

November 27, 2023

Xavier Becerra
Secretary
U.S. Department of Health & Human Services

Jeff Hild
Acting Assistant Secretary
Administration for Children and Families

Rebecca Jones Gaston, MSW
Commissioner
Administration on Children, Youth and Families

Aysha E. Schomburg, J.D.
Associate Commissioner
Children's Bureau

Address: 200 Independence Ave, S.W. Washington, D.C. 20201

Submitted electronically via regulations.gov

**Re: Safe and Appropriate Foster Care Placement Requirements for Titles IV–E and IV–B
Notice of Proposed Rulemaking (RIN 0970–AD03)**

Dear Secretary Becerra, Acting Assistant Secretary Hild, Commissioner Jones Gaston, and Associate Commissioner Schomburg:

On behalf of the ten undersigned organizations, we write in response to the Department of Health and Human Services (HHS), Administration for Children and Families (ACF), Administration on Children, Youth and Families (ACYF), and Children's Bureau (CB) (collectively “ACF”) notice of proposed rulemaking (RIN 0970-AD03) published in the Federal Register on September 28, 2023.¹ We thank you for proposing the Safe and Appropriate Foster Care Placement Requirements for Title IV-E and IV-B Rule, 45 CFR 1355 (“the Rule”), and for the opportunity to comment on the Rule.

We appreciate ACF’s commitment to ensuring lesbian, gay, bisexual, transgender, queer or questioning, intersex, non-binary children, or children who do not conform to gender stereotypes (LGBTQI+)² are protected from harm while in foster care, are connected to resources that improve their wellbeing, and thrive at home, with relatives, or, if necessary, in another

¹ In addition to a number of the organizations listed below, this comment was prepared with the assistance of Harper Jean Tobin, consultant for Family Equality; Kristen Miller, Senior Counsel, Democracy Forward Foundation; Laura Brennan, Child Welfare Policy Associate, Family Equality; and Currey Cook, Senior Counsel and Youth in Out-of-Home Care Project Director, Lambda Legal.

² We use LGBTQI+ in this comment unless research we cite uses another abbreviation or where research focuses on a subset within the LGBTQI+ population.

permanent, stable, family placement. Also, we thank ACF for summarizing available research about the experiences of LGBTQI+ children in foster care and proposing a rule that attempts to address well-documented discrimination, physical and emotional harm, and other challenges that have plagued child welfare system involved LGBTQI+ youth for years. The Rule also sets out a process to hold state agencies, tribes, and the placement providers they utilize in performing the government function of child welfare system administration accountable to the LGBTQI+ children they serve, to protect children from harm while in foster care, and to require training on how to best support LGBTQI+ children that meets certain standards. These explicit requirements are long overdue and provide necessary guidance on how to ensure existing requirements under existing law are guaranteed for an especially vulnerable population.

The Rule adds important safeguards and necessary training requirements, but we do not support finalization of the Rule in its current form without essential revisions. If ACF is not inclined to accept suggested revisions to expand the Rule, we request the final rule include comprehensive, system-wide nondiscrimination protections and require safe and appropriate placements for all children without an opt out or blanket exemption. At a minimum, ACF must ensure placements are safe and appropriate for all children without an opt out or blanket exemption. If ACF does not agree to incorporate these provisions and strengthen the rule, we recommend the agency not finalize the Rule and instead issue a new notice of proposed rulemaking with a more robust, comprehensive, and practicable rule that 1) does not require children to request basic safety in care when safety is already guaranteed under existing law, 2) protects all children and families from harm and discrimination related to the multiple aspects of their identity, in addition to the sexual orientation and gender identity, in all Title IV-E and IV-B programs, and 3) holds all providers to the same standards for LGBTQI+ youth that all youth in foster care have a right to expect without a blanket exemption.

I. Overview

We appreciate ACF's efforts and support certain provisions in the proposed Rule, but we do not support finalization of the proposed Rule in its current form because it:

- 1) impermissibly treats LGBTQI+ children differently than their non-LGBTQI+ peers by guaranteeing only a percentage of foster placements are safe and appropriate for them;
- 2) places the onus on LGBTQI+ children to request safe and appropriate placements that are already guaranteed to them, and all children in foster care, under existing law;
- 3) does not protect all LGBTQI+ children from harm, but only youth who are out³ or have been identified or presumed to be LGBTQI+ by others;
- 4) does not explicitly protect all youth from discrimination based on sexual orientation, gender identity, or gender expression or other aspects of their identity (e.g., religion, race, national origin, disability, or HIV status) in all Title IV-E and IV-B services and does not require that all children be notified of these rights at an appropriate age;
- 5) does not clearly prohibit attempts to undermine, suppress, or change the sexual orientation or gender identity of a child or to subject intersex children to medically unnecessary, nonconsensual surgeries;
- 6) does not guarantee a child access to clinically appropriate medical care;

³ LGBTQI+ children who are "out" have disclosed their identity to another person or persons.

7) purports to protect LGBTQI+ youth from harm and retaliation, but offers placement providers the ability to opt out of a nonoptional statutory requirement to provide a safe and appropriate placement, whether such an exemption is for faith-based reasons or not;

8) abandons ACF's most basic obligation to protect all children in the child welfare system by prioritizing providers wishes or beliefs over the basic needs of children:

9) focuses solely on foster care and expanding foster home options rather than including support for family and kin to become safe and supportive homes for LGBTQI+ children.

10) fails to protect all families, including kin, and current and prospective foster and adoptive parents, from discrimination at all points of contact with the child welfare system; and

11) inaccurately presupposes that faith-based providers should be given an exemption from statutory requirements based on a flawed interpretation of ACF's obligation under the Religious Freedom Restoration Act ("RFRA"), including an inaccurate description of the U.S. Supreme Court's holding in *Fulton v. City of Philadelphia*.

In addition to these limitations, the proposed rule is impracticable. It requires that a "sufficient" number of safe and appropriate placements be made available but provides no specific standards that would guarantee supportive providers and safe placements be actually available to every child, nor that they would be close to a child's family, school, or community. Also, the Rule adds a complicated layer of bureaucracy – for opting in to providing a safe and appropriate placement scheme and notifying only some children of their right to such a placement – into a system already infamous for its bewildering and challenging bureaucracy. In a bureaucracy already difficult for agencies, tribes, providers, advocates, judges, and, most importantly, children and families to navigate, we are concerned that this convoluted approach may fail to make a difference for the youth and families most in need of protection.

Before addressing these concerns in more detail and proposing revisions that would strengthen protections for all children and add protections for families, we remind ACF that in September 2023, a number of the undersigned organizations recommended, in response to the HHS Grants Notice of Proposed Rulemaking (RIN-045-AA19), that HHS initiate rulemaking to adopt broad nondiscrimination protections in grant programs that are authorized by statutes that lack explicit nondiscrimination protections, such as Titles IV-B and IV-E of the Social Security Act, but which have general rulemaking authority.⁴ We reiterate that request here and ask that such protections be included in a revised Rule or in the RIN-045-AA19 rulemaking process.

Accordingly, we suggest that HHS revise the Rule and put in place comprehensive non-discrimination protections for all children, including LGBTQI+ children, and families, including kin and current and prospective foster and adoptive parents as they receive the gamut of services provided by HHS through Title IV-E and IV-B. Those protections should clarify that individuals are protected from discrimination and harm on account of their race, national origin, religion, disability, and HIV status, as well as sex, sex characteristics, including intersex traits, sexual orientation, gender identity, and gender expression.⁵ HHS should also revise the Rule to clarify,

⁴ Family Equality, et al, *HHS-OCR-2023-0011-0078 (RIN-0945-AA19)* (Sept. 11, 2023), <https://www.regulations.gov/comment/HHS-OCR-2023-0011-0078>.

⁵ These most basic protections from discrimination now exist across other federal programs serving youth. The Department of Housing and Urban Development ("HUD") prohibits discrimination by providers receiving HUD funding on the basis of race, color, national origin, religion, sex (including gender identity and sexual orientation), familial status (including children under 18, pregnancy, and seeking legal custody), and disability. *Equal Access to*

consistent with existing law, that all children in care are entitled to safe and appropriate placements and that any religious exemption process under RFRA would be considered on a case-by-case basis when and if a provider requests such an exemption.

Only when these foundational parameters are set out explicitly and holistically in federal law, will LGBTQ+ families, kin, and foster and adoptive parents be assured of equitable treatment as they participate in or benefit from Title IV-E and IV-B programs. The purposes of Title IV-E and IV-B programs—which include protecting and promoting the welfare of all children; preventing abuse and neglect; supporting families so children can remain safely at home; promoting children’s safety, permanence, and well-being; providing training and support to ensure a well-qualified child welfare workforce; and providing services for transition age youth, adoption assistance for special needs children and kinship guardianship—cannot be fully realized if children and families are not certain they will be treated fairly and protected from harm on account of immutable aspects of their identity.⁶ Given the legacy of harm inflicted by the child welfare system on Black and Brown, American Indian and Alaska Native (AI/AN), and LGBTQ+ children and families, as well as those living with disabilities or HIV, ACF should make clear that harm, discrimination, and abuse is not acceptable in Title IV-E and IV-B programs. ACF should hold agencies and their providers accountable to requirements under federal law, and provide accessible information about those guarantees to all children and families.

We make the following recommendations regarding provisions in the Rule:

The Final Rule Should Maintain the Following Provisions from the Proposed Rule:

- Title IV-E/IV-B agencies must meet the following requirements for LGBTQI+ children in foster care:
 - Protections
 - The Title IV-E/IV-B agency must ensure that a safe and appropriate placement is available and provided to all children in foster care, including

Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5662 (Mar. 5, 2012) (codified at 24 C.F.R. §§ 5, 200, 203, 236, 400, 570, 574, 882, 891, 982), available at <https://www.federalregister.gov/documents/2012/02/03/2012-2343/equal-access-to-housing-in-hud-programs-regardless-of-sexual-orientation-or-gender-identity>; *Equal Access in Accordance With an Individual’s Gender Identity in Community Planning and Development Programs*, 81 Fed. Reg. 64763 (Oct. 21, 2016) (codified at 24 C.F.R. § 5), available at <https://www.federalregister.gov/documents/2016/09/21/2016-22589/equal-access-in-accordance-with-an-individuals-gender-identity-in-community-planning-and-development>. Likewise, HHS prohibits providers who receive funds through its Runaway and Homeless Youth program grants from discriminating on the basis of race, ethnicity, nationality, age, religion/spirituality, gender identity/expression, sexual orientation, socioeconomic status, physical or cognitive ability, language, beliefs, values, behavior patterns, or customs. *Runaway and Homeless Youth Program*, 45 C.F.R. § 1351 (1978), available at <https://www.ecfr.gov/current/title-45/subtitle-B/chapter-XIII/subchapter-F/part-1351>. The Department of Justice, Office of Justice Programs, has issued guidance to its grantees explaining that federal law requires protection from discrimination on the basis of sex, including sex characteristics, sexual orientation and gender identity, ensuring LGBTQI+ children participating in Office of Juvenile Justice and Delinquency Prevention-funded programs are protected. See Assistant Attorney General Kristen Clarke, *DOJ Memo Re: Interpretation of Bostock v. Clayton County regarding the nondiscrimination provisions of the Safe Streets Act, the Juvenile Justice and Delinquency Prevention Act, the Victims of Crime Act, and the Violence Against Women Act*, U.S. Department of Justice, Civil Rights Division (Mar. 10, 2022), available at <https://www.justice.gov/media/1212061/dl?inline>.

⁶ 42 U.S.C. § 621 (2006).

those who identify as LGBTQI+. Such a placement is one that a) will establish an environment free of hostility, mistreatment, or abuse based on the child’s LGBTQI+ status; b) is trained to be prepared meet the needs of the child related to the child’s sexual orientation, gender identity and gender expression and c) will facilitate the child’s access to age appropriate resources, services, and activities to support their health and well-being.⁷ To provide additional clarity, consistency, and protection, we urge ACF to modify this language to refer to “LGBTQI+ identity or status,” and to a child’s “sexual orientation, gender identity, gender expression and (where applicable) variations in sex characteristics.”

- The Title IV-E/IV-B agency must implement a process for LGBTQI+ children to report concerns about any placements that fail to meet the three requirements for safe and appropriate placements, that safeguards the privacy of and confidentiality of the child, and that notifies children of the guarantee of a safe and appropriate placement both verbally and in writing, and that responds to any reported concern consistent with the agency’s time frames for investigating child abuse and neglect reports.⁸
- No LGBTQI+ child in foster care experiences retaliation for disclosing their LGBTQI+ identity or for reporting concerns that their placement is not safe and appropriate.⁹ To provide additional clarity, consistency, and protection, we urge ACF to modify this language to “LGBTQI+ identity or status,” and to disclosure by the child “or a third party.”
- Title IV-E/IV-B agencies must ensure that LGBTQI+ children have access to age-appropriate services that are supportive of their sexual orientation and gender identity, including clinically appropriate mental and behavioral health services.¹⁰ To provide additional clarity, consistency, and protection, we urge ACF to modify this language to refer to a child’s “sexual orientation, gender identity, gender expression and (where applicable) variations in sex characteristics.”
- Placement of transgender and gender non-conforming children in foster care.
 - Title IV-E/IV-B agencies must consult with transgender, gender non-conforming or intersex children to provide an opportunity to voice any concerns related to placement when the agency is considering placement in a sex-segregated childcare institution.¹¹ We support this requirement, and the principle that when sex-segregated placements are made children have a right to a placement consistent with their gender identity. We provide additional recommendations to clarify this requirement, including as it applies to non-binary children.

⁷ *Safe and Appropriate Foster Care Placement Requirements for Titles IV-E and IV-B - Placement requirements under titles IV-E and IV-B for children who identify as lesbian, gay, bisexual, transgender, queer or questioning, intersex, as well as children who are non-binary or have non-conforming gender identity or expression*, 88 Fed. Reg. 66752 (proposed Sept. 28, 2023) (to be codified at 45 C.F.R. § 1355.22(a)(1)), available at <https://www.govinfo.gov/content/pkg/FR-2023-09-28/pdf/2023-21274.pdf>.

