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November 27, 2023

U.S. Department of Health & Human Services
Administration for Children and Families
Mary E. Switzer Building 330 C Street, S.W.
Washington, D.C. 20201

Subj: Safe and Appropriate Foster Care Placement Requirements RIN 0970-AD03

Dear Sir or Madam:

On behalf of the National Catholic Bioethics Center, we respectfully submit the following comments on the proposed regulations, published by the Administration for Children and Families (ACF) of the Department of Health and Human Services at 88 Fed. Reg. 66752 (Sept. 28, 2023), on foster care placement requirements.

The National Catholic Bioethics Center (NCBC) is a faith-based organization engaged in bioethics publication, education and consultation to thousands of persons seeking its services. It has a membership of 1300 members, representing individuals, dioceses, parishes, health care corporations, educational institutions, social services agencies, among many others. Thus, the impact on membership far exceeds the official number of members. Through our consultation services increasingly we are made aware of challenges to families and children, including the value to children of a stable nuclear, and even extended family, in which the complementarity of sexual roles is recognized and modelled. Furthermore, there is a great need for clarity in terms of the legally protected right to religious freedom of individuals and institutions seeking to address the health and social services needs of the very populations served by HHS. These entities often rely on federal grants, partnering with the federal government to meet the needs of residents of the United States, and beyond.

The regulations would require placements that are "safe" and "appropriate," an environment free of "hostility," "mistreatment," and "abuse," and access to services that support the child's "health" and "well-being." While laudable, one troublesome feature of the proposed regulations is that they make these requirements applicable not to all minors, but only to those who present issues with respect to gender identity or sexual orientation (SOGI). In fact, every child in the foster care system should be provided with a safe, appropriate placement. No child should be subjected to hostility, mistreatment, or abuse of any kind, or be denied services that support his or her health and wellbeing. These norms should apply to all minors and should not be focused in their application to some subset of minors or to SOGI specific cases.

Other provisions of the proposed regulations also are problematic because they propose, incorrectly, that gender affirmance is the only and best way to treat gender dysphoria. The regulations would therefore require agencies to ensure that children "who identify as LGBTQI+" have access to "services that are supportive of their sexual orientation and gender identity, including clinically appropriate mental and behavioral health supports." At the same time, the regulations would prohibit attempts to "undermine, suppress, or change the sexual orientation or gender identity of a child." These provisions, read together, mean not that children as persons must be affirmed and supported, as they should, but that specific inclinations or behaviors with respect to SOGI—and only those inclinations and

behaviors, no matter how confused, inconsistent, transitory, or ambivalent—must be affirmed. Only through a whole-person approach are the best interests of the child truly taken into account and the child's special needs met.

Furthermore, experts report that, in the vast majority of cases (roughly nine out of ten), gender dysphoria is resolved in favor of an individual's biological sex. By requiring a gender affirming approach to gender dysphoria, the proposed regulations ignore a substantial body of evidence on the health risks associated with that approach and the positive outcomes associated with alternatives.

It should be noted, that while the preamble to the regulations helpfully acknowledges the government's obligation to accommodate the conscience rights of private foster care providers, the regulations themselves are silent on this subject. As to such rights, we believe the regulatory text should mirror the statements in the preamble.

I. Safe and Appropriate Care for Minors

The opening paragraph of proposed Section 1355.22(a) states that the title IV-E/IV-B agency "must meet the following requirements for each child in foster care who identifies as lesbian, gay, bisexual, transgender, queer or questioning, or intersex, as well as each child who is non-binary or has non-conforming gender identity or expression (LGBTQI+)." 88 Fed. Reg. at 66768. Thus, judging from the opening paragraph, the requirements set out in Section 1355.22 appear to relate only to a subclass of minors, not all minors.

