ALLIANCE DEFENDING FREEDOM
FOR FAITH. FOR JUSTICE.

November 27, 2023

Jeff Hild
Acting Assistant Secretary
U.S. Administration for Children and Families
VIA REGULATIONS.GOV

RE: Safe and Appropriate Foster Care Placement Requirements for Titles IV-E and IV-B
RIN 0970-AD03, Docket ID ACF-2023-0007

The Rule Will Harm Religious Liberty, Exclude Loving Parents, and Endanger Children

Dear Assistant Secretary Hild,

All across the country, children in the foster system need loving homes. We urgently need more families willing to care for these vulnerable children, not fewer. But now, the Biden administration is threatening to put politics over parents, and gender ideology above children's best interests. The administration's new proposed rule will deter families from fostering children and will make it harder to place children with capable, loving parents. In the process, the new rule threatens free speech, religious freedom, parental rights, privacy, and common sense. Alliance Defending Freedom writes to oppose the rule.

ADF submits this comment on the Notice of Proposed Rulemaking on Title IV-E and IV-B agencies and providers, **RIN 0970-AD03,** Docket ID ACF-2023-0007. ADF is an alliance-building legal organization that advocates for the right of all people to freely live out their faith. It pursues its mission through litigation, training, strategy, and funding. Since its launch in 1994, ADF has handled many legal matters involving the First Amendment, adoption, gender identity, parental rights, women's privacy, and other issues addressed by the proposed rule.

For example, ADF represents Jessica Bates in her effort to adopt children in Oregon after state officials categorically excluded her from the state's adoption and foster system because of her common-sense belief that girls and boys are biologically different.[1] ADF is greatly concerned about efforts that discriminate against people of faith in the foster and adoption system, that deter capable parents from fostering and adopting children, or that otherwise impair constitutional rights. ADF thus urges the Administration for Children and Families (ACF) to withdraw and abandon the proposed rule.

[1] Complaint at 2, *Bates v. Paksereshi*, No. 2:23-cv-00474-AN (D. Or., April 03, 2023), https://bit.ly/3Ri6VW1.

ADF's comment explains how the proposed rule threatens religious liberty, free speech, privacy, children's well-being, and parental rights. By labeling certain providers and families as "not safe" because of their common-sense beliefs, ACF seeks to exclude a large portion of willing applicants from fostering certain kids in need. That hurts children and imperils constitutional freedoms.

I. The proposed rule threatens religious liberty, free speech, parental rights, and children's best interests by requiring states to ensure "safe and appropriate" foster-care placements—but never defining those terms—for children who identify as LGBT.

A. The proposed rule never fully defines "safe and appropriate" but suggests that providers must ensure access to unproven medical treatments, use someone's self-selected pronouns, and affirm gender ideology over biological reality—even if that undermines the best interest of a child.

The proposed rule requires states to provide "safe and appropriate" foster-care placement for children who identify as LGBT. This is both broad and vague.

The rule proposes three requirements that would qualify providers as a "safe and appropriate" placement for LGBT children: 1) The provider "will establish an environment free of hostility, mistreatment, or abuse based on the child's LGBTQI+ status"; 2) The provider "is trained to be prepared with the appropriate knowledge and skills to provide for the needs of the child related to the child's self-identified sexual orientation, gender identity, and gender expression"; and 3) The provider "will facilitate the child's access to age-appropriate resources, services, and activities that support their health and well-being." 88 Fed. Reg. 66756.

As to the first requirement, the rule never fully defines what constitutes "hostility, mistreatment, or abuse." *Id*. This is deliberate. By avoiding precise definitions, the rule empowers officials to label providers and families as "hostile" for simply disagreeing with the state's so-called "appropriate" method for caring for LGBT children. *Id*. Nonetheless, the rule expects providers to "utilize the child's identified pronouns, chosen name, and allow the child to dress in an age-appropriate manner that the child believes reflects their self-identified gender identity and expression." *Id*. at 66757. In other words, providers must fully promote a child's espoused gender identity over and against their sex. Indeed, the rule says that attempts to "undermine, suppress, or change the sexual orientation, gender identity, or gender expression of a child, including through the use of so-called 'conversion therapy'" do not constitute a "safe and appropriate" placement. *Id*.

