



THE EQUAL PROTECTION PROJECT
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January 20, 2026

Hon. Robert F. Kennedy, Jr.
Secretary of Health and Human Services
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, D.C. 20201

In re: RIN 0945-AA27 – In Support of Proposed Rule

Dear Secretary Kennedy:

This letter is in response to the Health and Human Services Department’s request for public comment on the proposed revision to the regulation implementing section 504 of the Rehabilitation Act of 1973, as it applies to recipients of HHS funding, to clarify that the Department interprets “gender identity disorders not resulting from physical impairments” as excluded from the definitions of “individual with a disability” and “disability.”¹

The Equal Protection Project (EPP), a project of the non-profit Legal Insurrection Foundation, is dedicated to the fair treatment of all persons without regard to race, ethnicity, or sex. EPP’s guiding principle is that there is no “good” form of unlawful discrimination, and that the remedy for unlawful discrimination is never more unlawful discrimination. Since its creation, EPP has filed civil rights complaints against more than one hundred twenty governmental entities engaging in alleged discriminatory conduct, including those based on sex.

Based on its experience, EPP submits this comment in support of the Department’s decision to pursue rulemaking to clarify the noted legal ambiguity introduced in the preamble to the 2024 Final Rule regarding whether “gender dysphoria” meets the statutory definition of

¹ 45 CFR 84.4(g).

“disability.” It doesn’t, and the plain statutory language of the ADA should trump fluid subjective conceptions of identity based on shifting psychology.

1. Gender dysphoria is not a “disability” under the ADA.

The development of “gender identity” as a way of describing transgender individuals and developing therapeutic treatments for persons suffering from “gender dysphoria” occurred in the context of addressing the distress and anxieties presented by individual patients convinced that their biological sex did not match their subjective sense of their “real” sex.²

At the time Congress enacted the Americans with Disabilities Act (ADA) in 1990, no one spoke of a person’s sex being “assigned at birth,” as if it were a matter about which there could be some doubt. No one spoke of men “transitioning” to become women, and then perhaps “transitioning” back to become men again, as if one’s sex was merely a social or cultural costume. Instead, “gender” was simply another term for a person’s biological sex, either male or female, but in either case fixed and permanent.³ This understanding of the differences between the sexes was recognized across the globe for time immemorial (before ten to fifteen years ago). “Gender dysphoria,” while likely resulting from a mental illness, is not comparable to the debilitating impact of “disabilities” as statutorily defined.

Under the ADA,⁴ “disability” is defined as: (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” The ADA further explicitly excludes certain conditions from the definition of “disability.”⁵ Specifically, stating that “[t]he term ‘disability’ shall not include (1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders[.]” Thus, any regulatory interpretation of section 504 must adhere to these identical statutory exclusions from the definitions of “individual with a disability” and “disability.” If “disability” is redefined as subjective identity based on shifting psychology, Section 504 loses all coherence.

2. Academic theories are a poor substitute for objective sex categories.

While trendy gender identity theories may be debated in the culture at large, they are a poor basis for legal definitions. The use of “gender” to distinguish between femininity and masculinity, as aspects of personality and behavior, only gained currency in the 1960s with works such as Robert Stoller’s *Sex and Gender*.⁶ Stoller, a UCLA psychiatrist, described gender as “the

² The American Psychiatric Association's Diagnostic and Statistical Manual (DSM), third edition (1987)

³ See, e.g., Alex Byrne, *Trouble with Gender* (Polity Press: Cambridge, UK and Hoboken, NJ 2024) (hereinafter cited as “Byrne, Trouble”), 47.

⁴ 42 U.S.C. 12102(1).

⁵ at 42 U.S.C. 12211(b).

⁶ Byrne at 48.

amount of masculinity or femininity found in a person,” observing that the “normal male has a preponderance of masculinity and the normal female a preponderance of femininity.”⁷

Other academics repurposed Stoller’s distinction to adapt the word “gender” to mean sex-typed social roles, where “gender” is deemed “a matter of culture,” referring to “the social classification into “masculine” and “feminine.”⁸ This conception of “gender” added nothing new other than its anti-biological bias combined with a critique of the normative sense attached to established sex-typed roles. It merely substituted the word ‘gender’ for “sex” into the already well-established discussion of sex-typed roles and occupations in society.

From there, some academics went a step further and reconceived sex into its currently accepted form as “gender identity” or “the sense of knowing to which sex one belongs, that is, the awareness ‘I am a male’ or ‘I am a female.’”⁹ By 2004, Judith Butler and other theorists carried this idea into the “politics and theory of transgenderism and transsexuality.”¹⁰ Disputes about “sex,” “gender,” and “gender identity” have since become intensely contentious, with scholars and advocates urging diametrically opposite conclusions.

This little known history, while highly persuasive to those with a political agenda to refine “sex” as something other than biology, is irrelevant to the applicable statutory definitions under the ADA. Ideological fashions are fleeting, and nothing ensures that the current transgender paradigm is scientifically valid, or will remain dominant.

Conclusion

Accordingly, EPP supports the Department’s decision to pursue rulemaking to clarify the legal ambiguity introduced in the preamble to the 2024 Final Rule regarding whether “gender dysphoria” meets the statutory definition of “disability. It doesn’t, and the proposed rule will allow the Department to focus on ensuring truly disabled individuals receive the proper legal protections.

Respectfully submitted,

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⁷ *Id.*

⁸ Ann Oakley, *Sex, Gender and Society*, 38 (London: Routledge 1972).

⁹ Byrne at 42.

¹⁰ *Id.* at 43.