



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 17, 2018

Lynn Johnson
Assistant Secretary
Administration for Children and Families
U.S. Department of Health and Human Services
330 C Street, SW
Washington, DC 20201

Re: Texas's Requests for Rulemaking and Exception Regarding 45 C.F.R. § 75.300(c-d)

Dear Ms. Johnson:

On behalf of the State of Texas, this letter requests that the U.S. Department of Health and Human Services ("HHS") commence rulemaking to repeal 45 C.F.R. § 75.300(c-d) (the "Rule"), which governs child welfare funding provided to the States under Title IV-E of the Social Security Act, 42 U.S.C. §§ 670–679b. The Rule exceeds statutory authority, conflicts with Texas law, and infringes the religious freedom of foster care and adoption service providers. In the alternative, if HHS is unwilling to commence rulemaking and until such a decision is made, Texas requests an exception, pursuant to 45 C.F.R. § 75.102, from the requirements imposed by the Rule on Texas and its providers.

I. Texas Partners with Private and Faith-Based Child Welfare Services Providers to Implement the Purposes of Title IV-E Funding.

Texas receives Title IV-E funds and administers the programs to distribute these funds to eligible foster care and adoption service providers. The Texas Department of Family and Protective Services ("DFPS"), through its Child Protective Services ("CPS"), provides services to children and families and seeks permanency for children in substitute care. At the end of fiscal year 2017, CPS placed over 48,000 children in substitute care (including foster care), and out of more than 7,000 children in CPS custody waiting for adoption, placed over 5,000 in adoptive homes.

CPS works with both secular and faith-based communities to find loving homes for children removed from their homes due to abuse and neglect. Several of those initiatives involve faith-based organizations. One program, called Congregations Helping in Love and Dedication ("CHILD"), encourages faith partners across Texas to join with DFPS to help provide current and potential adoptive and foster parents support, training, and resources. Another program is the One Church, One Child adoption recruitment program designed to partner with the minority community to identify adoptive families and single parents for children in need of homes.

Several faith-based providers receive Title IV-E funding through DFPS to provide their services. Some of these providers require potential foster care or adoptive parents to share a religious faith or agree to the provider's statement of faith.¹ The Rule, however, requires these faith-based organizations to abandon their core religious beliefs as a condition of receiving Title IV-E funding.

In anticipation of such a dilemma, in 2017, Texas enacted House Bill 3859, which protects the religious liberty of these organizations and prohibits the State from granting or refusing to grant funding to such organizations because of their religious beliefs. *See* Tex. Hum. Res. Code §§ 45.001–.010. HB 3859 provides that a “child welfare services provider may not be required to provide any service that conflicts with the provider’s sincerely held religious beliefs.” Tex. Hum. Res. Code § 45.005(a). The Rule now asks Texas to ignore the protections afforded to these religious organization under federal and state law. Thus, as discussed below, HHS must repeal the unlawful Rule, or provide Texas with an exception.

II. The Rule Violates the Administrative Procedure Act and the Religious Liberty of Texas’s Faith-Based Foster Care and Adoption Service Providers.

A. The Rule is contrary to law.

The Rule prohibits Title IV-E funding recipients from excluding, denying benefits to, or discriminating against individuals on the basis of “age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation.” 45 C.F.R. § 75.300(c). It also requires recipients to treat as valid the marriages of same-sex couples. *Id.* § 75.300(d). The purported regulatory authority for the Rule is the Office of Management and Budget’s Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards published on December 19, 2014, 79 Fed. Reg. 75,871, and HHS’s regulatory implementation of those standards on January 20, 2016, 81 Fed. Reg. 3004. *See* 81 Fed. Reg. 89,393 (Dec. 12, 2016) (describing authority for the Rule). But none of these regulations includes a provision allowing HHS to prohibit discrimination on the basis of gender identity or sexual orientation in Title IV-E funding programs.

