

May 27, 2025

Via Federal eRulemaking Portal

Robert F. Kennedy, Jr.
Secretary
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9884-P
P.O. Box 8016
Baltimore, MD 21244-8016

Re: OMB, “Unaccompanied Children Program Foundational Rule,” RIN 0970-AD16

Dear Secretary Kennedy:

I am a scholar at the Ethics and Public Policy Center (EPPC), a member of EPPC’s Administrative State Accountability Project (ASAP), and a former attorney in the U.S. Department of Justice’s Civil Rights Division. I write to offer public comment regarding the Department of Health and Human Services (HHS) Administration for Children and Families’ (ACF) interim final rule, “Unaccompanied Children Program Foundational Rule; Update To Accord With Statutory Program” (IFR),¹ which identifies and removes an unlawful aspect of HHS’s April 30, 2024 “Unaccompanied Children Program Foundational Rule” (Foundational Rule).²

I support the IFR and HHS’s welcome commitment to the rule of law. Under the Biden administration, my colleagues in EPPC’s ASAP and I observed that HHS not only advanced policies that were harmful to the American people but did so in a manner that showed disregard for the rule of law and the will of the American people as expressed through the laws passed by Congress. It is in that context that my colleagues and I are especially grateful for HHS’s willingness to recognize in this IFR that the Office of Refugee Resettlement (ORR) must act “[c]onsistent with its statutory responsibilities,” that it’s “authority is limited” by statute, and HHS’s willingness to act decisively here in response to what Congress has said about the ORR’s authority in this instance. *Id.* at 13554. As the IFR correctly notes, 8 U.S.C. 1373 “unambiguously limits ORR’s authority” and thus ORR “must” act to revise 45 CFR 410.1201(b) so that it accords with federal law. *Id.* at 13555. I further agree with ORR that, relevant to 4 U.S.C. 533(b)(B)’s good cause requirement, “no amount of public input could give ORR the power to contravene a duly-enacted law of Congress via regulation.” *Id.*

In this same vein, I also write to bring to your attention other aspects of the Foundational Rule that I likewise believe are unlawful or are contrary to the Trump administration’s policy priorities. I hope these help HHS and ORR identify other changes that should make to the Unaccompanied

¹ 90 Fed. Reg. 13554 (March 25, 2025), <https://www.federalregister.gov/documents/2025/03/25/2025-04971/unaccompanied-children-program-foundational-rule-update-to-accord-with-statutory-requirements>.

² 89 Fed. Reg. 34384 (April 30, 2024), <https://www.federalregister.gov/documents/2024/04/30/2024-08329/unaccompanied-children-program-foundational-rule>.

Children Program so that it reflects federal law and, within the bounds set by Congress, the mandate that President Trump received from the American people.

On December 4, 2023, my colleagues Rachel N. Morrison and Mary R. Hasson submitted a public comment in response to the proposed rule that became the Foundational Rule.³ That comment urged ORR to “drop the requirements that ORR consider ‘LGBTQI+ status’ for placements and facilitate abortions and medical gender transitions for unaccompanied children.” On April 1, 2024, Rachel Morrison provided further comment in connection with an EO 12866 meeting on the same proposed rule.⁴

While the final rule made some improvements in areas we identified in our comments, I raise below three areas of ongoing concern with the Foundational Rule.

1. The Foundational Rule’s commitment to gender ideology is at odds with President Trump’s executive orders, HHS definitions, and HHS’s Gender Dysphoria Report.

In EPPC’s public comment, we raised concerns with ACF’s claim that ORR should make placements based on “LGBTQI+ status.”⁵ We noted that this was an unclear and problematic proposal, given that sexual fluidity is a common experience for youth, especially among sexual minorities. As such, we noted that the designation of an unaccompanied child as having “LGBTQI+ status” may quickly become updated, inaccurate, or no longer applicable.

We called into question two incorrect and harmful assumptions baked into the proposed rule:

First, the proposal assumes that only “affirmation” of a child’s asserted LGBTQI+ identity is “safe and appropriate”; and conversely, “non-affirmation” of a child’s sexual desires or behaviors, and self-proclaimed “gender” is unsafe and abusive. Second, the proposal assumes that any foster care provider that holds traditional beliefs about marriage, sexuality, and gender—including but not limited to faith-based foster care providers with differing convictions about how best to love LGBTQI+ identifying children—is unable to provide LGBTQI+ children with a safe and loving home.

Nonetheless, the Foundational Rule still maintained that “consideration of an unaccompanied child’s gender and LGBTQI+ status or identity status or identity is important in determining a safe and appropriate placement for such children.” 89 Fed. Reg. at 34415. ACF declined our request to explain what this standard means, but merely said that this was part of the “best interest” calculation ORR must make. *Id.* at 34416.

