



ADVANCING FAITH, FAMILY AND FREEDOM

December 19, 2019

Submitted electronically

Jennifer Moughalian
Acting Assistant Secretary
Office of the Assistant Secretary for Financial Resources
Department of Health and Human Services
200 Constitution Avenue, NW
Washington, DC 20210

Re: Public comment regarding the Proposed Rule “Notification of Nonenforcement of Health and Human Service Grants Regulation”

RIN: 0991-AC16

Dear Madam,

Family Research Council welcomes, and writes to support, the Department of Health and Human Services’ (HHS) recent issuing of a proposed rule to “repromulgate or revise certain provisions of HHS, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards.”¹

This proposed rule will allow faith-based adoption agencies to continue serving children in need—as they have been doing for centuries—without the federal government requiring them to compromise their religious nature and beliefs. It is crucial that the government does not punish these agencies for their sincerely-held religious beliefs, but instead allows them to continue placing children in wonderful homes. This proposed rule reaffirms that religious organizations may remain free and able to contribute to the public good of our society—such as placing those children in most need of a home with a loving mother and father—without governmental discrimination.

Religious liberty—the acknowledgment that God, not government, is of greatest importance in a person’s life—is a founding principle of our nation and is woven into the fabric of our society. People of faith may freely engage in the public square or with the government without compromising their beliefs. This freedom to live out one’s faith without interference from the government benefits not only the individual but also the common good. For example, research shows that Christians are over twice as likely to adopt than the average population.² If Christians

¹ Office of the Assistant Secretary for Financial Resources; Health and Human Services Grants, Proposed Rule, Nov. 19, 2019, Regulation RIN 0991-AC16, <https://www.federalregister.gov/documents/2019/11/19/2019-24385/office-of-the-assistant-secretary-for-financial-resources-health-and-human-services-grants>.

² Natalie Goodnow, “The Role of Faith-Based Agencies in Child Welfare,” The Heritage Foundation, May 22, 2018, accessed December 17, 2019, <https://www.heritage.org/civil-society/report/the-role-faith-based-agencies-child-welfare>.

are free to “look after orphans...in their distress” (James 1:27), our communities and nation benefit.

Defects with the Current Rule

The current rule, which had modified 45 CFR §75.300(c) and (d), has been problematic ever since it was published as a final rule on December 12, 2016. When an agency issues a proposed or final rule, that agency must prepare an analysis that meets the requirements of the Regulatory Flexibility Act (RFA) and publish such analysis in the Federal Register.³ The RFA usually requires agencies to ensure that the rule will not unnecessarily impact small entities. If the rule will not significantly impact a substantial number of small entities, it does not apply. The rulemaking that originally promulgated and amended 45 CFR 75.300(c) and (d) in 2016 raises significant concerns about compliance with the requirements of the RFA. As explained in the proposed rule, HHS at that time had neither performed an RFA analysis nor expressly certified that the rules “will not . . . have a significant economic impact on a substantial number of small entities.” The rulemaking simply declared that it would “not have a significant economic impact beyond HHS’s current regulations.” It did not even acknowledge small entities or their strong interests, which should have been protected by the RFA process. And yet this rule has significantly impacted small groups, especially adoption agencies. HHS failed to make the certification and provide the factual statement described by the RFA. Therefore, we support HHS’ exercise of its enforcement discretion as it chooses not to enforce this defective rule.

Adverse Impact of the Current Rule

Under the current rule, faith-based adoption providers and other entities are no longer eligible for funding unless they comply with requirements that often force them to violate their faith. A number of these adoption agencies have served a crucial role in society for centuries by placing children with loving families. Many of these agencies are motivated by their faith, specifically the idea that children deserve a home with a loving mother and father. The proposed rule not only ensures that these agencies are protected, but it also more effectively serves the children in need of help. When a larger and more diverse number of agencies remain open, they will be better poised to help the many children in the foster care system.

The Current Rule Has Already Violated Religious Freedom

The current rule has been used to attack faith-based adoption and foster care providers, forcing them to either violate or compromise their beliefs. Earlier this year, South Carolina Governor Henry McMaster had to ask HHS for a special waiver from this regulation so that Miracle Hill, the state’s largest provider of foster homes, could remain open. This process diverted time and resources away from helping the vulnerable children of South Carolina.⁴ While HHS ultimately granted the waiver because the regulation violated the Religious Freedom Restoration Act

³ 5 U.S.C. §§ 603, 604.

⁴ Letter to Governor Henry McMaster from Steve Wagner, Principal Deputy Assistant Secretary of Administration For Children and Families, January 23, 2019, accessed December 17, 2019, <https://governor.sc.gov/sites/default/files/Documents/newsroom/HHS%20Response%20Letter%20to%20McMaster.pdf>.

(RFRA), that waiver has now come under attack.⁵ As noted in the proposed rule, “Some Federal grantees have stated that they will require their subgrantees to comply with the non-statutory requirements of § 75.300(c) and (d), even if it means some subgrantees with religious objections will leave the program(s) and cease providing services rather than comply.” HHS is correct to note that “such an outcome would likely reduce the effectiveness of programs funded by federal grants by reducing the number of entities available to provide services under these programs.”