⁸ *Id.* (to be codified at C.F.R. § 1355.22(a)(3))

⁹ *Id.* (to be codified at C.F.R. § 1355.22(a)(4))

¹⁰ *Id.* (to be codified at C.F.R. § 1355.22(a)(5))

¹¹ *Id.* (to be codified at C.F.R. § 1355.22(b))

- Training and notification requirements
 - Title IV-E/IV-B agencies must ensure employees who have responsibility for placing children in foster care, make placement decisions, or provide services are adequately prepared with the appropriate knowledge and skills to serve an LGBTQI+ child related to their sexual orientation, gender identity, or gender expression.¹² To provide additional clarity, consistency, and protection, we urge ACF to modify this language to refer to a child’s “sexual orientation, gender identity, gender expression and (where applicable) variations in sex characteristics.”
- Severability¹³
- Criteria for determining substantial conformity.¹⁴ We support the incorporation by reference of requirements of proposed § 1355.22 as part of the substantial conformity requirements for case review systems in § 1355.34 (c)(2). We urge ACF to similarly incorporate elements of § 1355.22 into other parts of § 1355.34, as explained below.

The Final Rule Should Revise the Following Provisions in the Proposed Rule:

- Revise § 1355.22 to include all children participating in or benefitting from all Title IV-E/IV-B programs and services.
- Revise § 1355.22(a)(1) to ensure it applies to placements for all children, including LGBTQI+ children.
- Revise § 1355.22(a)(1)(ii) to contain a requirement that training must include information about meeting a child’s need related to their entire identity, reflect professional standards and recommended practices for promoting the safety and wellbeing of LGBTQI+ children, and be developed in consultation with LGBTQI+ children with experience in the child welfare system.
- Revise § 1355.22(a)(2) to eliminate the requirement that LGBTQI+ children submit a request in order to obtain a safe and appropriate placement, consistent with the revision to § 1355.22(a)(1) that makes all placements safe and appropriate. This section should also be revised to require that notice of the availability of safe and appropriate placements be provided to all children, including LGBTQI+ children, age 7 and over.
- Revise § 1355.22(a)(3) to reflect that the title IV-E/IV-B agency must implement a process for all children, including LGBTQI+ children, to report concerns about placements that do not meet safe and appropriate requirements of § 1355.22(a)(1).
- Revise § 1355.22(a)(3)(iii) to reflect that the title IV-E/IV-B agency must respond promptly to any child’s reported concern that a placement is not safe and appropriate.
- Revise § 1355.22(a)(4) to reflect that a prohibition against retaliation applies to any child who reports a concern about discrimination or about a placement and that retaliation is not limited to items listed and can include restriction of access to supportive community resources.

¹² *Id.* (to be codified at C.F.R. § 1355.22(c)(1))

¹³ *Id.* (to be codified at C.F.R. § 1355.22(d))

¹⁴ *Id.* (to be codified at C.F.R. § 1355.34).

- Revise § 1355.22(a)(5) to ensure all children, including LGBTQI+ children, have access to age-appropriate services supportive of all aspects of identity, including their sexual orientation, gender identity, gender expression, and (where applicable) variation in sex characteristics and that includes clinically appropriate medical care.
- Revise § 1355.22(b) to ensure that a placement consistent with a child’s gender identity is done with their consent, that safe and appropriate placement options include access to private rooms and facilities or non-sex segregated facilities if the child prefers, and that those options do not stigmatize or isolate the child.
- Revise § 1355.22(c)(2) to reflect that all contractors and subrecipients are informed of all the requirements to comply with this section, including non-retaliation provisions.

The Final Rule Should Include Certain New Provisions:

- New [X], Definition, which defines as LGBTQI+ as “a child who is (including a child who self-identifies as) lesbian, gay, bisexual, transgender, queer or questioning, or intersex, or a child who is non-binary, or has a nonconforming gender identity or expression, or has variations in sex characteristics.”
- New § 1355.22(a)(1), Nondiscrimination, which requires that IV-E and IV-B agencies ensure no child otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of Title IV-E/IV-B programs and services, that attempts to undermine, suppress, or change the sexual orientation, gender identity, or gender expression of a child or perform medically unnecessary surgeries on a child with intersex traits without the child’s consent are prohibited, and that IV-E and IV-B agencies develop and implement standards to prohibit, prevent, and effectively respond to such discrimination.
- New Section 1355.23, Nondiscrimination, requiring that IV-E and IV-B agencies ensure all parents, kin, or current or prospective foster or adoptive parents—including those who identify as lesbian, gay, bisexual, transgender, queer or questioning, intersex, as well as adults who are non-binary or have non-conforming gender identity or expression—are protected from discrimination while benefitting from or participating in all programs funded through Titles IV-E and IV-B.
- Revise § 1355.30 to add appropriate cross references to HHS regulations implementing Title IX of the Education Amendments of 1972, and Section 1557 of the Affordable Care Act. These statutes, implementing rules for which HHS and the Department of Education are currently revising, both contain critical protections for all children, youth, and families, including those who are LGBTQI+.
- Education is central to the purposes and activities of Title IV-E and -Title IV-B programs, and Title IX applies to all educational and training activities. These include, for example, all Title IV-E and IV-B training activities child welfare and related workforces, community groups, and volunteers;¹⁵ all educational and training activities aimed at families, or prospective foster or adoptive parents, or pregnant individuals;¹⁶ and

¹⁵ See, e.g., 42 U.S.C. §§ 628c, 629f, 629g 629h, 629i, 671, 674, 677, 679c.

¹⁶ These include, for example, parental skills programs, kinship navigator programs, and other activities funded or required under 42 U.S.C. §§ 627, 629g(f)(5)(E), 671(e)(1)(B).

all activities aimed at providing, planning for, or facilitating education or training for youth.¹⁷

- Health promotion, prevention, and health care are also core components of Title IV-E and IV-B purposes and activities, and Section 1557 applies to all health activities. These include, for example, all activities aimed at assessing health and health needs or at providing, planning for, or facilitating medical or mental health care or health prevention activities, or identifying or preventing medical neglect for youth or caregivers.¹⁸
- ACF should also use the preamble to the final rule to remind agencies and providers of the application of Section 504. clearly applies to all Title IV-E and IV-B programs and regulations. While HHS’s Section 504 regulations are already listed in § 1355.30, agencies and providers may not appreciate the breadth of the law’s application, including with respect to LGBTQI+ individuals, and HHS has recently proposed revisions to these rules to clarify particular applications in the child welfare context.¹⁹ Notably, the Department of Justice has also recognized that: “Restrictions that prevent, limit, or interfere with otherwise qualified individuals’ access to care due to their gender dysphoria, gender dysphoria diagnosis, or perception of gender dysphoria may violate Section 504” or the ADA.²⁰

Some Commentary in the Proposed Rule Should Be Revised Before Inclusion in a Final Rule:

- The Section of the commentary, “Religious Liberty and Other Freedoms” should be revised to reflect an accurate description of the process for considering case by case requests for religious exemptions under the Religious Freedom Restoration Act and an accurate description of the U.S. Supreme Court’s decision in *Fulton v. City of Philadelphia*.²¹
- Portions of the commentary describing a process children should follow to request an appropriate placement, notification requirements related to the right to safe and appropriate placement to only certain children, and portions describing a system where a placement provider may opt out of providing safe and appropriate placements, for religious or other reasons, should be eliminated to be consistent with suggested revisions.

We recommend a final rule read as outlined in attached Appendix A and in the rest of this comment offer our support for these revisions, including additional legal authority, responses to some questions posed in the NPRM, and additional practical considerations if the Rule were to

¹⁷ These include core elements of care planning, as well as residential educational programs, vocational programs, and other activities funded or required under 42 U.S.C. §§ 674(e), 675(1)(G), 677, and 1320a-9(a)(7)(G) and (J)).

¹⁸ See, e.g., 42 U.S.C. §§622 (15)(A), 629a(a)(7)(B)(i)-(iii), 629g(f), 671(a)(9) and (15) and (21)-(22), 671(e)(1)(A), 672(k), 675A(c), 677, and 1320a-9(a)(7)(B) and (J)).

¹⁹ *Discrimination on the Basis of Disability in Health and Human Service Programs or Activities*, 88 Fed. Reg. 63392 (proposed Sept. 14, 2023) (to be codified at 45 C.F.R. 84), available at <https://www.federalregister.gov/documents/2023/09/14/2023-19149/discrimination-on-the-basis-of-disability-in-health-and-human-service-programs-or-activities>.

²⁰ *Letter from Kristen Clarke, Assistant Attorney General, to State Attorneys General*, U.S. Department of Justice, Civil Rights Division (Mar. 31, 2022), available at <https://www.justice.gov/media/1206711/dl?inline>.

²¹ *IV. Section-by-Section Discussion of Proposed Regulatory Changes, Required Protections for LGBTQI+ Children in Foster Care To Receive Safe and Appropriate Placements Section 1355.22, Religious Liberty and Other Freedoms*, 88 Fed. Reg. at 66761.

be implemented as proposed. If ACF does not agree to incorporate these provisions, we request it adopt comprehensive, system-wide protection from discrimination and requirements for safe and appropriate placements for all children without an opt out or blanket exemption. Or, at a minimum, ACF should ensure that placements are safe and appropriate for all children without an opt out or blanket exemption.

II. Children and Families Need Explicit, Comprehensive Nondiscrimination Protections Applicable to All Aspects of IV-B and IV-E Programs and Applicable to all Agencies, Tribes, and Placement Providers

A. Background

HHS transfers nearly \$10 billion per year to eligible states through Titles IV-B and IV-E of the Social Security Act to subsidize child welfare services.²² Title IV-E funds support foster care, adoption assistance, and guardianship assistance for children meeting family income and other requirements. And, as of fiscal year 2020, states may opt to use Title IV-E funds to provide selected evidence-based foster care prevention services, such as mental health services or parenting education.²³ In 2021, Congress allocated HHS \$9.9 billion for Title IV-E.²⁴

Title IV-B funds provide federal funding for child and family services, including those to support, preserve, and reunite families and promote and support adoption. Total fiscal year 2021 funding for Title IV-B was \$781million.²⁵ Federal funds comprise, approximately 48 percent of a state's annual child welfare budget.²⁶ HHS and ACF are responsible for ensuring that those funds are spent in compliance with constitutional safeguards, and federal statutes and regulations, including federal civil rights law.²⁷

In addition to providing foster care for children removed from home, Title IV-E/IV-B agencies provide child protection services, as a result of an investigation or alternative response, to children and their families when children are at home with parents or guardians.²⁸ In federal fiscal year 2019, forty-seven states reported that approximately 1.9 million children received

²² *LWVUS Joins Comments on Nondiscrimination Protections in HHS Grant-Funded Services*, League of Women Voters (Sept. 11, 2023), available at <https://www.lwv.org/equal-rights/lwvus-joins-comments-nondiscrimination-protections-hhs-grant-funded-services>.

²³ U.S. Gov't Accountability Off., GAO-22-104688, *Foster Care: Further Assistance from HHS Would be Helpful in Supporting Youth's LGBTQ+ Identities and Religious Beliefs* (2022), at 10, available at <https://www.gao.gov/assets/gao-22-104688.pdf>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Emilie Stolfus, *Child Welfare: Purposes, Federal Programs, and Funding*, Congressional Research Service (Oct. 27, 2023), available at <https://sgp.fas.org/crs/misc/IF10590.pdf>. Additional federal funding to state child welfare agencies comes from Social Services Block grants and Temporary Assistance for Need Families programs.

²⁷ Office for Civil Rights, *Enforcement Activities and Results*, U.S. Department of Health and Human Services (reviewed Oct. 27, 2021), available at <https://www.hhs.gov/civil-rights/for-providers/compliance-enforcement/index.html>.

²⁸ Stolfus at 2.

prevention services and approximately 1.3 million children received post response services from a child protective services agency.²⁹

With the passage of the Family First Prevention Services Act (FFPSA), states and tribes have the option of using IV-E funding for time-limited prevention services for mental health, substance abuse, and in-home parent skill-based programs for children who are candidates for foster care, pregnant or parenting youth in foster care, and the parents or kin caregivers of those children.³⁰ These services and programs are focused on preventing the removal of children from home so they may safely remain at home and do not enter foster care, supporting placement with kin if remaining at home is not possible, and reducing placement in congregate care for children who have been removed from home. Forty-eight states, the District of Columbia and Puerto Rico have submitted Title IV-E prevention plans to the Children's Bureau for approval. As of July 2022, 43 plans have been approved and 5 are awaiting approval.³¹

When children and families receive preventive services or post-response services, they are generally not represented by counsel and, because the agency has not yet filed a petition to request to remove a child or request temporary custody post-emergency removal, there is no court case. Although some jurisdictions are now exploring pre-petition legal representation for children and families,³² in most places they are subject to the actions of the agency or its contractors or subrecipients without advocates and judicial oversight.

Even when a court case begins and children are removed or remain in the home with court oversight, legal representation for children or parents is not guaranteed in every state at every stage of the proceeding or at all.³³ During the pendency of a case if children are returned home after removal to a parent for a trial home visit or placed with kin who are not licensed foster parents, there is agency involvement with the child and their family without the child being in foster care. During all these periods children and parents, including kin and foster and adoptive parents, may experience discrimination and harm by agency staff and services providers the agency uses to provide services.

²⁹ *Child Maltreatment 2019: Summary of Key Findings*, U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau 7 (April 2021), available at <https://www.childwelfare.gov/pubpdfs/canstats.pdf>

³⁰ Family First Prevention Services Act, Pub. L. No. 115-123 (passed as part of the Bipartisan Budget Act of 2018), Sec. 50711, codified at 42 U.S.C. § 671, available at <https://www.congress.gov/115/plaws/publ123/PLAW-115publ123.htm>.

³¹ *Family First State Plans and Enacted Legislation*, National Conference of State Legislatures (Updated Oct. 17, 2023), available at <https://www.ncsl.org/human-services/family-first-state-plans-and-enacted-legislation>.

³² *How can pre-petition legal representation help strengthen families and keep them together?*, Casey Family Programs (Feb. 13, 2020), available at <https://www.casey.org/preventive-legal-support/>.

³³ *Foster Care Legal Representation*, 88 Fed. Reg. 66769 (proposed Sept. 28, 2023) (to be codified at 45 C.F.R. 1356), available at <https://www.federalregister.gov/documents/2023/09/28/2023-20932/foster-care-legal-representation>.