The purported statutory authority for the Rule is 42 U.S.C. § 671(a)(18), which prohibits discrimination on the basis of “race, color, or national origin.” Title IV-E, however, does not authorize HHS to prohibit discrimination on characteristics other than race, color, or national origin, or to mandate particular treatment of same-sex marriages. Under any “ordinary, contemporary, common meaning,” *Contender Farms, LLP v. USDA*, 779 F.3d 258, 269 (5th Cir. 2015), the operative terms of section 671(a)(18)—“race, color, or national origin”—do not include “age, disability, sex, . . . religion, gender identity, or sexual orientation.” Nor do they contemplate the treatment of same-sex marriages. The Rule’s expanded definition of prohibited discrimination is “contrary to clear congressional intent” in section 671. *Chevron, USA, Inc. v. Nat. Res. Defs.*

¹ A list of these providers is located on the DFPS website. *See* DFPS, Texas Adoption Resource Exchange, available at https://www.dfps.state.tx.us/Adoption_and_Foster_Care/Adoption_Partners/private.asp. The particular requirements of each provider may be determined by clicking on a provider’s name and accessing that provider’s website.

Council, Inc., 467 U.S. 837, 843 n.9 (1984); *see also Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016) (enjoining HHS regulation that included “gender identity” within the definition of “sex” under the Affordable Care Act and Title IX).

Even HHS’s authority to enforce other nondiscrimination statutes fails to justify the prohibitions contained in the Rule.² Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin, 42 U.S.C. § 2000d, section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act prohibit discrimination based on disability, 29 U.S.C. § 794; 45 C.F.R. pt. 84, and the Age Discrimination Act of 1975 prohibits discrimination on the basis of age, 42 U.S.C. § 6101; 45 C.F.R. pt. 90. Moreover, even Section 1808(c) of the Small Business Job Protection Act of 1996, which is aimed at prohibiting discrimination in foster care placements or adoptions, focuses only on discrimination based on race, color, or national origin. 42 U.S.C. § 1996b. None of the statutory authority conveyed to HHS authorizes prohibitions in foster care and adoption funding based on “gender identity” or “sexual orientation.” In fact, when the Obama Administration attempted to reinterpret the prohibition on “sex” discrimination in Title VII and Title IX, 20 U.S.C. § 1681(a); 42 U.S.C. § 2000e-2(a), to include sexual orientation and gender identity discrimination, a federal court blocked those efforts, *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016), and President Trump eventually rescinded those unlawful interpretations.

To be sure, when Congress wants to include other forms of prohibited discrimination in a federal funding statute, it knows how to do so. For example, Title IV-A of the Social Security Act, which provides block grants to States for temporary assistance for needy families, prohibits gender discrimination, 42 U.S.C. § 603(a)(5)(I)(iii), and incorporates by reference the Age Discrimination Act of 1975, section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, and Title VI of the Civil Rights Act of 1964, *id.* § 608(d). But Title IV-A also broadly protects religious organizations who participate in State funding from discrimination because of their religious character and beliefs. *Id.* § 604a. Other federal nondiscrimination laws provide similar exemptions for religious organizations. *See, e.g.*, 42 U.S.C. § 1687 (providing religious organizations an exemption from the requirements of Title IX of the Education Amendments of 1972).

Title IV-E, by comparison, contains no references to other federal anti-discrimination laws. It simply prohibits discrimination on the basis of race, color, and national origin, which makes sense because those prohibitions are based on Title VI, which applies to any program or activity receiving federal financial assistance. 42 U.S.C. § 2000d. Congress knows how to include or exclude nondiscrimination policies in its welfare funding statutes, and its decision to focus on only race, color, and national origin in Title IV-E means no other forms of discrimination are prohibited by funding recipients. HHS’s expansion of Title IV-E’s nondiscrimination provision in 45 C.F.R. § 75.300(c–d) is contrary to law. Absent statutory authorization, HHS must repeal the Rule or risk its invalidation in court.

² *See* HHS, Office for Civil Rights, Laws and Regulations Enforced by OCR, *at* <https://www.hhs.gov/civil-rights/for-providers/laws-regulations-guidance/laws/index.html>.

