



December 19, 2019

U.S. Department of Health and Human Services
Administration for Children and Families
Director, Policy Division
330 C Street SW, Washington, DC 20024
Submitted via regulations.gov

Re: Response to Request for Public Comments on Proposed Regulation RIN 0991-AC16

To Whom it May Concern:

Pursuant to the notice published in the Federal Register on November 1, 2019 (RE: RIN 0991-AC16), Juvenile Law Center and Youth Law Center hereby submit these comments in opposition to the proposed rule and the [notice of nonenforcement](#).

If implemented, the proposed rule will negatively impact children whose safety and well-being depends on a child welfare system that is organized around meeting their needs and providing children nurture and care. This Rule impacts the more than \$500 billion in grants that the Department of Health and Human Services (HHS) awards to serve the most vulnerable among us and includes federal child welfare funds for foster care, guardianship adoption, and juvenile justice services. The discrimination and exclusion this rule promotes are wide sweeping: under this new rule, agencies and programs that receive federal HHS grant money could refuse to provide services based on religion, sex, gender identity, or sexual orientation and to women, transgender people, married same-sex couples, and LGBT children or children with same-sex parents.

Juvenile Law Center is the first non-profit, public interest law firm for children in the country and works on behalf of children who come into contact with the child welfare and justice systems. Juvenile Law Center works to improve the opportunities and futures of system-involved youth and strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, and consistent with children's unique developmental characteristics.

YLC is a national non-profit that profit that advocates through youth-focused and research informed litigation, policy reform, media advocacy, collaborative system change initiatives, training, and public education to transform foster care and juvenile justice systems so every young person can thrive. Since 1978, YLC has represented the interests of countless children and young adults in California and dozens of other states across the country. YLC staff have long been involved in public discussions, legislation, and court challenges regarding the treatment, services, and benefits available to youth. As a long-time advocate for our nation's foster youth, YLC strongly urges the administration to take into account the needs of these children and reconsider the proposed policy change.

We write jointly to oppose the proposed rule and **to highlight the harms the proposed rule will cause to children and families involved with the child welfare system.** These systems, which depend heavily on federal funds, have a special obligation to our most vulnerable children who have experienced neglect, abuse, and trauma. In many cases, children rely on these systems to meet their most basic needs for safety and care. If implemented, this rule will significantly compromise the child welfare agency's core obligation to provide for the safety, well-being and permanency of children and will result in harm to children by limiting the number of families and caregivers who can provide nurturing homes for children and by putting children and youth in situations where their identity and needs are not respected or affirmed.

1. Permitting Discrimination Harms Children by Reducing the Number of Homes and Families Available to Children and Youth in Foster Care.

There are approximately 440,000 youth in foster care in the United States, and the number is on the rise. More than 100,000 children are waiting for adoptive homes and many more need safe and nurturing placements to help them heal and provide care as work is done to get them back with family or in another permanent situation. These children deserve loving homes with caring adults who want to support them irrespective of their various identities. This Rule impedes the capacity of child welfare agency to provide homes to children and youth.

Across the country there is a struggle to find qualified home to care for children. Children in the child welfare system are incredibly diverse. In order to ensure that children are placed not simply with foster and adoptive families that are available, but into homes where they can thrive, it is important that we have a diverse array of foster and adoptive parents, both in terms of demographics and attitudes. Recruiting a pool of foster parents of only one faith, background, and attitude will make it impossible to meet the needs and affirm the identities of the diverse group of youth who need families. The impact of discrimination in child welfare will fall most heavily on youth who have more complicated needs, including older youth, LGBTQ youth, sibling groups, youth of minority faiths, youth of color and youth with disabilities. These youth too often end up moving through multiple placements, being placed in institutional care, seeing worse outcomes and aging out of the system at much higher rates. In fact, this rule could result in family members—including kin and parents—from being turned away or excluded from the care of a child, a result which goes against all current laws and basic child welfare practice and principles.