B. Discrimination and Harm to Children and Families, Including LGBTQI+ Children and Families, Pervades the Entire Child Welfare System

1. Children, including LGBTQI+ children

Discrimination is systemic and pervasive throughout the child welfare system, which has a history of removing children based on a family’s race, disability status, and poverty level. As a result of targeted surveillance and removal of children from Black families, Black children are overrepresented in foster care. In 2021, they made up 20% of children in care but only 14% of the child population.³⁴ Once in care, Black children generally receive inferior services and are kept out of their homes for longer periods than their white counterparts.³⁵ Likewise, a history of discriminatory policy—including federal policy that created and sustained the federal Indian boarding school system for American Indian and Alaska Native (“AI/AN”) children—has resulted in decades of harm and a disproportionate removal of AI/AN children from their homes and their culture. AI/AN children continue to be overrepresented in the foster care system and are four times more likely to be placed in care than their white counterparts.³⁶

Harm and trauma are compounded for children and youth with intersecting identities who may face discrimination on account of their race, national origin, and/or disability status and may also face specific or related additional harm on account of their actual or perceived sexual orientation, gender identity, gender expression, or sex characteristics. The one in three youth in foster care who identify as LGBTQI+ experience mistreatment in care at twice the rate as their non-LGBTQI+ counterparts.³⁷ Due to discrimination, rejection, and poor placement decisions, LGBTQI+ youth have higher rates of multiple placements, educational instability, and exiting

³⁴ Annie E. Casey Foundation, *Child Welfare and Foster Care Statistics*, (May 30, 2023), available at https://www.aecf.org/blog/child-welfare-and-foster-care-statistics?gad_source=1&gclid=CjwKCAiA9dGqBhAqEiwAmRpTC5mClBT_f5A090G9QqzAOpUMAofSexiYRf7p4d_a7B715mFMnFOF7hoCtEEQAvD_BwE.

³⁵ Dorothy Roberts & Lisa Sangoi, *Black Families Matter: How the Child Welfare System Punishes Poor Families of Color*, *The Appeal* (Mar. 26, 2018), available at <https://theappeal.org/black-families-matter-how-the-child-welfare-system-punishes-poor-families-of-color-33ad20e2882e/>.

³⁶ *Indian Boarding Schools*, NICWA, available at <https://www.nicwa.org/boarding-schools/#:~:text=Because%20of%20its%20significant%20impact,1960s%20as%20boarding%20schools%20waned;Disproportionality%20in%20Child%20Welfare%20Fact%20Sheet>, National Indian Child Welfare Association, available at <https://www.nicwa.org/wp-content/uploads/2019/10/2019-AIAN-Disproportionality-in-Child-Welfare-FINAL.pdf>

³⁷ Laura Baams, Bianca D.M. Wilson, & Stephen T. Russell, *LGBTQ Youth in Unstable Housing and Foster Care*, *143 Pediatrics* 3, e20174211 (2019), available at <https://pediatrics.aappublications.org/content/pediatrics/early/2019/02/07/peds.2017-4211.full.pdf>; Megan Martin, Leann Down, & Rosalynd Erney, *Out of the Shadows: Supporting LGBTQ youth in Child Welfare Through Cross-System Collaboration*, Center for the Study of Social Policy (2016), available at <https://cssp.org/resource/out-of-the-shadows/>; Theo G. M. Sandfort, *Experiences and Well-Being of Sexual and Gender Diverse Youth in Foster Care in New York City: Disproportionality and Disparities*, Administration for Children’s Services (2020), available at <https://www1.nyc.gov/assets/acs/pdf/about/2020/WellBeingStudyLGBTQ.pdf>; Marlene Matarese, Angela Weeks, Elizabeth Greeno, & Paige Hammond, *The Cuyahoga Youth Count: A Report on LGBTQ+ Youth Experience in Foster Care*, The Institute for Innovation and Implementation (2021), available at <https://theinstitute.umaryland.edu/media/ssw/institute/Cuyahoga-Youth-Count.6.8.1.pdf>.

foster care into homelessness with LGBTQI+ youth of color reporting even higher rates of placement instability and worse outcomes than their white counterparts.³⁸

In RIN 0970–AD03 ACF presented some existing research about the challenges and harm LGBTQI+ children experience in the child welfare system and asked commenters to share additional information about the experiences of system-involved LGBTQI+ children. LGBTQI+, child advocacy, and child welfare groups have shared the experiences of LGBTQI+ children in the child welfare system and their recommended system changes for years in the hopes of preventing further harm and eliminating inequities. The nature of the harm children have recounted over a span of almost twenty years of research and advocacy is multifaceted and not only about harm while in a foster care placement. LGBTQI+ youth with lived experience in care, quoted below, have described discrimination and mistreatment by agency caseworkers, group home staff, and foster parents; imposition of the religious values of placement providers; multiple placement changes related to their identity; lack of access to gender affirming medical care; lack of connection to community resources, and an absence of safety fueling a fear of coming out while in care, among other serious concerns:

- “Agency directors need to take a visible stand, implement real change, ban discrimination, and hold staff accountable for discriminatory treatment.”³⁹
- “Young people in care experience so many placement changes that they are left with little hope for permanency.”⁴⁰
- “My heart goes out to all the people who live in homes that aren’t accepting right now [during the pandemic]. They can’t be themselves freely. They can’t come out because they’re afraid they’ll be hurt by their foster families or group homes. LGBTQ youth are so trapped right now and many of them are in danger. It breaks my heart.”⁴¹
- “It became real clear to me that my caseworker wouldn’t be able to handle it if I came out and told her I was gay. A couple of times I tried to hint around about it, but she just wasn’t hearing any of it. And she was always asking me about my ‘girlfriends.’ So when she found me a foster home, I knew I couldn’t count on her to have made sure they’d be cool with my being gay. I was afraid to tell my foster family too. So, more time in the closet for me.”⁴²
- “After coming out to one of my foster families, I was told I was going to hell and forced to go to church with them. I became very closeted after that and didn’t tell any other

³⁸ Bianca D.M. Wilson, Khush Cooper, Angeliki Kastanis & Sheila Nezhad, *Sexual and Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles*, The Williams Institute: UCLA School of Law (2014), available at https://williamsinstitute.law.ucla.edu/wpcontent/uploads/LAFYS_ExecutiveSummary_Aug_2014.pdf; Jeffrey M. Poirier, Sandra Wilkie, Kristin Sepulveda, & Tania Uruchima, *Jim Casey Youth Opportunities Initiative: Experiences and Outcomes of Youth who are LGBTQ*, 96 *Child Welfare* 1 (2018).

³⁹ *Out of the Margins* at 96.

⁴⁰ *Id.* at 68.

⁴¹ Christina Wilson Remlin, Madeline MacNiel Kinney, Daniele Gerard, & Daniel Adamek, *Fostering Inequity: How COVID-19 Amplifies Dangers for LGBTQ+ Youth in Care*, *Children’s Rights*, 7 (2020), available at <https://www.childrensrights.org/wp-content/uploads/imported-files/Fostering-Inequity-2020-Web-Mid-Res.pdf>

⁴² Rob Woronoff, Rudy Estrada, Susan Sommers et al., *Out of the Margins: A Report on Regional Listening Forums Highlighting the Experiences of Lesbian, Gay, Bisexual, Transgender, and Questioning Youth in Care*, Lambda Legal Defense and Education Fund & Child Welfare League of America, 2 (2006), available at <https://lambdalegal.org/wp-content/uploads/2011/11/out-of-the-margins.pdf>.

foster families I was a lesbian. I was in 22 different homes; many of them were very religious.”⁴³

- “My foster family took away my clothes, called me a ‘dyke,’ and tried to remake me.”⁴⁴
- “I think it would have helped me if I would have known that my foster mom or my foster dad were ok with [my sexuality]. I never knew if I could disclose it and I never did. And I think that’s where I think a lot of my outlashing, my attitude, my anger, my depression and my rebellion came from. I felt like nobody understood me. If there was some sort of way for me to know that they were conscious of me and my sexuality and what I’m dealing with, they wouldn’t even have had to sit there and say it, but even just providing the environment and that thought process, I think that would have helped me.”⁴⁵
- “In my first group home, the staff sat me down with a big family Bible and described to me why it was wrong to be gay.”⁴⁶
- “I got jumped by a bunch of guys in my group home, and when I told the Director he said, ‘Well, if you weren’t a faggot, they wouldn’t beat you up.’”⁴⁷
- “Some group homes block mentors and other supportive adults from talking to young LGBTQ people.”⁴⁸
- “The most important issue is safety, especially in “straight” group homes where the staff can be unfriendly and rape and other forms of abuse are often tolerated.”⁴⁹
- “One group home wouldn’t let my friend buy her own clothes because they said she was going to buy ‘boy’ clothes. Why do I have to wear what you want me to wear?”⁵⁰
- “Training on sexuality and gender issues should be incorporated into existing foster care staff and parent training.”⁵¹
- “Sensitivity training on transgender issues is needed for all child welfare staff, across the board.”⁵²
- “Transgender young people often lack information about themselves, and have limited access to resources and information.”⁵³
- “We shouldn’t have to get the hormones we need from the streets. We should have access to hormones from primary care physicians or friendly doctors who understand our needs.”⁵⁴

In 2017 three transgender young women, Ashley and Jennifer, who experienced foster care in southern states, and Savannah, who was in foster care in the northeast, shared their experiences and recommendations for change in a report, *Safe Havens: Closing the Gap*

⁴³ *Getting Down to Basics: Tools to Support LGBTQ Youth in Care*, Lambda Legal Defense and Education Fund & Child Welfare League of America, 26 (2012), available at https://legacy.lambdalegal.org/sites/default/files/publications/downloads/getting_down_to_basics_-_2015.pdf.

⁴⁴ *Id.* at 12.

⁴⁵ *Out of the Shadows* at 17.

⁴⁶ *Out of the Margins* at 113.

⁴⁷ *Getting Down to Basics* at 14.

⁴⁸ *Out of the Margins* at 48.

⁴⁹ *Id.* at 85.

⁵⁰ *Out of the Shadows* at 23.

⁵¹ *Out of the Margins* at 87.

⁵² *Id.*

⁵³ *Id.* at 89.

⁵⁴ *Id.* at 88.

Between Recommended Practices and Reality for Transgender and Gender Diverse Youth in Out of Home Care,⁵⁵ authored by Lambda Legal, Children’s Rights, and the Center for the Study of Social Policy:

- “While in care, **Ashley** experienced discrimination in multiple ways on account of her identity: Caseworkers and providers failed to respect her as female and she was placed in non-affirming housing and therapeutic services. While there, she was physically and emotionally victimized.” “Ashley notes that in the past she was placed in facilities that were supposed to help her when she was contemplating suicide, but says on the contrary that they were actively harming her by failing to acknowledge her identity. Also, she endured harassment. She feels strongly that child welfare agencies should guarantee that youth are not placed in harmful settings, especially when they are at their most vulnerable. This requires solid feedback mechanisms such as follow-up by placement agencies, interviews with young people and ongoing coaching and training for staff to ensure supportive and affirming treatment for all young people in their care.”⁵⁶
- “According to **Savannah**, her parents [did] not ‘agree’ with her identity. While living in their home, Savannah experienced emotional distress and exhibited behavior problems, including self-harm and attempted suicide. After entering the child welfare system, the county child welfare agency and its contracted providers rejected her identity. Thus, Savannah was placed in foster homes that were not affirming. The county refused to allow Savannah to use her clothing stipend to buy female clothing, citing ‘agency policy.’ Neither the county nor their contract agencies ensured that she was able to access trans-affirming behavioral health and medical care. While Savannah was still a minor, she was told that she would have to wait until she was 18 to begin hormone therapy.”⁵⁷
- “During her childhood and adolescence, **Jennifer** experienced physical and emotional trauma, conflict between her parents and difficulty accepting her transgender identity. These experiences impacted Jennifer’s mental health. After threatening to harm herself, she was admitted to an acute psychiatric facility. After a few weeks, Jennifer was stable enough for discharge from the facility, but her parents refused to take her home. They felt her behavior problems and mental health issues were too extreme for them to handle. The state child welfare agency took custody of Jennifer. Although the facility had deemed Jennifer ready for discharge and the state was legally required to find a less restrictive placement for her since she no longer needed acute care, she remained there for several months. She understood the delay was because no home or facility across the state would accept her as a transgender girl and affirm her identity. Ultimately, due to lack of affirming placements in her state, the child welfare agency placed Jennifer in a residential treatment facility in a neighboring state... While in care, Jennifer experienced additional discrimination due to the fact that her caregivers interpreted gender to mean her sex assigned at birth. Jennifer was unable to use her state clothing stipend for female clothing, because the state’s ‘policy’ at the time was that ‘gender appropriate’ clothing

⁵⁵ Christina Wilson Remlin, M. Currey Cook, Rosalynd Erney *et al.*, *Safe Havens: Closing the Gap Between Recommended Practice and Reality for Transgender and Gender-Expansive Youth in Out-of-Home Care*, Lambda Legal Defense and Education Fund, Children’s Rights, & Center for the Study of Social Policy (Apr. 2017), available at https://legacy.lambdalegal.org/sites/default/files/publications/downloads/tgnc-policy-report_2017_final-web_05-02-17.pdf.

⁵⁶ *Id.* at 32.

⁵⁷ *Id.*

meant clothing consistent with a youth's sex assigned at birth. In addition, when staff at one of the facilities got angry with her, they would intentionally misgender her as a punishment ... Jennifer says that she knew she was sent away because 'no one would accept me because of who I am,' and it made her feel rejected and unwanted."⁵⁸

In addition to the experiences with the child welfare system shared by LGBTQI+ children in reports, as part of studies, at conferences, and in listening sessions, Lambda Legal has received multiple calls to its Help Desk and its Youth in Out-of-Home Care Project from children in care, their advocates, and concerned adults:

- A teenager in a midwestern state shared that she had left her home after her mother choked her when her mother found out she was lesbian by reading the girl's diary. The girl said the case worker assigned to investigate a report of harm about the physical assault told her that "it was [the girl's] fault" because she is lesbian, and "she has no place to put a lesbian teenager" and has "babies to worry about."
- An agency leaving a transgender girl in juvenile detention because it did not have a placement available that would accept her even when a juvenile court judge had found she did not meet legal requirements for detention.
- Multiple reports of placement of transgender youth in out-of-state residential treatment facilities because no treatment facility in the youth's state would place a youth in sex-segregated programming consistent with their identity.
- A youth's therapist, arranged for them by the agency, engaging in efforts to "convert" or "change" the youth because the therapist's faith did not approve of LGBTQI+ people.
- Placement of a transgender girl against the wall in the sleeping area of an emergency shelter in a bed that straddled the imaginary line between the "boys' side" and the "girls' side" because shelter staff said the girl was "neither."
- Placement of a transgender girl in a hallway between a "boys' side" and a "girls' side" of an emergency shelter with 24-hour staff supervision because she was deemed a "safety risk" as a trans girl if placed with other girls.
- Numerous instances of congregate care staff using a transgender youth's chosen name and pronouns as a reward for good behavior or denying participation in programs consistent with identity as a punishment.
- Numerous instances of state or county agency caseworkers telling transgender youth that "they don't permit youth to access gender affirming medical care," that the "youth's attorney will have to ask for that," or "just wait until you are eighteen."

