Bowen* plurality clearly left the door open for HHS to issue substantially similar regulations with the same aim—protecting the dignity and rights of children with disabilities—on a stronger factual record:**

⁷ *Ramos v. Louisiana*, 140 S. Ct. 1390, 1403 (2020) (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)).

⁸ 88 Fed. Reg. at 63407.

⁹ *Id.* at 63403.

¹⁰ *Bowen*, 476 U.S. at 636.

¹¹ *Id.* at 637-38.

¹² *Id.* at 643.

¹³ 88 Fed. Reg. at 63472.

HHS has “substantial leeway to explore ways in which discrimination against the handicapped pos[es] particularly significant problems and to devise regulations to prohibit such discrimination.”¹⁴

- If HHS does not believe it has a sufficient factual record to support stronger protections for infants with disabilities, I call on HHS to pause this rulemaking so that it can do so.
 - HHS should seek comment from the public on this matter so that it better understands and has a more detailed record of how our healthcare system treats infants with disabilities and their parents.
 - HHS should also perform its own research to better understand the circumstances under which our healthcare system as a whole and healthcare providers—institutional and individually—discriminates against infants and other persons with disabilities.
- Based on such findings, HHS should continue to develop regulations to protect human dignity. It would be an error for HHS to conclude that *Bowen* precludes the Department from doing so.
- c. ***Bowen* does not prohibit HHS from investigating and developing regulations to protect infants with disabilities when parents do not consent to treatment.**
- Finally, HHS’s Proposed Rule does not appear to recognize that the Department remains free to protect disabled children from discrimination even in situations where the child’s parents refuse to give their consent. HHS states that it will “follow the *Bowen* plurality in declining to require a recipient to provide medical treatment to an individual where the individual, or the person legally authorized to make medical decision on behalf of that individual, does not consent to that treatment in situations where consent would typically be required regardless of whether the individual had a covered disability.”¹⁵ Exactly what HHS means by this statement is unclear.
 - If HHS only means that it cannot and will not hold a covered provider liable under Section 504 *simply* for failing performing a medical procedure that a disabled child’s parent did not consent to, then I agree.
 - But if HHS interprets *Bowen* to hold that a covered provider cannot ever be liable under Section 504 for failing to treat a disabled child so long as the child’s parent withholds consent, then I do not agree.
- The very next paragraph in the Proposed Rule shows this to be false. As HHS explains, “Denial of treatment is not the only way a recipient can discriminate on the basis of disability in its covered programs or activities.”¹⁶ “For example, a covered hospital may not repeatedly request that a patient with a disability (or the patient’s legally authorized representative consent to a do-not-resuscitate order where it would not make such repeated requests of a similarly situated nondisabled patient.”¹⁷ The Proposed Rule provides heartbreaking stories where doctors or hospitals have pressured the family

¹⁴ *Bowen* at 643 (quoting *Alexander v. Choate*, 469 U.S. 287, 304 n.24 (1985)).

¹⁵ 88 Fed. Reg. at 63408.

¹⁶ *Id.*

¹⁷ *Id.*

members of disabled persons to forgo medical treatment that would extend their lives, even trying to convince the patient's loved ones that "live with the disability of quadriplegia was not worth living. This would be a violation of the proposed regulation under both 84.56(b)(1) and (c)(2)(ii)."¹⁸

- Covered provider discriminate in violation of Section 504 by pushing parents to consent to a do-not-resuscitate order for a disabled child, where the same pressure would not be brought on parents of a non-disabled child. The flip-side is also true: covered providers discriminate in violation of Section 504 when they fail to seek parents' consent with the same zeal because the child in question has disabilities.
- Finally, along the same lines, covered providers illegally discriminate against children with disabilities when they fail to report a child's parents to state authorities for failure to consent to a life-sustaining intervention if the provider would have made a report on behalf of a child that had no disabilities. The rules for when a provider must make such a report is a matter of state law. Nonetheless, a provider violates federal protections for disabled children when it carries out this reporting function in a discriminatory matter.
- **Nothing in the plurality's opinion in *Bowen* prohibits these applications of Section 504.** In fact, many statements in the Justices' opinions support them. Furthermore, the general nondiscrimination principles summarized above compel them. **I urge HHS to clarify** in its final rule that all of the rights that persons with disabilities are entitled to under Section 504 apply with full force to persons in their earliest days after birth and that **no Supreme Court decision says otherwise.**

2. HHS should clarify that these general principles also apply to persons with disabilities in connection with assisted suicide.

