FAMILY EQUALITY COUNCIL

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March 27, 2018

U.S. Department of Health and Human Services
Office for Civil Rights
Attention: Conscience NPRM, RIN 0945-ZA03
Hubert H. Humphrey Building
Room 509F
200 Independence Avenue, S.W.
Washington, D.C. 20201

RE: Public Comment in Response to the Proposed Rule, Protecting Statutory Conscience Rights in Health Care RIN 0945-ZA03

To Whom it May Concern:

Family Equality Council submits the following comment in response to the request for public comment regarding the proposed rule entitled "Protecting Statutory Conscience Rights in Health Care," published January 26.

Family Equality Council connects, supports, and represents the three million parents who are lesbian, gay, bisexual, transgender and queer (LGBTQ) in this country and their six million children. We are a community of parents and children, grandparents and grandchildren that reaches across this country. For over 30 years we have raised our voices toward fairness for all families.

We thank you for the opportunity to comment on HHS' Proposed Rule, RIN 0945-ZA03, "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority" (Rule).

Every day too many LGBTQ people face discrimination and other barriers to accessing lifesaving care. These barriers are especially pronounced for transgender patients. The proposed rule ignores the prevalence of discrimination and damage it causes and will undoubtedly lead to increased discrimination and denials of care for some of the most vulnerable members of our community. We deeply value freedom of religion but sweeping exemptions that obstruct access to care are a fundamental distortion of that principle. American patients, particularly those already at heightened

risk for discrimination in health care services as documented by HHS' own Office of Civil Rights, deserve better.[1]

Family Equality Council and partner organizations have documented numerous instances of mistreatment, discrimination and denial of health care services to LGBTQ people and our children in amicus briefs to the Supreme Court and other courts. These stories illustrate not only the discrimination and degrading treatment LGBTQ individuals face when seeking medical care, but also the impact such treatment has on our families:

- Kinsey, a one-week old infant who had a life-threatening reaction to vaccine but was not immediately treated by hospital staff because the lesbian mother who had brought her could not prove she was her "real" mom.[2]

- M.C., a two-year old whose emergency treatment by a pediatric dentist was delayed because, as she was told, "a child cannot have two mothers."[3]

- A.S. and M.S., a married lesbian couple in Tennessee, who were denied service by multiple midwives and a birthing class provider during A.S.' pregnancy.[4]

- K.S., a transgender woman seeking mental health services who was subject to abusive treatment, inappropriate questioning and breaches of confidentiality, and who attempted to commit suicide twice while at the facility.[5]

- M.H., a gay man who checked into a New York City hospital with a severe infection and was treated roughly, called a 'faggot' multiple times, dragged down the hall in an office chair causing him to fall out of chair, and left on the ground where he had a seizure and convulsions.[6]

Expanding religious refusals can exacerbate the barriers to care that LGBTQ individuals and our family members already face.

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[1] See for example Sharita Gruberg & Frank J. Bewkes, *The ACA's LGBTQ Nondiscrimination Regulations Prove Crucial, 2018* https://www.americanprogress.org/issues/lgbt/reports/2018/03/07/447414/acas-lgbtq-nondiscrimination-regulations-prove-crucial/

[2] Brief of Amici Curiae Family Equality Council, Colage, and Kinsey Morrison in Support of Petitioners, Addressing the Merits and Supporting Reversal, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2015, https://www.familyequality.org/_asset/mhfjym/VoCSCOTUS2015.pdf

[3] Brief of Amici Curiae Lambda Legal Defense and Education Fund, Inc., Family Equality Council et al., in Support of Respondents, *Masterpiece Cake Shop v. Colorado Civil Rights Commission,* (S. Ct. 2017), https://www.familyequality.org/_asset/5xtc7j/20171030-LambdaLegal-FamEq-Amicus-Brief-Masterpiece.pdf

[4] Ibid.

[5] Ibid.

[6] Ibid.