These examples, which represent a fraction of the calls Lambda Legal has received over the years, and the experiences shared by children across multiple studies and in multiple fora, demonstrate that harm to LGBTQI+ children is pervasive, occurs at multiple interaction points within the child welfare system and not just in foster care, and negatively impacts LGBTQI+ children of color and those living with disabilities compared to other children.

⁵⁸ *Id.* at 33-34.

While there has been less extensive documentation and research regarding the experiences of children and youth with intersex variations in child welfare systems, we know that these youth face similar forms of stigma and discrimination, as well as unique forms of harm. President Biden's June 2022 Executive Order on LGBTQI+ Equality included directives to the Department to address disparities facing intersex as well as other LGBTQI+ youth, and to use its authorities to protect youth from discrimination on the basis of sex characteristics.⁵⁹ A growing body of research documents discrimination based by intersex youth and adults in many areas of life, including education and health care.⁶⁰

As explained in a landmark National Academies report on LGBTQI+ health in 2020, “Although some infants with genital diversity require urgent surgery to address urinary obstruction or exposed pelvic organs, many have no immediate medical concerns and do not require urgent medical treatment.”⁶¹ As the report explains, “A growing number of consensus groups and professional medical organizations, including the American Academy of Family Physicians and Physicians for Human Rights, have interpreted the risk-benefit ratio as unfavorable for early genital surgery in instances where the individual is too young to participate in the consent process.”⁶² The NASEM report thus concluded that, like so-called SOGIE “conversion” practices, “elective genital surgeries on children with intersex traits who are too young to participate in consent are dangerous to the health and well-being of sexual and gender diverse people.”⁶³

Critically, when infants and young children with intersex variations are in the custody or care of state agencies, those agencies can become the ultimate decision-makers about such autonomy-denying medical interventions; even when the agency is not the ultimate legal decisionmaker, it can play an influential or even decisive role. Although treatment of very young children within these systems is inherently very difficult to document (with specific cases outside

⁵⁹ Exec. Order No. 14075, *Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals*, 87 C.F.R. 37189 §§ 5(a)-(b) (June 15, 2022), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/06/15/executive-order-on-advancing-equality-for-lesbian-gay-bisexual-transgender-queer-and-intersex-individuals/>.

⁶⁰ See, e.g., Caroline Medina & Lindsay Mahowald, *Discrimination and Barriers to Well-Being: The State of the LGBTQI+ Community in 2022*, Center for American Progress (2023), available at <https://www.americanprogress.org/article/discrimination-and-barriers-to-well-being-the-state-of-the-lgbtqi-community-in-2022/>; Myeshia N. Price et al., *The Mental Health and Well-being of LGBTQ Youth who are Intersex*, The Trevor Project (2021), available at <https://www.thetrevorproject.org/wp-content/uploads/2021/12/Intersex-Youth-Mental-Health-Report.pdf>; Laetitia Zeeman & Kay Aranda, *A Systematic Review of the Health and Healthcare Inequalities for People with Intersex Variance*, 17 Int'l J. Env't Rsch. & Pub. Health 6533 (2020).

⁶¹ National Academies of Sciences, Engineering, and Medicine, *Understanding the Well-Being of LGBTQI+ Populations* 370 (Washington, DC: The National Academies Press), available at <https://doi.org/10.17226/25877>. Unlike the gender-affirming medical care wanted and needed by many transgender adolescents and adults, the NASEM report found that when it comes to these surgeries on young intersex children, “there is mixed evidence that surgery achieves its physical goals and scant evidence that it confers psychosocial benefit. The existing research does provide strong evidence of the risk of irreversible harm from early genital surgery, including immediate postoperative complications and later revisions, as well as the potentially catastrophic risk of incorrect, surgically reinforced gender assignment.” *Id.* at 378-380.

⁶² *Id.* at 378.

⁶³ *Id.* at 380.

the foster care system often being publicly documented only many years or even decades after the fact), some cases have come to light where Title IV-E agencies have come to light.⁶⁴

State agencies' actions regarding medical interventions for intersex children can have enormous implications for agencies' statutory obligations under Title IV-E regarding those children's safety, health, and welfare.⁶⁵ These decisions also have important implications for those children's constitutional rights,⁶⁶ as well as their rights under state laws whose application to intersex children has often been neglected (such as laws that prohibit, or require court approval, for involuntary sterilization).⁶⁷

Thus, in addition to ensuring that intersex children and youth benefit from placements and services that are safe and appropriate in other respects, ACF must make clear that agencies protect intersex infants and young children from, and are not themselves responsible for subjecting them to, surgeries aimed at changing their sex characteristics to which they cannot give individual consent or assent, and which are not necessary to address an immediate physical health concern.

2. Families, including LGBTQI+ families

The disproportionate targeting of families of color, families where a parent has a disability, LGBTQI+ families, immigrant families, and families living in poverty is the result of a system plagued with discrimination and bias. For example, poverty is often misconstrued as neglect and can increase a family's risk of involvement with the child welfare system, disproportionately impacting BIPOC, LGBTQI+, and immigrant families⁶⁸ who are more likely to be living in poverty due to systemic inequities and bias.⁶⁹ Black parents have a higher rate of

⁶⁴ See generally Ashley Huddleston, *Intersex Children In Foster Care: Can Government Elect Sex Assignment Surgery?*, 22 J. of L. & Pol'y (2014).

⁶⁵ See, e.g., 42 U.S.C. §§ 622(b)(15)(A), 671(e)(4)(C)-(D), 672(k)(4), 675a(c), 677(b)(2)(E).

⁶⁶ See *M.C. ex rel. Crawford v. Amrhein*, 598 F. App'x. 143, 147 (4th Cir. 2015); see also Azeen Ghorayshi, *A Landmark Lawsuit About An Intersex Baby's Genital Surgery Just Settled For \$440,000*, BuzzFeed News (Jul. 27, 2017), available at <https://www.buzzfeednews.com/article/azeenghorayshi/intersex-surgery-lawsuit-settles>.

⁶⁷ Laws in several states generally prohibit providers from conducting sterilizing procedures on minors based solely on proxy consent, unless necessary to preserve a child's life or prevent serious impairment of health. See, e.g., Alaska Stat. §§ 13.26.316(e)(2), 13.52.050; Or. Rev. Stat. § 436.225; NYC AC 17-401 et seq.; *Matter of A. W.*, 637 P.2d 366 (Colo. 1981). Others require judicial approval. See, e.g., N.H. Rev. Stat. § 463:12; *Morgan by Next Friend Ray v. Shah*, No. 341846, 2019 WL 575371 (Mich. Ct. App. Feb. 12, 2019); *In re Est. of K.E.J.*, 382 Ill. App. 3d 401, 887 N.E.2d 704 (Ill. App. 1 Dist., 2008); Anne Tamar-Mattis, *Sterilization and Minors with Intersex Conditions in California Law*, 3 Cal. L. Rev. Circuit 126 (2012) available at <https://interactadvocates.org/wp-content/uploads/2016/01/Sterilization-and-Minors-with-Intersex-Conditions-in-California-L.pdf>. Some states apply similar limitations on proxy-only consent for other procedures that remove bodily organs. See, e.g., Ark. Code Ann. § 28-65-302; Ky. Rev. Stat. § 387.660(3); 20 Pa. Con. Stat. § 5521(d); D.C. Code § 21-2047.01(1); see also *Curran v. Bosze*, 141 Ill. 2d 473, 566 N.E.2d 1319 (Ill. 1990) (bone marrow).

⁶⁸ Jill Yordy, *Poverty and Child Neglect: How Did We Get it Wrong?*, National Conference of State Legislatures (2023), available at <https://www.ncsl.org/state-legislatures-news/details/poverty-and-child-neglect-how-did-we-get-it-wrong>

⁶⁹ *Homelessness and Racial Disparities*, National Alliance to End Homelessness (Updated Apr. 2023), available at <https://endhomelessness.org/homelessness-in-america/what-causes-homelessness/inequality/>; Bianca D.M. Wilson et al., *Pathways Into Poverty – Lived Experiences Among LGBTQ People*, UCLA School of Law, Williams Institute (Sept. 2020), available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Pathways-Overview-Sep->

child welfare investigation, are more likely to have their children removed, and are more likely to have their parental rights terminated as compared to white parents.⁷⁰ Parents with disabilities have their parental fitness questioned using inappropriate assessments and as a result have their children removed at alarming rates.⁷¹ Immigrant families are also disproportionately referred to child welfare, and face language and legal barriers when accessing services.⁷² Families that live at the intersection of these identities are at an even greater risk of discrimination and bias. One study found that Black lesbian and bisexual mothers were four times more likely to lose custody of their children in child welfare proceedings than their non-LGB counterparts.⁷³

A bias against LGBTQI+ relationships and a lack of education on state parentage laws can put LGBTQI+ families at further risk of discrimination. A case worker may fail to recognize that a parent's LGBTQI+ partner is also a parent under state law, is entitled to reunification efforts, is entitled to assistance of counsel where provided by state law, and is entitled to kinship consideration. Such failures once again compound the trauma families experience in removals. There are also numerous stories of LGBTQI+ kin who have been denied kinship care placements due to their sexual orientation or gender identity.⁷⁴ The lack of understanding about LGBTQI+ parentage laws and discrimination against LGBTQI+ kin prevents children from remaining with family despite the fact that children experience better outcomes with kin and in family-like settings.⁷⁵

Individuals looking to foster and adopt may be discriminated against based on their sexual orientation, gender identity, gender expression, religion, or marital status. Same-sex couples are seven times more likely to foster and adopt than their non-LGBTQI+ counterparts. Further, LGBTQI+ individuals are more likely to foster and adopt sibling groups, children with disabilities, and older children.⁷⁶ Despite this, thirteen states allow agencies to turn away qualified individuals if it conflicts with the agency's sincerely held religious beliefs, impacting LGBTQI+, religious minority, and single prospective foster and adoptive parents.⁷⁷ This

[2020.pdf](#); Jennifer Van Hook *et al.*, *A decomposition of trend in poverty among children of immigrants*, 41 *Demography* 4: 649-670 (2004), available at <https://doi.org/10.1353/dem.2004.0038>.

⁷⁰ Child Welfare Information Gateway, *Child welfare practice to address racial disproportionality and disparity*, U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau (Apr. 2021), available at <https://www.childwelfare.gov/pubs/issue-briefs/racial-disproportionality/>.

⁷¹ *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children*, National Council on Disability (Sept. 27, 2012), available at https://www.ncd.gov/sites/default/files/Documents/NCD_Parenting_508_0.pdf.

⁷² *Understanding Immigration and Child Welfare*, Child Welfare Information Gateway, available at <https://www.childwelfare.gov/topics/systemwide/diverse-populations/immigration/understandingimm/>

⁷³ Nancy D. Polikoff, *Neglected Lesbian Mothers*, 52 *Fam. L. Q.* 87, 90 (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3407307

⁷⁴ *See Every Child Deserves a Family, Adoption & Foster Care Stories*, available at <https://everychilddeservesafamily.com/stories>.

⁷⁵ Richard P. Barth, *Institutions vs. foster homes: The empirical base for the second century of debate* (Chapel Hill, NC: UNC, School of Social Work, Jordan Institute for Families), (June 17, 2023), available at <https://bettercarenetwork.org/sites/default/files/Institutions%20vs%20Foster%20Homes.pdf>.

⁷⁶ Danielle Taylor, *Same-Sex Couples are More Likely to Adopt or Foster Children*, United States Census Bureau (Sept. 17, 2020), available at <https://www.census.gov/library/stories/2020/09/fifteen-percent-of-same-sex-couples-have-children-in-their-household.html>.

⁷⁷ Movement Advancement Project, *Child Welfare Nondiscrimination Laws* (Updated Nov. 1, 2023), available at https://www.lgbtmap.org/equality-maps/foster_and_adoption_laws

discrimination limits the pool of foster parents by faith, sexual orientation, and gender identity which may prevent agencies from matching a child with a family that can best support and affirm their identity.⁷⁸ Turning away qualified individuals, when there is a well-documented shortage of placements that leaves children sleeping in hospital beds, hotel rooms, and even in child welfare offices, is not in the best interest of children.⁷⁹

In a well-publicized example, South Carolina's largest child placing agency ("CPA") Miracle Hill Ministries, uses religious criteria to decide which foster parent applicants it will work with and recommend for licensure.⁸⁰ Its criteria exclude prospective parents who are not Evangelical Christian and who are LGBTQI+. A Catholic woman, Aimee Madonna, and a married, same-sex couple, Eden Rogers and Brandy Welch, were turned away by the agency when they took steps to become foster parents.⁸¹ Miracle Hill Ministries had turned away 25-30 other families, including Catholic, Jewish and LGBTQI+ people.⁸² South Carolina has no requirement in place for its CPAs to report when they have refused to serve applicants or to track whether applicants who have experienced the stigma of being turned away reapplied elsewhere or lost interest in fostering.⁸³ Although ACF rescinded a waiver of federal nondiscrimination requirements that a previous administration granted to faith-based CPAs in South Carolina, it chose not to enforce those requirements.⁸⁴

⁷⁸ See, e.g., Lambda Legal, *Rogers v. United States Department of Health and Human Services*, available at <https://lambdalegal.org/case/rogers-v-us-department-health-human-services/>. See also, Americans United, *Maddonna v. Department of Health and Human Services*, available at <https://www.au.org/how-we-protect-religious-freedom/legal-cases/cases/maddonna-v-department-of-health-and-human-services/>. See also, Christine Hauser, *Tennessee Couple Says Adoption Agency Turned Them Away for Being Jewish*, New York Times (Jan. 22, 2022), available at <https://www.nytimes.com/2022/01/22/us/tennessee-jewish-couple-adoption.html>.

⁷⁹ Sean Hughes *et al.*, *Why Foster Children are Sleeping in Offices and What We Can Do About It*, American Enterprise Institute (Apr. 2023), available at <https://www.aei.org/research-products/report/why-foster-children-are-sleeping-in-offices-and-what-we-can-do-about-it/>.

⁸⁰ Plaintiffs' Motion for Summary Judgment Against State Defendants at 33, *Rogers v. United States Dep't of Health and Hum. Servs.*, No. 6:19-cv-01567 (D.S.C. Nov. 17, 2022), ECF No. 243, available at <https://lambdalegal.org/wp-content/uploads/2023/07/2022-11-17-DKT-243-Plaintiffs-Motion-for-Summary-Judgment-Against-State-Defendants.pdf>.

