

United States Senate

WASHINGTON, DC 20510-0609

January 11, 2024

The Honorable Xavier Becerra
Secretary
Department of Health and Human Services
200 Independence Ave SW
Washington, D.C. 20201

Dear Secretary Becerra,

We write to express our profound concerns regarding the notice of proposed rulemaking issued on September 28, 2023, (RIN 0970-AD03) by the Administration for Children and Families (ACF) in the U.S. Department of Health and Human Services (HHS) entitled, *Safe and Appropriate Foster Care Placement Requirements for Titles IV-E and IV-B (88 Fed. Reg. 66752)*, which would impose new mandates on states that would narrow the pool of eligible foster families for children.

The premise of this proposal is that any foster care provider who does not “affirm” a child’s sexual orientation or gender that differs from his or her biological sex is perpetuating and committing child abuse and will be shunned for failing to support the foster child’s “health and wellbeing.” If enacted, this proposal would place further strain on the child welfare system and undermine the ability of states to provide safe, stable, and loving homes to our most vulnerable children.

All children in foster care, regardless of their sexual orientation or gender identity, deserve a safe and proper placement. However, this proposal goes beyond statutory requirements to force states to adopt extreme gender ideology in their placement decisions. Congress intentionally gave states the authority to make those determinations, but HHS has usurped that authority to impose its own woke ideology in place of states’ judgments.

Federal law requires that state and tribal Title IV-E and IV-B agencies develop a case plan for each child in foster care to receive “safe and proper care.” The intent of this language is to ensure that the well-being of foster children remains of utmost priority for child welfare providers. Under the law, state and tribal Title IV-E and IV-B agencies are responsible for determining what constitutes “safe and proper care” for foster children. While HHS claims that the proposal would “support states and tribes in complying with Federal laws that require that all children in foster care receive safe and proper care,”¹ defining “safe and proper care” for a specific subset of

¹ <https://www.federalregister.gov/documents/2023/09/28/2023-21274/safe-and-appropriate-foster-care-placement-requirements-for-titles-iv-e-and-iv-b>

foster children, would undermine state and tribal statutory authority to determine what is in the best interests of a child in their care.

HHS has not provided evidence that states' programs are harming children, or that this rulemaking is necessary. Many commenters agreed; the rule is arbitrary. The Iowa Department of Health and Human Services submitted a comment on the NPRM, which states, "The rule fails to identify a problem with the array of available options today."² Further, 19 state attorneys general, led by Alabama, opposed the NPRM, and note that HHS relies only on one study of a single county in Maryland to support its claim that LGBTQI+ children are overrepresented in foster care.³⁴ That letter goes on to say that, "the proposed rule states, 'A 2020 survey found that LGBTQI+ youth in foster care were 2.6 times more likely to report a past year suicide attempt than LGBTQI+ youth who were not in foster care, with 35% of LGBTQI+ foster youth reporting such an attempt.'" But the cited survey by an advocacy organization asked whether LGBTQI+ youth had "ever been in foster care (even if only for a short period of time)," which means that the survey's positive results would include a 17-year-old who was in foster care for a month as a newborn and had a suicide attempt at age 16."

Furthermore, HHS has also failed to consider – much less quantify – the impact this NPRM will have on the availability of foster care in states that partner with faith-based agencies, particularly in rural areas where there are fewer foster care providers. For example: one faith-based group recruits almost half of foster homes in Arkansas.⁵ We request that HHS provide data and analysis on the impact of the NPRM, including how many faith-based group homes and families will be excluded and how rural areas will be impacted.

Research shows that when faith-based providers are excluded, there are fewer good homes. For example, Boston stopped partnering with faith-based providers in 2006. One year later, the percentage of children who aged out of the Massachusetts foster care system rose by over 50% and has not returned to pre-2006 levels.⁶ In 2011, Illinois passed a law ending its partnerships with faith-based agencies. Between 2012 and 2019, Illinois lost 5,352 foster homes – the most significant decrease in any state that reported that data.⁷ 36% of the families recruited by one Christian organization said they would not have become foster or adoptive parents were it not for that organization's efforts.⁸

Of further issue is the impact this NPRM will have on the participation of foster families and child welfare organizations in states that have laws protecting minors from gender transition

² <https://www.regulations.gov/comment/ACF-2023-0007-4338>

³ <https://www.regulations.gov/comment/ACF-2023-0007-4342>

⁵ <https://arktimes.com/news/arkansas-reporter/2017/12/01/one-faith-based-group-recruits-almost-half-of-foster-homes-in-arkansas>

⁶ See generally, Adoption & Foster Care Statistics, U.S. Dep't of Health & Human Services, Children's Bureau, <https://perma.cc/H7TV-A7QM>.

