

December 18, 2019

Mr. Alex M Azar II
Secretary
United States Department of Health and Human Services
330 C St SW
Washington, DC 20416



Re: Response to request for public comments on notice of Proposed rulemaking to repromulgate or revise certain regulatory provisions of the Department of Health and Human Services, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards; RIN 0991-AC16, 84 Fed. Reg. 63831

Dear Secretary Azar,

The Children's Defense Fund (CDF) is pleased to have the opportunity to comment on the Notice of Proposed Rulemaking (NPRM) regarding nondiscrimination protections for programs funded by the U.S. Department of Health and Human Services (HHS), as published in the Federal Register on November 19 (RIN 0991-AC16). CDF is extremely concerned about the wide ranging impacts this rule will have on the vulnerable children who rely on HHS-funded services. We strongly urge you to halt implementation of this rule and to resume enforcement of these vital nondiscrimination protections.

For the more than four decades CDF has been advocating for vulnerable children in our child welfare system, we have been guided by the cardinal rule of child welfare, the best interest of the child must always be paramount. We stand strongly opposed to this rule because allowing taxpayer-funded discrimination will cause further harm to children who have already experienced trauma. This rule allows agencies to prioritize their personal beliefs over the safety, permanency and well-being of the children they are meant to serve. Children will suffer deeply and needlessly if government-sanctioned discrimination is allowed to move forward. While children will undoubtedly be harmed by this discrimination in many programs, as allowed by this NPRM, we have chosen to focus our comments on children in the child welfare system, who will be most deeply impacted by this callous and shortsighted license to discriminate.

CDF stands firmly opposed to discrimination in all its forms. Across the entire country, discrimination has serious impacts on the health, well-being and development of children. As with so many injustices, the people who will suffer most are the children who are already disproportionately failed by our systems. Older youth, LGBTQ+ youth, youth of minority faiths, youth of color and youth with disabilities will face the greatest impacts of systemic discrimination, even if they don't face direct discrimination themselves. As with any resource constraints and policy failures in the system, youth deemed "hard to place" in foster and adoptive homes will be most left behind. Because of the system's inability to meet their needs, they already experience greater placement instability, are more likely to be unnecessarily placed in institutional care and are more likely to age out of the system without the support of a permanent family than their peers. This misguided rule will deepen the failures within our system to keep them safe and protect their wellbeing.

We urge HHS to rescind this rule and to center any future reforms on the needs of children and their families. It is important that HHS consider any potential reform primarily through the lens of potential consequences for the children the system is meant to serve.

This rule threatens the ability of the child welfare system to promote permanency for youth in care by limiting the pool of foster and adoptive parents (or "resource families"). Our child welfare system faces significant shortages in the number of foster and adoptive families necessary to fulfill our duty to the nearly 440,000 children in the system, including the more than 125,000 waiting to be adopted. This rule will exacerbate resource family shortages by discouraging qualified adults from fostering or adopting. There is no evidence that allowing

discrimination will help agencies recruit more resource families and in an amicus brief filed on behalf of the respondent in *Fulton v. City of Philadelphia*, sixteen jurisdictions attested that barring agencies from discriminating did not hinder their ability to recruit more resource families.

What is clear is that potential resource families facing discrimination are less likely to foster or adopt, even if there is another provider in their area that would not discriminate. In many communities, it is not as simple as finding an alternative provider. Potential resource families facing discrimination, particularly those in rural areas, may be forced to travel extremely long distances to find the nearest provider, with no guarantee they won't face discrimination there as well. Research indicates that the more barriers a family faces to fostering or adopting, be they distance or discrimination, the less likely they are to move forward and the more difficult it will be to retain them as a foster parent.

As we work to recruit resource families for the more than 125,000 children in care who are waiting to be adopted, we know that word of mouth is the most important recruitment tool. Only allowing resource families from one faith or one sexual orientation and gender identity cuts off whole communities from being encouraged by peers to foster or adopt. Further, when one family experiences discrimination in the system, their experience can have a ripple effects throughout the community. Allowing a hostile and discriminatory environment for potential foster parents at one agency will make it more difficult for other agencies that are affirming of LGBTQ and religious minority resource parents to recruit families that want to adopt or foster. The only way to guarantee that communities will not be discouraged from fostering or adopting is to ensure that merit is the only factor for licensing resource families at any point in the system.

Our system is already struggling to meet its responsibilities to the nearly 440,000 children in the system who need safe, supportive temporary homes. Across the country, shortages in foster parents are leading to children being made to sleep in agency offices or hotels, instead of growing up in the safe, supportive families the system is meant to provide. Even when circumstances are not as dire, an insufficient number of foster and adoptive parents means children will spend more time in the system, that they will experience greater placement instability, that they will be more likely to be placed in congregate care and ultimately that they will be more likely to age out of the system. With shortages in resource families, turning away qualified foster parents because of their religion, their sexual orientation or their gender identity harms children.