Similar Governmental Policies Elsewhere Have Violated Religious Freedom

Elsewhere, the attack on faith-based adoption and foster care providers has been fierce and expansive, as various states and localities across the nation have shut down these entities.⁶ This is even occurring in places where laws are in place to offer protection from government discrimination, like Michigan. Litigation against Catholic Charities in Michigan has led to a preliminary injunction against enforcement of 75.00(c) because of protected speech and religious exercise rights.⁷ Moreover, Catholic Charities was clearly targeted by its opponents, despite the fact that children in their care had been adopted to parents who identify as lesbian, gay, bisexual, or transgender (LGBT).⁸

Forcing Faith-Based Entities Out of Operation Harms Children

Despite a desperate need for hundreds of foster homes, the city of Philadelphia terminated its foster placement contracts with Catholic Charities and Bethany Christian Services—two of its nearly 30 partner agencies—because they were faith-based. These terminated contracts resulted in empty foster homes and left children languishing in the system because fewer agencies were working on their behalf. One such empty foster home was Cecelia Paul’s. She had fostered over 130 children, adopted six, and been named “Foster Parent of the Year.” Foster parents like Sharonell Fulton, who is caring for two special needs children, may not be able to continue fostering because they no longer have access to the training, resources, and support of Catholic Charities, which she and others have observed as superior to that of government agencies. Even worse, sibling groups are in danger of not being placed together. When another agency transferred a child into Catholic Charities’ custody so that it could be placed with its sibling already in Catholic Charities’ care, the city didn’t respond favorably. Although the city did not separate the siblings, it sent a notice to its partner agencies demanding written acknowledgment of the referral contract termination, thus indicating that siblings would not automatically be placed together in the future.⁹

⁵ “Coalition Letter to HHS Secretary Azar on South Carolina Child Welfare Exemption Request,” November 19, 2018, accessed December 17, 2019, <https://www.aclu.org/letter/coalition-letter-hhs-secretary-azar-south-carolina-child-welfare-exemption-request>.

⁶ See Travis Weber, “The Child Welfare Provider Inclusion Act: Ensuring a Fee Market of Adoption Providers,” Family Research Council, April 2018, accessed December 17, 2019, <https://downloads.frc.org/EF/EF18D31.pdf>.

⁷ See *Buck v. Gordon*, No. 1:19-cv-286 (W.D. Mich. Sept. 26, 2019) (ECF No. 70) (“Defendant Azar shall not take any enforcement action against the State under [45 CFR 75.300\(c\)](#) based upon [plaintiff’s] protected religious exercise. . . .”)

⁸ Complaint, *Buck v. Gordon*, United States District Court for the Western District of Michigan Southern Division, filed April 15, 2019, accessed December 17, 2019, <https://s3.amazonaws.com/becketnewsite/Complaint-in-Buck-v.-Gordon.pdf>.

⁹ Mary Beth Waddell, “National Adoption Month Launches with Assault on Faith-Based Adoption,” *Townhall*, November 19, 2018, accessed December 17, 2019,

When Catholic Charities was closed down in Boston, adoptions in Massachusetts dropped by 28 percent (a drop of approximately 800) from 2008-2012.¹⁰ Meanwhile, opioid overdoses in Boston increased by 130 percent from 2011 to 2015, putting greater strain on the foster care system.¹¹ From 2012 to 2014, there was a 200 percent change in the difference between the numbers of children waiting for adoption and children adopted,¹² showing that there are more children languishing in the system at the same time that we need to keep more agencies open and able to help them. By protecting religious freedom for all entities, the proposed rule will ensure the maximum number of agencies are available to help children.

Forcing Faith-Based Entities Out of Operation Harms Special Needs Children in Particular

When Catholic Charities was kicked out of Illinois, it had been one of 50 agencies partnering with the government¹³ and had been awarded a plaque by the governor's office for "doing an exceptional job at finding homes for children with special needs."¹⁴ Yet the state terminated Catholic Charities' contracts due to their religious beliefs. Because of this termination, more kids had to stay in group homes, and more kids (particularly special needs children)¹⁵ bounced from foster home to foster home, struggling to find one equipped for their needs.¹⁶ Also, due to fewer foster parents, some foster homes essentially became miniature group homes. Nearly 2,000 children were displaced by the forced shutdown, constituting 11 percent of the children in Illinois' foster care system.¹⁷

As reported by the U.S. Conference of Catholic Bishops and others in a recent court filing, "[o]f the 3,794 completed adoptions by Catholic Charities agencies in 2009, 1,721 (45 percent) were of children considered to have special needs. In the same year, 541 of 1,716 adoptions (32 percent) provided by Bethany Christian Services, the largest faith-based adoption agency in the United States, were of hard-to-place older children previously in foster care."¹⁸ Discriminating against faith-based adoption and foster care providers like these, and forcing them out of the marketplace, makes victims of the children and families they help serve. The proposed rule will ensure this does not happen.

