



RE: RIN Number 0945-AA27, *Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance*

IFPC Legal Center’s Comment in response to RIN Number 0945-AA27

Introduction

Sex is an immutable characteristic of humanity. One is born either male or female. Some people struggle with this reality—some with very real, personal struggles—but law must not. When Congress established the Americans with Disabilities Act (“ADA”), it recognized that these struggles are not properly classified as disabilities, excluding “transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, [and] other sexual behavior disorders.”¹ But the Biden Administration included language in the preamble to the 2024 Final Rule that contradicted the statute, suggesting that it might treat “gender dysphoria” as a disability for purposes of the ADA. The IFPC Legal Center supports the Department of Health and Human Service’s (“Department”) attempts to bring its regulations into conformity with the meaning of the statute.

This comment outlines the IFPC Legal Center’s perspective on the Department’s request for comment on RIN Number 0945-AA27. First, the letter explains why the IFPC Legal Center believes that any reliance interests should not

¹ 42 U.S.C. 12211(b)(1).



impede the Department’s proposal. Second, the comment affirms the Department’s choice to pursue rulemaking instead of other alternatives.

I. Any reliance interests resulting from the Biden-era 2024 Final Rule preamble are neither reasonable nor justifiable.

Reliance interests do not define statutory language. Nor should they stop an agency from issuing a new regulation or correcting a poorly defined existing one. Reliance interests must be both reasonable and justifiable to be legally cognizable,² and any reliance interests based on the 2024 Final Rule preamble are neither. They are neither reasonable nor justifiable because the preamble to the 2024 Final Rule had no legal effect, the 2024 Final Rule had no power to override statutory language, and the original public meaning of the statutory language of the ADA clearly proscribed gender dysphoria from disability categorization.

A. Final rule preambles have no legal effect.

Final rule preambles are not codified in the C.F.R. and are at most interpretive tools to guide interpretation of the particular regulation which they precede.³ Any reliance on legally ineffective language is unjustifiable, especially when it contradicts clear statutory language to the contrary. Further, the 2024 Final Rule preamble only indicated that an individual with gender dysphoria “may” qualify for disability status,

² See generally Gary M. Bridgens, *Demystifying Reliance Interests in Judicial Review of Regulatory Change*, 29 GEO. MASON L. REV. 411 (2021).

³ 1 C.F.R. § 18.12(a) (“Each agency submitting a proposed or final rule document for publication shall prepare a preamble which will inform the reader, who is not an expert in the subject area, of the basis and purpose for the rule or proposal.”).



not that they definitely would.⁴ The fact that the language in the 2024 Final Rule preamble was ambiguous further illegitimizes any reliance on the preamble.

B. The original public meaning of “gender identity disorders not resulting from physical impairment” included gender dysphoria.

The term “gender identity disorders not resulting from physical impairments” in the ADA—incorporated by reference in Section 504 of the Rehabilitation Act—possessed a particular meaning when Congress enacted it into law in 1990. As Justice Antonin Scalia famously explained, “Words have meaning. And that meaning doesn’t change.”⁵

The commonly accepted term for gender dysphoria used to be “gender identity disorder.” Researchers at Brown University confirm this historical definition: “Gender dysphoria used to be called ‘gender identity disorder.’”⁶ This is further confirmed by the historical record as explained in the Notice of Proposed Rulemaking—the condition now labeled “gender dysphoria” by the DSM-V was previously labeled as a “gender identity disorder” by the DSM-III. “Gender identity

⁴ The 2024 Final Rule preamble explained that “an individual with gender dysphoria may have a disability under section 504 [of the Rehabilitation Act] and 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.” *Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance*, 45 C.F.R. Part 84, (2024), <https://www.federalregister.gov/d/2024-09237/p-51>.

⁵ Jennifer Senior, *In Conversation: Justice Scalia*, *New York Magazine* (Oct. 4, 2013), <https://nymag.com/news/features/antonin-scalia-2013-10/>.

⁶ *Gender Dysphoria*, Brown University Health (last accessed January 20, 2026), <https://www.brownhealth.org/centers-services/mens-health-center/conditions-we-treat/gender-dysphoria>.



disorder”—the language used by the ADA—subsumed what is now referred to today as “gender dysphoria.”

An agency interpretation to the contrary has no power to change the original public meaning of a statutory term. As the United States Supreme Court recognized in *Loper Bright Enterprises v. Raimondo*, agency interpretations of a statute or a regulation are not entitled to special deference.⁷ Rather, correct statutory interpretation is paramount—and here, the clear import of the statutory text does not support the agency’s earlier interpretation. Accordingly, any reliance on the agency’s previously incorrect interpretation is neither reasonable nor justifiable.

II. Implementing the proposed rule is the appropriate course of action.

The Department should implement the proposed rule because other alternatives would be either insufficient to clarify the confusion caused by the 2024 Final Rule preamble or would be too broad in scope. First, the Department should not leave the existing preamble uncorrected while maintaining its position that the preamble language is neither binding nor legally enforceable. Doing so would waste an opportunity to return to a faithful interpretation of the ADA and might even lend credence to the 2024 Final Rule preamble’s position on gender dysphoria. Second, the Department should not stop short of rulemaking and merely issue guidance

⁷ See 603 U.S. 369, 392 (2024) (“[B]y directing courts to ‘interpret constitutional and statutory provisions’ without differentiating between the two, Section 706 [of the APA] makes clear that agency interpretations of statutes—like agency interpretations of the Constitution—are *not* entitled to deference. Under the APA, it thus ‘remains the responsibility of the court to decide whether the law means what the agency says.’” (citation omitted)).



explaining that it interprets “gender identity disorders not resulting from physical impairments” to include “gender dysphoria” for the same reasons. With the change in language in both the DSM-V and common parlance, the Department should enshrine a statutorily faithful interpretation in the C.F.R. rather than only issuing easily-changed guidance. Finally, fully repealing the 2024 Final Rule would be an unnecessarily broad solution to remedy this discrete problem. The proposed regulation is limited in scope and sufficiently addresses the confusion caused by the 2024 Final Rule preamble.

Conclusion

The IFPC Legal Center thanks the Department for proposing this rule and clarifying that gender dysphoria does not count as a disability for purposes of the ADA and Section 504 of the Rehabilitation Act. We strongly urge the Department to adopt this rule.

Sincerely,

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