⁸¹ *Id.* at 9, 16.

⁸² *Id.* at 31.

⁸³ *Id.* at 21 n. 15.

⁸⁴ Exhibit A to Governor Henry McMaster's and Director Michael Leach's Motion for Judgement on the Pleadings – Letter from Governor McMaster to Steven Wagner, HHS Acting Assistant Secretary, *Rogers v. United States Dep't of Health and Hum. Servs.*, No. 6:19-cv-01567 (D.S.C. July 15, 2022), ECF No. 173-1. Both Aimee Maddonna and Eden Rogers and Brandy Welch challenged South Carolina's policies, but their cases were dismissed. Order and Opinion Denying Plaintiffs' Motion for Summary Judgment and Granting State Defendants' Motion for Summary Judgment, *Rogers v. United States Dep't of Health and Hum. Servs.*, No. 6:19-cv-01567 (D.S.C. Sept. 29, 2023), ECF No. 278 available at <https://www.aclu.org/cases/rogers-v-health-and-human-services?document=rogers-v-health-and-human-services-plaintiffs-motion-summary-judgment#legal-documents>; Order and Opinion Granting Summary Judgment Against Maddonna, *Maddonna v. United States Dep't of Health and Hum. Servs.*, No. 6:19-cv-3551, available at <https://www.au.org/wp-content/uploads/2023/09/Maddonna-v.-Dept.-of-HHS-District-Court-of-S.C-Order-9.29.23.pdf>. In South Carolina, non-Christians, LGBTQI+ individuals, and married, same-sex couples do not have the same ability to pursue foster parent licensing through South Carolina CPAs as other individuals and families.

III. A Comprehensive Nondiscrimination Requirement Protecting Children and Families Benefiting from and Participating in all IV-E and IV-B services is Essential, Practicable, and Consistent with Federal Law, Prior Agency Guidance, and Professional Standards

A. Comprehensive protection for children and families in *all* IV-E/IV-B services and programs is essential.

As described above, children and families receive an array of services funded by Titles IV-E and IV-B. Years of research and anecdotal evidence shows they have and continue to experience discrimination at multiple points when interfacing with agencies and contract service providers. With an increased focus on prevention services in recent years, which are provided prior to any court processes, more services will be provided to children and families without judicial oversight or legal counsel. In the absence of federal guidance and enforceable protections, this type of involvement with agencies leaves children and families vulnerable to harm and inequitable treatment. For example, under the 2020 Adoption and Foster Care Analysis and Reporting System (“AFCARS” Rule), agencies are required to identify whether conflict at the time of the child’s removal is related to the child’s sexual orientation, gender identity, or gender expression.⁸⁵ This requirement presupposes that agency caseworkers will have conversations and make observations about whether the child is or is perceived to be LGBTQI+. ACF appropriately noted the harms associated with rejecting behaviors by families. However, without explicit federal protections, caseworkers could further harm children by engaging in discriminatory behavior. For example, a caseworker could blame children for mistreatment they are experiencing or refer children to a contract prevention service provider who, for faith-based reasons, does not believe LGBTQI+ people exist. Likewise, a caseworker could refer the child to so-called “conversion” therapy. In addition, there is opportunity for discrimination in the context of a child protection investigation. A state may investigate parents for political reasons or because of bias related to a parent’s identity or income status. Without comprehensive federal protections and enforcement, there is no accountability for use of federal funds for inappropriate, discriminatory purposes in the investigation context.

The preamble recognizes that rejection by family is a significant contributor to the over-representation of LGBTQI+ children in the child welfare system, the proposed Rule does not address how Title IV-E/IV-B agencies and tribes should support children and families before children are removed from the home. Nor does the proposed rule address other contexts in which Title IV-E and IV-B services are provided, including when children are returned home after removal and remain under agency supervision, or when children are placed with kin who are not licensed foster placements. The need to address settings beyond foster care is underscored by ACF’s acknowledgement in the proposed rule that LGBTQI+ children are over-represented in congregate care and exit care without permanent placements and to homelessness at higher rates than their non-LGBTQI+ peers. An expansive, comprehensive rule would set the expectation that LGBTQI+ children and families will be treated safely and fairly across all Title IV-E and IV-B services. Only with a focus on parents and kin, in addition to foster care, will ACF guarantee child welfare practice that reduces over-representation of LGBTQI+ children in

⁸⁵ Adoption and Foster Care Analysis and Reporting System, 85 Fed. Reg. 28410 (July 13, 2020) (codified at 45 C.F.R. 1335.44(d)(4)(xxx)), available at <https://www.federalregister.gov/documents/2020/05/12/2020-09817/adoption-and-foster-care-analysis-and-reporting-system>.

care and disproportionately negative permanency outcomes for LGBTQI+ children. In addition, given historical and current discrimination on the basis of race, disability, and religion,⁸⁶ holistic protections all protect families from other forms of discrimination and promote more equitable outcomes.

B. Comprehensive protection is practicable.

The proposed Rule poses multiple administrative problems that will harm LGBTQI+ children. These issues would be resolved by adopting comprehensive protections that apply to all providers and by requiring agencies to inform all children of their rights to a safe and appropriate placement.

First, by imposing standards only on those providers that “opt-in” to being safe and appropriate for LGBTQI+ children, the proposed Rule will likely create scenarios where children have to choose between safe placements and remaining near their communities. Specifically, the proposed rule requires states to ensure that LGBTQI+ youth are afforded a “sufficient” number of safe and appropriate placements but does not describe how and whether that requirement will apply at the municipal, county, or state levels. ACF has appropriately and accurately acknowledged that LGBTQI+ youth experience more placement changes while in care than their non-LGBTQI+ peers and that a placement change could be inappropriate retaliation for reporting concerns about placement.⁸⁷ Under the current “opt in” scheme proposed in the Rule, if a placement is found harmful to an LGBTQI+ child, the provider may not be required to improve. Under such circumstances, the LGBTQI+ child would be forced to move to a new placement that is safe and appropriate. However, the proposed Rule provides no guarantees that the safe and appropriate placement would be near a child’s parents so visitation could happen frequently, would be close enough to a child’s school to maintain consistency in their education, would be close to their friends, or near their faith community. For example:

- If a placement that would accept their sibling group but is not safe and appropriate, a child would be forced to decide whether to elect sibling connection or support for their identity. A choice a child in government care should not be required to make.
- In state systems that are privatized, a large, community-based care contract agency could elect not to become a safe and appropriate placement provider for an entire region. LGBTQI+ children would be forced to decide whether to stay in their region without a guarantee of safety or move to another region in the state to be assured basic safety.

A rule that requires *all* placement providers—and not just those that opt in—to meet basic requirements for being a safe and appropriate provider would remove unnecessary bureaucratic processes for providers. Such a rule would also ensure that all children have the expectation that all placements meet these standards, thereby reducing the likelihood that children will have to choose between safe placements or remaining near their communities.

⁸⁶ GAO-22-104688 at 11, 32; Brief of Amici Curiae Indian Law Professors in Support of Respondents, *Fulton v. City of Philadelphia, Pennsylvania*, No. 19-123 (2020), available at <https://www.aclu.org/cases/fulton-v-city-philadelphia?document=fulton-v-city-philadelphia-amicus-brief-indian-law-professors#legal-documents>.

⁸⁷ *Overrepresentation of LGBTQI+ Children in Foster Care*, 88 Fed. Reg. at 66753, *Protection From Retaliation*, 88 Fed. Reg. at 66759.

Second, the proposed Rule provides that only certain LGBTQI+ children are entitled to notice of their right to safe and appropriate placement and attaches that right to an age that is not developmentally appropriate. Under the Rule, children over the age of 14, and LGBTQI+ youth who are out or are identified by someone else as being LGBTQI+⁸⁸ are provided information about a right guaranteed to all children in care by existing federal law. This proposal requires agencies to identify a subset of children who receive notice of rights that all children enjoy. Such a system is flawed because there will inevitably be children who are subject to discrimination and harm, but who escape the agency's notice. Indeed, LGBTQI+ children who are not out or have not been identified as LGBTQI+ by someone else will fall through the cracks and may suffer needlessly because they have not been informed of their rights. Further, by requiring agencies to identify subsets of children, the proposed rule introduces unnecessary bureaucracy.

A more practicable system would require notice of these rights to *all* children, at an appropriate age, such as age seven, and in a developmentally appropriate manner. This would allow agencies to provide information about rights at one time and in one place for all children. Doing so would also ensure that all children understand that they have a right to be treated fairly and a right to placements that are safe and appropriate. LGBTQI+ youth could then be assured that coming out to a placement would not result in harm, including placement changes.

Nor is there any reason that agencies should limit themselves to informing children 14 years or older. ACF has selected age 14 as a marker of when to advise children of their rights because that age triggers a right to participate in case planning. But youth of every age have a right to safe and appropriate placements. Moreover, children are able to understand their rights at a much younger age. The proposed Rule offers no justification for or reasoning behind their decision to not inform younger children of rights under federal law that apply to all children.

Finally, one of the most concerning provisions of the Rule from both a practical and legal perspective, is the requirement that LGBTQI+ youth must request a safe and appropriate placement. Federal law requires all youth have a basic expectation of safety while in care. Children who have been removed are not with their families, in theory, because they were not safe. At a minimum, the government care provided to them must be safe. ACF cites no authority or other explanation to justify its requirement that LGBTQI+ youth are singled out as a distinct population that must request a placement that is safe and appropriate for them. From a practical perspective, this requirement adds both an unnecessary and cumbersome layer of bureaucracy – notification of the request, capturing the request in case records, and executing the request – and a concerning risk of danger to the child. To request a safe and appropriate placement, the child has to out themselves without a guarantee that the caseworker will treat them fairly. In contrast, a rule that requires all providers—as a default—to be safe and appropriate for LGBTQI+

⁸⁸ This portion of the rule has inherent problems. The only way to know if someone is LGBTQI+ is for them to tell you. The Rule appears to endorse the practice of assuming a child is LGBTQI+ and then providing them notice which carries the risk of bias and stereotyping. A rule requiring all children be noticed of their rights avoids these unnecessary complications.

children would ensure that all such children are safe, not just those who are, supposedly, identifiable or who request a safe placement.⁸⁹

IV. ACF has Legal Authority to Promulgate a Rule with Comprehensive, Explicit Protections from Discrimination for Children and Families

A. Children Receiving Child Welfare Services from the Government Have Constitutional Rights to Protection from Discrimination.

A constitutional duty to protect children is triggered when an agency takes children into custody—i.e., when “the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs.”⁹⁰ “When a state intervenes and removes a child from their home, federal civil rights statutes require that the state provide the child with reasonably safe living conditions.”⁹¹

Children in care have substantive due process rights under the Fourteenth Amendment, which protect their personal security and reasonably safe living conditions; freedom from psychological harm and from physical and psychological deterioration; and adequate care including the provision of certain services, and a reasonably suitable placement.⁹²

In addition, children have a right to equal protection when receiving government care and services. This right includes the right of LGBTQI+ children to be treated equally when compared to their non-LGBTQI+ peers and.⁹³ Furthermore, youth have the right to freedom of religion (or freedom not to practice religion) because the Establishment Clause forbids imposition of a state-sanctioned religion.⁹⁴

⁸⁹ We recognize that the agency is concerned that imposing requirements on all private providers could infringe on providers' religious liberties. However, those concerns are misplaced because providers' rights would be sufficiently accommodated by a case-by-case RFRA exemption process, as explained further below in part VI.

⁹⁰ *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 200, 109 S. Ct. 988 (1989); *Youngberg v. Romero*, 457 U.S. 307, 102 S. Ct. 2452 (1982).

⁹¹ National Association for Counsel for Children, *Child Welfare Law and Practice: Representing Children, Parents, and Agencies in Neglect, Abuse, and Dependency Cases* (The Red Book) 23 (Josh Gupta-Kagan et al. eds., 4th ed. 2022).

⁹² See *Safe Havens* at 7.

⁹³ *Id.* Carrying out a statute's mandates necessarily involves ensuring that it is done in compliance with constitutional requirements. See *Nat'l Juv. L. Ctr., Inc. v. Regnery*, 738 F.2d 455, 462 (D.C. Cir. 1984) (when "Congress has delegated authority for making policy ... a given agency must obey the substantive and procedural constraints that the Constitution and Congress impose."). As the APA itself plainly recognizes, agency action cannot be "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C.A. § 706. See *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) (unconstitutional action by agency must be set aside as unlawful). Issuing nondiscrimination regulations to ensure that LGBTQI+ people do not experience discrimination in Title IV-E/IV-B-funded programs is necessary to ensure that the agency's statutory mandates are carried out within constitutional constraints.

⁹⁴ See *Safe Havens* at 7-8.

B. Families Receiving Services from the Government Have Constitutional Rights to Protection from Discrimination.

Parents, guardians, and caregivers who are subjected to government investigations and to the involuntary removal of children in their care have the rights to due process and to equal protection when receiving government services and participating in government programs, including the right to be free from discrimination on the basis of immutable aspects of their identity.⁹⁵ Similar rights are triggered when kin step forward to interface with a government agency and provide care for a child and for prospective and current foster and adoptive parents. These rights also apply to LGBTQI+ parents, kin, and current and prospective foster parents. For example, same-sex couples should have the same opportunity to foster children that are made available to different-sex couples and should not be subjected to the stigma of being turned away from a government program because they are a same-sex couple. Discrimination based on sex and sexual orientation is presumptively unconstitutional and subject to heightened scrutiny.⁹⁶ Recognizing this reality, the Office of Management and Budget (OMB) recently proposed regulations to codify the obligation that: “In administering awards in accordance with the U.S. Constitution, [each] Federal agency must take account of the heightened constitutional scrutiny that may apply under the Constitution's Equal Protection clause for government action that provides differential treatment based on sexual orientation or gender identity.”⁹⁷

C. Statutory Authority

Comprehensive non-discrimination protections are well within the agency’s authority under the Social Security Act’s general rulemaking provision: Section 1302(a).⁹⁸ Some of the undersigned organizations have already explained this authority at length in their comment on the proposed HHS Grants Regulation earlier this year.⁹⁹ We summarize that discussion here, but urge ACF to revisit the comment for a more fulsome treatment of the agency’s authority.¹⁰⁰

Courts have repeatedly recognized the “undoubtedly broad” authority conferred by the Section 1302(a),¹⁰¹ which provides that the “Secretary of Health and Human Services . . . shall

⁹⁵ Josh Gupta-Kagan, *Child Welfare Law and Practice: Representing Children, Parents, and Agencies in Neglect, Abuse, and Dependency Cases (The Red Book) – Chapter 1 Constitutional Right to Family Integrity* 9-29, National Association for Counsel for Children (4th ed. 2022); *See, e.g., United States v. Windsor*, 570 U.S. 744 (2013) (federal government's discrimination against same-sex couples violates Equal Protection); *Karnoski v. Trump*, 926 F.3d 1180, 1200–01 (9th Cir. 2019) (federal government's discrimination against transgender people is subject to heightened scrutiny); *Obergefell v. Hodges*, 135 S. Ct. 2071, 2596 (2015) (“sexual orientation is both a normal expression of human sexuality and immutable.”)