Subsequent paragraphs in subsection (a) shift again to a subclass of minors: 88 Fed. Reg. at 66768 (proposed Sections 1355.22(a)(1)(i); 1355.22(a)(1)(iii); and 1355.22(a)(3)). It is not clear why the requirement of a safe and appropriate placement, access to services that support the minor's health and well-being, or the protection of his or her privacy, should apply only to a subset of minors, or why the prohibition against hostility, mistreatment, or abuse should be limited to acts or omissions predicated on SOGI. We believe that these requirements—a safe and appropriate placement, access to services that support a minor's health and well-being, and the safeguarding of a child's privacy—should be required for all minors. Likewise, all minors should be free from hostility, mistreatment, or abuse of any kind, whether or not predicated on SOGI. Thus, these aforementioned requirements should apply to all children.

II. Gender Identity

The proposed regulations would require agencies to ensure that children "who identify as LGBTQI+," regardless of age or circumstance, have access to "services that are supportive of their … gender identity…." 88 Fed. Reg. at 66768 (proposed Section 1355.22(a)(5)). The regulations do not specify what services ACF deems "supportive" other than to say that it "includ[es] clinically appropriate mental and behavioral health supports." 88 Fed. Reg. at 66768 (proposed Section 1355.22(a)(5)). The preamble states that these supports include at least "utiliz[ing] the child's identified pronouns, chosen name, and allow[ing] the child to dress in an age-appropriate manner that the child believes reflects their self-identified gender identity and expression." 88 Fed. Reg. at 66757. Utilizing identified pronouns, chosen name, and cross-dressing would lay the groundwork for other interventions such as hormone therapy, puberty blockers, and even surgery. In addition, the proposed regulations would prohibit "attempts to undermine, suppress, or change the … gender identity of a child." 88 Fed. Reg. at 66768 (proposed Section 1355.22(a)(4)).

Health care professionals must not affirm what is not true. Furthermore, the first duty of the health professions is to do no harm. The proposed regulations, in our view, do not pass that fundamental test. "According to the DSM-5, as many as 98% of gender confused boys and 88% of gender confused girls eventually accept their biological sex after naturally passing through puberty." American College of Pediatricians, Gender Ideology Harms Children ¶5 (Sept. 2017), https://cplaction.com/wp-content/uploads/Gender-Ideology-Harms-Children.pdf, citing American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013). Clinicians cannot reliably identify the small percentage of children whose gender dysphoria will not naturally resolve from others. (Brief of Amici Curiae Dr. Paul R. McHugh, M.D., Dr. Paul Hruz, M.D., Ph.D., and Dr. Lawrence S. Mayer, Ph.D. in Support of Petitioner (Jan. 10, 2017), at 13, Gloucester County Sch. Board v. G.G., No. 16-273 (U.S.) ("[T]here is no evidence that any clinician can identify the perhaps one-in-twenty children for whom gender dysphoria will last with anything approaching certainty.").

Other effective and less harmful interventions exist. Cognitive Based Therapy (CBT) has been shown to be useful in treating other body dysphoria disorders associated with increased risk of death, such as anorexia nervosa. Persons with gender dysphoria would benefit from such treatment of depression and anxiety along with aggressive counseling and medications directed to those conditions.[1] The harms associated with a gender-affirming approach,[2] and the absence of credible evidence of long-term benefits from such care,[3] have led to changes in the treatment of gender dysphoria in Europe.

The European medical community is expressing doubts about the gender-affirming approach. Having allowed these treatments for years, five countries—the United Kingdom (U.K.), Sweden, Finland, Norway, and France—now urge caution in their use for minors, stressing a lack of evidence that the benefits outweigh the risks. This month, the U.K.'s publicly funded National Health Service for England limited the use of puberty blockers to clinical trials, putting the drugs beyond the reach of most children. "These countries have done systematic reviews of evidence," said Leor Sapir as cited in the June 19, 2023 article in the *Wall Street Journal* (a fellow who studies transgender care at the conservative-leaning Manhattan Institute think tank). "They've found that the studies cited to support these medical interventions are too unreliable, and the risks are too serious."[4]

The evidence of risk and harm is beginning to surface: "more than a quarter of the patients" who have undergone gender transition subsequently regret it.[5] Minors, who are now adults, are seeking damages for the harm done to them. Earlier this year, Chloe sued her doctors and health care providers

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[1] Catholic Medical Association, *The Ideology of Gender Harms Children* (Sept. 8, 2023), at https://www.cathmed.org/resources/the-ideology-of-gender-harms-children/.