- Given the great care and sensitivity with which the Proposed Rule discusses how persons with disabilities face discrimination in the health care context, I was surprised that HHS did not discuss how disabled persons are discriminated against in the assisted suicide context.
- Though proponents of assisted suicide promise that "strict procedures" will be put in place to ensure that assisted suicide would only be available to a very small population of people, I documented in my public comment that there is substantial evidence that this is not what happens in practice.¹⁹
- I urge HHS to study this research and issue detailed findings and recommendations about how the protections under Section 504 apply in the assisted suicide context.

3. HHS's claim that Section prohibits discrimination on the basis of "gender dysphoria" is arbitrary and capricious and not supported by law.

- The Proposed Rule takes a dramatic turn, however, when it departs from the main purpose of this rulemaking—to clarify the rights of disabled persons under Section 504—and claims that transgender persons diagnosed with "gender dysphoria" may now assert rights and bring claims under Section 504.

¹⁸ *Id.*

¹⁹ EPPC Public Comment at 8-10.

- HHS acknowledges that proposed § 84.4(g) “is taken directly from the Rehabilitation Act, 29 U.S.C.705(20)(F), and is consistent with similar exclusions contained in the ADA” at 42 U.S.C. § 12211.²⁰ In the cited statutory provision, Congress explicitly excluded “transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders” from the definition of “disability” under the Rehabilitation Act.
- Nonetheless, HHS asserts “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.”²¹ This is an amazing claim—the sort of statement that gives lawyers and federal bureaucrats a bad name.
- As HHS acknowledges, the American Psychiatric Association swapped out the term “gender identity disorder” for the new term “gender dysphoria” when it updated the DSM in 2013. According to The Advocate, “the world’s leading source of LGBT news and information,” the DSM “replace[d] the diagnostic term ‘Gender Identity Disorder’ with the term ‘Gender Dysphoria.’”²² The reason this change was made was to remove the stigma that transgender persons face, not to designate a different condition.; “the new term implies a temporary mental state rather than an all-encompassing disorder, a change that helps remove the stigma transgender people face by being labeled ‘disordered.’”²³
- HHS ignores this history. It cites only one authority in support of its claim that Congress’ decision that Section 504 does not apply to “gender identity disorders not resulting from physical impairments” did not apply to people diagnosed with “gender dysphoria”: *Williams v. Kincaid*, 45 F.4th 759 (4th Cir. 2022), *cert. denied*, 600 U.S. ____ (U.S. June 30, 2023) (No. 22-633). But one circuit court case the law does not make. Importantly, the Supreme Court has never held that Section 504 covers gender dysphoria.
- As my EPPC colleague Rachel Morrison has noted, the Proposed Rule is not the first time this administration has falsely claimed that gender dysphoria counts as a disability under Section 504; it was doing so even before the Fourth Circuit decided *Kincaid*.²⁴ In a March 31, 2022, letter to States Attorneys General, DOJ’s Civil Rights Division stated:

Section 504 of the Rehabilitation Act of 1973 protects people with disabilities, which can include individuals who experience gender dysphoria. Restrictions that prevent, limit, or interfere with otherwise qualified

²⁰ 88 Fed. Reg. at 63464.

