CONCERNED WOMEN for AMERICA

September 11, 2023

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services
Washington, DC 20201

RE: (RIN) 0945–AA19 HHS-OCR-2023-0011-0001

Dear Secretary Becerra,

The proposed Health and Human Services Grants Regulation, HHS-OCR-2023-0011-0001 (Rule), is unconstitutional and will only serve to worsen current regulatory confusion administering HHS grants. What is needed is a full repeal of the Obama Rule you have disavowed as grounds for dismissing a legitimate lawsuit against you in *Holston United Methodist Home for Child., Inc. v. Becerra*, No. 2:21-CV-185, 2022 WL 17084226 (E.D. Tenn. Nov. 18, 2022), and to clarify rights under grant requirements consistent with Supreme Court precedent, including the major questions doctrine and upholding universal religious freedom rights.

This rule, on the other hand, weaponizes grant rules against recipients for the purpose of promoting an unscientific ideological agenda around sexuality and gender, which improperly overrules the fundamental definition of sex in law. Rewriting the meaning of sex in nondiscrimination statutes is a major question for legislative decision making not executive rulemaking. It has significant consequences for the operation of longstanding programs passed by Congress. As Justice Ruth Bader Ginsburg declared in *United States v. Virginia*, "enduring" differences between the sexes are "not fungible." For example, declaring a male can be "female" has direct consequences for maternal health programs, among numerous other matters.

An activist interpretation of *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020), for the purpose of advancing your policy preferences is no defense for such an overzealous mandate as proposed here to change the meaning of sex, to the detriment of millions of women. Federal statute does not provide you that authority nor justification.

As CEO and President of the largest grassroots public policy women's organization dedicated to upholding the health and well-being of women and children and defending our constitutional freedoms, I write in strong opposition to this Rule as fundamentally illegitimate, illegal, unreasonable, and overtly antagonistic to the foundations of sex discrimination in these long-standing grant programs designed to promote the health education, and welfare of women, children, and families. The substantial concerns of women we present to you cannot be ignored and must be answered.

**HHS Must Follow Supreme Court Precedent**

As stated in 45 CFR §75.300(d) and necessarily left unchanged in this rulemaking, "HHS will follow all applicable Supreme Court decisions in administering its award programs." And the fact of the matter is

that the U.S. Supreme Court has been clamping down on executive overreach through rulemaking in recent decisions. The Biden Administraiton has been on the losing side of many of these challenges (i.e. *West Virginia v. EPA*, 597 U. S. ____ (2022)). These are directly applicable to the Rule administering HHS award programs.

Most recently in *Nebraska v. Biden*, 600 U. S. ____ (2023), the Supreme Court ruled that major questions are the role of the legislative branch to resolve. The executive branch cannot claim power to legislate. The major questions doctrine upholds the constitutional separation of powers in federal law and policymaking which is why The Biden Administration was on the losing side of that case involving student debt cancellation. In reversing and remanding the Court wrote:

> *All this leads the Court to conclude that "[t]he basic and consequential tradeoffs" inherent in a mass debt cancellation program "are ones that Congress would likely have intended for itself." West Virginia, 597 U. S., at ___. In such circumstances, the Court has required the Secretary to "point to 'clear congressional authorization' " to justify the challenged program. Id., at ___, ___ (quoting Utility Air Regulatory Group v. EPA, 573 U. S. 302, 324). Nebraska* at ___ (slip op. at 24-25).

Here also, there is no authorization for this radical departure from the text of the law. Changing the fundamental meaning of sex in long-standing statutory programs by executive or administrative fiat with substantial consequences to the purpose of nondiscrimination on the basis of sex under grant award programs is not a power granted the executive branch. The Rule imposes undefined, fluid, subjective notions of "sexual orientation" and "gender identity" which have no basis in federal statute. The Rule will inevitably result in arbitrary and capricious interpretation and enforcement. It is a clear violation of major questions doctrine and renders the Rule woefully illegitimate.

Similarly to the Court's conclusion in *Nebraska*, in justifying the change here the agency "provides no authorization for the Secretary's plan even when examined using the ordinary tools of statutory interpretation—let alone 'clear congressional authorization' for such a program." *Nebraska* at ___ (slip op. at 25).

Under your leadership, HHS has been on a crusade to mandate a new taxpayer-funded definition of sex on Americans through Section 1557 of the Affordable Care Act (ACA) and strip faith-based and secular providers of their rights of conscience and religious belief. Such efforts have been unsuccessful in rewriting the meaning of sex under ACA, including appellate court reprimands in *Franciscan Alliance v. Becerra*, 47 F.4th 368, 376 (5th Cir. 2022), and *Sisters of Mercy v. Becerra*, 55 F.4th 583, 589 (8th Cir. 2022).

The Supreme Court has chided government actors in recent significant cases for undue exclusion of faith-based providers and discriminatory attacks on religious expression:

- In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017), the Supreme Court held that under the First Amendment's Free Exercise Clause, an applicant could not be excluded from a state grant program simply because of the applicant's religious nature.
- In *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), the Supreme Court held that the Free Exercise Clause required that a state program using state income tax credits aid

benefit K-12 schools could not be denied to certain private schools based on their religious status.