However, we know that simply having enough foster parents won't meet children's needs. To ensure the safety, stability and well-being of children in care, agencies that place children with families need to concern themselves with finding the right family for each individual child. That will never be possible if agencies only recruit resource families of one faith, background or attitude. The children in the care of the system are incredibly diverse. They deserve to be celebrated for every aspect of their complex identities, and a diverse array of foster parents is necessary to ensure that every child is affirmed for who they are, who they love and what they believe. Rejection by family, including temporary families in the child welfare system, can have profound negative impacts on a child's health and well-being. Permitting discrimination will not lead to a child welfare system that is affirming of children's evolving identities. A system built on discrimination cannot create the supportive, affirming environment that children need to grow and thrive.

Research shows that an ideal place for children to grow and thrive is with non-parent relatives (or "kinship caregivers"), who could be sidelined by this rule. Children being raised in kinship families have better placement and educational stability than their peers in traditional foster care. They are less likely to return to the system after reunifying and more likely to be adopted by family if reunification isn't possible. They have better mental and behavioral health and sibling groups are more likely to be kept together. Children placed with kinship caregivers have greater connections to their culture, identity and community, less disruption and a greater sense of belonging. When it is possible, kinship care is generally the best option for kids. This rule, though, would allow agencies to turn away relatives who want to be kinship caregivers solely because of their religion, their sexual orientation or their gender identity even when placement with them would be in the best interest of the child. Discriminating against

potential kinship caregivers will deny children their best placement options and further exacerbate foster parent shortages by pushing children into traditional foster care unnecessarily.

We urge HHS to prioritize building policies that will incentivize prospective resource families to foster and adopt and will help agencies support and retain them, instead of policies which discourage certain groups from fostering or adopting.

Allowing providers to discriminate jeopardizes the safety and well-being of children in foster care. Legally, child welfare systems are obligated to support the safety and well-being of children in foster care. Children will suffer if the very providers that are supposed to care for them and their families can deny services based on non-merit factors. Government-sanctioned discrimination means fewer services will be available to help families reunify. If providers are able to discriminate it will make it more difficult for parents to receive treatment for mental health issues, support in overcoming addiction or services that help them safely parent. These are necessary services that help families reunify and keep kids safe but many communities face a dramatic shortage of providers. In some communities, a single provider is relied upon for all mental health and substance use services. If those providers are allowed to discriminate, it will keep children in the system when they could have returned to safe and loving families.

The provider shortages in the system are especially impactful when providers are allowed to discriminate against the very children the system is meant to protect. Youth in foster care have often experienced significant trauma and access to services is vital to help them heal and thrive. When service providers are allowed to deny services to youth, rather than affirming their identities, they compound the traumas that children experience. The child welfare system cannot be a place that risks causing harm to children but, by allowing discrimination, that is exactly what this rule will do.

Our child welfare system already struggles to service LGBTQ+ youth well, and this rule will make that reality even bleaker. LGBTQ+ youth are overrepresented in child welfare, making up more than one in five youth in the foster care, in large part due to the discrimination they face in their homes of origin. Prior to this rule, LGBTQ+ youth were underserved by a system with a lack of affirming services and with providers who refuse to acknowledge or discuss a youth's sexual orientation or gender identity, even if that is the very reason they entered care. Even without federally-sanctioned discrimination in the system, they are more than twice as likely as their non-LGBTQ+ peers to report poor treatment in the system. Due to a lack of affirming supports, services and placements, they are more likely to be placed in congregate care or to become homeless upon aging out than their non-LGBTQ+ peers. This is especially true of LGBTQ+ youth of color who are being failed by our system, with data showing they are more 65% more likely to experience more than 10 placements than their white non-LGBTQ+ peers. The system's inability to properly provide them stable placements causes significant harm to their health, education and well-being.

The existing protections under that this rule rescinds were insufficient to ensure that LGBTQ+ youth have access to the supports and services they need to thrive, but at least prevented the worst discrimination they could face. By removing those protections, this NPRM allows providers in the child welfare system to openly discriminate against LGBTQ+ youth, further compounding the system's failure to protect them. Discrimination based on sexual orientation or gender identity can cause significant damage to their mental and behavioral health. Facing rejection and discrimination based on a core part of a youth's identity can have immediate and lasting consequences. Even if a youth is able to receive affirming treatment and services from a different provider in the future, the experience of discrimination in the system undermines a youth's ability to heal. Further, regardless of whether youth experience direct discrimination, the knowledge that a system or agency allows discrimination undermines the trust and relationships with caregivers and services providers that youth need to heal from trauma and thrive.

Rather than rescind existing protections, we urge HHS to sincerely interrogate failures in the system that lead to LGBTQ+ youth facing discrimination and disproportionately negative outcomes in a system meant to protect them.

This rule directly contradicts the priorities of child welfare reform, which have been based on decades of research regarding what children need to thrive. Allowing it to move forward runs directly counter to the advice of experts in child development, mental health and violence prevention. In a time when this country is making significant progress toward building the system our children deserve, this rule would undermine that progress. It ignores what research and experts show to be best for kids.

