

February 18, 2020

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 regarding nondiscrimination in matters pertaining to faith-based organizations: implementation of executive order 13831; RIN 0991-AC13, 85 Fed. Reg. 2889

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 in matters pertaining to faith-based organizations funded by the U.S. Department of Health and Human Services (HHS or the Department), as published in the Federal Register on January 17 (RIN 0991-AC13). 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.

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 and any other rule that strips away religious freedom protections of children, especially those youth in the care of government systems. This rule allows agencies to prioritize their personal beliefs over the religious liberty, safety and well-being of the children they are meant to serve. While children will undoubtedly be harmed by this attack on religious freedom in many programs, we have chosen to focus our comments on children in the child welfare system, who will be most deeply impacted by these proposed regulations.

Since its inception, CDF has worked closely with the faith community to advocate for the needs of children. Through our Samuel Dewitt Proctor Institute for Child Advocacy Ministry and our Children's Sabbath program, we have convened thousands of clergy, seminarians, religious educators, community organizers, young adult leaders and other faith advocates to join together in the hard, sacred work of pursuing justice for children and ending child poverty. The history of the children's movement is filled with advocates who exemplify the ideal of the servant leader, called by their faith to the moral vision of a world without child poverty, without abuse or neglect. We understand that the faith community is vitally important for the work of protecting children especially within the child welfare system where people of faith and faith-based organizations have played such a powerful role in providing the safe, stable and loving homes that children so desperately need.

Our experience and connection with the faith community is exactly why we have been so alarmed by the litany of NPRMs that have sought to allow discrimination into the systems meant to protect our most vulnerable children, all in the name of religion. We know the vast majority of communities of faith ardently oppose discrimination knowing that every child deserves the right to not only survive but thrive and realize their God given potential. Indeed, faith-based organizations, faith leaders and people of faith have been at the vanguard of every movement for children's rights and justice. To see discrimination in the name of religion does a grave disservice to the servant leaders who have been called by their faith to advocate for

children's needs. This NPRM puts the beliefs of only a very small fraction of the faith community over the very real needs of vulnerable youth.

This most recent rule rescinds regulations that were put in place "to improve service delivery and strengthen religious liberty." They were based on 12 *unanimous* recommendations by the religiously diverse President's Advisory Council on Faith-Based and Neighborhood Partnerships, which described itself as "the first time a governmental entity has convened individuals with serious differences in some church-state issues and asked them to seek common ground." The express purpose of the council's recommendations was "honoring our country's commitment to religious freedom."

Repealing these religious freedom protections is not a necessary step and does not reflect the will of the broader faith community. This NPRM will provide only a nominal benefit for some faith-based organizations receiving federal funds to provide social services. In doing so, however, it will put the religious liberty, safety and well-being of the beneficiaries of these social services at grave risk.

As with so many things, children will face the greatest burden of these proposed regulations. When parents lose or reject services they need because of this rule, more children will suffer neglect and abuse, causing them to enter the child welfare system. Those children who are already in the child welfare system, dependent on government-funded social services to support them and keep them safe, will experience an undue burden from these faith-based provisions. Children in care of minority faiths and LGBTQ+ youth, often among the most vulnerable to religious discrimination, will face the greatest burden of these changes.

#### **Alternative Provider Requirement**

This NPRM would rescind the requirement in Executive Order 13559 that requires faith-based providers receiving federal funds to provide referrals for beneficiaries who object to the religious character of a provider. Rescinding this requirement will lead adults with children to forgo support services because they are uncomfortable receiving services from a faith-based organization, or from an organization practicing a particular faith that is different from their own. For secular parents, parents of minority faiths and parents who have had negative experiences with religion, working with a faith-based provider may not feel safe, and they may choose not to receive services rather than to put themselves in an undesirable situation. Research has shown that providing support services to families in crisis can help to stabilize and strengthen those families, preventing child maltreatment before it starts. It is, therefore, vitally important that agencies provide options for parents who are struggling but who do not feel safe nor welcomed in certain spaces of faith. Discouraging these families from receiving services they need can lead to more children being unnecessarily pulled into the child welfare system.

Youth will also be directly impacted by this rule, choosing to forgo services where they do not feel affirmed based on their religion, sexual orientation or gender identity. This is of particular importance in the case of LGBTQ+ youth who make up more than 20 percent of the children in the child welfare system. These youth have often been thrown out of their homes, run away or been drawn into the child welfare system on account of facing scorn and violence because of their sexual orientation or gender identity. As such, they are fittingly sensitive to accessing services that are affirming of who they are and who they love, and will likely avoid even necessary services that do not feel explicitly affirming. One study from the Georgetown University Center for Child and Human Development found that as many as 56 percent of LGBTQ+ youth in care spend at least some time homeless because they feel safer on the streets than in group or foster homes, which puts them further at risk of substance abuse, risky sexual behavior, victimization or criminal justice involvement. LGBTQ+ youth already are underserved by the system.

Placing barriers that will make it more difficult for them to access services that are affirming of their identity could prove disastrous.

When the NPRM pertaining to nondiscrimination protections in taxpayer-funded services (RIN 0991-AC16) was introduced in November, proponents of the state-sanctioned discrimination that the rule allowed argued that people who faced discrimination would be able to receive services because they would be able to receive referrals to secular agencies. By removing this regulation, this NPRM compounds the potential damage that discrimination will cause for vulnerable people in seeking help, particularly vulnerable children who don't have the ability to seek out alternate providers if they face discrimination.

