December 19, 2019

VIA ELECTRONIC SUBMISSION

Department of Health and Human Services

Attn: Richard Brundage, Office of the Assistant Secretary for Financial Resources


Docket ID: HHS-OS-2019-0014-0001; RIN 0991-AC16

The Institute for Policy Integrity at New York University School of Law ("Policy Integrity") respectfully submits the following comments to the Department of Health and Human Services ("HHS" or the "Department") regarding proposed changes to regulations governing HHS grant recipients ("Proposed Rule"). Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through scholarship in the fields of administrative law, economics, and public policy.

We write to note that HHS has failed to provide any assessment of the Proposed Rule’s costs and benefits and that finalizing the rule in the absence of such an analysis would violate both Executive Order 12,866 and the Administrative Procedure Act ("APA").

Though HHS claims that the Proposed Rule is "economically non-significant," the Department has nevertheless designated it "as a ‘significant regulatory action’ under section 3(f) of Executive Order 12866," presumably because the rule will “[m]aterially alter . . . rights and obligations of [federal grant] recipients.” For rules in this category, the executive order requires agencies to provide “[a]n assessment of the potential costs and benefits of the regulatory action.” This assessment should be based “on the best reasonably obtainable scientific, technical, economic, and other information,” and should include quantifiable measures “to the fullest extent that [they] can be usefully estimated.” Yet HHS does not provide even a qualitative description of the Proposed Rule’s likely impacts.

In addition to violating Executive Order 12,866, HHS’s disregard for the Proposed Rule’s potential costs violates the APA’s requirement of reasoned decisionmaking. A regulation is

1 This document does not purport to present New York University School of Law’s views, if any.
3 Id. at 63,834 (emphasis added).
5 Id. § 6(a)(3)(B)(ii).
6 Id. § 1(a), (b)(7).
arbitrary and capricious under the APA if the issuing agency fails to “examine the relevant data” or “consider an important aspect of the problem,” and “[a]gencies have long treated cost as a centrally relevant factor when deciding whether to regulate.” Furthermore, the costs that an agency must consider “include[] more than the expense of complying with regulations”; instead, “any disadvantage could be termed a cost.”

Here, HHS proposes to, among other things, eliminate a regulatory prohibition on “discrimination in the administration of HHS programs and services based on non-merit factors such as . . . gender identity, or sexual orientation.” HHS says this provision “burdens” some grantees—by which it means, presumably, that the provision constrains the behavior of some grantees that would like to discriminate on the basis of gender identity or sexual orientation. Accordingly, it is reasonable to assume that lifting the prohibition will cause an increase in discrimination on these bases by HHS grantees.

For example, finalizing the Proposed Rule will likely lead to more denials of service to otherwise qualified LGBT individuals and same-sex couples by HHS-funded foster-care or adoption programs. Such denials would impose both psychological and financial costs on prospective LGBT parents (who would, at minimum, incur the expense of seeking out an alternative foster or adoption agency to work with) and on children in need of placement (who might have to wait longer to match with a family).

To satisfy its obligations under Executive Order 12,866 and the APA, HHS must describe the circumstances in which the Proposed Rule can reasonably be expected to cause discrimination against LGBT individuals and families and assess the potential consequences of that

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9 Id.
10 45 C.F.R. § 75.300(c); see also 84 Fed. Reg. at 63,832 (proposing to revise the text of § 75.300(c)).
11 84 Fed. Reg. at 63,832.
12 See Ariana Eunjung Cha, Proposed HHS rule would strip Obama-era protections for LGBTQ individuals, Wash. Post (Nov. 1, 2019), https://www.washingtonpost.com/health/2019/11/01/new-hhs-rule-would-strip-obama-era-protections-lgbtq-individuals/ (“Faith-based [foster and adoption] agencies in several states, including South Carolina, Texas, Michigan and Pennsylvania, have argued they should not be forced to work with gay, lesbian or transgender parents against their own beliefs.”).
13 See, e.g., Leslie Cooper & Paul Cates, Too High a Price: The Case Against Restricting Gay Parenting 75 (ACLU 2006), https://www.aclu.org/sites/default/files/images/asset_upload_file480_27496.pdf (“Given the severe shortage of adoptive parents in this country, such exclusions mean that some of society’s most vulnerable children will have to wait for years to be adopted, and some will grow up without ever having a family of their own.”); see also Shoshana K. Goldberg & Kerith J. Conron, How Many Same-Sex Couples in the U.S. Are Raising Children? (Williams Institute at UCLA School of Law 2018), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Parenting-Among-Same-Sex-Couples.pdf (noting that same-sex couples are “far more likely” to raise adopted or foster children than male/female couples).
discrimination—using quantifiable measures whenever possible. Finalizing the Proposed Rule without conducting such an analysis would be arbitrary and capricious.

Respectfully,

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