- *În Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Supreme Court held that the Free Exercise Clause required the government to provide regulatory accommodation to a funded, faith-based foster care placement agency.
- In *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), the Supreme Court held that concerns about violating the Establishment Clause did not justify a public school taking actions against a football coach that violated his right to neutral treatment under the Free Exercise and Free Speech Clauses.
- In *Carson v. Makin*, 142 S. Ct. 1987 (2022), the Supreme Court held that the principle of Free Exercise neutrality required state aid to be provided on equal terms to public and private high school students, including students attending "sectarian" schools.

All of these cases have relevance here exposing the illegitimacy of this Rule seeking to mandate viewpoints regarding unlimited and subjective notions of sexuality and "gender identity" that antagonize First Amendment rights and subject targeted recipients to heightened government scrutiny and entanglement to enforce a preferred but ultimately arbitrary viewpoint. By squandering taxpayer funds in a foolish exercise to impose activist policy preferences in major long-standing federal health and human service programs the Administration shows great contempt for the Constitution and the women who stand to lose the most under this misguided pursuit.

These ideological policy preferences have significant impacts for recipient obligations that the Rule leaves undisclosed, untreated, unsubstantiated, and unenforceable.

**Expansion of scope**

The Rule expands the scope of application to include "activities, projects, assistance" (**§**75.300(d)) without providing the adequate cost benefit analysis or quantifiable regulatory impact required by law. Exactly what is covered in the Rule that has not been previously? What is the cost for small entities? This assessment is required by law.

This provision also exposes the fallacy of the changes sought in the Rule:

> c) It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs, activities, projects, assistance, and services, to the extent doing so is prohibited by *federal statute*. (*Id.* emphasis added).

The Rule collapses on its own weight by appropriately retaining language that *federal statute* is the authority for prohibiting sex discrimination, not a rogue administrative interpretation.

If HHS refuses to acknowledge this, it neuters the entire Rule, where in the legislative history specifically governing each of these programs has federal statute authorized inclusion of "sexual orientation" or "gender identity"? It cannot be found. None of the HHS grant programs under this Rule are authorized by federal statutes prohibiting sex discrimination beyond a plain meaning of the male and female binary as has always been understood by both the legislatures and the courts. For that reason, no recipient should be obligated to follow the Rule.

**Religious Liberty**

As proposed, §75.300 (f)(1) acknowledges some recipients may be "exempt" from this rogue expansion of interpretation. It states that such recipients may seek exemption or modification of the new mandate through "application of a federal religious freedom law, including the Religious Freedom Restoration Act (RFRA) and the First Amendment."

But it is clear in the myriad hoops the rule creates that HHS believes religious liberties are not inalienable rights, but they require "Mother May I" entanglement with the federal government. Every dollar with strings attached can be used to strangle the very liberties recipients should be guaranteed.

HHS is turning a blind eye to what the Supreme Court has declared in several recent cases (as discussed), that government aid cannot be denied based on religious character. In *Espinoza*, it dealt with a state program using state income tax credits and said it could not be denied to certain private schools based on their religion. Yet this Rule sets itself to commit the same constitutional violations.

As proposed, HHS agents are set to judge what recipient is worthy of exemption from government-mandated ideology. As stated in §75.300(f) (3): "The awarding agency, working jointly with ASFR or OCR, will, in legal consultation with OGC, assess whether there is a sufficient, concrete factual basis for making a determination and will apply the applicable legal standards of the relevant law." Given this Administration's poor track record respecting religious liberty, instead showing outright hostility toward religion and setting itself against its free exercise in case after case, it is more than reasonable for Americans to feel that HHS has not met its burden with this poorly written Rule.

It has become clear in case after case that the "applicable standards of the relevant law" the Administration believes are applicable are not the same as that which the Supreme Court continues to uphold by overruling Administrative action that continues to abuse constitutional rights.

Lacking any standard or objective criteria for determining exemption and citation of exact standards of relevant law, this rule is arbitrary and capricious and likely in violation of the Administrative Procedures Act (APA).

**Sexualizing Head Start**

What exactly are the requirements for Head Start recipients after adding "sexual orientation and gender identity" to these regulations? Among the Social and Emotional development learning goals for Head Start is this: "Describes self using several different characteristics. Goal P-SE 9."

Does the Department expect Head Start to incorporate instruction of multiple sexual and gender identities in its program? What exactly will be expected of Head Start recipients to comply with the mandate against discrimination on the basis of sexual orientation and gender identity?

Will parents be able to opt out their children from any discussions that violate beliefs or conscience?

Head Start's focus on equity has placed special emphasis on African American boys. Will exposure to controversial concepts of sexual and gender identity also disproportionally impact boys based on race? How will this mandate along with guidelines for "developmentally appropriate curriculum" like this one found in Head Start objectives not result in race-based outcomes: "Inspire Black boys to inquire, play,

and explore new ideas, and create space for gender non-conforming boys by breaking down stereotypes of Black masculinity (Browne & Gilmore 2021)?"