With the challenges of the opioid crisis, the need for family foster homes has never been greater. For example, child welfare officials in Texas project that by 2021 it will have just 39 percent of the foster homes that it needs for youth with special and higher needs.¹ They are not alone in having unmet needs. When there are not sufficient foster homes, children end up in group care and institutions. The research is clear that these placement settings do not meet the needs of youth and put them at a high risk for harm and abuse.² The Administration For Children (ACF) has acknowledged the harms of group

¹ Foster Care Needs Assessment (Texas Department of Family and Protective Services July 2019).

² Mary Dozier et al, *Institutional Care for Young Children: Review of the Literature and Policy Implications*, Social Issues Policy Review (March 2012); Mary Dozier et al., *Consensus Statement on Group Care for Children and Adolescents: A Statement of Policy of the American Orthopsychiatric Association*, American Journal of Orthopsychiatry, 84(3), 219–225 (2014).

care and, through its leadership on the Family First Prevention and Services Act (FFPSA), made clear that state child welfare agencies must move to increase the number of family placements for youth and reduce group care. Children deserve the right to grow up in the least restrictive environment possible, which is why provisions of the Family First Prevention Services Act make it more difficult to place children in congregate care. This means that the need for family placements will increase in coming years. The child welfare system will not be able to meet their obligations to children if regulations prioritize the preferences of foster care providers over the needs of the children they are meant to serve.

The proposed rule is at odds with this important federal law efforts to reduce group care, and the core goal of the child welfare system to connect children with families. This rule would allow providers of foster and adoption services to turn away families who are otherwise qualified to care for a child because of their marital status, religion or sexual orientation, for example. This Rule would even allow providers to turn away a child's kin. Same-sex couples are nearly three times as likely as straight couples to be raising an adopted or foster child.³ They, as well as willing and qualified individuals of all religions and affiliations, should have the opportunity to serve and support children, and children deserve this care. Allowing recipients of federal funds to impose categorical restrictions on the pool of foster and adoptive parents interferes "with the attainment of a permanent family relationship for parentless children in the state's care. By disqualifying any group of adults from adopting regardless of their ability to parent, the system limits children's opportunity to become part of a stable family."⁴ When qualified caregivers are turned away as this rule will allow, youth are denied loving homes, are likely to end up in group care and institutions, and will thereby suffer harm.

2. This Rule Harms Children by Putting Them at Risk of Facing Discrimination and Exclusion

Supporting a system that allows discrimination to flourish puts children at risk of harm by exposing them to discriminatory behavior and views. Every child deserves the right to grow up in a family that is affirming of their identity. Rejection by family, including temporary families in foster care, has extreme detrimental effects on children. A system that is built on discrimination will not ensure that families accept and affirm the evolving identities of children and youth. We are also concerned that the proposed Rule could allow direct discrimination of children by service providers.

As mentioned above, the number of family foster and adoptive homes available to children is reduced when agencies are allowed to categorically exclude people who are qualified to care for children. In addition, children are also at risk of harm when they are placed in family foster homes or are served by providers who allow or condone discrimination. Putting children, many who have experienced trauma, in situations where their identity is not affirmed, accepted, or is stigmatized, causes them harm and negatively impacts their well-being and ability to feel safe. In fact, the Administration for Children and Families has recognized that the general duty to promote the wellbeing of youth in care includes

³Gary J. Gates, *Demographics of Married and Unmarried Same-sex Couples: Analyses of the 2013 American Community Survey 1* (The Williams Institute 2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Demographics-Same-Sex-Couples-ACS2013-March-2015.pdf>; Magellan Health Services Children's Services Task Force, *Perspectives on Residential and Community-Based Treatment for Youth and Families*, Magellan Health Services Children's Services Task Force (2008).

⁴Joseph S. Jackson & Lauren G. Fasig, *The Parentless Child's Right to A Permanent Family*, 46 WAKE FOREST L. REV. 1, 36–37 (2011).

providing for “[i]dentity development, self-concept, self-esteem, [and] self-efficacy” of children.⁵ The identity and self-concept of youth who hold differing identities cannot be affirmed when they are placed in homes or serviced by providers who do not accept them and who they are.