[2] The risks of hormone therapy and puberty blockers are so great that at least 21 states have barred the practice for minors. L.W. v. Skrmetti, 83 F.4th 460, 471 (6th Cir. 2023) (listing 19 states in addition to Tennessee and Kentucky).

[3] See Paul Dirks, *Transition as Treatment: The Best Studies Show the Worst Outcomes*, THE PUBLIC DISCOURSE (Feb. 16, 2020) ("The mainstream narrative often says that medical transition is well-studied, and that there is academic consensus on its effectiveness. In reality, the literature is fraught with study design problems, including convenience sampling, lack of controls, cross-sectional design, small sample sizes, short study lengths, and enormously high dropout rates among participants."), at https://www.thepublicdiscourse.com/2020/02/60143/.

[4] Jathon Sapsford and Stephanie Armour, *U.S. Becomes Transgender-Care Outlier as More in Europe Urge Caution* WALL STREET JOURNAL (June 19, 2023), at https://www.wsj.com/articles/u-s-becomes-transgender-care-outlier-asmore-in-europe-urge-caution-6c70b5e0. See also L.W. v. Skrmetti, 83 F.4th at 477 (noting that "some of the same European countries that pioneered these treatments [of puberty blockers and hormone therapies for gender dysphoria] now express caution about them and have pulled back on their use.").

[5] E. Abbruzzese, Stephen B. Levine, and Julia W. Mason, The Myth of "Reliable Research" in *Pediatric Gender Medicine: A Critical Evaluation of the Dutch Studies—And Research That Has Followed*, 49 J. OF SEX & MARITAL THERAPY 673, 673-74 (2023: 691), at https://www.tandfonline.com/doi/full/10.1080/0092623X.2022.2150346.

for injuries she alleges resulted from the defendants' gender-affirming approach. *Brockman v. Kaiser Foundation Hospitals*, No. STK-CV-UMM-2023-0001612 (Cal. Super. Ct., County of San Joaquin, Stockton Branch) (filed Feb. 22, 2023). Similarly, on September 13 of this year, Luka sued her health care providers and physicians for injuries she alleges resulted from gender-affirming care. *Hein v. UNMC Physicians*, No. D01C1230007381 (Neb. Dt. Ct. Douglas County) (filed Sept. 13, 2023).

Read together, these various aforementioned provisions in the Proposal require care that "affirms" or "supports" a minor's self-expressed gender identity; every other approach is prohibited. Our principal point is that the proposed requirement of a gender-affirming approach is not in the best interests of children. It also follows that a prospective foster parent should not be excluded from the foster care program on the ground that he or she does not agree with or implement a gender-affirming approach to gender dysphoria, and this is true whether or not the foster parent's views on this point are based on religious or secular grounds (or both). We believe that the requirement of gender-affirming approach, and the prohibition of alternative approaches that are effective and less risky than gender-affirming interventions, violate the ACF's statutory duty to provide for the care and appropriate placement of minors. 42 U.S.C. § 675(1)(B) (stating that children in foster care must receive "safe and proper" care).

III. Sexual Orientation

The proposed regulations would require agencies to ensure that children "who identify as LGBTQI+" have access to "services that are *supportive* of their sexual orientation…." 88 Fed. Reg. at 66768 (proposed Section 1355.22(a)(5)) (emphasis added). The regulations do not specify what services it deems "supportive" of sexual orientation other than to say that it "includ[es] clinically appropriate mental and behavioral health supports." *Id.*

Provisions require care that "affirms" or "supports" a minor's self-expressed sexual orientation and forbid other approaches with positive outcomes. We believe this requirement and prohibition violate ACF's statutory duty to provide for the appropriate care and placement of minors. 42 U.S.C. § 675(1)(B) (children in foster care must receive "safe and proper" care). Children, as noted earlier, are best supported in a loving environment that treats and affirms them as whole persons. A tunnel-vision approach that requires confirmation of one set of affective traits or behaviors to the exclusion of all other factors does them a disservice.

