December 16, 2019


Secretary Alex Azar
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

RE:  Proposed rulemaking to repromulgate or revise certain regulatory provisions of the
Department of Health and Human Services, Uniform Administrative Requirements, Cost
Principles, and Audit Requirements for HHS Awards; RIN 0991-AC16, 84 Fed. Reg.
63831 (Nov. 19, 2019)

Dear Secretary Azar:

Thank you for providing an opportunity to comment on the proposal to repromulgate and revise
certain regulatory provisions of the Department of Health and Human Services (HHS), Uniform
Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards.
Pursuant to the Notice of Proposed Rulemaking (NPRM) published in the Federal Register on
November 19, 2019 (84 Fed. Reg. 63831), the American Bar Association (ABA), the largest
voluntary association of lawyers and legal professionals in the world, submits these comments.

The ABA writes to express concern with HHS’s decision to eliminate antidiscrimination rules
designed to support children and families in the context of foster care and adoption. The ABA
respectfully urges HHS to withdraw the proposed rule changes because they will cause harm to
children and families and are inconsistent with child welfare law and the Administrative
Procedure Act (APA).

The ABA has long supported all individuals’ rights to be free from discrimination through a
variety of Association resolutions.1 Consistent with the ABA’s existing nondiscrimination

1 ABA Resolution 204B (2007) (supporting laws that promote the safety, well-being and permanent placement of
LGBTQ youth who are homeless or involved with the foster care system); ABA Resolution 102 (2006) (opposing
legislation and policies that restrict children’s placement into foster care on the basis of a parent’s sexual
orientation); ABA Resolution 112 (2003) (supporting the establishment of legal parent-child relationships through
joint adoptions and second-parent adoptions by unmarried persons who are functioning as a child's parents when
such adoptions are in the best interests of the child); and ABA Resolution 109B (1999) (supporting laws that provide
sexual orientation shall not be a bar to adoption when the adoption is determined to be in the best interest of the
child).
policies, and based on its leadership role ensuring access to justice for children and families, the ABA recently adopted a policy that addressed discrimination against LGBTQ children and parents in the context of foster care and adoption.²

The ABA opposes laws, regulations, rules or practices that discriminate against Lesbian, Gay, Bisexual and Transgender (LGBT) individuals in exercising the fundamental right to parent and urges lawmakers to ensure equal protection of all LGBT individuals under the law.

HHS’s proposed modifications to Final Rule 81 FR 89393, Sec. 75.300(c)-(d) allow federal funds to be used to discriminate against children in foster care and against families who seek to provide foster or adoptive care. The proposed rule changes contradict the fundamental principle that government action in the child welfare context must prioritize the “welfare of the child.”³ Finally, the proposed changes fail to meet requirements for modifying final rules under the APA. For each of these reasons, the ABA urges HHS to reconsider the proposed rule changes and to continue to enforce and implement the Final Rule that has been in effect since January 2017.

**Background:**

In 2016, HHS finalized the current language of 45 C.F.R. §§ 75.300(c) and (d) following the required opportunity for public notice and comment.

Section c of the Final Rule stated:

> It is the 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 and services based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation. Recipients must comply with this public policy requirement in the administration of programs supported by HHS awards.

Section d of the Final Rule stated:

> In accordance with the Supreme Court decisions in *United States v. Windsor* and in *Obergefell v. Hodges*, all recipients must treat as valid the marriages of same-sex couples. This does not apply to registered domestic partnerships, civil unions or similar formal relationships recognized under state law as something other than a marriage.

In November 2019, nearly three years after promulgating the Final Rule, HHS issued an NPRM to repromulgate and revise these two provisions.

As modified, the Final Rule would read as follows:

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² ABA Midyear Resolution 113 (2019).
³ 42 U.S.C. § 672(a)(2)(B) (without consent from a parent, a child’s removal into foster care is only permissible upon “a judicial determination to the effect that continuation in the home from which removed would be contrary to the welfare of the child…”).
It is the 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 and services based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation. Recipients must comply with this public policy requirement in the administration of programs supported by HHS awards to the extent doing so is prohibited by federal statute.