Because of the broad language of the rule that goes beyond existing statutes and regulations, we are concerned it could embolden health care providers to claim protections for the kinds of harmful mistreatment and service denials such as those outlined in the examples above.
Nearly 56% of lesbian, gay, and bisexual people have had at least one experience of mistreatment or service denials in health care and 31% of transgender people have faced such discrimination in the last year alone. [7]

In a recent study, nearly one in five LGBTQ people, including 31% of transgender people, said that it would be very difficult or impossible to get the health care they need at another hospital if they were turned away. That rate was substantially higher for LGBTQ people living in non-metropolitan areas, with 41% reporting that it would be very difficult or impossible to find an alternative provider.[8] For these patients, being turned away by a medical provider is not just an inconvenience: it often means being denied care entirely with nowhere else to go.

The proposed rule attempts to inappropriately broaden religious exemptions in a way that can lead to dangerous denials of medically necessary treatments.

The rule purports, among other things, to clarify current "religious refusal clauses" related to abortion and sterilization in three federal statutes. Each of these statutes refers to specific, limited circumstances in which health care providers or health care entities may not be required to participate in abortion and sterilization procedures. The rule, however, creates ambiguity about these limited circumstances and encourages an overly broad misinterpretation that goes far beyond what the statutes permit.

For example, section (d) of the Church Amendments refers to circumstances when a person may refuse to participate in any part of a health service program or research activity that "would be contrary to his religious beliefs or moral convictions." Even though longstanding legal interpretation applies this section singularly to participation in abortion and sterilization procedures, the proposed rule does not make this limitation clear. This ambiguity can encourage an overly broad interpretation of the statute that empowers a provider to refuse to provide *any* health care service or information for a religious or moral reason. Some providers may try to claim even broader refusal abilities, as a recent analysis of complaints to HHS showed that transgender patients are most often discriminated against simply for being who they are rather than for the medical care they are seeking.[9]

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[7] Movement Advancement Project, *LGBT Policy Spotlight: Public Accommodations Nondiscrimination Laws,* 2018, http://www.lgbtmap.org/file/Spotlight-Public-Accommodations-FINAL.pdf
[8] Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care* , 2016, https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care.
[9] Sharita Gruberg & Frank J. Bewkes, *The ACA's LGBTQ Nondiscrimination Regulations Prove Crucial, 2018* https://www.americanprogress.org/issues/lgbt/reports/2018/03/07/447414/acas-lgbtq-nondiscrimination-regulations-prove-crucial/

Medical staff may interpret the rule to indicate that they can not only refuse but decline to tell the patient where he would be able to obtain these lifesaving services or even inform patients of their treatment options. This puts the health of the patient, and potentially that of others, at risk. In addition, by unlawfully redefining the statutory term "assisting in the performance" of a procedure, the rule could encourage health care workers to obstruct or delay access to a health care service even when they have only a tangential connection to delivering that service, such as scheduling a procedure or running lab tests to monitor side-effects of a medication. The extension and broadening of this clause will impair LGBTQ patients' access to care services if interpreted—as the proposed rule improperly appears to do—to permit providers to choose patients based upon sexual orientation, gender identity, or family structure.

We are particularly concerned that the proposed rule will be used to refuse medically necessary care to transgender patients. We are concerned that the rule's sweeping terms and HHS's troubling discussions of a case involving a transgender patient will encourage the mistaken belief that treatments that have an incidental impact on fertility, such as some procedures used to treat gender dysphoria, are sterilization procedures. Treatments for serious medical conditions may have the incidental effect of causing or contributing to infertility: for example, a hysterectomy to treat gender dysphoria, chemotherapy to treat cancer, and a wide range of medications can have the incidental effect of temporarily or permanently causing infertility. The primary purpose of such procedures, however, is not to sterilize, but to treat an unrelated medical condition. If religious or moral exemptions related to sterilization are misinterpreted to include treatments that have simply an incidental effect on fertility—as the vague and sweeping language of this rule encourages—it can lead to refusals that go even further beyond what federal law allows and unlawfully encourages individuals and institutions to refuse a dangerously broad range of medically needed treatments.