The *Family First Prevention Services Act of 2018*, the most significant piece of child welfare legislation in decades, emphasizes the importance of family-based care. It requires that children only be placed in congregate care settings if they could not safely be cared for in a family. It further ensures that they may only remain in those settings as long as it is strictly necessary for their safety and well-being and then should be moved to a family-based setting. This is undoubtedly a positive change, but as systems shift from unnecessary use of congregate care the need for foster homes will necessarily increase. If regulations prioritize the personal beliefs of agencies over the safety, permanency and well-being of the children they are meant to serve, the child welfare system will not be able to meet its obligations to children.

The *Family First Prevention Services Act of 2018* also creates the Title IV-E Prevention Program, reflecting the knowledge that providing support services to families plays an important role in preventing child abuse and neglect. As child welfare increases its investments in prevention, allowing agencies that provide those services to discriminate against parents will undermine the goal of preventing unnecessary placements in foster care. Discrimination will mean that abuse and neglect that could have been prevented won't be and that children who, with some support, could have remained safely in their homes will face the trauma of family separation. This is simply because the personal beliefs of providers are treated as more important than the health and safety of children.

Additionally, this rule will threaten the religious liberty of youth in care. Rejecting potential foster parents because their religion doesn't pass an agency's ideological litmus test will deprive children of minority faiths the opportunity to grow up in families of the same religion. This directly contradicts HHS guidance that asserts children should have the possibility of "placement in a setting" "where their religious customs can be maintained." Allowing religious discrimination against potential resource parents grants tacit approval to violate the rights of children of minority faiths in the child welfare system. Faith and connection to a religious community are important protective factors for youth in care and we cannot allow them to be denied the free exercise of their religion, for the sake of taxpayer-funded discrimination.

In August, the Children's Bureau released an Information Memorandum that underscored the vital importance of youth and family voices in the planning and improvement efforts of public agencies. For years, youth leaders with lived experience in the system, including the National Foster Care Youth & Alumni Policy Council and members of the Congressional Coalition on Adoption Institute's Foster Youth Internship Program, have worked to identify, create and recommend policies and practices that protect youth in care from discrimination. By ignoring the Children's Bureau's guidance and, worse, the work, wisdom and expertise of youth who have experienced the system first-hand, this NPRM sends a clear message to youth in care that their voices, their experiences and their traumas are not a priority for the system that is meant to keep them safe. We should be applauding the tenacity, bravery and ingenuity of these youth leaders, not silencing their voices in favor of a license to discriminate. There is no better expert on what youth in care need, than the youth themselves.

While we appreciate the attention to improving our child welfare system, we urge HHS to follow the lead of child welfare reformers to build a system that is based on research and the lived experiences of children who have lived experience of foster care.

Outside of the direct discrimination allowed under this rule, the rollback of blanket nondiscrimination protections introduces a pernicious uncertainty to the system. Overarching protections provided clarity within the scope of HHS-funded programs that, no matter what, no one could be denied services based on non-merit

factors. The clear boundaries created by that certainty meant providers knew what they could and could not do and beneficiaries knew what they should expect. This rule removes that certainty and leaves providers and beneficiaries to navigate a confusing patchwork of laws about what is and is not permissible. This confusion will create a space where qualified beneficiaries will avoid services they need for fear of discrimination and where providers believe they have a license to discriminate beyond what is permissible under the law. Though beneficiaries would have legal recourse, the immediate and long-term damage to developing minds caused by discrimination would be done.

We urge HHS to maintain the nondiscrimination regulations in 45 CFR § 75.300 and deepen enforcement to ensure that children and families in the system never have to face discrimination for who they are, who they love or what they believe.

Allowing any federally-sanctioned discrimination creates an environment where youth, especially those who already face unsanctioned discrimination in the system, are more likely to be discriminated against.

Discrimination, in any form harms children. HHS should certainly not disregard the well-being of children in favor of the discriminatory views of a small handful of providers. Government sanctioned discrimination is diametrically opposed to the cardinal rule of child welfare, that the best interest of the child is paramount, and, as such, it should never be allowed in the child welfare system. This NRPM will negatively impact children's safety, permanency and well-being. It is opposed by research and the priorities of child welfare reform and the ones who will suffer most because of it are children who are already most vulnerable.

According to its stated mission, HHS exists to enhance and protect the health and well-being of all Americans," but this proposed rule will do nothing but make our most vulnerable children more vulnerable. Allowing state-sponsored discrimination is a gross dereliction of the agency's duty to protect children. In no uncertain terms, CDF calls on the administration to withdraw this rule and immediately resume enforcement of nondiscrimination policies.

We appreciate the opportunity to offer our comments on the proposed rule and would be happy to discuss them in more detail with you or others on your staff.

Sincerely yours,



Kathleen King
Interim Policy Director
kking@childrensdefense.org; 202-662-3576



Steven Olender
Senior Policy Associate, Child Welfare and Mental Health
solender@childrensdefense.org; 202-662-3698