



August 28, 2023

The Honorable Xavier Becerra
Secretary of Health and Human Services
U.S. Department of Health and Human
Services
200 Independence Ave, SW
Washington, DC 20201

The Honorable Jeff Hild
Acting Assistant Secretary
Administration for Children
and Families
330 C St., SW
Washington, DC 20201

Re: Public Comments Regarding ACF's Notice of Proposed Rulemaking on Improving Child Care Access, Affordability, and Stability in the Child Care and Development Fund, No.: ACF-2023-0003-001

Below are comments from Independent Women's Forum (hereinafter IWF) on the Department of the Health and Human Services' (HHS) Administration of Children and Families' (ACF) proposal regarding "Improving Child Care Access, Affordability, and Stability in the Child Care and Development Fund," Docket Number ACF-2023-0003-0001, published in the Federal Register on July 17, 2023.

Independent Women's Forum is the leading national women's organization dedicated to developing and advancing policies that are more than just well-intended, but enhance people's freedom, opportunities, and well-being. As a 501c3 non-profit organization, IWF works every day to engage and inform women about how policy issues impact them and their loved ones.

IWF is committed to American families having plentiful, quality choices when it comes to how to care for their children. IWF wants parents to have greater ability to choose whether or not to use paid childcare arrangements, and to make it easier to keep a parent or loved one at home. IWF wants more Americans to have the ability to work with friends and neighbors to collaborate on providing child care. IWF recognizes that child care is tremendously important for families, businesses, and our society as a whole. Most importantly, society has an interest and moral obligation to ensure that all children are cared for in a safe, supportive environment when their parents are at work.

For some families finding accessible, quality, affordable child care is a huge challenge. Child care can be expensive and scarce. Policymakers ought to

consider how to improve options for families. However, while these challenges are very real for millions of families, it's important for policymakers to also recognize that most families are actually satisfied with their childcare arrangement and many don't use or prefer a formal, paid childcare arrangement.

For example, a 2021 **Bipartisan Public Policy Center survey** found that two-thirds (66%) of families with a single parent or two working parents reported using their ideal childcare arrangement in January 2020. A 2022 report by the **Bipartisan Policy Center** and Morning Consult found that nearly six in ten parents preferred informal child care over formal child care centers, *even if formal care was free and in a convenient location*. Most parents would prefer to work less and spend more time with their children. Most parents and Americans simply think that having family or family-like care is best for children and formal, institutional daycare centers tend to be parents' least preferred option.¹

Therefore, IWF is tremendously concerned that ACF's proposal would take America's childcare infrastructure in the wrong direction—making it harder for parents to find the types of childcare arrangements they prefer, making it harder for parents to keep a child home in a family-care setting, and making our childcare infrastructure less diverse rather than more.

Therefore, IWF urges HHS and ACF to withdraw this proposal.

Background

IWF shares all of the concerns detailed in the comments made on this rule by the American Conservative Union Foundation's Center for Regulatory Freedom. In particular, we are concerned that subsidizing certain childcare facilities and making them beholden to government regulators—rather than parents—can lead to worse outcomes, including higher childcare costs and inferior quality. In particular, we are concerned that increased reliance on government funding will encourage more of these daycare facilities to feel

¹ See Linda Smith, Sarah Tracey, Ben Wolters, "Are Parents' Child Care Preferences Changing? Overview of BPC's Parent Survey," *Bipartisan Policy Center*, 2021. <https://bipartisanpolicy.org/blog/are-parents-child-care-preferences-changing-overview-of-bpcs-parent-survey/>. And Nikki Graf, "Most Americans say children are better off with a parent at home," *Pew Research Center*, 2016. <https://www.pewresearch.org/short-reads/2016/10/10/most-americans-say-children-are-better-off-with-a-parent-at-home/#:~:text=Among%20those%20who%20think%20children,t%20employed%20outside%20the%20home>.

compelled to adopt policies favored by the federal government and general bureaucracy, including politicized and ideological curriculums and policies.