But as explained more below, clinical data does not support this required approach. In fact, the proposed rule mischaracterizes alternative approaches, such as watchful waiting, as "hostility, mistreatment," and "abuse." *Id.* at 66756. This mischaracterization seeks to punish foster-care providers and families for wanting to affirm children's biology and physiology. As

such, the rule poses a threat to the long-term health and well-being of children in the foster-care system. Indeed, the proposed rule's second requirement—that training curriculum "must reflect evidence, studies, and research about the impacts of rejection, discrimination, and stigma on the safety and wellbeing of LGBTQI+ children and provide information for providers about practices that promote the safety and wellbeing of LGBTQI+ children"—wholly disregards studies revealing the harms of trying to negate a child's biology. *Id*. at 66768.

The third requirement—that states must "facilitate the child's access to age-appropriate resources, services, and activities that support their health and well-being"—leaves states guessing as to what is included in "age-appropriate resources," "services" or "activities" that "support [the child's] health and well-being." *Id*. The rule's non-exhaustive list provides that services "may" include (1) "facilitating access to behavioral health supports respectful of their LGBTQI+ identity"; (2) "interacting with LGBTQI+ mentors and peers"; (3) "joining and participating in affinity groups"; and (4) "connecting the child to available LGBTQI+ supportive resources and events, either in person or virtually depending on local availability." Providers also "must not discourage or prevent the child who identifies as LGTBQI+ from receiving age-appropriate services and supports." *Id*. at 66758. Could these "services," however, also include puberty blockers, cross-sex hormones, and surgeries meant to block a child's natural development? Roughly 21 states have already banned these drugs and procedures as experimental or dangerous. *See L. W. by & through Williams v. Skrmetti*, 83 F.4th 460 (6th Cir. 2023) (upholding Tennessee and Kentucky laws protecting children from these procedures). The administration should clarify and confirm that this rule does not require states to mandate these same unproven procedures deemed illegal under state laws.

The rule's vagueness will also make it harder to place foster children in loving homes that further a child's best interest. For example, ADF recently became aware that a state agency tried to separate siblings in the care of a foster parent simply because one of the children identified as LGBT, and the agency felt that the parent's religious beliefs were not sufficiently "affirming." The agency did so despite the fact that the child *wanted* to remain with the foster parent. Thankfully, the state relented after the child's therapist warned that separating the children was not in their best interests. But under the proposed rule, it is unclear if agencies must remove children who identify as LGBT from religious providers that are considered not "safe and appropriate," even if that means separating a child from her siblings. Or would the rule require that *no child* be placed with a willing religious provider, thereby extending the time these children stay in the foster system? As the rule itself admits, "a significant body of evidence demonstrates that when children in the foster care system are placed with kinship caregivers that they have better outcomes." *Id*. at 66762. But the rule completely ignores this factor—and the best interest of the child—by imposing a categorical rule that would forbid certain placements, including with the child's own siblings.

Likewise, what if a religious grandparent who believed girls and boys are different wanted to foster her two grandchildren, one of whom identified as LGBT? Would the rule forbid that placement, even if that result meant not placing the children in a relative's home and even if

that placement furthered the children's best interest? *See Blais v. Hunter*, 493 F. Supp. 3d 984 (E.D. Wash. 2020) (state violated Free Exercise Clause when it refused to place a child with her great-grandparents because of their religious beliefs about human sexuality).

The administration's rule seems to categorically value a perceived conflict with one aspect of a child's espoused identity above all other considerations—even when those considerations all point to placing a child in a religious family that believes in affirming a child's biology. This categorical approach is inconsistent with the nature of the foster and adoption system which typically evaluates the particular facts about each child and seeks to further the best interest of each child based on those particular facts.