Moreover, the Proposal fails to identify what is meant by "facilitat[ing] the child's access to age-appropriate resources, services, and activities that support their health and well-being." 88 Fed. Reg. at 66768 (proposed Section 1355.22(a)(3)). What does "age-appropriate" mean in the context of sexuality for minors, especially for minors under the age of consent in various jurisdictions? Sexuality, of course, is inextricably tied to acts which, by statute, many minors cannot provide consent due to age. And what is included in the term "services"? Will that mean that "safe and appropriate" providers will be forced to obtain hormone replacement therapy, double mastectomies, genital alterations, and other such "services" for the children they are supposed to protect in foster care?

The Proposal specifically mentions "interacting with LGBTQI+ mentors and peers" as a possibly "age-appropriate resource" that "safe and appropriate providers" must facilitate. *Id.* at 66758. But it does not explain anywhere the parameters of such access. Since LGBTQI+ identity is centered around an individual's gender identity with implications concerning sexuality, the ACF ought to consider setting behavioral standards to avoid minors engaging in sexual activity before the age of consent. This is especially important in the case of these "mentors," who, presumably, are adults in positions of authority

over vulnerable youths. Clearly, there is a need to address the required vetting of any adult who would be in a position of authority, even as a mentor, for any youth.

We believe that the proposed regulations, by mandating the affirmation of LGBTQI+ identity and forbidding all other approaches, fail to adequately protect the best interests of all children and violate ACF's statutory duty to ensure a foster care environment that is safe and appropriate. It also follows that a prospective foster parent or foster care agency should not be excluded from the foster care program on the ground that they do not agree with or implement an orientation-affirming approach, whether or not their views on this point are based on religious or secular grounds (or both).

IV. Religious Liberty

The preamble to the proposed regulations includes many laudable statements about religious liberty and other freedoms. 88 Fed. Reg. at 66761-62. To be sure, such statements in the preamble are helpful, but they are relegated to the preamble and not actually replicated in the text of the proposed regulations. Because statements in a regulatory preamble are not themselves legally enforceable, functioning much like legislative history in relation to statutory text, see, e.g., *Wyeth v. Levine*, 555 U.S. 555, 577 (2009) (declining to defer to agency views set out in the preamble to a regulation as opposed to the regulation itself), we believe the regulations should incorporate these assertions so that they are legally binding on the federal government, states, and tribes.

While it is noted that ACF recommends that states and tribes do not adopt selection criteria that adversely disadvantage any faith-based organizations that express religious objections to providing safe and appropriate placements for LGBTQI+ children, this is only a recommendation. It should be a requirement. Furthermore, the very statement indicates that such a religious objection is inconsistent with providing a safe environment.

Thus, the conscience protections for persons and agencies/institutions that have a religious character/belief would effectively be threatened by parts of these regulations. Such persons and entities should be expressly safeguarded for their deeply held moral and religious beliefs protected by the U.S. Constitution's First Amendment, the *Religious Freedom Restoration Act* (RFRA), and the *Civil Rights Act* of 1964 (and subsequent amendments). This final Proposal, when finalized (Final Rule) must assure the religious and conscience protections guaranteed under these aforementioned laws and regulations. The requirements to respect religious liberty and not to disadvantage faith-based organizations with respect to their religious objections should not be tucked away in the preamble or expressed merely as "recommend[ations]" (88 Fed. Reg. at 66762), but set out as requirements in the regulations themselves.

We are grateful that the Proposal indicates the ACF takes seriously its obligation to comply with the Constitution and Federal laws, including First Amendment, RFRA, and that it remains fully committed to thoroughly considering any organization's assertion that any obligations imposed by the final rule conflicts with their rights under those laws. However, it asserts that it will consider any "accommodation" requests on a case-by-case basis. *Id.* As the U.S. Supreme Court has recently made clear, the First Amendment protects faith-based entities that provide foster care services. See *Fulton v. City of Philadelphia*, 593 U.S. (2021). Consistent with this protection, the proposed rule, if adopted, should not require any faith-based provider to seek an accommodation or designation as a safe and appropriate provider for LGBTQI+ children as described in this proposed rule if the provider had sincerely held religious objections to doing so.