⁹⁶ *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017) (sex); *Baskin v. Bogan*, 766 F.3d 648, 654 (7th Cir. 2014) (sexual orientation); *SmithKline Beecham Corp. v. Abbott Lab’ys*, 740 F.3d 471, 484 (9th Cir. 2014) (sexual orientation); *Windsor v. United States*, 699 F.3d 169, 181-85 (2d Cir. 2012), *aff’d* on other grounds, 570 U.S. 744 (2013) (sexual orientation).

⁹⁷ *Guidance for Grants and Agreements*, 88 Fed. Reg. 69390, 69445 (proposed on Oct. 5, 2023) (to be codified at 2C.F.R. § 200.300(c)).

⁹⁸ 42 U.S.C. § 1302(a).

⁹⁹ Family Equality, et al, *supra* note 4 at 7-15.

¹⁰⁰ *Id.*

¹⁰¹ *See, e.g., Merck & Co. v. United States Dep’t of Health & Hum. Servs.*, 962 F.3d 531, 537 (D.C. Cir. 2020); *Nat’l Welfare Rts. Org. v. Mathews*, 533 F.2d 637, 640 (D.C. Cir. 1976).

make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which each is charged under this chapter.”¹⁰² As the D.C. Circuit explains, it “would be difficult to devise” a “more plenary [grant] of rule-making power.”¹⁰³

To determine whether a rule is “necessary” to a program’s “administration”—and thus whether it is authorized under Section 1302(a)—courts assess whether there is “an actual and discernible nexus between the rule and the conduct or management” of the functions with which the Secretary is charged.¹⁰⁴ Consistent with this “broad grant of power,” the D.C. Circuit has found Section 1302(a) to authorize rulemaking that directly regulate conduct that is central to the administration of HHS programs.¹⁰⁵ Conversely, where the D.C. Circuit has found a regulation to exceed section 1302(a)’s rulemaking authority, the court has emphasized just how far the rule “stray[ed] from truly facilitating the ‘administration’ of the Secretary’s duties.”¹⁰⁶ Considering these standards, it is straightforward to conclude that Section 1302(a) authorizes ACF to adopt broad nondiscrimination protections, which are “necessary to the efficient administration” of Title IV-B and IV-E and consistent with the purposes of those programs.

First, the recommended nondiscrimination protections contain “an actual and discernible nexus between the rule and the conduct or management” of the Title IV-B and IV-E programs.¹⁰⁷ Specifically, the proposed protections would govern core elements of Title IV-B and IV-E, such as how child welfare services are provided (e.g., by prohibiting discriminatory and abusive treatment of LGBTQI+ children in foster care) and to whom such services are provided (e.g., by prohibiting child welfare agencies from turning away prospective foster parents based on their religious beliefs, sexual orientation, gender identities, or sex characteristics). Thus, the proposed rulemaking’s “operational focus [would be] on [Title IV-E and IV-B].”¹⁰⁸

Second, the proposed protections are necessary to implement myriad specific statutory requirements that apply to state plans approved under Title IV-B and IV-E. To take just one example that was explored in depth above, comprehensive protections that apply to both children and families across all title IV-E and IV-B services are necessary to meet the requirement that children’s case plans be “designed to achieve placement in a safe setting that is the least restrictive (most family like) and most appropriate setting available and in close proximity to the parents’ home, consistent with the best interest and special needs of the child.”¹⁰⁹ Our prior

¹⁰² 42 U.S.C. § 1302(a).

¹⁰³ *Nat’l Welfare Rights Org.*, 533 F.2d at 640 (internal quotation omitted).

¹⁰⁴ *Merck*, 962 F.3d at 537-38.

¹⁰⁵ *See Nat’l Welfare Rights Org.*, 533 F.2d at 640.

¹⁰⁶ *Merck*, 962 F.3d at 538.

¹⁰⁷ *Id.* at 537-38.

¹⁰⁸ *Id.* at 538.

¹⁰⁹ 42 U.S.C. § 675(5)(A); *see also supra* pages 17-20 (explaining why comprehensive protections are needed across title IV-B and IV-E services and why protections must apply to all providers).

comment on the HHS Grants proposed rule provides an extensive list of other statutory requirements whose implementation requires broad nondiscrimination protections.¹¹⁰

Third, the proposed nondiscrimination protections are “not inconsistent with [the Social Security Act]”¹¹¹ because they are necessary to achieve the purposes of Title IV-B and IV-E.¹¹² Specifically, as the agency could easily explain the final rule—and as discussed above, *supra* pages 10-21—the nondiscrimination protections are necessary to ensure the safety and well-being of children in care—a goal shared by both Title IV-B and IV-E.¹¹³

D. Logical Outgrowth

Adopting comprehensive nondiscrimination protections in the final rule would also be consistent with the agency’s obligations under the Administrative Procedure Act (“APA”) because such protections would be a logical outgrowth of the proposed rule.¹¹⁴

A final rule is a logical outgrowth “if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.”¹¹⁵ “By contrast, a final rule fails the logical outgrowth test and thus violates the APA’s notice requirement where interested parties would have had to divine the agency’s unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.”¹¹⁶ Comprehensive non-discrimination protections would meet the logical outgrowth standard in this rulemaking because interested parties should be able to anticipate that such changes are possible.

¹¹⁰ Family Equality, et al, *supra* note 4 at 12-13. Among others, these statutory requirements include: 42 U.S.C. § 671(a)(10)(A)-(B) (requiring states to Establish standards that “are reasonably in accord with recommended standards of national organizations concerned with standards [for foster family homes and child care institutions], including standards related to . . . safety . . . and protection of civil rights,” and “appl[y]” those standards “to any foster family home or child care institution” receiving Title IV-E or IV-B funds); 42 U.S.C. § 671(a)(22) (requiring states to “develop and implement standards to ensure that children in foster care placements in public or private agencies are provided quality services that protect the safety and health of the children.”); 42 U.S.C. § 671(a)(15)(A),(C) (requiring states to make “the child’s health and safety [as] the paramount concern” when making “reasonable efforts” to find “permanent placement[s]” in a “timely manner” for children in foster care); 42 U.S.C. § 671(a)(24) (requiring states to ensure that foster parents are “prepared adequately with the appropriate knowledge and skills to provide for the needs of the child.”); 42 U.S.C. § 675(1)(A)-(B) (requiring states to ensure case planning focuses on the “safety and appropriateness” of placements and “assuring that the child receives safe and proper care”); and 42 U.S.C. § 677(b)(2)(E) (requiring states to “[u]se objective criteria for determining eligibility for benefits and services under the programs, and for ensuring fair and equitable treatment of benefit recipients.”).

¹¹¹ 42 U.S.C. § 1302(a).

¹¹² See *Vierra v. Rubin*, 915 F.2d 1372, 1378 (9th Cir. 1990) (reasoning that section 1302(a)’s rulemaking authority extends only to regulations consistent with the purposes of the Social Security Act).

¹¹³ See 42 U.S.C. § 621(4) (providing that the purpose of Title IV-B includes “promoting the safety, permanence, and well-being of children in foster care and adoptive families”); 42 U.S.C. § 671(a)(22) (requiring states to “develop and implement standards to ensure that children in foster care placements in public or private agencies are provided quality services that *protect the safety and health* of the children”) (emphasis added).

¹¹⁴ 5 U.S.C. §§ 553(b), 551(5).

¹¹⁵ *Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1373 (Fed. Cir. 2017).

¹¹⁶ *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1080 (D.C. Cir. 2009) (internal quotations omitted).

First, commenters should anticipate that the agency could switch from an opt-in system (where providers must opt-in by volunteering to provide a safe and appropriate placement for LGBTQI+ children) to an opt-out system (where all providers must provide safe and appropriate placements by default, but may opt-out by obtaining a RFRA exemption process). Such a change is merely an adjustment to a process already discussed in the proposed rule, not the adoption of an entirely new process.

To begin, the preamble discusses the proposal and rationale for an opt-in system at length, explaining that it deliberately chose this system in an attempt to balance the religious freedom of private providers with the statutory obligations to look after the safety and well-being of children in care.¹¹⁷ As part of that discussion, the preamble justifies the opt-in system by providing the agency’s understanding of RFRA, its reading of the Supreme Court’s decision in *Fulton*, and its belief that state child welfare agencies will be able to recruit a sufficient number of volunteers.¹¹⁸ Implicit in this discussion is the possibility that ACF could instead impose the requirement on all private providers, subject to a RFRA exemption process.¹¹⁹ As such, the lengthy exploration of the agency’s reasoning provides ample notice that the agency could—as a result of comments received during this rulemaking—change its view on these issues and decide that an opt-in system is neither workable, nor required by the law. Indeed, as courts have recognized, the very discussion of a proposed path “effectively raise[s] the question as to whether [the proposal] ma[kes] sense.”¹²⁰ Here, adjusting the mechanism by which children obtain protections is exactly the kind of reasonably foreseeable change that agencies may make following public comment on a proposed mechanism.

Moreover, it is quite foreseeable that an opt-out system will be necessary to meet the statutory requirements that are the driving purpose behind the proposed rule. The preamble to the proposed rule *repeatedly* emphasizes that safe and appropriate placements for LGBTQI+ children are “required by statute.”¹²¹ To meet this mandatory statutory requirement, the child welfare system must have *at least* as many safe and appropriate placements as the number of LGBTQI+ children in the system. Indeed, the proposed rule recognizes this fact by imposing a requirement that child welfare agencies “ensure that the totality of their child welfare system

¹¹⁷ See 88 Fed. Reg. at 66761-62.

¹¹⁸ *Id.*

¹¹⁹ Such a process would sufficiently accommodate providers’ rights under RFRA and the First Amendment. See *infra* Part VI.

¹²⁰ See, e.g., *Arizona Pub. Serv. Co. v. E.P.A.*, 211 F.3d 1280, 1299 (D.C. Cir. 2000).

¹²¹ 88 Fed. Reg. at 66755. See also *id.* at 66752 (“Federal law requires that state and tribal title IV–E/IV–B agencies (“agencies”) ensure that each child in foster care receives ‘safe and proper’ care and has a case plan that addresses the specific needs of the child while in foster care to support their health and wellbeing”); *id.* at 66753 (“the title IV–E/IV–B case review system requires that the agency have procedures for assuring that each child has a case plan designed to achieve placements in the most appropriate setting available, consistent with the best interests and special needs of the child”); *id.* (“the Act requires the agency to certify that foster parents are ‘prepared adequately with the appropriate knowledge and skills to provide for the needs of the child’ Finally, the Act requires agencies to develop and implement standards to ensure that children in foster care placements are provided quality services that protect their safety and health”); *id.* at 66760 (“The title IV–E statute provides that each child must have a case plan designed to achieve placements in the most appropriate setting available consistent with the best interests and special needs of the child.”).

includes sufficient placements for LGBTQI+ children that meet these standards.”¹²² Further, to meet the statutory requirement, the system must function smoothly enough to ensure that LGBTQI+ children are placed in the homes that are safe and appropriate for them. It does not take a great leap of intuition to realize that ACF may determine that the opt-in system will likely be inadequate on both counts because (1) placement providers are not likely to volunteer for extra training at the rate necessary to ensure a sufficient number of safe and appropriate placements and (2) LGBTQI+ children will inevitably be placed in less-than-safe homes and will be faced with an onerous bureaucratic process before finding their way to a safe placement, if they ever do. It is therefore foreseeable that the agency would decide to switch to an opt-out system to ensure that there are enough safe and appropriate placements and to ensure that LGBTQI+ children actually make it to those placements.

Further, the proposed rule already proposes to impose *some* protections on an opt-out basis. Specifically, the proposed section (a)(4) would require “a procedure to ensure that no child in foster care experiences retaliation when the child has disclosed their LGBTQI+ identity, is otherwise reported or perceived to have an LGBTQI+ identity, has requested a safe and appropriate placement, or has reported concerns that the placement is not meeting the requirements of paragraph (a)(1).”¹²³ The proposed rule makes clear that this non-retaliation protection applies by default to all regulated entities, including private actors such as “the agency’s contractors, or foster care providers.”¹²⁴ Expanding the opt-out requirements from just the non-retaliation provisions to the broader range of requirements that make a placement safe and appropriate is therefore foreseeable.

Second, commenters are on notice of the possibility that the agency would adopt protections for families, including prospective foster and adoptive parents who identify as LGBTQI+, because such protections are necessary to recruit a sufficient number of safe and appropriate placements for LGBTQI+ children—an issue that ACF explicitly invited comments on. Indeed, the driving impetus for this rule is the reality that “many LGBTQI+ foster youth do not currently receive placements or services that are safe and appropriate” as “evidence[d] [by] qualitative studies, listening sessions, and Congressional testimony.”¹²⁵ In a section devoted to this issue, the agency noted that “a majority of states [will] need to expand their efforts to recruit and identify providers and foster families that [are] safe and appropriate placements for a LGBTQI+ child.”¹²⁶ ACF clearly anticipates that this will be a challenge and “invites public comment on how best we can support states and tribes in recruiting providers to provide safe and appropriate placements.”¹²⁷

One foreseeable way to help increase the number of such homes is to adopt nondiscrimination protections that prohibit providers from rejecting prospective foster and adoptive parents because of any aspect of their identity, including LGBTQI+ identities. Indeed,

¹²² *Id.* at 66756.

¹²³ *Id.* at 66759.

¹²⁴ *Id.*

¹²⁵ *Id.* at 66755.

¹²⁶ *Id.* at 66763.