The rule's underlying assumption is that anyone adhering to traditional beliefs about human sexuality cannot ever provide a "safe and appropriate" environment for youth who identify as LGBT. That assumption is unproven and certainly cannot apply to all children who identify as LGBT in the foster system. For example, according to a recent Gallup poll from June 2023, 69% of Americans believe that athletes who identify as transgender should only compete on sports teams that match their biological sex. This trend is on the rise, as that number represents a 7% increase from 2021. Meanwhile, just 26% of Americans said athletes should be able to play on teams designated for the opposite sex. In light of this trend, the proposed rule's assumption could exclude up to 70% of the population from being eligible parents to adopt certain children. *See also* David M. Smolin, *Kids Are Not Cakes: A Children's Rights Perspective on Fulton v. City of Philadelphia*, 52 Cumb. L. Rev. 79, 143 (2022) (estimating that approaches that screen families wanting to affirm a child's biology would "exclude half to two-thirds of prospective and present foster parents.").

This result would be catastrophic for the children in the foster and adoption system. But the rule never estimates how many eligible families it would exclude from the foster system or how it might delay placing children with families, much less evaluate the costs and harms these exclusions and delays would produce on children in the foster system. ADF encourages the administration to consider these possible effects.

B. The proposed rule threatens girls' privacy by requiring agencies to place boys in girls' private spaces.

The proposed rule would require agencies to "make placements consistent with the child's self-identified gender identity" if they are placing children who identify as LGBT in a "sex-segregated child-care institution." 88 Fed. Reg. 66760. This suggests that providers must place a male child who identifies as female in a female-only living space.

This requirement could incredibly harm girls, especially those who have suffered from prior sexual trauma and abuse. For example, in *Downtown Hope Center v. Municipality of Anchorage*, ADF represented a faith-based women's shelter after Anchorage tried to force that shelter to admit a male who identified as female—thereby requiring the women in the shelter to

sleep with and disrobe next to a man.[2] Some of the women in that shelter testified under oath that they had been abused and raped and were seeking refuge in a women's only shelter.[3] As a result, they explained that they would not feel safe sleeping next to a male at that time. As one woman put it, she "would rather sleep in the woods than sleep in the same area as a biological man."

The proposed rule acknowledges that many children in the foster-care system are victims of trauma. Yet it still requires that males who espouse a different gender identity than their sex be housed with females. This requirement poses the same threat to young girls as Anchorage's ordinance did to female victims of abuse in *Downtown Hope Center*.

C. The proposed rule threatens families' right to free speech by pressuring them to use someone's self-selected pronouns and thereby requires them to affirm a view of gender ideology they disagree with.

The proposed rule mandates that state agencies require providers—such as families who want to care for kids who identify as LGBT—"to utilize the child's identified pronouns" and "chosen name." *Id*. at 66757. The First Amendment, however, does not countenance compelled ideological speech—even in situations where it tries to do so as a condition of accessing a government benefit or program. *See Agency for Int'l Dev. v. Al. for Open Soc'y Int'l*, *Inc*., 570 U.S. 205, 214 (2013).

In this case, compelling parents to use particular pronouns to access child-welfare programs is viewpoint-based compelled speech. The First Amendment protects "the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Thus, the government "may not compel affirmance of a belief with which the speaker disagrees." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995). When the government tries to do so anyway, it violates this "cardinal constitutional command." *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018). In the context of gender identity, requiring someone to use a person's self-selected pronouns "convey[s] a powerful message" that "[p]eople can have a gender identity inconsistent with their sex at birth." *Meriwether v. Hartop*, 992 F.3d 492, 507-08 (6th Cir. 2021) (professor stated viable free-speech claim when university punished him for not using feminine titles and pronouns for male student). The use of pronouns concerns "a struggle over the social control of language in a crucial debate about the nature and foundation, or indeed real existence, of the sexes." *Id.* at 508. Refusal to use self-selected pronouns reflects the "conviction that one's sex cannot be changed, a topic which has been in the news on many occasions and has become an issue of contentious political debate. *Id.*

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[2] Complaint, *The Downtown Soup Kitchen v. Mun. of Anchorage*, No. 3:18-cv-00190-SLG (D. Alaska, August 16, 2018), https://bit.ly/3RiduIc.