The Department argues the repeal of this requirement is necessary because requiring faith-based agencies to offer referrals presents an unfair burden on those agencies. However, the Department refers to the associated costs of this requirement as "minor" and says "the Department estimates that the removal of the referrals requirement would, at most, generate only de minimis benefits for faith-based social service providers." While the Department argues that requests for these referrals is rare, that only proves the burden on providers is minimal. For a single individual, however, the denial of a referral to another provider can have catastrophic impacts, threatening the safety and well-being of children. It is crucial that this regulation remain in place to keep children safe.

#### **Written Notice Requirement**

This NPRM would also rescind the requirement in Executive Order 13559 that requires written notice be provided to beneficiaries of faith-based organizations receiving Federal funds. The notice was required to detail their religious freedom, including that they may not be discriminated against on the basis of their religion, that they cannot be forced to participate in religious activities and that they have the right to seek the aforementioned referrals. People who do not know their rights cannot exercise them, and removing the regulation that informs social service beneficiaries of their rights leaves them further vulnerable. Children, especially, cannot be expected to know their rights or to pursue them. This leaves them susceptible to discrimination, proselytization and religious coercion. Not only does this threaten the religious liberty of children and run counter to the child welfare guideline that children in care must be free to practice their own religion, but it makes it more likely that beneficiaries will withdraw from services they need. This dramatically undermines the purpose of social services and it puts children at risk.

The Department has argued that the requirement to provide beneficiaries with notice of their religious freedoms is overly burdensome for programs. However, in its own estimates, the Department argues that the requirement to provide notice could impose, "a cost of no more than \$200 per organization per year." Surely the religious liberty and, indeed, the safety and well-being of children in care is more valuable than this nominal cost. Allowing such a clear threat to religious liberty to save providers such a small sum would indicate that the Department is not serious about its commitments to protect the religious liberty of people who need its support.

Further, the Department acknowledges that such notices are a valuable tool to inform people about their rights. Within this same NPRM, HHS requires that similar notice be provided to faith-based organizations so they understand their rights. Knowing that the costs of providing notice are minimal and knowing that such notice is an effective tool, we urge the Department to rescind this NPRM and keep the written notice requirement in Executive Order 13559 in place.

### **Expansion of the Title VII Exemption**

This NPRM expands upon the Title VII exemption, which allows for religiously affiliated employers, using their own funds, to prefer co-religionists in employment. It states “an organization qualifying for such exemption may select its employees on the basis of their acceptance or adherence to the religious tenets of the organization” and that such an organization may also “require that all applicants and employees conform to the religious tenets of such organization.” Title VII provides valuable protections for faith-based organizations, but to claim that it should be used to provide litmus tests for taxpayer-funded staff is a perversion of Title VII that runs contrary to the ideals of servant leadership and the broader faith community. Though only a small fraction of faith-based organizations will exercise the right to impose such a litmus test, the impact on the children in their care can be enormous.

Children in care who often do not get a say in their providers or placements, particularly LGBTQ+ youth in care, will be harmed by this expansion of religious discrimination in employment. As seen in the case of Miracle Ministries, whose doctrinal statement denies the existence of transgender and gender non-conforming people and disavows homosexuality, many faith-based organizations that serve youth in the child welfare system have stringent religious tenets. Requiring that the staff at such organizations believe these specific tenets denies LGBTQ+ youth in their care the opportunity to have adults that affirm them for who they are.

LGBTQ+ youth are already underserved by the child welfare system. They report twice the rate of poor treatment in care, longer stays in residential care and significantly more placements than their non-LGBTQ peers. Being rejected for core parts of their identity compounds this further, leading to significant psychological damage. Studies have shown, however, that having just one adult who is affirming of a child’s identity serves as a protective factor for them, and is crucial for healthy development. This rule would deny LGBTQ+ youth placed in the care of religious organizations the opportunity to have even one adult they can trust and feel affirmed by.

The expansion of employment discrimination would also have deleterious impacts on children of minority faiths. Strict doctrinal statements like the one in effect for Miracle Hill Ministries press a religious orthodoxy that will not serve the needs of the religiously diverse population of the child welfare system. When children of minority faiths are placed in the care of agencies that require staff to conform to religious tenets that deny that faith, they cannot reasonably expect that their religious liberty and free exercise rights will be respected. 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 in order to satisfy the beliefs of a small fraction of faith-based providers, especially not using taxpayer funds.

Every single child deserves to be affirmed for who they are, who they love and what they believe. This rule would deny many children that opportunity. We urge HHS to protect the religious liberty, safety and well-being of children in care by removing the right of faith-based organizations to discriminate on the basis of religious tenets in hiring using taxpayer funds.

### **Conclusion**

The faith community has been an indispensable partner in the fight to protect the safety and well-being of vulnerable children. It is vitally important that the rights of faith-based providers be respected. However, it was through the consensus recommendations of a diverse council of faith leaders that these rules come into effect in the first place. Rather than reflect the faith community, this NPRM values the beliefs and the convenience of a small handful of faith providers over the consensus voices of the broader fair community. More importantly it preferences those beliefs over the religious liberty, safety and well-being of vulnerable children.

The child welfare system must always be guided by its cardinal rule, that the best interest of the child must remain paramount. In no uncertain terms, CDF calls on the Administration to withdraw this rule and to focus, instead, on building a system where all children can be safe and affirmed for who they are, who they love and what they believe.

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,



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