Will Head Start providers be expected to have specific training and/or programming to help *preschoolers* describe their sexual attraction or" gender identity?" Where has federal statute granted authority for requiring this as a matter of nondiscrimination?

These questions must be answered definitively. We are talking about minors here. The assault on children's innocence through the indoctrination of sexual content and concepts in Head Start programs and activities cannot be tolerated. Yet that will be the practical impact of the Rule. If you disagree, you must state clearly why and how this will be actively prevented. The fact that disadvantaged children would be the pawns of this aggressive ideology and that Head Start would be used as a tool for advancing viewpoints rejected by the majority of federal taxpayers is unconscionable. Parents have the constitutional right to direct the upbringing of their children on matters of sexuality, not the federal government through Head Start programs.

**Impact on other identified programs**

The vague language of the sweeping mandate imposed by the Rule augments the likelihood that it will be found in violation of the APA. The Rule raises substantial questions of meaning and obligation. HHS has not adequately quantified the regulatory impacts required by law.

The questions we ask here are concerning enough, but they are not nearly exhaustive of the substantial questions HHS must be able to answer concerning the seismic, unauthorized rewrite of sex discrimination provisions imposed by this Rule:

Will Community Mental Health programs require recipients to affirm the declaration of a gender identity that is incongruent with a person's actual sex? Will recipients be required to follow the HHS Notice and Guidance on Gender Affirming Care, Civil Rights and Patient Privacy which discriminates against any viewpoint that discourages gender transition treatments that destroy healthy bodies?

What is the regulatory impact of redefining sex for Maternal and Child Health Block Grants? What is the definition of "maternal" and how is it impacted by the addition of "gender identity"? Where has Congress explicitly authorized an interpretation of "maternal" that is anything other than applying to the female sex? Under the Rule, could a male who self-identifies as a "woman" and desires "maternal" services to satisfy a desire for "motherhood" be eligible for "feminizing" treatments? Precisely what procedures are required under this Rule? Chest reconstruction? "Chestfeeding" assistance?

Will Child Health program grants be required to follow HHS guidance advocating use of puberty blockers, cross-sex hormones, and surgeries on youth who express an "identity" incongruent with their biological sex? What peer-reviewed, scientific, evidence-based research defends current HHS guidance and definitively concludes such "gender transition" treatments are fully safe for minors, improve lifelong health, do not irreversibly maim the development of a young, healthy body, and do not increase long-term health risks?

Puberty blocking drugs and cross sex hormones have never been approved for use on minors by the Food and Drug Administration. In fact, over 20 states have enacted laws prohibiting use of so-called

"gender affirming" drugs and surgeries to protect the health and welfare of children and youth. Many European countries are doing a U- turn based on the sheer lack of evidence, the disregard for mental health issues, and the undeniable long-term health risks. What authority does HHS cite to justify hijacking states with "gender identity" mandates for care in these grant programs that are being vigorously challenged, proven ineffective, and resulting in serious regret?

Does the Rule require Family Violence Prevention and Services programs to force parents to accept a daughter's desire to cut off her breasts to become a "boy" or face charges of child abuse or neglect? Does the Rule require parents to affirm a child's "gender identity" or sexual orientation? What specific changes to handling custody disputes are new obligations in adding "sexual orientation" and "gender identity" to sex nondiscrimination provisions? Where has Congress authorized this change for the Family Violence and Prevention Services program? To other programs identified in the Rule?

**Family Impact Analysis**

HHS is required by law under Section 654 of the Treasury and General Government Appropriations Act, 1999, Pub. L. 105-277, to assess the impact of proposed regulations on families on enumerated dimensions, including whether "the action strengthens or erodes the authority and rights of parents in the education, nurture, and supervision of their children," and "the action establishes an implicit or explicit policy concerning the relationship between the behavior and personal responsibility of youth, and the norms of society." Where is this assessment? Without this analysis this Rule fails its legal obligation to analyze burdens that Congress has identified as relevant for HHS rulemaking. These fundamental policy questions must be answered.

In conclusion, it is regretful that HHS seeks illegitimate authority to do what it knows it cannot do through the appropriate legislative process, lacking considerable support from the American people, to redefine sex discrimination provisions in federal statutes to advance novel, unscientific, subjective, undefinable identities that strip the reality of the sexes from its foundation and disproportionately hurt women.

Nothing in the legislative history of these HHS statutes or statutory interpretation by the U.S. Supreme Court has changed the meaning of sex as applied to nondiscrimination requirements established by Congress to govern these programs. HHS has no legitimate authority to rewrite federal statutory civil rights provisions to redefine the immutable characteristic of sex to mean "sexual orientation" and "gender identity" and thus force recipients to pledge allegiance to a divisive, destructive ideology. Neither *Bostock* nor any other case offers cover to the radical redefinition of sex discrimination under HHS grant programs.

HHS should back off this crusade, withdraw this Rule, and cease squandering time and resources on advancing a politically-motivated agenda that will hurt women and families, possibly causing irreparable harm that will ruin many lives.

Sincerely,

Penny Nance
CEO and President
Concerned Women for America