HHS will follow all applicable Supreme Court decisions in administering its award programs. In accordance with the Supreme Court decisions in United States v. Windsor and in Obergefell v. Hodges, all recipients must treat as valid the marriages of same-sex couples. This does not apply to registered domestic partnerships, civil unions or similar formal relationships recognized under state law as something other than a marriage.

As a rationale for this abrupt change, HHS explained that it is relying on its “enforcement discretion” not to apply the Final Rule. In addition to using its discretion to stop applying the Final Rule, HHS has also proposed to modify or repeal several key provisions, including those outlined above. HHS articulated a concern that “the Department has faced several complaints, requests for exceptions, and lawsuits concerning” the Final Rule. HHS noted that these challenges have produced a “lack of predictability and stability for the Department and stakeholders with respect to these provisions’ viability and enforcement.” HHS also noted a concern that some organizations that currently receive federal funding to recruit and license foster and adoptive families may “leave the program(s) and cease providing services” rather than consider licensing or supporting LGBT foster parents.

ABA Comments:

The ABA strongly opposes the proposed rule changes for the following reasons:

1. The proposed changes nullify the purpose of the Final Rule and produce an illogical result.

Removing express prohibitions on discrimination and replacing them with statements requiring generic compliance with all federal statutes and Supreme Court precedent effectively nullify the entire purpose of the Final Rule and, the purpose of HHS’s rulemaking in this area. As the Supreme Court has repeatedly explained, Executive Branch authority to issue regulations comes from its power to administer congressionally created programs and to formulate policy and rules to “fill any gap left, implicitly or explicitly, by Congress.” Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 104 S. Ct. 2778, 2782 (1984) (citing Morton v. Ruiz, 94 S. Ct. 1055, 1072 (1974)). The Final Rule fulfills this Executive Branch responsibility by complementing existing statutory and precedential law with a detailed list of the types of non-merit factors that HHS grantees may not use to exclude individuals from participating in federally funded programs.
HHS’s proposed changes turn the functionality of the Final Rule on its head by eliminating all
detail and merely restating the general principle that federal grantees cannot violate federal
statutory or Supreme Court law. In so doing, HHS has abdicated its core responsibility to fill
gaps in statute and provide clarity for the public that is governed by those laws. Indeed, as HHS
explicitly states in the NPRM, the government anticipates “no economic impact” from the
proposed changes because grantees are already required to comply with applicable federal law
and Supreme Court precedent and therefore the changes do not alter the baseline that exists
without the rule. Not only does this proposed change produce an irrational result by undermining
the purpose of regulations – to clarify the law and fill gaps that may be left unanswered by
legislation – it presents significant risks of harm for children and families.

2. **HHS’s proposed changes would permit the use of federal funds to financially
support discrimination.**

As proposed, HHS’s regulatory rollback will enable discrimination against foster children by
permitting organizations and individuals who receive federal funding to refuse to support LGBT
activities for children in their care. This is not a hypothetical risk. There are group homes
throughout the country that have sought public funds to support programs that discriminate
against children on the basis of gender identity and sexual orientation. For example, a children’s
shelter in California was recently denied a foster care license in part because the shelter refuses
to support youth in its care by “driving them to LGBT-affirming activities.”4 HHS’s proposed
change would open up federal funding to support programs such as this that restrict services for
children on the basis of their identity.