²¹ *Id.*

²² Camille Beredjick, *DSM-V To Rename Gender Identity Disorder 'Gender Dysphoria'*, The Advocate, July 12, 2012, <https://www.advocate.com/politics/transgender/2012/07/23/dsm-replaces-gender-identity-disorder-gender-dysphoria>.

²³ *Id.*

²⁴ Rachel Morrison, *Biden DOJ Letter Pushes Transgender Misinformation and Implies Gender Dysphoria Is a Disability*, National Review, May 13, 2022, <https://www.nationalreview.com/bench-memos/biden-doj-letter-pushes-transgender-misinformation-and-implies-gender-dysphoria-is-a-disability/>.

individuals' access to care due to their gender dysphoria, gender dysphoria diagnosis, or perception of gender dysphoria may violate Section 504.²⁵

- Morrison's analysis notes that the letter from the Civil Rights Division failed to note that Congress specifically excluded "gender identity disorders not resulting from physical impairments, or other sexual behavior disorders" from the definition of disability under Section 504. Morrison concludes, "At best, the DOJ was sloppy with the letter's medical claims and legal analysis in the administration's rush to push gender ideology. At worst, the letter was a deliberate attempt to obfuscate the limits of gender medicine and the law in an attempt to 'encourage' state attorneys general to push the Biden administration's preferred policies over legal obligations."
- a. **The Fourth Circuit's opinion in *Kincaid* is deeply flawed and should not serve as the basis of HHS's interpretation of 42 U.S.C. § 12211.**
- To the extent HHS's claim that gender dysphoria is a disability under Section 504 is based on *Kincaid*, the Department's case is unconvincing. My colleague Ed Whelan has written two separate posts dismantling the Fourth Circuit's opinion in *Kincaid*.
- Whelan first wrote in August 2022, after the Fourth Circuit issued its divided opinion.²⁶ He notes that the majority opinion claims that "gender dysphoria is categorically *not* a 'gender identity disorder' at all" because "when the ADA was enacted in 1990, the concept of 'gender identity disorders' did not include gender dysphoria."

By [Judge] Motz's illogic, the fact that the American Psychiatric Association removed "gender identity disorders" from its revised diagnostic manual in 2013 and substituted a narrower diagnosis of "gender dysphoria" somehow means that gender dysphoria is not a "gender identity disorder" under the ADA.

- As Whelan shows, Judge Marvin Quattlebaum's dissent shows the illogic of the panel majority's analysis:

But as Judge Marvin Quattlebaum explains in dissent (slip op. at 38-47), the gender dysphoria that [plaintiff] Williams alleges—"discomfort or distress that is caused by a discrepancy between a person's gender identity and that person's sex assigned at birth (and the associated gender role and/or primary and secondary sex characteristics)"—"falls precisely under the [American Psychiatric Association's] description of, and diagnostic criteria for, gender identity disorders" in its diagnostic manual in effect in 1990. Indeed, Quattlebaum shows more broadly that "[f]rom 1990 to today, gender identity disorder has been understood to include distress and discomfort from identifying as a gender different from the gender assigned at birth."

²⁵ DOJ, Civil Rights Division, Letter to State Attorneys General, March 31, 2022, <https://www.justice.gov/opa/press-release/file/1489066/download>.

²⁶ Ed Whelan, *Fourth Circuit's Transgender Dysphoria*, National Review, Aug. 17, 2022, <https://www.nationalreview.com/bench-memos/fourth-circuits-transgender-dysphoria/>.

What’s more, a gender identity disorder wouldn’t even fall within the general definition of an ADA “disability” in the first place unless it resulted in an “impairment that substantially limits one or more major life activities of [an] individual.” So it’s precisely because the subcategory of gender dysphoria involves “clinically significant stress” that the exclusion comes into play.

Second, Motz maintains that even if gender dysphoria is a gender identity disorder under the ADA, Williams’s complaint can plausibly be read to support the inference that his gender disorder “result[ed] from physical impairments.” (Slip op. at 15-20.) But as Quattlebaum objects, the complaint does not identify any part of Williams’s body that is impaired or even allege any physical impairment. (Slip op. at 50-53.)