You need only look at the battles that rage over the content of our government-run public schools around the country to envision what will be in store as the federal government and related agencies increase their power and role in daycare centers. Rather than parents being able to find providers that reflect their priorities and values, more and more daycare providers will be focused on meeting the priorities and preferences of those who hold the purse strings—government officials.

There Are Better Ways to Make Day Care More Diverse, Accessible, and Affordable

There are ways that government officials can make day care more affordable and accessible. To start, policymakers at all levels of government should seek to eliminate regulations that are not directly related to safety and true quality so that a greater diversity of providers—especially smaller and at-home providers—enter the marketplace so parents have more and better options.

A **study** by the Mercatus Center found that costs of care could be reduced by between \$850 and \$1,890 per child per year by eliminating regulations not related to the quality of care. A **review of childcare regulations** around the country reveals ludicrous examples of regulations dictating the minutiae of daycare facilities such as very specific art supplies and the number and size of balls and other toys, which clearly just create headaches and drive up costs for providers. These should be rescinded.

During COVID, policy leaders around the country, including Democrats as well as Republicans, lifted daycare regulations to encourage the creation of additional daycare options. Policymakers should explore the consequences of this deregulation and make permanent the elimination of regulations that have been found unnecessary.

In fact, in spite of the tremendous disruption during COVID, the 2022 **data** released by Child Care Aware of America showed that the number of licensed childcare centers today exceeded the number open pre-pandemic. States around the country have been enacting a variety of new childcare-related initiatives, which will provide helpful examples of what works and what

doesn't.² That's progress that we should seek to continue and the federal government shouldn't disrupt.

Furthermore, rather than the government infusing billions of additional taxpayer dollars into select childcare facilities, policymakers ought to focus on reducing financial burdens on parents, especially parents who have young children, since they often face the largest expenses. However, in doing so, policymakers should not make financial support conditional on childcare arrangements. Incentivizing the use of paid child care isn't fair to all the families with loved ones—parents, grandparents, aunts, and neighbors—who provide loving care for children in their lives for free, while forgoing paid employment. Having family members like grandparents as caregivers is good for kids and for the grandparents themselves. We should not effectively discourage or crowd out these relationships.

A Gross Misuse of the Regulatory Process

IWF is also deeply concerned that such a sweeping, significant change to our nation's childcare infrastructure would be made without the involvement of the people's elected representatives in Congress. Our Constitution is clear: only the people's representatives—not unelected bureaucrats—have the authority to make law.³ The proposed rule would usurp that power by significantly changing the business model for our nation's childcare providers.

Congress did not regulate such a broad swath of conduct. And absent a delegation from Congress, the Department is powerless to do so.⁴

As recently as June 2022, the Supreme Court reiterated the importance of the constitutional separation of powers, holding that executive agencies may *not* adopt regulations that go beyond the scope of the statutes written by Congress.⁵

² Dana Goldstein, "With Child Care Scarce, States Try to Fix 'a Broken Market,'" *New York Times*, 2022. <https://www.nytimes.com/2022/06/18/us/child-care-state-regulations.html>.

³ See Erin Hawley, "Placing the Administrative State in Constitutional Context," *Indep. Women's Forum*, 2016. <https://tinyurl.com/IWFAdminBrief>.

⁴ See *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").


⁵ *West Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2608 (2022) (in "extraordinary cases" of "economic and political significance," and particularly when the agency uses "unheralded" or new authority, the agency must be able to point to a clear statement from Congress) (quotation marks omitted).

This case is not even close. Here, not only is there no clear statement from Congress; Congress, in fact, considered and rejected similar provisions contained in this proposed rule during the debate about the “Build Back Better Act.” To be clear: *These provisions did not pass and were not implemented because they did not have the support of the American people.*

The unlawful attempt by the Department of Health and Human Services to use the regulatory process to accomplish what Congress could not is a gross misuse of executive authority that violates our Constitution’s clear separation of powers.

For the foregoing reasons, IWF respectfully urges HHS and ACF to withdraw this unlawful and misguided proposal.

Respectfully,

A handwritten signature in cursive script that reads "Carrie Lukas".

Carrie Lukas
President
Independent Women’s Forum