¹²⁷ *Id.*

the advocacy community has been calling for such an approach for years.¹²⁸ As noted above, LGBTQI+ families are far more likely to foster or adopt than their non-LGBTQI+ peers and are more likely to provide safe and appropriate placements for LGBTQI+ children.¹²⁹ Accordingly, discrimination against potential foster and adoptive parents limits the pool of safe and appropriate placements. Because such a change would address the very issue that the ACF seeks comment on, it is a logical outgrowth of the proposed rule. Indeed, courts have consistently upheld final rules as logical outgrowths “where the NPRM expressly asked for comments on a particular issue.”¹³⁰

Third, commenters should foresee the possibility that ACF will apply nondiscrimination protections to all title IV-E and IV-B services, including prevention services, because such protections are necessary to address the many harms identified by the preamble, which extend beyond the harms experienced while in foster care.¹³¹ In a section titled “Overrepresentation of LGBTQI+ Children in Foster Care,” the proposed rule explains that LGBTQI+ youth are more likely to end up in foster care in part because of “higher rates of parental physical abuse” and because they are more likely to be kicked out due to “conflict over their sexual orientation or gender identity.”¹³² To properly address these harms, child welfare agencies need to ensure that their prevention services—which are designed to prevent children from entering foster care—are conducted in a nondiscriminatory and supporting manner. Indeed, the preamble even notes that ACF has recently published an information memorandum that “include[s] suggestions on how agencies could best provide services and supports to each child who identifies as LGBTQI+ who is at risk of entering . . . foster care.”¹³³ In light of this discussion, it is entirely foreseeable that ACF could extend the various protections that already apply to child welfare agency staff in the foster care context—such as the non-retaliation provisions discussed just above¹³⁴—by adopting nondiscrimination provisions that apply to all Title IV-E and IV-B services.

¹²⁸ See, e.g., Family Equality, *Comment on 2019 HHS Grants NPRM (RIN 0991-AC16)* at 3-7 (Dec. 19, 2019) (opposing the repeal of comprehensive nondiscrimination protections because “discrimination against prospective foster and adoptive parents . . . limit[s] the pool of available homes and appropriate placements for children in care.”); Brief for Family Equality Council & COLAGE as Amicus Curiae, *Fulton v. City of Philadelphia*, No. 18-2572 at 5-12 (3rd Cir. Oct. 4, 2018), available at <https://www.aclu.org/legal-document/fulton-v-city-philadelphia-family-equality-council-amicus-brief>.

¹²⁹ *Supra* page 18.

¹³⁰ *CSX Transp. Inc.* 584 F.3d at 1081 (citing *Owner–Operator Indep. Drivers Ass’n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 209–10 (D.C. Cir. 2007); and *City of Portland v. E.P.A.*, 507 F.3d 706, 715 (D.C. Cir. 2007)).

¹³¹ To the extent any of these services are offered by private providers, such providers could avail themselves of the RFRA exemption process, which would accommodate their rights under RFRA and the First Amendment. See *infra* Part VI.

¹³² 88 Fed. Reg. at 66753.

¹³³ *Id.* at 66755.

¹³⁴ See text *supra* accompanying notes 126-27.

V. A Federal Requirement for Comprehensive Nondiscrimination Protections is Consistent with Professional Standards as well as Guidance from States and Federal Agencies

A. A Federal Requirement for Comprehensive Nondiscrimination Protections is Consistent with Child Welfare Professional Standards

Numerous organizations and associations have contributed to the body of work that serve as professional standards in the child welfare field. For example, the Child Welfare League of America (“CWLA”) has long been a principal standard bearer. Over ten years ago, in 2012, CWLA released *Recommended Practices To Promote the Safety and Well-Being of Lesbian, Gay, Bisexual, Transgender and Questioning (LGBTQ) Youth and Youth at Risk of or Living with HIV in Child Welfare Settings* (“*Recommended Practices*”).¹³⁵ *Recommended Practices* consolidates and summarizes recommended practices derived from previous publications of the Child Welfare League of America, the American Bar Association Center on Children and the Law: Opening Doors for LGBTQ Youth in Foster Care Project, Diane E. Elze, the Family Acceptance Project, Lambda Legal, Legal Services for Children, Gerald P. Mallon, Robin McHaelen, the National Alliance to End Homelessness, the National Center for Lesbian Rights, the National Center for Transgender Equality, the National Network for Youth and the Sylvia Rivera Law Project, among others. The purpose of *Recommended Practices* was to provide guidance to ACYF, state and local child welfare agencies and their contract providers on how to fulfill their professional and legal obligations to ensure safe and proper care consistent with the best interest and special needs of each and every LGBTQ child in the child welfare system. *Recommended Practices* was public supported by then ACYF Commissioner Bryan Samuels.

With the primary goal to improve the safety, permanency, and well-being of LGBTQ youth and their families who receive services through the child welfare system, CWLA recommends federally funded state and local child welfare agencies and their contracted direct service providers should adhere to the following standards:

- LGBTQ youth should have the same rights and privileges as other youth who receive child welfare services.¹³⁶
- When seeking a foster or adoptive home placement for an LGBTQ young person, child welfare staff should be sure that the home is accepting of LGBTQ people.¹³⁷
- All foster and adoptive parents should receive training on caring for an LGBTQ young person, as any child may be LGBTQ.¹³⁸

¹³⁵ Child Welfare League of America *et al.*, *Recommended Practices: To Promote the Safety and Well-Being of Lesbian, Gay, Bisexual, Transgender and Questioning (LGBTQ) Youth and Youth at Risk of or Living with HIV in Child Welfare Settings* (2012), available at <https://legacy.lambdalegal.org/sites/default/files/publications/downloads/recommended-practices-youth.pdf>.

¹³⁶ *Id.* at 10.

¹³⁷ *Id.* at 11.

¹³⁸ *Id.*

- Child welfare agencies should engage in outreach to LGBTQ adults and non-LGBTQ adults who are supportive, in order to be able to provide a range of homes that are safe and nurturing for LGBTQ youth.¹³⁹
- Child welfare agencies should not discriminate against prospective or present foster and adoptive parents based on their sexual orientation or gender identity.¹⁴⁰
- Child welfare staff should not put LGBTQ youth into placements, services, schools or programs where they will be unsafe or unsupported.¹⁴¹
- Child welfare agencies should actively recruit, and support prospective LGBTQ foster parents. Every national professional child welfare organization strongly supports licensing LGBTQ foster and adoptive parents according to the same standards applied to non-LGBTQ applicants. Child welfare staff should support awareness that LGBTQ people can be good foster and adoptive parents.¹⁴²
- State child welfare agencies should respect federal and state prohibitions against religious discrimination in the provision of governmentally-supported social services.¹⁴³
- Faith-based agencies that receive government funds to provide social services or that care for children in state custody must adhere to professional and legal standards of care, providing for nondiscriminatory, competent and nonjudgmental services to LGBTQ youth and foster and adoptive parents.¹⁴⁴

In addition to CWLA, The National Association of Social Workers (NASW), the American Psychological Association (APA), the American Academy of Pediatrics (AAP) and the American Academy of Child and Adolescent Psychiatry (AACAP),¹⁴⁵ Children’s Defense Fund,¹⁴⁶ Casey Family Programs,¹⁴⁷ among other child welfare, social science, and medical health organizations oppose discrimination against LGBTQI+ youth. These professional organizations agree that all children should be afforded the same treatment and respect regardless of sexual orientation or gender identity. Leading social science and medical associations are uniform in their positions that policies and practices that limit access to sex-segregated spaces consistent with a youth’s identity negatively impact them, while affirmation of all aspects of

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 16.

¹⁴⁴ *Id.*

¹⁴⁵ *Getting Down to Basics - Tools to Support LGBTQ Youth in Care - What the experts say: Position & Policy statements on LGBTQ Issues from Leading Professional Associations*, Lambda Legal (2015), available at https://legacy.lambdalegal.org/sites/default/files/what_the_experts_say_2015.pdf.

¹⁴⁶ Steven Olender, *The Biden Administration Must Advance Policies to Support LGBTQ+ Children and Adults in the Child Welfare System*, Children’s Defense Fund (July 16, 2021), available at <https://www.childrensdefense.org/blog/lgbtq-child-welfare-system-rfi/>.

¹⁴⁷ Casey Family Programs, *Supporting LGBTQ2SIA+ families means doing no harm* (Mar. 15, 2022), available at <https://www.casey.org/supporting-lgbtqsia-families/>.

identity improves wellbeing¹⁴⁸ and that affirming health care improves wellbeing and reduces self-harm and suicidal ideation and attempts.¹⁴⁹

B. A Federal Requirement for Comprehensive Nondiscrimination Protections is Consistent with State Law, Agency Policy, and Foster Care Bills of Rights

As noted by the General Accounting Office, a majority of states do have nondiscrimination requirements that protect children and families and that apply to both agency staff and contractors.¹⁵⁰ Most of these nondiscrimination provisions include religion as well as sex, sexual orientation, and gender identity. In many states these protections for children appear in bills of rights for children in foster care, but in many others they are broad nondiscrimination protections that apply to children and families and to all programs and services offered by the child welfare agency.¹⁵¹ Only two states, Alaska and Alabama do not have nondiscrimination provisions in law or agency policy specific to the child welfare systems.

The presence of these requirements indicates that a majority of states understand that their services must be provided in a nondiscriminatory manner. These requirements are not a substitute for federal requirements, however, as enforcement mechanisms such as state ombudsman office or internal grievance procedures are often administered under the general oversight of the Title IV-E/IV-B agency itself, providing a possible disincentive to acknowledge harm has occurred. Also, a state child welfare agency may make decisions for political reasons that are contrary to the welfare of children in its care. It is the role of the federal government to ensure that each state complies with federal legal requirements that protect all children and families in every state and that a child and families rights are not dependent upon the state in which they reside.

C. A Federal Requirement for Comprehensive Nondiscrimination Protections is Consistent with HHS, ACF, ACYF, and CB Guidance

Comprehensive nondiscrimination protections, including protection against discrimination on the basis of sexual orientation, gender identity and gender expression applicable to all aspects of the child welfare system and all agencies, tribes, and contact providers is consistent with HHS, ACF, ACYF, and CB policy, guidance, and training and technical assistance materials.¹⁵² At no point in its history has ACF maintained that obligations

¹⁴⁸ M. Currey Cook & Shannan L. Wilber, *Child Welfare Law and Practice: Representing Children, Parents, and Agencies in Neglect, Abuse, and Dependency Cases (The Red Book): Chapter 6 - LGBTQ+ Justice*, National Association for Counsel for Children (4th ed. 2022).

¹⁴⁹ *Id.*

¹⁵⁰ GAO-22-104688 at 15.

¹⁵¹ State of New Mexico Children, Youth and Families Department, *Nondiscrimination Policy Statement*, (June 29, 2020), available at <https://www.cyfd.nm.gov/wp-content/uploads/2023/03/LGBTQIAEnglish.pdf>.

¹⁵² U.S. Dep't of Health and Hum. Serv., Administration on Children, Youth and Families, *ACYF-CB-IM-11-03 Lesbian, Gay, Bisexual, Transgender and Questioning Youth in Foster Care* (Apr. 6, 2011), available at <https://www.acf.hhs.gov/sites/default/files/documents/cb/im1103.pdf>; U.S. Dep't of Health and Hum. Serv., Administration on Children, Youth and Families, *ACYF-CB-IM-22-01 Guidance for Title IV-B and IV-E Agencies When Serving LGBTQI+ Children and Youth* (Mar. 2, 2022), available at <https://www.acf.hhs.gov/sites/default/files/documents/cb/im2201.pdf>; *Working With LGBTQ+ Youth and Families*, Child Welfare Information Gateway, available at <https://www.childwelfare.gov/topics/systemwide/diverse->

under federal law and its recommendations for child welfare practice that supports and affirms LGBTQI+ youth would only apply to children in foster care or apply to only placement providers that choose to follow them.

D. A Federal Requirement for Comprehensive Nondiscrimination Protections is Consistent with Guidance General Accounting Office Recommendations

In April 2022, the General Accounting Office conducted a study at the request of congress about the rights of LGBTQ+ children in foster care and the rights of children to practice their own faith or be free from imposition of a provider’s faith while in foster care. Their report examines (1) state protections against discrimination on the basis of sexual orientation, gender identity, and religion in foster care; (2) promising practices for providing supportive care to LGBTQ+ youth and youth of various religious beliefs in foster care; and (3) challenges selected states reported facing in supporting LGBTQ+ identities and religious beliefs among foster youth, and how HHS assists states in supporting these youth. The GAO recommends that “establishing inclusive nondiscrimination policies and standards for providing care is a promising practice according to literature and HHS publications [it] reviewed, and two stakeholder groups [it] interviewed.”¹⁵³

VI. ACF Should Eliminate the Current Religious Freedom and Restoration Analysis and Provide an Accurate Description of its Obligations in a Revised Rule

We agree with the comment submitted by Americans United, the American Civil Liberties Union, American Atheists, and Interfaith Alliance as it relates to ACF’s RFRA analysis in the Rule and incorporate their analysis here.

The Religious Freedom Restoration Act (RFRA) asks whether a federal law or policy places a “substantial burden” on religious exercise. If so, the government regulation must “further[] a compelling governmental interest” using the “least restrictive means.”¹⁵⁴ As the preamble acknowledges, RFRA requires a “fact-specific case-by-case analysis.”¹⁵⁵ Thus, when claims under RFRA are advanced, the government is required to assess all the circumstances related to the claim. Because granting a religious exemption without first determining whether there is a substantial burden on religious exercise would impermissibly favor religion,¹⁵⁶ the government cannot just take the claimant at its word or create blanket exemptions for hypothetical burdens. But even if the government determines the claimant has proved that there is a government-imposed burden, RFRA still does not require an exemption if the law or policy is the least restrictive means for the government to advance a compelling interest.

[populations/lgbtq/](#). Revisions such as comprehensive nondiscrimination protections for children and families, a prohibition on so-called “conversion” therapy, and access to gender affirming medical care suggested in this comment are also consistent with Exec. Order No. 14075, *Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals*, supra note 59.

¹⁵³ GAO-22-104688 at 25.

¹⁵⁴ 42 U.S.C. § 2000bb-1(a)-(b).

¹⁵⁵ 88 Fed. Reg. at 66762.

¹⁵⁶ See, e.g., *Cnty. of Allegheny v. Am. C.L. Union Greater Pittsburgh Chapter*, 492 U.S. 573, 613 n.59 (1989); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334-35 (1987).