This rule will only increase the odds that youth in care experience discrimination in at least three ways. First, discrimination against same-sex parents harms LGBTQ youth by sending a message that LGBTQ people are considered inappropriate resources to provide loving homes. This harms an LGBTQ child by sending the message that discrimination against LGBTQ individuals—including them—is appropriate. The stigma LGBTQ prospective parents suffer when being turned away from adoption and foster care agencies perpetuates a cycle of stigmatic harm for LGBTQ youth. Second, excluding a group of families that may be especially well suited to support LGBTQ youth who are overrepresented in the child welfare system and often come to the system having experienced poor treatment, harms those children and youth by depriving them of appropriate care. Third, promoting discrimination of caregivers also presents a risk to LGBTQ youth that they will be placed in homes and served by individuals who do not accept their identity and treat them in manner that reflects this lack of acceptance and support.

It is well established that LGBTQ youth are disproportionately overrepresented in the child welfare system compared to their non-LGBTQ peers. A federally-funded study of children in the child welfare system in Los Angeles County recently found that 19.1 percent of youth surveyed identified as LGBTQ, suggesting that “there are between 1.5 and 2 times as many LGBTQ youth living in foster care as LGBTQ youth estimated to be living outside foster care.”⁶ Other studies have found even higher rates of overrepresentation: although LGBTQ youth make up only about 5 to 7 percent of the general youth population, research estimates that 25 percent of youth in child welfare systems, 20 percent of youth in juvenile justice systems, and 50 percent of youth experiencing homelessness are LGBTQ.⁷

LGBTQ youth who enter the system have “the added layer of trauma that comes with being rejected or mistreated because of their sexual orientation, gender identity or gender expression.”⁸ Once in care, LGBTQ youth are also more likely to report negative outcomes and experiences than heterosexual and cisgender youth. A survey conducted by the Williams Institute found that LGBTQ youth are more likely to report mistreatment in out-of-home care: 37.7 percent of LGBTQ youth reported that they had experienced poor treatment connected with their gender expression, sexual orientation, or transgender status, compared with 18.5 percent of all youth who reported “some form of discrimination” based on people’s perceptions of their gender or sexuality.⁹ LGBTQ youth are also more likely to be hospitalized for emotional reasons, with 13.5 percent of LGBTQ respondents reporting this experience compared to only 4.3 percent of non-LGBTQ respondents.¹⁰

⁵ U.S. Dep’t of Health & Human Servs., Admin. on Children, Youth, & Families, Information Memorandum ACYF-CB-IM-12-04 (2012).

⁶ *Sexual and Gender Minority Youth in Foster Care: Addressing Disproportionality and Disparities in Los Angeles* 37 (the Williams Institute 2014), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS_report_final-aug-2014.pdf.

⁷ Christina Wilson Remlin et al., *Safe Havens: Closing the Gap Between Recommended Practice and Reality for Transgender and Gender Expansive Youth in Out-of-Home Care 2* (Children’s Rights, Lambda Legal, & Ctr. for the Study of Soc. Policy 2017).

⁸ *LGBTQ Youth in the Foster Care System* 1 (Human Rights Campaign), https://assets2.hrc.org/files/assets/resources/HRC-YouthFosterCare-IssueBrief-FINAL.pdf?_ga=2.233888158.1095092815.1576619933-1307900665.1575581986

⁹ Supra note 6, at 35.

¹⁰ Supra note 6 at 38.