Refusing to support children in foster care who seek to participate in LGBT-affirming activities
is directly in tension with federal child welfare provisions in The Preventing Sex Trafficking and
Strengthening Families Act.5 That legislation requires family and group home caregivers to use a
“reasonable and prudent parent standard” to support a child in foster care’s ability to participate
in “extracurricular, enrichment, cultural, and social activities.”6 As Judge Darlene Byrne from
Texas recently explained, participation in such extracurricular activities should be guided by
working with children to find “diverse activities that interest them.”7 Adults who know the child
well can also contribute ideas, but in situations where a child and parent have different views
about activities, Judge Byrne explained she follows the child’s lead because “[t]hey’re the one at
the heart of the case and I want to make sure that I’m trying to meet their needs at the highest
level and hear their voice.”8

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4 See https://www.sandiegouniontribune.com/news/courts/story/2019-12-08/religious-rights-vs-foster-youth-rights-
weighed-in-lawsuit-over-sex-trafficking-shelter?utm_medium=email&utm_source=govdelivery
5 PREVENTING SEX TRAFFICKING AND STRENGTHENING FAMILIES ACT, PL 113-183, September 29,
6 Id.
7 See Judicial Approaches to Promoting Normalcy for Children in Foster Care published in the ABA Child Law
Practice Today available at https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january-
december-2018/judicial-approaches-to-promoting-normalcy-for-children-in-foster/
8 Id.
This is consistent with the federal law, which emphasizes the importance of finding activities that address the child’s needs and cultural and social interests.9 Nothing in the federal legislation permits foster parents or group home operators to reject those interests based on their own cultural and social values. Under the proposed change, however, this is what the federal government would financially support by funding group homes and family foster homes that refuse access to LGBT supportive services for children by asserting that their own belief system should override that of the children in their care. Using federal funds to reduce children’s access to services that support their individual interests and needs is harmful to children and inconsistent with federal law.

This rule change could also mean federal funds are used in environments where children are not only denied access to supportive services, but would also potentially be subjected to efforts to change aspects of their identities that do not conform with the belief system of their caregivers. For example, a foster parent with federal support could subject a child to “conversion therapy” or force a child to dress or present in a manner inconsistent with their gender identity. Families and organizations whose belief systems have not included acceptance of LGBT youth and children’s identities have sought to change those fundamental components of children’s identities while in care. For example, in a recent story posted through Foster Club, Sonia Emerson describes her 16 years in the foster care system as a time when she was often “sexually harassed or told that she was mentally ill because of her being honest about her sexual orientation & identity.”

To minimize this risk, several state child welfare agencies throughout the country have established policies to prohibit such practices both by families and social worker staff members. As an illustration, in 2014 the Tennessee Department of Children's Services developed policies providing that:

In the course of their work, employees, volunteers, and contractors must not refer to youth by using derogatory language in a manner that conveys bias towards or hatred of LGBT people. In particular, employees, volunteers or contractors must not imply to or tell LGBT youth that they are abnormal, deviant, or sinful, or that they can or should change their sexual orientation or gender identity.

All LGBT youth must be provided with access to medical and mental health providers who are knowledgeable about the health care needs of this population. These providers should facilitate exploration of any LGBT issues by being open, non-judgmental and empathetic, and will not participate in corrective or conversion therapy.

HHS’s proposed rule change would weaken precisely these kinds of policies by allowing federal funds to support child welfare placements in which the caregiver seeks to challenge or alter the child’s identity because it does not conform with the caregiver’s own belief system. This is

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9 PREVENTING SEX TRAFFICKING AND STRENGTHENING FAMILIES ACT, PL 113-183, September 29, 2014, 128 Stat 1919 (providing that “extracurricular, enrichment, cultural, and social activities” should focus on the “best interests of a child while at the same time encouraging the emotional and developmental growth of the child.”).

particularly concerning given that rejection by biological family is a notable cause of child welfare system involvement for LGBT youth, who are generally overrepresented in foster care, and experience greater levels of suicidality and related negative mental and behavioral health outcomes when compared to heterosexual youth.