B. The Rule violates the religious liberty of Texas’s foster care and adoption partners.

By mandating nondiscrimination based on religion and recognition of same-sex marriages, the Rule violates the religious liberty protections provided to foster care and adoption agencies under federal and Texas law. The Religious Freedom Restoration Act (“RFRA”) prohibits the federal government from substantially burdening a person’s exercise of religion, even if the burden results from a rule of general applicability, unless the government demonstrates a compelling interest that is the least restrictive means. 42 U.S.C. § 2000bb–1(a–b). “RFRA was designed to provide very broad protection for religious liberty,” *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2767 (2014), and protects individual and businesses alike, *id.* at 2768–69. Moreover, the Rule puts Texas’s child welfare service providers to a choice: participate in an otherwise available government funding program or remain a religious entity. In other words, under the Rule, providers must abandon their religious beliefs to receive the funding, a result recently held unconstitutional in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

The Rule substantially burdens the religious beliefs of religious child welfare service providers in Texas by requiring them to abandon their core tenets of serving families who share a particular faith and regularly attend religious services, among other things. The Rule requires these providers to abandon those requirements because it prohibits the providers from discriminating on the basis of religion in the provision of their services. Moreover, the Rule substantially burdens religious beliefs of providers whose faith disagrees with same-sex marriage and precludes them from placing children in such arrangements. And this conflict is not hypothetical. A couple in Fort Worth, Texas is suing HHS and the United States Conference of Catholic Bishops (“USCCB”) because USCCB provides foster care and adoption services in Texas, but places children according to core Catholic beliefs—a decision Texas protects. *See* Complaint ¶¶ 41–42, *Marouf v. Azar*, No. 18-cv-378 (D.D.C. 2018).

HHS, however, lacks a compelling interest to impose the Rule’s nondiscrimination policy on Title IV-E grantees, and the Rule is not the least restrictive means of advancing any purported interest that may exist. First, as discussed above, HHS lacks a compelling interest to enact the Rule because Congress did not authorize HHS to impose those requirements on States and their child welfare service providers. Second, even if HHS had authority, the Rule is not the least restrictive means. Other federal anti-discrimination statutes provide exemptions for religious entities when the policy goals of the nondiscrimination mandate would potentially conflict with a person or entity’s religious beliefs. Here, the Rule itself provides no express exemption. Instead, the Rule’s nondiscrimination restricts the religious beliefs of key State-partners in foster care and adoption. This leaves Texas with no choice but to seek a state-wide exception under 45 C.F.R. § 75.102.

The Rule also collides with Texas law protecting the religious liberty of child welfare service providers. A “child welfare services provider may not be required to provide any service that conflicts with the provider’s sincerely held religious beliefs.” Tex. Hum. Res. Code § 45.005(a). The Rule asks Texas to ignore this law by mandating that providers not discriminate based on religion to receive funding. *Id.* §§ 45.006–.008.

But Texas did not leave individuals who do not want to work with religious child welfare service providers without options. To facilitate the religious liberty protection, but also serve all children and potential foster care or adoptive parents in the State regardless of their religious beliefs, Texas requires state entities to ensure that secondary child welfare services providers are available if a child welfare services provider, pursuant to religious beliefs, declines to provide a particular service. It also requires that provider to provide the person seeking the service information related to other service providers and a referral to another provider. Tex. Hum. Res. Code § 45.005(c).

Requiring faith-based entities who receive Title IV-E funding through a Texas foster care or adoption services grant to comply with the Rule's broad nondiscrimination statement and policy regarding same-sex marriages infringes their rights to freedom of conscience and religious belief under federal and Texas law. Some faith-based partners require potential foster or adoptive homes to maintain a certain belief system and regularly attend religious services. Some have particular religious views on marriage, gender identity, and sexual orientation. But none of them should be required to forfeit their beliefs as a condition of helping Texas's most vulnerable children.

III. Conclusion

The Rule not only undermines the first liberty provided in the Bill of Rights—religious liberty—it is also contrary to Title IV-E's nondiscrimination provision, violates RFRA, and conflicts with Texas law. For these reasons, I respectfully request that HHS commence the process of repealing the Rule. In the alternative, and while HHS considers that option, I request, on behalf of the State of Texas and our faith-based child welfare service providers, an exception from subparts (c) and (d) of 45 C.F.R. 75.300. I look forward to hearing from you at your earliest convenience.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, slightly slanted style.

Ken Paxton
Attorney General of Texas

cc: Roger Severino, Director, HHS Office for Civil Rights