⁷ Non-relative Foster Homes 2012-2019, Chronicle for Social Welfare, WHO CARES: A National Count of Foster Homes and Families, (April 28, 2020), <https://www.fostercarecapacity.com/data/non-relative-homes>

⁸ Michael Howell-Moroney, On the Effectiveness of Faith-Based Partnerships in Recruitment of Foster and Adoptive Parents, *Journal of Public Management & Social Policy*, No.19, Vol. 2, (2013), pp. 176–177.

procedures. These procedures can cause irreparable harm to children, many of whom have inconsistent parental guidance and lack the physiological development that is necessary to make an informed decision of such consequence. States should not be penalized for acting to protect the children of their state. The NPRM lacks clarity on its impact on Title IV funding streams to states that have laws protecting minors of medical transition procedures. It only causes further confusion.

States have submitted comments saying this will make it harder to provide foster care. The Texas Department of Family Protective Services submitted a comment saying the NPRM would be “cumbersome and would be a further disincentive for providers, thereby creating greater challenges to maintain capacity.”⁹ The Utah Department of Health and Human Services submitted a comment stating that the agency is concerned about “the additional level of burden placed on states by incorporating these changes...The CFSR process is already administratively cumbersome...”¹⁰ The proposed rule would most certainly exacerbate the dire shortage of foster homes and foster parents across the country. More than half of all states have seen a significant decline in licensed foster homes in the past year,¹¹ and states are also grappling with a child welfare workforce crisis. This proposed rule would divert key state resources from foster family recruitment and services and direct them toward compliance with HHS’s unnecessary and unlawful proposal.

Furthermore, this rule requires that states provide means for children to be placed in sex-specific facilities consistent with their “self-identified gender identity,” which undermines the safety and security of foster youth and is inappropriate, as children are in different stages of their development. We are deeply concerned about the chilling effect this proposal will have on prospective foster families, as this rule will likely result in a reduction in the pool of available providers and resource parents.

Moreover, we recognize that the proposed rule notes that HHS “would not require any faith-based provider to seek designation and a safe and appropriate provider for LGBTQI+ children” and that states must meet the proposed rule’s requirements “without imposing substantial burdens on religious exercise of providers.”¹² While accommodations for faith-based institutions are important and welcomed, the proposed rule provides no such protection for families or individual family members who may have conscience objections or sincerely held religious beliefs related to sex and gender.

As the proposal recognized, faith-based child welfare providers are a critical component of the child welfare system. This proposed rule, however, would alienate, if not exclude, a significant number of families motivated by their faith to welcome and serve foster children and their families. More than one-fifth of foster parents say they are motivated to do this work because of their faith. And more than 80% attribute their success in fostering to the support of their faith.¹³

⁹ <https://www.regulations.gov/comment/ACF-2023-0007-4341>

¹⁰ <https://www.regulations.gov/comment/ACF-2023-0007-3567>

¹¹ <https://www.fostercarecapacity.com/data/total-licensed-foster-homes>

¹² <https://www.federalregister.gov/documents/2023/09/28/2023-21274/safe-and-appropriate-foster-care-placement-requirements-for-titles-iv-e-and-iv-b>

¹³ <https://nypost.com/2023/10/07/new-wh-proposal-will-further-alienate-religious-foster-parents/>

The Department’s proposal would put religious families and religious providers in the position of declaring themselves unfit placements for a subset of the foster care pool, in spite of their long track records of excellence in serving and loving all children who need help.

While purported to respect religious freedom, this proposed rule is a creative continuation of the Biden Administration’s campaign to undermine faith-based child welfare providers under the guise of “advancing equity.”¹⁴ The Administration’s attempt to exclude families and remove faith-based providers from participating in the child welfare system if they refuse to conform their beliefs on sexual orientation and gender identity directly violates the unanimous holding of *Fulton v. City of Philadelphia*¹⁵, which clearly stated that, “the refusal of Philadelphia to contract with (Catholic Social Services) for the provision of foster care services unless CSS agrees to certify same-sex couples as foster parents violates the Free Exercise Clause of the First Amendment.”

Every child deserves to thrive in a safe, loving, and stable family, and our concerns with the proposed rule are rooted in our commitment to protect foster youth families and child welfare organizations. For the reasons stated above, we urge the immediate rescission of the proposed rule.

Sincerely,



Roger Marshall, M.D.
United States Senator



Tom Cotton
United States Senator



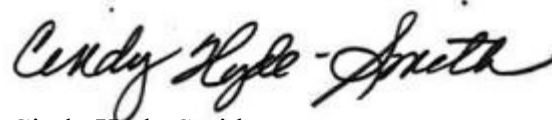
John Barrasso
United States Senator



Markwayne Mullin
United States Senator



Michael S. Lee
United States Senator



Cindy Hyde-Smith
United States Senator

¹⁴ Ibid.

¹⁵ 141 S. Ct. 1868, 1882 (2021)