And finally, because the government’s ability to provide religious accommodations is not unlimited, it must, as the preamble acknowledges, assess “any harm an exemption could have” on others.¹⁵⁷ The Establishment Clause requires that “an accommodation must be measured so that it does not override other significant interests,” “impose unjustified burdens on other[s],” or have a “detrimental effect on any third party.”¹⁵⁸

Under the proposed rule, states and tribes have flexibility to implement the requirements to ensure children in foster care who identify as LGBTQI+ are provided “safe and appropriate” placements. The preamble explains that ACF took RFRA principles into account when drafting the proposed rule and it strongly suggests that based on these principles, states and tribes should find ways to exempt faith-based providers from these requirements. But exemptions to the requirements for “safe and appropriate” placement, notice, and transfer could undermine care for LGBTQI+ children and require states and tribes to reshape their Title IV-E/IV-B programs. RFRA doesn’t require this structure. Nor does RFRA require or allow blanket exemptions; it requires a case-by-case assessment.

We urge ACF to provide guidance to states and tribes that clarifies their obligations under the Rule including under RFRA and the Constitution. It’s clear that RFRA governs requests for exemption to obligations imposed by the Rule. But because ACF has given states and tribes flexibility to implement the rule’s requirements, it is likely that state law, which is not subject to RFRA,¹⁵⁹ and the U.S. Constitution would govern obligations imposed directly on providers. Thus, we suggest that the guidance explain that the Establishment Clause limits on exemptions also apply to the states.¹⁶⁰ We also suggest the guidance explain requirements under the Free Exercise Clause: the government may set neutral, generally applicable requirements that incidentally burden religion, but the government may not have a system to create individualized, discretionary exemptions from those requirements.¹⁶¹

In addition, ACF’s analysis of its obligation under RFRA in the Rule differs from its analysis in its November 2021 letter revoking a waiver that the Trump administration granted to faith-based child placing agencies exempting them from the requirements in the 2016 HHS Grants Rule. ACF accurately noted in the context of considering a waiver of nondiscrimination requirements that “the government maintains a strong interest in tailoring the relief provided to mitigate the potential harm of limiting the diversity of available foster homes for children in the foster care population, many of whom identify as lesbian, gay, bisexual, transgender, and queer

¹⁵⁷ 88 Fed. Reg. at 66762.

¹⁵⁸ *Cutter v. Wilkinson*, 544 U.S. 709, 720, 722, 726 (2005); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 729 n. 37 (2014) *see also Est. of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989).

¹⁵⁹ *City of Boerne v. Flores*, 521 US 507 (1997).

¹⁶⁰ As explained above, there must be an actual—not hypothetical—government-imposed burden on the claimant and exemptions may not harm third parties or other significant interests.

¹⁶¹ *Fulton v. City of Philadelphia, Pennsylvania*, 141 S.Ct. 1868, 1878 (2021). This decision does not prohibit states from implementing neutral program requirements to include bars on discrimination.

or questioning (LGBTQ+).”¹⁶² ACF also noted, appropriately that the 2019 exception was “overbroad and did not properly apply the substantial burden requirement under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, et seq.” and that South Carolina “did not provide evidence supporting a blanket exception from section 75.300(c)’s religious non-discrimination requirement for the benefit of all faith-based subrecipients in South Carolina.”¹⁶³

VII. Conclusion

Thank you for taking the time to consider our views, and the impact these proposed revisions will have on all children and families in the child welfare system. We support a prompt issuance of revised rule that includes the recommended changes and enhancements discussed in this comment. If the recommended revisions are not changes ACF can or will include in this Rule, we request that ACF not finalize the Rule and notice a new rule at a later date that ensures comprehensive protection for all children and families who participate in or benefit from Title IV-E and IV-B programs. Please do not hesitate to reach out to Laura Brennan, Child Welfare Policy Associate at Family Equality, at Lbrennan@familyequality.org or Currey Cook, Senior Counsel and Director of the Youth in Out-of-Home Care Project at Lambda Legal, at ccook@lambdalegal.org with any questions.

Respectfully submitted,

Lambda Legal
Family Equality
Children’s Action Alliance
Children’s Law Center of California
Children’s Rights
interACT: Advocates for Intersex Youth
Movement Advancement Project
National Center for Transgender Equality
Nebraska Appleseed
Youth Law Center

¹⁶² Joo Yeun Chang, Principal Deputy Assistant Secretary, *Withdrawal of Approval of Exception from Religious Non-Discrimination Requirement of 45 CFR 75.300(c)*, Administration for Children and Families 1-2 (Nov. 18, 2021), available at <https://www.acf.hhs.gov/sites/default/files/documents/withdrawal-of-exception-from-part-75.300-south-carolina-11-18-2021.pdf>.

¹⁶³ *Id.* at 1.

Appendix A

[suggested additions are underlined; suggested deletions are struck through]

PART 1355—GENERAL

- 1. The authority citation for part 1355 continues to read as follows:

Authority: 42 U.S.C. 620 et seq., 42 U.S.C. 670 et seq.; 42 U.S.C. 1302. 42 U.S.C.

- 2. Add § 1355.22 to read as follows:

§ 1355.22 ~~Placement r~~ Requirements under titles IV–E and IV–B for children, including children who identify as lesbian, gay, bisexual, transgender, queer or questioning, intersex, as well as children who are non-binary or have non-conforming gender identity or expression.

[X] Definition. As used in this section, “LGBTQI+” includes a child who is (including a child who self-identifies as) lesbian, gay, bisexual, transgender, queer or questioning, or intersex, or a child who is non-binary, or has a nonconforming gender identity or expression, or has variations in sex characteristics.

(a) Protections. The title IV–E/IV–B agency must meet the following requirements for each child ~~in foster care participating in or benefitting from title IV-E/IV-B programs, including a child who is or is perceived to be~~ identifies as lesbian, gay, bisexual, transgender, queer or questioning, or intersex, as well as each child who is non-binary or has nonconforming gender identity or expression (LGBTQI+).

(1) Nondiscrimination.

(i) The title IV-E/IV-B agency shall ensure that no child otherwise eligible will be:

(A) Excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of Title VI-E/IV-B programs and services based of age, disability, sex, sex characteristics, including intersex traits, race, color, national origin, religion, gender identity, gender expression, or sexual orientation.

(B) Subjected to attempts to undermine, suppress, or change the sexual orientation, gender identity, or gender expression of the child.,

(c) With respect to a child with innate variations in physical sex characteristics and who is unable to provide individual informed consent or assent, subjected to interventions to alter the sex characteristics of the child, unless medically necessary to address an immediate physical health concern.

(ii) The title IV-E/IV-B agency shall develop and implement standards to prohibit, prevent, and effectively respond to such discrimination.

(1 2) Safe and appropriate placement. The title IV–E/IV–B agency must ensure that a safe and appropriate placement is available for and provided to all children in foster care, including those who identify as LGBTQI+. ~~As used in this section, for a placement to be considered safe and appropriate for an LGBTQI+ child, the agency must place such child with a~~ Placement providers must that:

(i) ~~Will~~ Establish an environment free of hostility, mistreatment, or abuse based on the child’s LGBTQI+ identity or status, and other protected characteristics listed in § 1355.22(a)(1). . ;

(ii) ~~Is~~ Be trained to be prepared with the appropriate knowledge and skills to provide for the needs of the child related to the child’s entire identity including race, national origin, religion, sex, sex characteristics, disability, and self-identified sexual orientation, gender identity, and gender expression. The training must reflect evidence, studies, and research about the impacts of rejection, discrimination, and stigma on the safety and wellbeing of LGBTQI+ children, ~~and~~ provide information for providers about professional standards and recommended practices that promote the safety and wellbeing of LGBTQI+ children; and be informed by and developed in consultation with LGBTQI+ youth with experience in the child welfare system.

(iii) ~~Will~~ Facilitate the child’s access to age-appropriate resources, services, and activities that support their health and well-being.

~~(2) Process for requesting safe and appropriate placement. The IV–E/IV–B agency must implement a process by which a child identifying as LGBTQI+ may request a safe and appropriate placement, as described in paragraph (a)(1) of this section. The title IV–E/IV–B agency must consult with such child to provide an opportunity to provide input into their safe and appropriate placement. The process must safeguard the privacy and confidentiality of the child, consistent with section 471(a)(8) of the Act and 45 CFR 205.50, and must include the following components:-~~

~~(i3) Notice of the availability of safe and appropriate placements must be provided to, at minimum:~~

~~(A) All children age 14 7 and over; and~~

~~(B) Children under age 14 who:-~~

~~(1) Have been removed from their home due, in whole or part, to familial conflict about their sexual orientation, gender identity, or sex characteristics; or~~

~~(2) Have disclosed their LGBTQI+ identity or whose LGBTQI+ identity is otherwise known to the agency;-~~

(ii) The notice must be provided in an age-appropriate manner, both verbally and in writing; and

~~(iii) The notice must inform the child of how they may request a safe and appropriate placement.~~

~~(34) Process for reporting concerns about placements. The title IV–E/IV–B agency must implement a process for children, including LGBTQI+ children, identifying as LGBTQI+ to report concerns about any placements that fail to meet the requirements of paragraph (a)(1) of~~

this section. The process must safeguard the privacy and confidentiality of the child, consistent with section 471(a)(8) of the Act and 45 CFR 205.50, and must include the following components:

~~(i) The title IV–E/IV–B agency must notify all children who meet the requirements of paragraphs (a)(2)(i)(A) and (B) of this section of the availability of this process;~~

(ii) The notice must be provided in an age-appropriate manner, both verbally and in writing; and

(iii) The title IV–E/IV–B agency must respond promptly to an ~~LGBTQI+~~ child’s reported concern, consistent with the agency’s timeframes for investigating child abuse and neglect reports depending on the nature of the child’s report.

(45) Retaliation prohibited. The title IV–E/IV–B agency must have a procedure to ensure that no child ~~in foster care~~ experiences retaliation for ~~the child~~ disclosure of a child’s~~ing~~ their LGBTQI+ identity or status (whether by the child or a third party), ~~for requesting a safe and appropriate placement as described in paragraph (a)(1) of this section, or or~~ for reporting concerns that their current placement is not safe and appropriate or they are experiencing discrimination on the basis of protected characteristics in § 1355.22(a)(1). Retaliation includes, but is not limited to, unwarranted placement changes including unwarranted placements in congregate care facilities, restriction of access to supportive community resources, or for LGBTQI+ children, access to LGBTQI+ peers, or attempts to undermine, suppress, or change the sexual orientation or gender identity of a child, or other activities that stigmatize a child’s LGBTQI+ identity or status.

(56) Access to supportive and age appropriate services. The title IV–E/IV– B agency must ensure that children, including LGBTQI+ children who identify as LGBTQI+, have access to age appropriate services that are supportive of all aspects of identity, including their sexual orientation, ~~and~~ gender identity, and gender expression, and (where applicable) with respect to a child’s variations in sex characteristics, including clinically appropriate mental and behavioral health supports and medical care.

(b) Placement of transgender and gender non-conforming children in foster care. When considering placing a transgender, nonbinary, gender non-conforming or intersex child in sex segregated childcare institutions, the title IV–E/IV–B agency must place the child consistent with their gender identity, subject to the child’s consent. Providers should make available safe and appropriate placement options, including private rooms and facilities or non-sex segregated facilities if the child prefers such an option, and ensure those options do not stigmatize or isolate the child. The IV–E/IV– B agency must also consult with the transgender, nonbinary, gender non-conforming, or intersex child to provide an opportunity to voice any concerns related to placement when the agency is considering a placement in such a facility.

(c) Training and notification requirements. In addition to meeting the requirements of paragraph (a)(1)(ii) of this section, the title IV–E–/IV–B agency must:

(1) Ensure that its employees who have responsibility for placing children in foster care, making placement decisions, or providing services:

(i) Are trained to implement the procedural requirements of this section; and

(ii) Are adequately prepared with the appropriate knowledge and skills to serve an LGBTQI+ child related to their sexual orientation, gender identity, and gender expression, and (where applicable) with respect to a child’s variations in sex characteristics.

(2) Ensure that all of its contractors and subrecipients who have responsibility for placing children in foster care, making placement decisions, or providing services are informed of the ~~procedural~~ requirements to comply with this section, including the required non-retaliation provisions outlined in paragraph (a)(4) of this section.

~~(3) Ensure that any placement providers who have not chosen to become designated as safe and appropriate placements for LGBTQI+ children are informed of the procedural requirements to comply with this section, including the required nonretaliation provision outlined in paragraph (a)(4) of this section.~~

(d) Severability. Any provision of this section held to be invalid or unenforceable as applied to any person or circumstance shall be construed so as to continue to give the maximum effect to the provision permitted by law, including as applied to persons not similarly situated or to dissimilar circumstances, unless such holding is that the provision of this section is invalid and unenforceable in all circumstances, in which event the provision shall be severable from the remainder of this section and shall not affect the remainder thereof.

1355.23 Requirements under titles IV–E and IV–B for parents, kin, or current or prospective foster or adoptive parents, including those who identify as lesbian, gay, bisexual, transgender, queer or questioning, intersex, as well as adults who are non-binary or have non-conforming gender identity or expression.

(a) Nondiscrimination. No adult otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of Title VI-E and IV-B programs and services based on age, disability, sex, sex characteristics, including intersex traits, race, color, national origin, religion, gender identity, gender expression, or sexual orientation.

§ 1355.30 Other applicable regulations.

Add references to:

- 45 CFR Part 86 -- Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.
- 45 CFR Part 92 · Nondiscrimination on the Basis of Race, Color, National Origin, Sex, Age, or Disability in Health Programs or Activities Receiving Federal Financial Assistance.

■ 3. In § 1355.34, revise paragraph (c)(2)(i) to read as follows:

§ 1355.34 Criteria for determining substantial conformity.

* * * * *

(c) * * *

(2) * * *

(i) Provide, for each child, a written case plan to be developed jointly with the child's parent(s) that includes provisions: for placing the child in the least restrictive, most family-like placement appropriate to his/her needs, including placements described in § 1355.22(a)(1), and in close proximity to the parents' home where such placement is in the child's best interests; for visits with a child placed out of State/Tribal service area at least every 12 months by a caseworker of the agency or of the agency in the State/ Tribal service area where the child is placed; and for documentation of the steps taken to make and finalize an adoptive or other permanent placement when the child cannot return home (sections 422(b)(8)(A)(ii) and 471(a)(16) 475(5)(A) of the Act and § 1355.22(a)(1));

- In subparagraph (c)(3) (Quality assurance systems): “Addresses the requirements of § 1355.22.”
- In subparagraph (c)(4) (Training): Add “Addresses the requirements of § 1355.22.”
- In subparagraph (c)(5) (Service array): Add “including services supporting the goals and purposes of § 1355.22.”
- In subparagraph (c)(7)(i), clarify that “recommended standards of national organizations concerned with standards for such institutions or homes” includes standards related to LGBTQI+ children.