Expanding exemptions undermines the Department's mandate to protect the health and well-being of all Americans.

Reducing discrimination and other barriers to accessing health care services, as well as reducing the accompanying health disparities, is core to the Department's mission and its obligations under laws authorizing its programs. Weakening protections and limiting program access by expanding religion-based exemptions fundamentally runs contrary to this mission.

The Department's core mission is to "enhance and protect the health and well-being of all Americans…by providing for effective health and human services."[10] Ensuring that beneficiaries of Department programs and other patients have fair and equal access to services and reducing barriers to those services is an inseparable and necessary component of this responsibility. The Department's ability to ensure equal, nondiscriminatory access to services would be significantly weakened by the proposed rule. In order to meet its legal obligations and its statutory mission, HHS must prioritize the needs and rights of patients over those of organizations seeking federal funds and individual health

[10] Dep't. of Health & Human Servs., *About HHS*, 2017, https://www.hhs.gov/about/index.html.

care workers. Creating new or expanded exemptions for recipients of federal funds at the cost of patients' access to health services prevents the Department from meeting its responsibilities to HHS program beneficiaries and patients around the country.

The proposed rule undermines states' and local governments' efforts to protect patients' health and safety, including their nondiscrimination laws.

The Department claims that its unwarranted new interpretations of federal law supersede laws passed by state and local governments to ensure patients' access to health care. By claiming to allow individuals and institutions to refuse care to patients based on the providers' religious or moral beliefs in such a sweeping way, the proposed rule creates conflicts with hundreds of state and local nondiscrimination laws around the country that apply to health care. It therefore is inaccurate for the Department to claim that the proposed rule "does not impose substantial direct effects on States," "does not alter or have any substantial direct effects on the relationship between the Federal government and the States," and "does not implicate" federalism concerns under Executive Order 13132.

Foster children face unique harms due to health care service refusals.
Allowing Such Refusals Undermines States' and Local Governments' Statutorily Required Efforts to Promote Safety, Permanency, and Well-Being of Foster Youth, Including Child-Welfare Specific Nondiscrimination Laws

Foster children, including LGBTQ foster youth, are particularly vulnerable to health care service refusals, and the rule could lead to unlawful service refusals and worsened outcomes for youth in care. The rule could undermine the core statutory objectives of those providing services in the child welfare context, who must act in the best interests of the child, with the objectives of child safety, permanency and well-being. Instead, a health care provider could prioritize personal religious beliefs over the best interests of the child. A broadening of the interpretation of the Church Amendment could lead to a medical professional funded by federal health programs who is providing health care services to foster children, including those in a restricted setting, to feel emboldened to refuse the child a range of services that are in his or her best interests such as reproductive health care for a girl in care, transition related care for a transgender foster youth, or counseling for an LGBTQ-identified foster youth that affirms her or his identity.

Foster children are uniquely dependent on those providing their care, including health care. For example, a child placed in a group home may not have access to the internet, phone service, email, or other means to communicate with health providers other than those entrusted with their care. This means if these children are refused needed health services, it may simply not be possible for them to find a viable alternative.

LGBTQ and female foster youth are particularly vulnerable. HHS-funded research has shown that LGBTQ youth, who comprised 19% of foster youth over 12 in the study of Los Angeles foster care, suffer unacceptably high rates of mistreatment, hospitalizations, placements in group homes (instead of with loving families), serial placements, and homelessness.[11] A study conducted in New York City's child welfare system further found that more than half (56%) of the LGBTQ-identified youth who had been interviewed said that they had chosen living in the streets at one point as they felt safer there than living in group or foster homes.[12] Affirming care that supports LGBTQ foster youths' identities is essential for achieving the child welfare goals of safety, permanency, and well-being. This care includes affirming health care, including reproductive care, transition-related health care for transgender youth, and mental health care that helps LGBTQ foster youth address issues of trauma related to family rejection, violence, harassment, and discrimination due to their sexual orientation or gender identity or expression. Service refusals by medical professionals could greatly exacerbate the trauma these youth have already experienced, particularly as they face few options for accessing alternative providers.