As the National Association of Social Workers, a professional membership organization of social workers, has stated: “[t]he stigmatization of LGBT persons creates a threat to the health and well-being of those affected.” Similarly, the American Psychiatric Association has explained that “[t]he potential risks of reparative therapy are great, including depression, anxiety and self-destructive behavior.” As such, the proposed rule change, which eliminates protections against discrimination for LGBT youth in foster care, could have significant negative consequences for children in state custody. Not only are such consequences in tension with the normalcy provisions cited above, the harm incurred could also pose constitutional questions because children in state custody have due process rights to be free from unhealthy or highly risky or unsafe environments. See, e.g., Lintz v. Skipski, 25 F.3d 304, 305 (6th Cir. 1994) (“[D]ue process extends the right to be free from the infliction of unnecessary harm to children in state regulated foster homes.”); K.H. ex rel. Murphy v. Morgan, 914 F.2d 846, 848–49 (7th Cir. 1990).

Using federal funds to support caregiving that undermines children’s access to supportive services and potentially facilitates efforts to change children’s identities to conform with a caregiver’s belief system is insupportable under child welfare law and raises constitutional questions about state custody.

3. **HHS’s proposed changes would permit the use of federal funds to financially support discrimination against LGBT parents.**

Households led by same-sex parents are significantly more likely than those led by opposite-sex parents to be foster or adoptive parents. Recent data collection has shown that there are approximately 35,000 same-sex couples in the United States who have adopted or are fostering children. There is no need to turn away such an important resource for vulnerable children. In

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13 See NASW position statement on “Sexual Orientation Change Efforts (SOCE) and Conversion Therapy with Lesbians, Gay Men, Bisexuals, and Transgender Persons” available at https://www.socialworkers.org/LinkClick.aspx?fileticket=yH3UsGQmY1%3d&portalid=0.
15 Shoshana K. Goldberg & Kerith J. Conron, *How Many Same-Sex Couples in the U.S. Are Raising Children?*, The Williams Institute: UCLA School of Law (July 2018) (finding that 2.9% of same-sex couples vs. 0.4% of different-sex couples raise foster children and that 21.4% of same-sex couples vs. 3.0% of different-sex couples have an adopted child), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Parenting-Among-Same-Sex-Couples.pdf.
16 See id.
proposing a rollback of the current protections in 45 C.F.R. § 75.300(c) and (d), HHS seeks to do precisely that. As proposed, the federal government would enable discrimination against potential foster and adoptive parents thus threatening to reduce the number of available placements for youth who need them. At a time when over 125,000 children in foster care are waiting to be adopted, it is particularly disturbing that foster parents would be turned away simply because their identity is not compatible with the belief system of a publicly funded licensing agency.

HHS noted in the NPRM that pursuant to Section 654 of the Treasury and General Government Appropriations Act of 1999 it evaluated whether the proposed rule changes could affect “family well-being” and concluded they “will not.” This conclusion cannot be reconciled with the Supreme Court’s decision in Obergefell v. Hodges, which explained in part that same sex couples have the right to marry because exclusion from such fundamental practices in life produces a “stigma of knowing their families are somehow lesser.” 135 S. Ct. 2584, 2590 (2015). That same rationale applies here. By being refused an opportunity to foster or adopt children on the basis of LGBT status, families are forced to confront a “stigma of knowing their families are somehow lesser.” Using federal funds to sanction that stigma is simply incompatible with the Supreme Court’s analysis in Obergefell and produces a clear negative impact on “family well-being.”

The Supreme Court also explained in Obergefell that “[i]t is demeaning to lock same-sex couples out of a central institution of the Nation's society” and recognized that one of reasons marriage is recognized as such an institution is its close coordination with “related rights” of “childrearing, procreation, and education.” 135 S. Ct. 2584, 2590 (citing Pierce v. Society of Sisters, 268 U.S. 510). It is illogical to provide federal funding to programs that deny same-sex couples the right to parent when “childrearing” was one of the main “related rights” cited by the Supreme Court as a basis for finding a right to same sex-marriage.

This inconsistency may have provided part of the basis for HHS’s decision to remove the references to those two Supreme Court precedents in section 75.300(d) of the Final Rule. HHS explains in the NPRM that it is “committed to complying not just with those decisions, but with all applicable Supreme Court decisions and all applicable court orders.” By specifically detailing those two cases in the Final Rule, HHS was able to clarify that recipients of HHS funding “must treat the marriages of same-sex couples as valid.” This specification goes beyond mere compliance with precedent because it explains how those decisions apply in the context of federal grant-making, a point not explicitly addressed by the Court. By replacing this detail with a generic statement about compliance with Supreme Court precedent, HHS has proposed eliminating the very meaning of this section as written in the Final Rule.