[3] *See* Declarations of Downtown Hope Center Residents, *The Downtown Soup Kitchen v. Mun. of Anchorage*, No. 3:18-CV-00190-SLG (D. Alaska signed Nov. 1, 2018), https://bit.ly/3QW7F20.

Next, the Administration's pronoun requirement is also unnecessary, particularly for families who can use a child's self-selected name (just not their pronouns). The rule never explains what good it does to pressure providers and families to use particular pronouns in this situation beyond requiring ideological uniformity.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe" such orthodoxy. *Meriwether*, 992 F.3d at 506 (6th Cir. 2021) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). For example, in Kansas, a school district tried to force Pamela Ricard, a math teacher at Fort Riley Middle School to violate her religious beliefs by requiring her to use a student's "preferred name" to address a student in class while using the student's legal name when speaking to parents.[4] Ricard sued school district officials after they reprimanded and suspended her for addressing a student by the student's legal and enrolled last name. The federal court ruled that she is free to speak without violating her conscience by communicating with parents in a manner consistent with how she is required to address the students at school. Additionally, the court acknowledged that Ricard can continue addressing students by their preferred names while avoiding pronouns for students who have requested pronouns inconsistent with their biological sex.[5]

Policies that pressure families to address a child using a false pronoun violate their right to free speech protected by the U.S. Constitution. Families cannot be required to refer to boys as girls and girls as boys in violation of their conscience as a condition of fostering.

D. The proposed rule pays lip service to religious liberty while pressuring states to exclude foster-care providers that adhere to traditional beliefs about marriage, biology, and human sexuality from fostering children who identify as LGBT.

The proposed rule tries to restructure the foster-care system to prevent the placement of children who identify as LGBT with religious providers that affirm biology. This creates a regulatory framework that is hostile toward certain religious views.

In *Fulton v. City of Philadelphia*, 593 U.S. ----, 141 S. Ct. 1868 (2021), the Supreme Court made clear that the First Amendment protects faith-based entities that provide foster-care services. The Court held that Philadelphia violated the Free Exercise Clause when the city ended its agreement with a state-licensed foster care agency affiliated with the Roman Catholic Archdiocese because that agency would not violate their beliefs and certify same-sex couples as prospective foster families. *Id.* at 1882.

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[4] ADF, Court: Kansas teacher free to speak consistent with her religious beliefs, https://bit.ly/3TW59cG.
[5] *Ricard v. USD 475 Geary Cnty,, Kan. School Board*, No. 5:22-cv-04015-HLT-GEB, 2022 WL 1471372 (D. Kan. May 9, 2022).

To be sure, the proposed rule tries to exempt faith-based foster agencies from many of its requirements. But the scope of these exemptions remains unclear. The proposal still requires contractors, sub-recipients, and placement providers not seeking designation as "safe and appropriate" placements for LGBT children to be informed of the procedural requirements, including the non-retaliation provision. Furthermore, although the rule provides an exemption framework for religious providers, the accommodation-request process does not appear to apply to individual foster parents. And concerns remain about the implications of the proposed rule on individual foster-care providers with deeply held religious beliefs who may not be directly affiliated with a faith-based organization. These concerns are especially acute when the proposed rule requires the "totality" of placements to be in compliance with the rule, which will incentivize state actors to minimize or avoid any individual exemptions.