It is impermissible to allow those who care for foster children to deny them access to reproductive health care.

The government is legally obligated to provide medical care and family planning services to the youth in its care, without exception.[13] Yet, the proposed Rule could allow foster parents and social service agencies that provide services to children and young people to refuse even minor assistance to a young person in foster care who needs reproductive health services, including birth control, testing or treatment for sexually transmitted infection, and abortion care. This means that a social service agency or even just one person at that agency could block a young person in foster care from making an appointment or getting to a doctor's office for reproductive health care. A bus driver who is supposed to take a foster child to a doctor's appointment, for example, could refuse to drive the young person to a family planning clinic, claiming that doing so would "assist in the performance" of providing birth control.

Comprehensive, non-judgmental, and trauma informed reproductive health care is critical for youth in foster care. Girls in foster care are twice as likely as girls not in foster care to have sex and less likely to use birth control when they do have sex.[14] As a result, girls in foster care are more likely to

[11] Wilson, B.D.M., Cooper, K., Kastanis, A., & Nezhad, S. (2014). *Sexual and Gender Minority Youth in Foster care: Assessing Disproportionality and Disparities in Los Angeles.* Los Angeles: The Williams Institute, UCLA School of Law.
[12] G.P. Mallon, *We don't exactly get the welcome wagon: The experience of gay and lesbian adolescents in North America's child welfare system*, in Child Welfare League of America Best Practice Guidelines (Child Welfare League of America, 2006).
[13] *Flores v. Reno*, No. CV 85-4544- RJK(Px) (C.D. Cal. Jan. 17, 1997).
[14] Alison Stewart Ng & Kelleen Kaye, The National Campaign to Prevent Teen and Unplanned Pregnancy, *Teen Childbearing and Child Welfare*, 2013, 1, *available at* https://thenationalcampaign.org/sites/default/files/resource-primary-download/childbearing-childwelfare.pdf.

become parents: A national study found that twice as many girls in foster care give birth compared to girls not in foster care.[15]

It is critical, therefore, that young people in foster care be able to access comprehensive reproductive health care and counselling. Girls in foster care also experience higher rates of sexual violence.[16] They are twice as likely as boys to be removed from their homes and placed in foster care because of sexual abuse (6 percent of girls versus 2.9 percent of boys),[17] making it that much more crucial that they are provided timely, unimpeded access to a full range of reproductive health care services in a manner that is both respectful and non-stigmatizing.

Allowing young people to be placed in a setting with caregivers who are unwilling to allow a young person to access reproductive health care services would lead to discriminatory and substandard care. No young person in foster care should be denied access to needed health care services because the people or organizations who are supposed to care for the young person object to the care.

The proposed rule undermines states' and local governments' efforts to protect foster children's health and safety, including their nondiscrimination laws.

The Department claims that its new interpretations of federal law supersede laws passed by state and local governments to ensure patients' access to health care. Yet, by allowing health care providers to refuse care to patients based on the providers' religious or moral beliefs in such a sweeping way, the proposed rule conflicts with state and local nondiscrimination laws, regulations, and policies that provide protections to foster youth.