18 81 FR 89393.
4. **HHS’s proposed changes conflict with the most fundamental principles of child welfare law by prioritizing organizational interests above the interests of children in care.**

HHS explained in the NPRM that compliance with the Final Rule could mean “some subgrantees with religious objections will leave the program(s) and cease providing services rather than comply.” This concern does not provide a basis for allowing federal grantees to discriminate against children or same-sex couples who seek to support children in foster care and adoptive placements. By contrast, the implication that interests of current subgrantees should factor above children’s interests in care runs afoul of the most basic principles of child welfare law and practice – that the government has a responsibility to prioritize the “welfare of the child.”

To underscore this point, it is helpful to look directly at youth voice. In comments and public statements about this NPRM, individuals who experienced foster care as LGBTQ youth have explained that “[w]ithout protections, young people like us will be placed in homes that reject who we are, who we love, and what we believe.” No concern about subgrantees leaving federally funded programs should override this message or the fundamental principle underlying it that the government’s primary responsibility to children in state care is to support their best interests.

Moreover, HHS cited no data in the NPRM to support the speculation that prohibiting discrimination would reduce the number of available placements. Indeed, in states that now affirmatively prohibit discrimination in foster care licensing based on sexual orientation such as Illinois, Massachusetts and the District of Columbia, there has been no increase in the rate of placement of children in group homes or institutions as compared to foster family homes.

5. **HHS has not met the threshold requirements for revising previously promulgated regulations under the Administrative Procedure Act.**

The decision to repeal or revise a Final Rule is subject to notice and comment rulemaking under the APA. *Clean Air Council v. Pruitt*, 862 F.3d 1, 14 (D.C. Cir. 2017) (explaining that although agencies have broad discretion to reconsider a final rule after it has been issued, the agency must nevertheless meet procedural requirements). This ensures that an agency cannot “undo all that it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of repeal.” *Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm’n*, 673 F.2d 425, 446 (D.C. Cir. 1982). There are two key rules that emerge from case law in this area.

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19 42 U.S.C. § 672(a)(2)(B) (without consent from a parent, a child’s removal into foster care is only permissible upon “a judicial determination to the effect that continuation in the home from which removed would be contrary to the welfare of the child…”).


First, federal agencies cannot ignore prior factual findings. This means that when an agency seeks to repeal portions of a policy, its revised factual findings cannot contradict prior factual findings without a clear justification for doing so. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009); see also *State of California v. United States Bureau of Land Management*, 277 F. Supp. 3d 1106 (N.D. Cal. 2017) (“New presidential administrations are entitled to change policy positions, but to meet the requirements of the APA they must give reasoned explanations for those changes and ‘address prior factual findings’”) (original citations omitted). As applied to the nondiscrimination Final Rule, HHS has failed to meet this requirement.

The 2016 nondiscrimination language was promulgated without controversy. *See* 81 Fed. Reg. 89393 (“HHS received twelve comments on these provisions, all of which were strongly supportive of the codification of the nondiscrimination provisions in HHS awards and the recognition of same-sex marriages.”). In the NPRM, HHS has offered no explanation for why the conclusions reached in 2016 run so directly counter to the current landscape as to justify nullification of the Final Rule’s nondiscrimination provisions. Indeed, HHS has not sought to address prior conclusions at all in the NPRM other than suggesting the Final Rule may have incurred an economic impact on small entities.