V. Seeking Clarity

In reviewing the Proposal, we seek clarification concerning the following provisions:

- Definitions of "hostility," "mistreatments," "abuse," "age-appropriate resources," "services," "activities," "support health and well-being," training which constitutes "appropriate knowledge" and "skills?" No specific training is proposed, although two examples are given.
- If it is deemed that puberty blockers and transition surgeries are not in the best interest of the minor, does denial of such interventions constitute abuse or neglect?
- The Proposal indicates that agencies must create a process for placements of LGBTQI+ youth and for reporting of concerns, suggesting that agencies utilize existing abuse and neglect reporting and investigating procedures. Does this indicate that ACF holds as abusive and neglectful non-affirmation of LGBTQI+ *behavior* (emphasis added) by minors, whose identity may be fluid and masking of vulnerabilities which need to be addressed?
- Is affirmation the only approach acceptable to ACF? Does ACF consider "talk therapy," as "conversion therapy?" The Council for Psychotherapy of the United Kingdom has stated that explorative gender therapy is NOT "conversion therapy.": https://x.com/JamesEsses/status/1720212123878306026?s=20.
- Whether foster children will have to be given access to drugs and surgeries for "gender transitions?"
- Must foster care agencies and foster care parents provide for a wardrobe and use neopronouns inconsistent with the child's biology? How are such First Amendment rights of such persons protected?
- What are the rights of non-LGBTQI+ youth, and what are the rights and responsibilities of sex-segregated institutions?
- What about other identities which children can invoke? Under the same rationale, should not this Proposal also protect them, for example, children who want to worship frequently?
- How will threats to states-rights be protected, including the rights of states whose constituents have determined their state's policy on such issues?
- How are agencies and their staff to identify LGBTQI+ youth, to address their needs and comply with the requirements of the Proposal when data support the fluidity of such identity in minors? Additionally, this Proposal seems to give agency and their staff the ability to determine the sexuality or sexual identity of minors under the age of 14, as it states that it applies youths of that age who "[h]ave disclosed their LGBTQI+ identity or whose LGBTQI+ identity is otherwise known to the agency." 88 Fed. Reg. at 66768. This gives an unwarranted ability to discriminate against religious foster care parents and providers by arbitrarily deciding that a child falls within such a status, as is "otherwise known" by the agency. Moreover, this would allow an agency to confuse further an already troubled youth by speculating as to the youth's sexuality in an official capacity, the harm of which could be psychologically irreparable.
- What about the rights of biological parents of children in foster care? Could this rule make it more difficult for children to return to their biological parents?

In summary:

We endorse many of the general requirements described in the proposed regulations. However, we urge ACF to make requirements for a safe and appropriate environment, free of hostility, mistreatment, and abuse, with access to services that support the child's health and well-being, applicable to all minors rather than limit them to a class of minors or to SOGI issues. Furthermore, we assert evidence adduced by experts that gender dysphoria in minors is satisfactorily resolved in the vast majority of cases without a gender affirming approach. We affirm the demonstrated harm of gender-affirming interventions, and the successful outcomes of alternative approaches. We request that ACF consider the personal accounts of individuals who say they were injured by the gender-affirming interventions they received as minors, interventions for which the proposed regulations would lay the groundwork, if not facilitate.

The Proposal will require an orientation-affirming approach to LGBTQI+ in minors, as these proposed regulations would do. There is an underlying assumption that affirmation is the only appropriate response and faith-based providers are not appropriate placements for LGBTQI+ youth. Religious organizations, therefore, must choose to accommodate a view of sexuality with which they disagree, or else be designated as not "safe" for LGBTQI+ youths. The ACF's Proposal essentially could remove faith-based foster care providers from this service to which they have been committed for centuries. Thus, this will minimize the number of available providers that can foster LGBTQI+ youth; thus, increasing likelihood they children will not be placed.

Again, we thank you for the provisions that do protect the rights and dignity of persons who identify as LGBTQI+ youths. However, we believe *all* youths needing foster care deserve safe and appropriate care, in an environment free of hostility, mistreatment, and abuse, and access to services that support the child's health and well-being. We are grateful for the opportunity to express our concern for the wellbeing of the persons we mutually are committed to supporting.

Sincerely yours,

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