ACF rejected our critique that gender is a non-scientific, poorly defined concept and persisted in its position that gender should be considered as a factor when making placement decisions. *Id.* Incredibly, § 410.1103(b) as changed by the Foundational Rule states that the ORR “shall” consider

³ EPPC Public Comment on HHS Proposed Rule “Unaccompanied Children Program Foundational Rule,” RIN: 0970-AC93, Dec. 4, 1023, <https://eppc.org/wp-content/uploads/2023/12/EPPC-Comment-on-UC-Program-Proposed-Rule-1.pdf>.

⁴ EPPC Comment, EO 12866 Meeting, “Unaccompanied Children Program Foundational Rule,” RIN: 0970-AC92, April 1, 2024, <https://eppc.org/wp-content/uploads/2024/04/EPPC-Comment-EO-12866-Meeting-on-UC-Program-Rule-2.pdf>.

⁵ EPPC Public Comment at 2-4.

an unaccompanied child's "gender" or "LGBTQI+ status or identity" when making placement decisions, but not the child's sex. *Id.* at 34589.

We believe that the Foundational Rule's commitment to gender ideology is at odds with President Trump's early executive orders on gender ideology,⁶ with HHS's sex-based definitions,⁷ and with the recent HHS Gender Dysphoria report.⁸ I encourage HHS to revisit the Foundational Rule's commitment to gender ideology in light of these more recent and more scientifically accurate authorities.

2. The Foundational Rule refused to honor the Hyde Amendment's consensus on federal funding for abortion and refused to clarify how it would be facilitating sex-rejecting procedures⁹ for unaccompanied children.

EPPC's public comment on ACF's proposed rule also urged ACF to drop its proposal that ORR shall ensure that unaccompanied children have access to abortion and so-called "gender transitions."¹⁰ But in the Foundational Rule, ACF acknowledged that ORR has included abortion in the definition of medical services requiring heightened ORR involvement. *Id.* at 34395 (citing 88 Fed. Reg. 68979). ACF also relied on the OLC's September 2022 memo which claimed that the Hyde Amendment still allows the federal government to fund abortion-related transportation. *Id.* at 34519.

The Foundational Rule also persisted in ACF's commitment to gender ideology. ACF acknowledged that public comments had asked for clarification as to whether sex-rejecting procedures were included in its definition of "medical services requiring heightened ORR involvement." *Id.* at 34516. However, ORR refused our request for clarity. *Id.* at 34517. We took that to mean that ORR maintains that sex-rejecting procedures are covered, but they did not want to acknowledge or take legal responsibility for that position.

These proposals are unlawful and contrary to this Administration's policy priorities. On January 24, 2025, President Trump issued Executive Order 14182, "Enforcing the Hyde Amendment," which revoked President Biden's order instructing federal agencies to "support women's . . . ability to travel to seek abortion" because the President recognized that this policy was contrary to Congress' "longstanding consensus that American taxpayers should not be forced to pay" for elective abortions.¹¹ On the issue of sex-rejecting procedures, President Trump and HHS have

⁶ Exec. Order 14148, "Initial Rescissions of Harmful Executive Orders and Actions," 90 Fed. Reg. 8237 (Jan. 28, 2025), <https://www.federalregister.gov/d/2025-01901>; Exec. Order 14168, 90 Fed. Reg. 8615 (Jan. 30, 2025), "Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government," <https://www.federalregister.gov/d/2025-02090>; Exec. Order 14187, "Protecting Children from Chemical and Surgical Mutilation," 90 Fed. Reg. 8771 (Feb. 3, 2025), <https://www.govinfo.gov/content/pkg/FR-2025-02-03/pdf/2025-02194.pdf>.

⁷ HHS, *Sex-Based Definitions*, <https://womenshealth.gov/article/sex-based-definitions> (last updated Feb. 19, 2025).

⁸ HHS, *Treatment for Pediatric Gender Dysphoria: Review of Evidence and Best Practices*, May 1, 2025, <https://opa.hhs.gov/sites/default/files/2025-05/gender-dysphoria-report.pdf>.

⁹ For more on the term "sex-rejecting procedures," and why we believe it is more accurate and helpful than "gender-affirming healthcare," see Kniffin, Rice & Morrison, *Terminology and Definition: Replacing "Gender-Affirming Care" with "Sex-Rejecting Procedures"*, EPPC, May 9, 2025, <https://eppc.org/publication/terminology-and-definition-replacing-gender-affirming-care-with-sex-rejecting-procedures/>.

¹⁰ EPPC Public Comment at 5-15.

¹¹ Executive Order 14182, 90 Fed. Reg. 8751 (Jan. 24, 2025), <https://www.federalregister.gov/documents/2025/01/31/2025-02175/enforcing-the-hyde-amendment>.

been clear that these radical interventions are unproven and harmful. To protect America's children from gender ideology, the President has stated, "It is the policy of the United States that it will not fund, sponsor, promote, assist, or support the so-called 'transition' of a child from one sex to another, and it will rigorously enforce all laws that prohibit or limit these destructive and life-altering procedures." Exec. Order 14187. I encourage HHS to revisit the Foundational Rule to ensure that it reflects President Trump's directives to HHS regarding abortion and gender ideology. The American people deserve clarity on these important issues.