Second, federal agencies must always balance the anticipated costs with the anticipated benefits of implementing a rule. An agency cannot look only at the potential costs of implementing a Final Rule when considering repeal or revision. *State v. United States Bureau of Land Management*, 277 F. Supp. 3d 1106 (N.D. Cal. 2017) (finding that that Bureau of Land Management’s actions were arbitrary and capricious when it postponed a Rule’s compliance dates based on burdens and failed to consider the Rule’s benefits). In addition to examining both costs and benefits, the agency must also consider immediate and longer-term impact. For example, in some instances immediate costs may be high but fade over time while benefits are slow to accrue but develop several years after new systems are in place. Significantly, agencies cannot find new costs in the mere fact that implementation poses challenges for governed entities if those costs were “completely foreseeable” when the Rule was issued. *Id.* (rejecting “changed circumstances” argument based on an upcoming compliance deadline).

As applied to the nondiscrimination Final Rule, the NPRM focuses exclusively on the burden associated with implementing the Final Rule. Specifically, HHS explained in the NPRM that there is currently an injunction in place with respect to a specific plaintiff who filed suit in Michigan advancing its own religious free exercise claim. HHS fails, however, to explain why this unresolved as-applied lawsuit justifies abandoning the entire existing rule. Additionally, HHS notes that since the promulgation of the Final Rule, it has been asked to grant one waiver of the nondiscrimination prohibition to South Carolina. It is not clear, however, why the rule language must be now changed when HHS also believes the rule’s requirements are waivable under its discretionary enforcement authority.

Finally, as noted above, HHS suggests that the Final Rule could reduce the number of current subgrantees and in turn limit the number of foster homes available. Indeed, there is good reason to believe that the opposite may be true, as the removal of nondiscrimination protections will
lead the way to the rejection of suitable would-be foster and adoptive homes for discriminatory reasons. HHS has not shown in any of these instances how costs to grantees outweigh the benefits of protecting children and families from discrimination. In no respect has HHS met its simultaneous burden of continuing to examine the benefits of the Rule both on a short- and long-term scale.

In short, given clear gaps in HHS’s stated reasoning behind its new proposed rule and failure to fully examine the prior rule’s findings and benefits, HHS has failed to comply with the APA’s requirements for modifying a Final Rule.

**Conclusion**

For all the reasons above, the ABA is concerned that the proposed changes are harmful, improper, and unsupportable under both child welfare law and the APA. Therefore we respectfully request HHS withdraw the proposed rule and continue to implement the Final Rule that has been in effect for nearly three years.

Thank you for considering our views on this important issue. If you have any questions, please contact David Eppstein in the ABA Governmental Affairs Office at 202-662-1766 or david.eppstein@americanbar.org.

Sincerely,

Judy Perry Martinez
President, American Bar Association
Appendix:

RESOLVED, That the American Bar Association opposes laws, regulations, and rules or practices that discriminate against LGBT individuals in the exercise of the fundamental right to parent; FURTHER RESOLVED, That the American Bar Association urges lawmakers in jurisdictions where such discriminatory laws, regulations, and practices exist to promptly repeal them and ensure the equal protection of all LGBT individuals under the law. 2019 MY 113

RESOLVED, That the American Bar Association urges federal, state, territorial, tribal, and local legislatures, government agencies, and courts to adopt and implement laws, regulations, policies, and court rules that promote the safety, well-being, and permanent placement of lesbian, gay, bisexual, transgender, and questioning (LGBTQ) youth who are homeless or involved with the foster care system. 2007 AM 104B

RESOLVED, That the American Bar Association opposes legislation and policies that prohibit, limit, or restrict placement into foster care of any child on the basis of sexual orientation of the proposed foster parent when such foster care placement is otherwise appropriate under the applicable law of the state, territory, or tribe. 2006 MY 102

RESOLVED, That the American Bar Association supports state and territorial laws and court decisions that permit the establishment of legal parent-child relationships through joint adoptions and second-parent adoptions by unmarried persons who are functioning as a child's parents when such adoptions are in the best interests of the child. 2003 AM 112

RESOLVED, That the American Bar Association supports the enactment of laws and implementation of public policy that provide that sexual orientation shall not be a bar to adoption when the adoption is determined to be in the best interest of the child. 1999 MY 109B