- Whelan wrote on the *Kincaid* decision again last summer, after the Supreme Court declined the Fairfax County Sheriff’s petition for certiorari.²⁷ Whelan’s post highlights portions of Justice Alito’s dissent, which itself draws on Judge Marvin Quattlebaum’s dissent.
- Following my EPPC colleagues, I too find HHS’s claim that “gender dysphoria” counts as a disability under Section 504 wholly unpersuasive. In addition to the powerful arguments my colleagues have already registered, I offer here a few additional comments and questions for HHS to consider that highlight the flaws in HHS’s claim and the problem with its illegal effort to shoehorn transgender rights into Section 504.
- b. HHS’s interpretation of 42 U.S.C. § 12211 is nonsensical because there is no evidence Congress was aware of the term “gender dysphoria” when it adopted this exclusion in 1990.**
- The Proposed Rule credits the split panel’s claim that it saw “no legitimate reason why Congress would intend to exclude from the ADA’s protections transgender people who suffer from gender dysphoria.”²⁸ This argument presupposes that Congress might have considered this issue at all, which itself presupposes that the Congress that adopted this exclusion in 1990²⁹ was at all aware of this term.
- This seems extraordinarily unlikely. According to Congress.gov, the term “gender dysphoria” first appeared in the Congressional Record in 2008, nearly two decades after Congress adopted the definition at issue in *Kincaid*.³⁰
- Before finalizing this Proposed Rule, I ask HHS to consider and answer the following questions:
 - Does HHS believe that the members of Congress that voted to pass the ADA in 1990 were aware of the term “gender dysphoria” and had an opinion on how that

²⁷ Ed Whelan, *Fourth Circuit’s Transgender Dysphoria Evades Supreme Court Review*, National Review, July 3, 2023, <https://www.nationalreview.com/bench-memos/fourth-circuits-transgender-dysphoria-evades-supreme-court-review/>.

²⁸ 63464.

²⁹ Pub.L. 101-336, Title V, § 512 (including the ADA statutory exclusion now found at 42 U.S.C.A. § 12211).

³⁰ See Congress.gov, search term:

<https://www.congress.gov/search?pageSort=dateOfIntroduction%3Aasc&q=%7B%22search%22%3A%22%5C%22gender+dysphoria%5C%22+%22%7D>.

term related to “gender identity disorders not resulting from physical impairments?”

- If not, does HHS claim that it has authority, consistent with the APA, to broaden the reach of a federal statute based on whether it sees “no legitimate reason why Congress would intend to exclude” from a statutory interpretation a novel term that there is no reason to believe Congress was aware of?
- If not, why does HHS believe that it may, consistent with its obligations under the APA, rely on the Fourth Circuit’s decision in *Kincaid*?

c. HHS’s pattern of deferring or rejecting caselaw simply based on whether it supports the Administration’s policy agenda is arbitrary and capricious and does not meet the Department’s statutory obligation undertake reasoned decisionmaking.

- As I and my colleagues in EPPC’s HHS Accountability Project have noted on other occasions, HHS is consistently inconsistent in how it treats caselaw that bear on its policy preferences.
- On the one hand, HHS considers itself free to disregard caselaw that interferes with its agenda. For example, in proposed rules issued February 2, 2023, HHS proposed to maintain a religious exemption to its “contraceptive services” mandate but eliminate the exemption for non-religious moral exemptions.³¹ HHS acknowledges that a district court “reasoned that there was no rational basis” for “distinguishing between religious and moral exemptions.”³² But HHS summarily stated there that it “respectfully disagree[d]” with the court’s decision.³³
- Here, by contrast, HHS purports to expand Section 504 to count “gender dysphoria” as a disability—even though Congress excluded “gender identity disorders not resulting from physical impairments”—based on a single decision issued by a divided court. This fails to meet HHS’s obligation to provide a “reasoned explanation” for its actions.³⁴
- If HHS wishes to dispute this charge and defend its inconsistent treatment of caselaw, please answer the following questions:
 - As a general matter, how does HHS decide whether to follow or to “respectfully disagree” with judicial decisions interpreting federal law or regulations?
 - What criteria, besides HHS’s policy preferences (and its realization that Congress does not share these policy preferences) informed HHS’s decision to “respectfully disagree” with a federal court’s determination that “there was no rational basis” for “distinguishing between religious and moral exemptions” from its contraception mandate but to “agree[]” with a federal court’s judgment that it saw “no legitimate reason why Congress would intend to exclude from the ADA’s protections transgender people who suffer from gender dysphoria”?