The federal government should not pressure foster families to violate their common-sense views on sexual ethics in order to care for children. The official designation in federal regulations of religious providers and families of faith as not "safe" nor "appropriate" caretakers for LGBT children will have far-reaching consequences that extend well beyond foster care. This designation implies that a home that espouses traditional ethics of marriage, sexuality, and gender identity is harmful to LGBT children. That principle, once established, will not only pose problems for families of faith in the foster-care context but also for families in child-custody disputes and beyond. If applied more broadly, the rule's logic could establish the principle that any home in which parents follow the science and seek to affirm a child's biology, or have traditional religious beliefs, are deemed not to be "safe" parents—a principle that, if taken to its ultimate conclusion, would deem the vast majority of parents across the country to be unfit to care for their own biological children who identify (or may identify in the future) as LGBT, putting them at risk of losing custody of their own children. Any principle that has such a wide-reaching effect should be reconsidered at the outset and abandoned.

Furthermore, the rule's vague promise to respect religious liberty is no substitute for up-front religious exemptions. By omitting up-front exemptions, the rule seeks to chill speech and coerce as much compliance as possible by entities fearful of taking their chances on enforcement proceedings or litigation. The proposed rule thus seeks to force each religious foster-care parent to undergo years of litigation. On top of this, HHS's exemption addresses religious freedom only, so it offers no hope for non-religious providers.

E. The proposed rule violates the major questions doctrine and ignores the clear statements required under the federalism canon.

Federal agencies lack the power to decide major questions of vast economic and political significance, let alone take sides on matters of widespread debate. It would be "odd indeed" if Congress had tucked authority to negate the state child protection laws in such "a relatively obscure provision" of federal foster-care grant powers. *Sackett v. EPA*, 143 S. Ct. 1322, 1340 (2023). And, of course, Congress enacted no such thing. Simply put, the proposed rule seeks to "discover in a long-extant statute an unheralded power to regulate" parenting and child

healthcare. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (cleaned up)—claiming for themselves a power to resolve one of the most highly contentious social, political, and cultural decisions, *West Virginia v. EPA*, 142 S. Ct. 2587, 2605 (2022). But this power belongs to the people's elected representatives, and neither courts nor federal officials may employ "[a]n overly broad interpretation" of a longstanding statute to decide for themselves such a major question. *Sackett v. EPA*, 143 S. Ct. 1322, 1340–41 (2023).

The federal government "never previously claimed powers of this magnitude." *Biden v. Nebraska*, 143 S. Ct. 2355, 2358 (2023). And so, in addition to the major questions doctrine, the federalism clear-notice canon applies. This clear-statement rule is triggered by any rule that displaces a traditional area of state authority. Congress thus must use "exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *Sackett v. EPA*, 143 S. Ct. 1322, 1341 (2023) (cleaned up). This canon is also triggered by any regulation in which HHS seeks to use a grants statute to regulate under the Spending Clause. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 24 (1981). HHS cannot add any grant conditions unless they were "unmistakably clear in the language of the statute," *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (cleaned up), at the time of enactment, *Carcieri v. Salazar*, 555 U.S. 379, 388 (2009). HHS may not surprise grantees "with post acceptance or 'retroactive' conditions." *Pennhurst*, 451 U.S. at 25.

II. The proposed rule does not consider the harms of requiring agencies and families to immediately promote a child's espoused gender identify over their sex.

The proposed rule assumes that providers should promote children's perceived gender identity over their sex anytime they experience any discomfort or incongruence with their natal sex. This approach recommends that any expression of a child's gender identity should be immediately accepted as decisive, and thoroughly promoted by means of consistent use of clothing, names, or pronouns, for example. But this approach is not supported by the available clinical data, nor does it consider the long-term (and indeed potentially lifelong) harms.

In an expert affidavit provided in *Doe v. Madison Metropolitan School District*, Dr. Stephen B. Levine, Clinical Professor of Psychiatry at Case Western Reserve University School of Medicine, identified many of the concerning implications of this "affirmative" approach.[6]

As Dr. Levine's affidavit outlined, psychiatrists and psychotherapists have different views about the causes of and appropriate therapeutic response to gender dysphoria in children, and existing studies cannot determine which therapeutic response results in the best long-term outcomes for affected individuals.[7] Nonetheless, the proposed rule unquestioningly adopts an

[6] *See* Expert Aff. of Dr. Stephen B. Levine, *Doe v. Madison Metro. Sch. Dist.*, No. 20-CV-454 (Wis. Cir. Ct. signed Feb. 10, 2020), https://bit.ly/3TSOerz.
[7] *Id.* at ¶¶ 22–44.