3. The Foundational Rule refused to make concrete commitments on how ACF would honor its legal obligations under federal laws protecting religious freedom and conscience protections.

Given the Biden administration's aggressive positions on abortion and gender ideology, EPPC's public comment asked ACF to make concrete commitments on respecting religious liberty and conscience rights.¹² We noted that the preamble of ACF's proposed rule had repeated four times, without elaboration, that that ORR operates its Unaccompanied Child Program "in compliance with the requirements of the Religious Freedom Restoration Act and other applicable Federal conscience protections, as well as all other applicable Federal civil rights laws and applicable HHS regulations."

While we applauded ACF for recognizing that ORR must operate its program in compliance with federal laws, we stressed that this statement, without more, was "insufficient provide adequate assurances and protection." We asked for more specifics:

We ask ACF to elaborate on how it will operate its program, especially if it requires ORR to provide unaccompanied children with abortions and medical gender transitions, in compliance with RFRA and federal conscience protections. These protections will be especially important for providers and ORR staff who cannot facilitate abortions and medical gender transitions in accord with their religious beliefs or moral convictions.

How will ORR be notified of their religious freedom and conscience rights? How can they request a religious exemption under RFRA, religious accommodation under Title VII, or protection under the conscience protection laws? Will any ORR staff be forced to help facilitate an abortion or sterilizing gender transition intervention contrary to their religious beliefs or moral convictions? We ask that ORR answer these logistical questions in its final rule before staff have to resort to litigation to receive adequate protections, such as the case for VA employees under the VA's interim final rule on abortion benefits.¹³

I am hopeful that, in this instance, ACF will resolve these religious liberty and freedom of conscience concerns by revising the Foundational Rule so that it reflects federal law on abortion and the best science on sex-rejecting procedures. But more broadly, here and elsewhere, we are hopeful that ACF and HHS more broadly will recognize that honoring its moral and statutory responsibilities requires more than the Foundational Rule's broad commitment to operating programs "in compliance with federal law" or addressing obvious and clear religious liberty and conscience issues "on a case-by-case basis." Experience has shown that these general commitments mean very little in practice. The Biden administration resisted calls to respect religious liberty and conscience rights. Religious

¹² EPPC Public Comment at 16.

¹³ See *Texas Nurse Practitioner Wins Religious Accommodation Process for All VA Employees*, First Liberty (July 28, 2023), <https://firstliberty.org/news/nurse-practitioner-wins-religious-accommodation/>.

organizations affected by pro-abortion and pro-gender ideology regulations too often had to resort to litigation to vindicate civil rights that HHS should have just honored in the first place.

Moreover, when HHS saw that it was losing in court, it decided to make its regulations harder to attack by agreeing to address religious liberty and conscience concerns “on a case-by-case basis,” as we see in the Foundational Rule. A case-by-case approach is necessary in some instances. But when an agency has clear notice—either through experience or through issues flagged in public comments—that a proposed regulation raises religious liberty and conscience concerns, a federal agency should endeavor to figure out and then explain how it will meet its obligations under federal law. It is not enough to offer a vague outline of an indeterminate process that covered entities must navigate in order to find out whether HHS will honor and accommodate the entity’s convictions.

As I have argued in other comments,¹⁴ while the Religious Freedom Restoration Act does require a fact-intensive inquiry in many instances, this is not always the case. It was wrong, for example, for HHS to defend its case-by-case approach under Section 1557 regulations that “a fact-sensitive, case-by-case analysis of [substantial] burdens and [compelling government] interests is *needed* under FRFA.” (emphasis added). Our comment showed that courts have been able to resolve both the substantial burden inquiry and the least restrictive means test without detailed factual inquiries, and that HHS itself has done this in some context. Thus, it is plainly wrong that HHS cannot, as HHS under President Biden claimed, make clear rules in the first instance about how it will accommodate rights of conscience and religious exercise. I urge HHS to ensure that, in the Foundational Rule and elsewhere, HHS honor its independent obligation to follow federal law and not force Americans to go to court to secure their civil rights.

CONCLUSION

As noted above, I support the IFR but believe there are other aspects of the Foundational Rule that can and should be changed in light of President Trump’s directives to HHS. I note here especially those directives related to abortion and gender ideology. I also submit that the Foundational Rule reflects the Biden administration’s belief that our nation’s commitments to religious liberty and conscience rights were nuisances that got in the way, not rights that deserved to be honored and treated with respect.

I hope that this comment helps equip you to carry out President Trump’s policy priorities and protect the rule of law. Again, I thank you for this invitation to submit public comment and on our work on behalf of the American people to promote human flourishing and the rule of law.

Sincerely,

Eric Kniffin, J.D.

Fellow

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¹⁴ See EPPC Comment, EO 12866 Meeting, “Nondiscrimination in Health Programs and Activities,” RIN 0945-AA17, Feb. 2, 2024, at 9-11, <https://eppc.org/wp-content/uploads/2024/02/EPPC-Scholars-Comments-for-EO-12866-Meeting-Section-1557-ACA-.pdf>.