³¹ 88 Fed. Reg. 7236, 7249 (Feb. 2, 2023).

³² *Id.* (citing *March for Life v. Burwell*, 128 F. Supp. 3d 116 (D.D.C. 2015)).

³³ *Id.*

³⁴ *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

- Does HHS believe that its disparate treatment of caselaw meets its legal obligation to provide a “reasoned explanation” for its actions and avoid “arbitrary and capricious” determinations? If so, how?
- d. HHS should take into account that under its interpretation of Section 504, its favored—and sometimes mandated—treatment for gender dysphoria renders patients *permanently disabled* under the ADA.**
- HHS asserts in the Proposed Rule that people with gender dysphoria may claim they are disabled under Section 504 and the ADA. HHS has elsewhere claimed that that it is “medically necessary” that people with gender dysphoria, including children, have access to “gender-affirming care,” such as puberty blockers, cross-sex hormones, and so-called “gender-affirming surgery.”³⁵
 - As documented in my public comment, what HHS calls “gender-affirming care” can have profound and permanent effects on the human body, which is one important reason why clinicians have increasingly been raising concerns over gender-transition interventions.³⁶
 - My focus here, however, is on how “gender-affirming care”—including puberty blockers, cross-sex hormones, and surgical interventions—can render a patient permanently sterile and impair sexual function.
 - This is relevant because the Proposed Rule defines disability to include a physical or mental impairment that substantially limits an individual’s major life activities, including his or her reproductive system.³⁷ The Proposed Rule also states that “anatomical loss affecting one or more body systems” also renders one disabled.³⁸
 - It thus seems that under HHS’ interpretation of federal law, people with gender dysphoria are “disabled” under Section 504 and the ADA; *and the “medically necessary” treatment for this “disability” also renders patients disabled under the Section 504 and the ADA.*
 - I am unaware of any other situation where HHS has mandated a course of treatment that renders a patient—either invariably or necessarily—“disabled” under its understanding of federal law.
 - I call on HHS to clarify its understanding on this matter and explicate the legal implications of this state of affairs. OIRA should ensure that HHS’s final rule addresses the following issues:
 - Does HHS agree or disagree that people who receive what it calls “gender affirming care”³⁹ are, depending on the procedure, either invariably or necessarily rendered “disabled” under the definitions proposed in this Proposed Rule?

³⁵ 87 Fed. Reg. 47824, 47834 (Aug. 4, 2022).

³⁶ EPPC Public Comment at 14-15.

³⁷ 88 Fed. Reg. at 63459 (describing Proposed §84.4(1)(1)); 63460 (“‘Major life activities’ includes . . . the operation of a major bodily function such as . . . reproductive systems”).

³⁸ *Id.* at 63459

³⁹ 87 Fed. Reg. 47871.

- Are there any other disabilities HHS is aware of where HHS claims that that the “medically necessary” treatment for that disability renders the medical patient disabled in another way?
- Is it reasonable for a medical provider to refuse to render a patient disabled under Section 504 and the ADA if the medical provider believes there are other treatments available for the diagnosed condition that would not render the patient disabled?
- What, if any, additional informed consent protections are required before a medical provider can prescribe a pharmaceutical or perform a surgery that might or necessarily will render someone permanently disabled under Section 504?
- What impact, if any, do these observations and questions have on HHS’s assertion that it is “discriminatory on its face” 73F40 for a medical provider to categorically refuse to perform what HHS calls “gender affirming care,” even when the medical provider in good faith believes there are alternative treatments for someone with gender dysphoria that would not render the patient permanently disabled?