Thirty-seven states provide protections against discrimination based on sexual orientation for youth receiving foster care and adoption services by law, regulation, or policy, and twenty-four states provide such protections based on gender identity and expression.[18] Further, "all States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands have statutes requiring that the child's best interests be considered whenever specified types of decisions are made regarding a child's custody, placement, or other critical life issues." (from HHS Children's Bureau website, with links to all statutes.)[19]

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[15] Lois Thiessen Love et al., The National Campaign to Prevent Teen Pregnancy, *Fostering Hope: Preventing Teen Pregnancy Among Youth in Foster Care*, 2005, 7, *available at* https://thenationalcampaign.org/sites/default/files/resource-primary-download/FosteringHope_FINAL.pdf.

[16] Karen Banes-Dunning & Karen Worthington, "Responding to the Needs of Girls in Foster Care," *Georgetown Journal on Law & Poverty* 20 no. 2, 2013, 321-49, *available at* http://www.karenworthington.com/uploads/2/8/3/9/2839680/adolescent_girls_in_foster_care.pdf.

[17] National Women's Law Center calculations of unpublished data by National Data Archive on Child Abuse and Neglect.

[18] See https://www.lambdalegal.org/map/child-welfare for a map of sex, sexual orientation, and gender identity anti-discrimination statutes, regulations, and policies in place for foster youth by state.

[19] Available at https://www.childwelfare.gov/pubPDFs/best_interest.pdf

Two examples of state nondiscrimination laws and policies that protect LGBTQ foster youth from discrimination include (emphasis added):

California

Statute: Cal. Welf. & Inst. Code 16001.9
Rights of minors and non-minors in foster care.
"It is the policy of the state that all minors and nonminors in foster care shall have the following rights:
. . .
(23) To have fair and equal access to all available services, placement, **care, treatment, and benefits,** and to not be subjected to discrimination or harassment on the basis of actual or perceived race, ethnic group identification, ancestry, national origin, color, religion, **sex**, **sexual orientation**, **gender identity**, mental or physical disability, or HIV status.

(25) To have caregivers and child welfare personnel who have received instruction on cultural competency and sensitivity training relating to, and best practices for, providing adequate care to **lesbian**, **gay**, **bisexual**, and **transgender** youth in out-of-home care."

Idaho

Policy: Idaho Youth in Care Bill of Rights (Oct. 2015)
"Youth have the right to learn about their **sexuality** in a safe and supportive environment.
. . .
Youth have the most basic right to receive care and services that are free of discrimination based on race, color, national origin, ancestry, **gender**, **gender identity** and **gender expression**, religion, **sexual orientation**, physical and mental disability, and the fact that they are in foster care."

Because of explicit nondiscrimination protections in the provision of care and services to foster youth, including health care services, it is inaccurate for the Department to claim that the proposed rule "does not impose substantial direct effects on States," "does not alter or have any substantial direct effects on the relationship between the Federal government and the States," and "does not implicate" federalism concerns under Executive Order 13132. In fact, the rule could prove financially burdensome to states attempting to ameliorate the high costs of disproportionately negative outcomes for LGBTQ foster youth. An HHS-funded study found that LGBTQ foster youth had been hospitalized for emotional reasons at three times the rate of non-LGBTQ foster youth, and the report therefor recommended "address[ing] the needs of LGBTQ youth in care so their experience begins to approximate those of their non-LGBTQ counterparts. This will result in much needed cost avoidance for already over-burdened child welfare systems."[20]

[20] Wilson, B.D.M., Cooper, K., Kastanis, A., & Nezhad, S., 2014. *Sexual and Gender Minority Youth in Foster care: Assessing Disproportionality and Disparities in Los Angeles.* Los Angeles: The Williams Institute, UCLA School of Law.

Conclusion

The proposed rule goes far beyond established law, improperly undermines state nondiscrimination laws, and most importantly will put the health and potentially even the lives of some of the most underserved and vulnerable patients at risk. We urge you to withdraw the proposed rule.

Should you have any questions about these comments, I would be happy to visit your offices in Washington, DC to discuss them, or you can reach me via telephone or email at 646.829.9314 or ssloan@familyequality.org.

Sincerely,

Rev. Stan J. Sloan
Chief Executive Officer