"affirmative" response to children manifesting gender dysphoria or similar discomfort with their sex without engaging in any literature supporting opposite views.

Furthermore, as Dr. Levine explained, a majority of children (in several studies, a very large majority) who are diagnosed with gender dysphoria "desist"—that is, their gender dysphoria did not persist—by puberty or adulthood.[8] At the same time, studies also suggest that the active affirmation of young children's espoused transgender identity will substantially reduce the number of children "desisting."[9]

Dr. Levine went on to explain how a so-called "social transition" as part of an "affirmative" response (i.e., the use of different names, pronouns, or clothes, for example) is itself an important intervention with profound implications for a child's long-term mental and physical health.[10]

Dr. Levine outlined how putting a child or adolescent on a pathway towards presenting as the opposite sex puts that individual at risk of many long-term or even lifelong harms, including sterilization (whether chemical or surgical) and associated regret and sense of loss; physical health risks associated with exposure to elevated levels of cross-sex hormones; surgical complications and lifelong after-care; alienation of family relationships; inability to form healthy romantic relationships and attract a desirable mate; and elevated mental health risks.[11]

Indeed, Dr. Levine's more recent expert report submitted in *B.P.J. v. West Virginia Board of Education* (concerning a West Virginia law protecting women's ability to compete in women's sports) indicated that the concerns with an "affirmative" approach have only heightened in light of new scientific studies and international developments.[12]

Dr. Levine's latest report noted that the knowledge base concerning the "affirmative" treatment of gender dysphoria has very low scientific quality with many long-term implications still unknown.[13] Furthermore, Dr. Levine explained that internationally, there has been a marked trend away from "affirmative" care and toward better psychological care.[14]

Yet the proposed rule never addresses these important considerations. Instead, the proposed rule threatens to standardize the psychotherapeutic intervention known as "social transition" and then to make physical "transition" interventions standard care for gender-

[8] *Id.* at ¶ 60–62.
[9] *Id.* at ¶¶ 63–64.
[10] *Id.* at ¶¶ 65–69.
[11] *Id*. at ¶¶ 98–120.
[12] Decl. & Expert Rep. of Dr. Stephen B. Levine, *B.P.J. v. W. Va. State Bd. of Educ.*, No. 2:21-cv-00316 (S.D. W. Va. Feb. 23, 2022), ECF No. 286-1, https://bit.ly/3L19WFw.
[13] *Id*. at ¶¶ 140–59.
[14] *Id*. at ¶¶ 76 & 82.

dysphoric minors in foster care. Puberty blockers and cross-sex hormones could be offered to children as young as nine years old. After receiving these, minors could then undergo irreversible surgeries.

ACF should consider a different path—that children who struggle with discomfort with their sex should not be medicalized or subject to life-altering procedures. They should be given counseling as a part of watchful waiting or other assistance furthering desistance. This type of consensual talk-based counseling should not be labeled harmful or "conversion therapy"—as the rule incorrectly does. Indeed, a federal appellate court surveyed some of the research about this counseling and found a "complete lack of rigorous recent research" and "no clear indication of the prevalence of harmful outcomes among people who have undergone" such counseling. *Otto v. City of Boca Raton*, 981 F.3d 854, 869 (11th Cir. 2020) (cleaned up). Thus, at least in some situations, counselors, parents, and other foster-care providers should be free to continue to pursue such consensual counseling.

In short, neither ACF nor "safe and appropriate" foster-care providers pursue children's best interest when they seek to change a child's natural biological development. Instead, they are putting children on the course of needing lifelong medical care and are putting children at risk of many serious complications, including sterility, sexual dysfunction, infections, and other serious problems.

ACF thus should withdraw the proposed rule and instead take action to protect religious liberty, parental rights, and the safety and well-being of children in the child welfare system.

Respectfully submitted,

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