4. If HHS nonetheless persists in asserting that “gender dysphoria” counts as a disability under Section 504, it must clarify and calculate costs of this position.

- The Proposed Rule claims that gender dysphoria counts as a disability under Section 504 but fails to account for the massive impact and costs its proposal will have. Significantly, Section 504 and the ADA use identical language and are interpreted similarly. However, the ADA has a broader reach as it applies to employers. As such, it would seem that if HHS declares “gender dysphoria” to be a disability under Section 504 then the following would be considered discrimination based on gender dysphoria:
 - So-called “misgendering” or not using a person’s name, pronouns, titles, and honorifics that correspond to the person’s gender identity;
 - Not permitting a person to use bathrooms, locker rooms, showers, prison cells, and other sex-specific facilities that correspond to the person’s gender identity;
 - Having a sex-specific dress code and not permitting a person to dress consistent with their gender identity;
 - Not providing so-called “gender affirming care” to a patient that suffers from gender dysphoria;
 - Not providing insurance coverage for “gender affirming care”;
 - Not providing insurance coverage for other disabilities; and
 - Offering counseling to encourage or help a person resolve their gender dysphoria by accepting and coming to peace with his or her biological sex.
- To the extent that HHS’s proposal applies to any of the above situations, OIRA and HHS should determine whether any of these proposed applications require HHS to reopen this proposal for public comment.

⁴⁰ *Id.* at 47872.

- As HHS states throughout the Proposed Rule, it has developed this proposal because it understands the need to create more “clarity” about what counts as discrimination under Section 504 and the ADA.
- As it stands, such unstated applications are not a logical outgrowth of the proposal, do not provide “clarity” about federal disability rights laws, and would be contrary to law.
- Additionally, to the extent that this proposal will impact interpretation of the ADA and the employment context, HHS should consult with Department of Labor and the EEOC. To fail to do so would be arbitrary and capricious.
- Furthermore, to the extent that HHS believes that its proposal to extend Section 504 to gender dysphoria will result in any of the above applications, it must calculate the costs of such applications in its regulatory impact analysis. These calculations include, but are not limiting to:
 - Increased insurance costs to cover what HHS considers “gender affirming care”;
 - Other costs associated with the accommodations HHS believes employers will have to offer in order to comply with its interpretation of Section 504; and
 - Related training so that employers and employees are aware of these new legal obligations.

5. The Proposed Rule fails to account for its predictable impact on religious liberty.

- The Proposed Rule also fails to take into account the religious liberty implications of its attempt to expand Section 504 to cover “gender dysphoria.”
- HHS is well aware that its efforts to reinterpret federal law and create new legal rights for people that identify as transgender have a profound impact on this country’s religious institutions.
- For example, its efforts to create a transgender services mandate under Section 1557 of the Affordable Care Act led to significant litigation across the country. Two difference circuits have found HHS’s actions in this area unlawful:
 - In August 2022, the Fifth Circuit held that HHS’s efforts to coerce religious healthcare providers into performing and insuring “gender affirming procedures” violated the Religious Freedom Restoration Act (RFRA) and affirmed the district court’s issuance of a permanent injunction protecting the plaintiffs from HHS’s illegal mandate.⁴¹
 - In December 2022, the Eighth Circuit issued a similar decision upholding a permanent injunction in favor of religious healthcare institutions, religious schools, and other religious employers.⁴²
 - Last summer HHS decided to accept these decisions as final.⁴³

⁴¹ *Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 380 (5th Cir. 2022).

⁴² *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 609 (8th Cir. 2022).

