November 17, 2023

Submitted electronically
Kathleen McHugh
Director, Policy Division, Children's Bureau
Administration for Children and Families
Department of Health and Human Services
330 C Street, SW
Washington, DC 20201

Re: Public comment regarding the notice of proposed rulemaking entitled "Safe and Appropriate Foster Care Placement Requirements for Titles IV-E and IV-B"
RIN: 0970-AD03

Dear Director McHugh,

Family Research Council (FRC) is a nonprofit research and educational organization dedicated to articulating and advancing a family-centered philosophy of public life. Our vision is a prevailing culture in which all human life is valued, families flourish, and religious liberty thrives. We respectfully submit the following comment regarding the notice of proposed rulemaking issued by the Administration for Children and Families (ACF) in the U.S. Department of Health and Human Services (the "Department") entitled "Safe and Appropriate Foster Care Placement Requirements for Titles IV-E and IV-B."[1]

Currently, state and tribal Title IV–E/IV–B agencies must ensure "safe and proper" care for every foster child. The proposed rulemaking would add requirements that make it so agencies must take a series of actions for "children in foster care who identify as lesbian, gay, bisexual, transgender, queer or questioning, intersex, as well as children who are non-binary, or have non-conforming gender identity or expression" in order to meet these requirements of federal law.[2]

ACF proposes to specify specific steps agencies must take when implementing the case plan and case review requirements for children in foster care who identify as LGBTQI+. According to the proposed rule, agencies must ensure that "safe and appropriate placement is available for and provided to any child in foster care who identifies as LGBTQI+ and requests such a placement."[3] However, the proposed criteria required to be considered "safe and appropriate" would disqualify most established and trusted faith-based providers. The notice of proposed rulemaking states:

> To be considered as a safe and appropriate placement for a LGBTQI+ child means the provider with whom the agency places the child will establish an environment free of hostility, mistreatment, or abuse based on the child's LGBTQI+ status, 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 the provider will facilitate the child's access to age-appropriate resources, services, and activities that support their health and well-being (671(a)(24)) if the child wishes to access those resources, services, and activities.[4]

Requiring providers to facilitate access to "resources, services, and activities" for children who identify as LGBTQI+ could encompass a broad range of untested mandates that might violate a provider's religious belief or conscience, including facilitating a dangerous gender transition procedure. Thus, this definition of "safe and appropriate" poses serious problems for faith-based foster care providers, as well as for religious families who believe that no child is born into the wrong body and that gender transition surgeries amount to needless mutilation of children's healthy bodies. ACF seems to be forcing providers to choose between being considered a "safe and appropriate placement" or operating according to their sincerely held religious beliefs. It is difficult to see this as anything other than discrimination.

We recognize and appreciate that the proposed rule contains a discussion about religious freedom and other freedoms. We also welcome ACF's acknowledgment that faith-based providers offer a great deal of value to the child welfare system. Yet, the proposed rule states:

> Consistent with this [First Amendment] protection, the proposed rule, if adopted, would not require any faith-based provider to seek 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. ... Rather than placing requirements on child welfare providers, this rule as proposed would require agencies to ensure that their child welfare networks as a whole include sufficient numbers of providers that are willing to supply safe and appropriate placements for LGBTQI+ children so that all children who request such a placement will receive an appropriate one.[5]

How many "safe and appropriate placements" for LGBTQI+-identifying children are needed for a child welfare network to be considered "sufficient" under this proposed rule? The proposed rule does not make this clear, but it implies that long-serving faith-based providers ought to be the minority of providers. This is likely to cause problems in states with multiple thriving faith-based providers. For example, two lawsuits recently challenged South Carolina's dependence on Miracle Hill Ministries, a faith-based child placement agency.[6] Thankfully, the lawsuits were dismissed, but it is unclear how the proposed rule would affect court cases such as that one.

We also appreciate ACF's attention to states and tribes' selection criteria and its effects on faith-based providers. The proposed rule states:

> When states and tribes select organizations to participate in the child welfare program, ACF would recommend that states and tribes do not adopt selection criteria that adversely disadvantages any faith-based organizations that express religious objections to providing safe and appropriate placements for LGBTQI+ children.[7]

Although we welcome ACF's willingness to affirm that states and tribes should not disadvantage faith-based organizations, we deeply reject the characterization that a faith-based organization expressing religious objections will provide an unsafe or inappropriate environment for LGBTQI+-identifying children. We would also ask that this be a requirement rather than simply a recommendation. States and tribes should not be utilizing selection criteria that would harm the ability of faith-based providers to participate in the child welfare system.

Furthermore, it is deeply offensive for a federal rule to refer to faith-based organizations as not being "safe and appropriate." No federal rule should refer to faith-based organizations this way. It is marginalizing and discriminatory towards people of faith, who are inaccurately made to sound unsafe or dangerous. A country with a healthy respect for religious freedom does not insinuate that faith-based organizations are unsafe. It is demeaning and discriminatory to religious organizations that simply want to serve children and families.

Foster care agencies have already been affected by challenges to the religious freedom of providers or foster families. In Massachusetts, Mike and Kitty Burke recently applied to be foster parents but were denied because the reviewer who interviewed them (and posed an inordinate amount of questions about the couple's Catholic faith) stated, "their faith is not supportive and neither are they."[8] This is the same discriminatory attitude that ACF is demonstrating by asserting that faith-based providers are not "safe and appropriate placements" for LGBTQI+-identifying children. There was no evidence to suggest that the Burkes would pose a threat to the safety of an LGBTQI+-identifying child. The reviewer's decision was based solely on the couple's faith. The Burkes filed a federal lawsuit in the U.S. District Court for the District of Massachusetts, which is pending. The proposed rule would entrench the type of discriminatory attitude that the Burkes faced from Massachusetts' child welfare system.

This rule is likely to discourage religious families from applying to be foster parents. Religious families who worry that their sincerely held religious beliefs are deemed to not be "safe and appropriate" by the federal government are likely to think twice before entering the child welfare system. We need more loving families to open their homes for children in the child welfare system. ACF should not be applying pressure on agencies that would discourage faith-based providers and indirectly affect faith-based families. Ultimately, this will only harm, not help, children in foster care.

Conclusion

We ask that ACF address the question of how many "safe and appropriate placements" for LGBTQI+-identifying children are needed for a child welfare network to be considered "sufficient" under this proposed rule. Unfortunately, we are concerned that the answer will point to some level of discrimination.

No federal rule should ever treat faith-based groups or religious individuals or families as second-class citizens, and we fear that this proposed rule would. For the reasons stated above, Family Research Council urges ACF to withdraw the proposed rule.

Respectfully submitted,

/s/ Arielle Del Turco
Director of the Center for Religious Liberty

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[1] U.S. Department of Health and Human Services, Notice of Proposed Rulemaking, "Safe and Appropriate Foster Care Placement Requirements for Titles IV-E and IV-B," *Federal Register* 88, no. 187 (September 28, 2023): 66752-769, https://www.govinfo.gov/content/pkg/FR-2023-09-28/pdf/2023-21274.pdf.
[2] 88 Fed Reg 66752
[3] 88 Fed. Reg. 66756
[4] Ibid.
[5] Ibid at 66761.
[6] Adele Fulton, "Federal judge upholds faith-based foster care," *WORLD Magazine*, October 6, 2023, https://wng.org/roundups/south-carolina-court-upholds-faith-based-foster-care-1696624390.
[7] 88 Fed. Reg. 66762.
[8] "Burke v. Walsh," The Becket Fund for Religious Liberty, accessed November 11, 2023, https://www.becketlaw.org/case/burke-v-walsh/.