<https://townhall.com/columnists/marybethwaddell/2018/11/19/national-adoption-month-launches-with-assault-on-faithbased-adoption-n2536117>.

¹⁰ Weber, "The Child Welfare Provider Inclusion At: Ensuring a Fee Market of Adoption Providers."

¹¹ "Health of Boston 2016–2017," Boston Public Health Commission, Research and Evaluation Office, 2018, accessed April 22, 2018, https://www.boston.gov/sites/default/files/health_of_boston_2016-2017.pdf.

¹² Weber, "The Child Welfare Provider Inclusion At: Ensuring a Fee Market of Adoption Providers."

¹³ USCCB First Freedom Episode 16: "Steve Roach – Keep Kids First," accessed December 17, 2019, <https://soundcloud.com/usccbclips/episode-16-keep-kids-first-with-steve-roach>.

¹⁴ Ibid.

¹⁵ "Catholic Charities USA 2016 Annual Survey Final Report," Center for Applied Research in the Apostolate, Georgetown University, Washington, D.C., June 2017, accessed December 17, 2019, https://cara.georgetown.edu/qtn/ccusa16_report/CCUSA_2016_Annual_Survey_Report.pdf.

¹⁶ Kelsey Bolar, "Here's What Happened After Liberal Activists Shut Down Catholic Adoption Providers in Illinois," *The Daily Signal*, May 21, 2018, accessed December 17, 2019, <https://www.dailysignal.com/2018/05/21/heres-what-happened-after-liberal-activists-shut-down-catholic-adoption-providers-in-illinois/>.

¹⁷ Weber, "The Child Welfare Provider Inclusion At: Ensuring a Fee Market of Adoption Providers."

¹⁸ Brief for the U.S. Conference of Catholic Bishops et al. as Amicus Curiae Supporting Petitioners at 22, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), <https://www.scotusblog.com/wp-content/uploads/2016/01/Zubik-USCCB-brief.pdf>.

Forcing Faith-Based Providers Out of Operation Harms Women Who Would Partner with Them

Shutting down faith-based agencies also harms women faced with an unplanned pregnancy. Kelly Clemente and Adrian Collins tell the stories of how the faith-based agencies they worked with saved their lives. Kelly, who had supportive parents, had suicidal thoughts and said that her caseworker was “the first person that saw and heard [her] and made [her] feel like there was light at the end of the tunnel [she] was trapped in.” Kelly rightly notes that “[i]t’s not fair to take away birth mothers’ right to a faith-based agency because these women don’t just have a physical problem. Some of these women are at their weakest moment spiritually.”¹⁹ Similarly, Adrian says, “[t]he moment I walked into Hope’s Promise . . . I knew I’d found a safe place.” Her caseworker was one of her “greatest advocates” who “provided hope and encouragement during a time of doubt and sadness.” She writes, “[e]very encounter I had with the agency left me with greater clarity, direction, and a renewed sense of hope.” The support she received continued throughout her initial postpartum “journey of healing,” until she felt strong enough to be on her own. Better than most, Adrian understands that “[r]emoving faith-based agencies . . . may create unnecessary fears, anxiety and possible depression for birth mothers who already face a difficult decision.”²⁰ By protecting religious freedom for all entities, the proposed rule will ensure that faith-based agencies remain open and available to help these women and their children.

The Current Rule’s Requirements Are Unnecessary

Lastly, the requirements under the current rule in 45 CFR §75.300(c) and (d) are unnecessary. As noted in the proposed rule, nondiscrimination requirements already exist in law. Furthermore, those who identify as LGBT can adopt in all 50 states through multiple agencies in each state, a fact which has been noted by some in the LGBT community.²¹ Current nondiscrimination law, together with the changes in the proposed rule, will result in religious freedom and nondiscrimination requirements being respected, while at the same time ensuring that children are cared for by keeping open the maximum number of diverse agencies available to help them.

Conclusion

We support HHS’ commitment to protecting religious liberty and ensuring that our communities’ most vulnerable members have as many agencies working on their behalf as possible. We urge the adoption of the proposed rule.

¹⁹ Mary Beth Waddell, “Forcing faith-based agencies out of the system is a disservice to women,” *The Hill*, June 15, 2018, accessed December 17, 2019, <https://thehill.com/opinion/healthcare/397065-forcing-faith-based-agencies-out-of-the-system-is-a-disservice-to-women>.

²⁰ Adrian Collins, “This is My Choice: A Birth Mom’s Plea to Protect Faith-Based Adoption Agencies,” *The Christian Post*, June 6, 2018, accessed December 17, 2019, <https://www.christianpost.com/voice/this-is-my-choice-a-birth-moms-plea-to-protect-faith-based-adoption-agencies.html>.

²¹ Brad Polumbo, “Protecting Religious Adoption Agencies Won’t Stop LGBT People from Adopting,” *National Review*, July 31, 2018, accessed December 17, 2019, <https://www.nationalreview.com/2018/07/protecting-faith-based-adoption-agencies-will-not-stop-lgbt-people-from-adopting/>.

Respectfully submitted,

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