⁴³ Press Release: Federal Government Backs Down on Transgender Mandate, Becket (June 21, 2023), <https://www.becketlaw.org/media/federal-government-backs-down-on-transgender-mandate/>.

- In this Proposed Rule, HHS appears to be trying again to create a new transgender mandate through another means.
- Although most of the Proposed Rule discussed how Section 504 protects the rights of disabled persons in healthcare settings, HHS also discusses how Section 504 applies to schools that receive federal financial assistance and states that “this rule is intended to build on, but not to supplant those protections for students with disabilities.”⁴⁴
- These new obligations would also presumably have to incorporate HHS’s new claim that children with gender dysphoria are disabled under Section 504, and that covered schools therefore must update their Section 504 procedures “to identify children with disabilities.”
- Given that the stated purpose of this Proposed Rule is to “clarify existing requirements under section 504,”⁴⁵ it is unfortunate that HHS offers so little to help covered schools understand what exactly HHS’s claim that gender dysphoria now counts as a disability under Section 504 means for them.
- It is even more troubling that HHS does not acknowledge that this new interpretation of Section 504 has important religious liberty implications and says nothing about how it will fulfill its obligation to recognize religious liberty rights under the Free Exercise Clause and the Religious Freedom Restoration Act.
- In the final rule, HHS should clarify its position on what this new interpretation of Section 504 means for schools, including qualifying religious schools.
- HHS should likewise clarify how it will honor its obligations under the First Amendment and RFRA if it proceeds with its claim that gender dysphoria is now a disability under Section 504. It is irresponsible and unlawful for HHS to create new burdens on religious liberty without explaining how it will respect the rights of religious healthcare institutions, healthcare providers, medical professionals, schools, employers, employees, and other entities and individuals with sincere religious objections to complying with this mandate.
- HHS should specifically discuss how its provisions for religious liberty reflect the Fifth Circuit and Eighth Circuit precedents noted above.
 - At a minimum, HHS’s final rule should acknowledge the legal protections for religion identified by the Supreme Court in *Bostock*: the First Amendment ministerial exception, Title VII’s religious organization exemption, and RFRA.⁴⁶
 - Finally, it appears that the injunctions granted to plaintiffs in this Section 1557 litigation may also apply to these Proposed Rules under Section 504, given that Section 504 is one of the statutes that is incorporated by reference into Section 1557.
 - Does HHS believe that the injunctions in the Section 1557 litigation would apply equally to these regulations?

⁴⁴ 88 Fed. Reg. 63440-41.

⁴⁵ *Id.* at 63392.

⁴⁶ *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1754 (2020).

- If not, on what basis does HHS claim this new transgender mandate does not violate religious protection laws?

6. OIRA and HHS must ensure compliance with Executive Order 12250.

- Under Executive Order 12250,⁴⁷ the Department of Justice is required to coordinate the implementation of any regulations implementing nondiscrimination provisions of Title IX or of “[a]ny other provision of Federal statutory law which provides, in whole or in part, that no person in the United States shall, on the ground of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance.”
- It would appear that HHS’s claim that Section 504 prohibits discrimination on the basis of gender dysphoria triggers this obligation under EO 12250.
- As such, we call on OIRA and HHS to ensure that this obligation is met with this rulemaking.
- If OIRA and HHS determine that such DOJ review is not required, I call on HHS to explain in the final rule why its new interpretation of Section 504 does not trigger the aforementioned part of EO 12250.

7. OIRA and HHS must whether HHS is obliged to conduct a Family Policymaking Assessment.

- Section 654(c) of The Treasury and General Government Appropriations Act of 1999,⁴⁸ requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being:
 - (c) Family policymaking assessment.—Before implementing policies and regulations that may affect family well-being, each agency shall assess such actions with respect to whether—
 - (1) the action strengthens or erodes the stability or safety of the family and, particularly, the marital commitment;
 - (2) the action strengthens or erodes the authority and rights of parents in the education, nurture, and supervision of their children;
 - (3) the action helps the family perform its functions, or substitutes governmental activity for the function;
 - (4) the action increases or decreases disposable income or poverty of families and children;
 - (5) the proposed benefits of the action justify the financial impact on the family;
 - (6) the action may be carried out by State or local government or by the family; and
 - (7) the action establishes an implicit or explicit policy concerning the relationship between the behavior and personal responsibility of youth, and the norms of society.

⁴⁷ <https://www.justice.gov/crt/executive-order-12250>

⁴⁸ Pub. L. 105-277, 118 Stat. 814.

- HHS’s claim that gender dysphoria is now a disability under Section 504 may affect family well-being. The questions set out above indicate some of the uncertain impacts that HHS’s proposal may have on covered schools. Certainly, if HHS’s proposal would put even more pressure on schools to push children towards social and medical “gender transitions”—something that schools often do without parental notification—the proposal would undermine parent-child relationships and tear families apart.⁴⁹
- In light of the above, “before” the Department “implement[s]” the “regulations” in the Proposed Rule, it must conduct a Family Policymaking Assessment that complies with Pub. L. 105-277, § 654(c), 118 Stat. 814 (1999).

8. HHS’s proposal violates the major questions doctrine.

- HHS’s attempt to redefine Section 504 and count “gender dysphoria” as a disability, despite the exclusion in 42 U.S.C. § 12211 raises serious questions under the major questions doctrine.
- The Supreme Court most recently spoke to this doctrine in *Biden v. Nebraska*, where it expressed its “concerns over the exercise of administrative power”⁵⁰ and clarified the criteria courts and federal agencies must use when determining whether Congress has delegated authority to a federal agency to address “questions of deep economic and political significance.”⁵¹
- The major questions doctrine is rooted in the basic premise that Congress normally “intends to make major policy decisions itself, not leave those decisions to agencies.”⁵² Or, as Justice Breyer once observed, “Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters [for agencies] to answer themselves in the course of a statute’s daily administration.”⁵³
- There is no question that whether gender dysphoria should be treated as a disability and the profound implications of such a designation for federal nondiscrimination laws raise “questions of deep economic and political significance.”
- As such, HHS should explain why it believes that it can, consistent with the major questions doctrine, issue these regulations. If it cannot square its proposal with the major questions doctrine, HHS must withdraw this rule.
- To the extent that HHS relies on *Chevron* deference as legal justification for its efforts to expand Section 504, HHS should wait for the Supreme Court’s decisions in *Relentless*

⁴⁹ See EPPC Comment to Department of Education Opposing Athletics NPRM “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams,” RIN 1870-AA19, Docket ID ED-2022-OCR-0143 (May 15, 2023) at 17-20, <https://eppc.org/publication/eppc-scholars-submit-comments-opposing-eds-proposed-gender-identity-mandate-in-athletics/>.

⁵⁰ 143 S. Ct. 2355, 2372 (2023).

⁵¹ *Id.* at 2375.

⁵² *United States Telecom Assn. v. FCC*, 855 F.3d 381, 419 (CA DC 2017) (Kavanaugh, J., dissenting from denial of reh’g en banc).

⁵³ S. Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 370 (1986).

and *Loper Bright*, in which the continuing validity of *Chevron* is at issue. The Supreme Court heard oral argument in these cases on January 17, 2024.⁵⁴

Conclusion

I urge OIRA to ensure that the statutory and regulatory process is upheld, and that HHS's rulemaking under Section 504 has sufficient legal and economic analysis that reflects HHS's obligations under the Constitution, the Administrative Procedure Act, executive orders, federal laws protecting religious liberty, and all other relevant legal authority.

⁵⁴ See Amy Howe, *Supreme Court Likely to Discard Chevron*, SCOTUSblog (Jan. 17, 2024), <https://www.scotusblog.com/2024/01/supreme-court-likely-to-discard-chevron/>.