Given the prevalence of trauma LGBTQ youth have experienced both prior to and during their time in the foster care system, permitting official discrimination against LGBTQ people within that system will only compound the harm these youth have experienced. Allowing agencies to turn away a class of families likely to offer a supportive family environment to LGBTQ youth would put them at risk of continuing instability and distress and perpetuate the humiliation and degradation of having their LGBTQ identity deemed inferior

The Association of Medical School Pediatric Department Chairs recently expressed concern that state legislation permitting government-funded foster and adoption agencies to refuse to serve same-sex couples negatively impacts LGBTQ young people, stating that:

These bills create an environment of intolerance toward LGBT people and teach all children messages of fear and hatred of difference. They rely on the belief that sexual and gender minority individuals are not worthy of the compassion and respect owed to heterosexual and cisgender people, and, in fact, may not be welcome in that state. When young people who are gay or transgender receive these messages, the struggles they already may be facing in coming out or transitioning may become compounded. . . . Specifically, youth reporting perceived discrimination were more likely to also report self-harm, suicidal ideation, and depressive symptoms.¹¹

A study released earlier this year investigated the impact of laws permitting denial of services to same-sex couples, including Michigan's law permitting religious child placing agencies to discriminate against same-sex couples. This study found that laws like Michigan's were associated with a "46% relative increase in the proportion of sexual minority adults reporting mental distress."¹² In contrast, government action to protect LGBTQ individuals from "prejudice, discrimination, and violence would help to reduce the occurrence of prejudice-related stressors[,] particularly passing laws which "respect gay men and lesbians' intimate relationships by providing them . . . the benefits afforded to heterosexual married people and their families."¹³

If the proposed Rule is implemented, the evidence is clear that some of our most vulnerable youth will be further harmed by being deprived of the family based care they deserve *and* being put at risk for treatment that harms their sense of identity and puts their safety and well-being at risk.

¹¹ Daniel E. Shumer et al., *The Effect of Lesbian, Gay, Bisexual, and Transgender Related Legislation on Children*, 178 J. of Pediatrics 5 (2016).

¹² Julia Raifman et al., *Association of State Laws Permitting Denial of Services to Same-Sex Couples with Mental Distress in Sexual Minority Adults: A Difference-in-Difference-in-Differences Analysis*, 75 JAMA Psychiatry 671, 674 (2018).

¹³ Ilan H. Meyer & David M. Frost, *Minority Stress and the Health of Sexual Minorities*, in Handbook of Psychology and Sexual Orientation 252, 259 (Charlotte J. Patterson & Anthony R. D'Augelli eds., 2013).

3. Permitting Discrimination Compromises the Child Welfare Agency's Ability to Fulfill Its Legal Duty to Children Committed to its Care

Proceeding with the proposed Rule will put state and county child welfare agencies at risk of failing in their obligations under federal law to abused and neglected children in their care. Each state and county child welfare agency in this country has not just a moral obligation, but a legal obligation to meet the needs of the children who are committed to their care. These obligations are defined by federal statutory and case law. Agencies will have a difficult time fulfilling these obligations if providers of services can engage in discriminatory practices that harm children.

Custody of children in state-regulated foster care creates a “special relationship” that triggers substantive due process rights, including children’s right to constitutionally adequate care, the right to personal security and reasonably safe living conditions, and the right to be free from physical and psychological harm.¹⁴ As discussed in section 2, practices that result in youth being placed in group care or in homes where they are not accepted and stigmatized, puts children at risk of psychological harm and unsafe situations. If child welfare agencies are engaging in practices that are shown to cause harm, they will be violating their duties to children.

In addition to the constitutional obligations that child welfare agencies have to children, federal law also creates statutory obligations. Implementing this Rule is at odds with the specific priorities set by federal law and the obligations that child welfare agencies have to children in their care. As mentioned above, one federal priority is to increase the number of available foster and adoptive homes and to reduce reliance on group care through the Family First Prevention and Services Act. The Family First Prevention and Services Act limits federal funding for placements that are not in foster families.¹⁵ Federal law also requires the selection of the least restrictive, most family-like setting for a child. 42 U.S.C. § 675(5)(A). Child welfare agencies also must make reasonable efforts to prevent a child’s placement and to finalize the permanency plan if a child is placed. 42 U.S.C. § 671(a)(15). Allowing discrimination is at odds with these requirements because it reduces the number of available foster family homes and forces children into more restrictive settings. Discrimination against LGBTQ and other people based on factors unrelated

¹⁴ *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000) (en banc) (“[W]hen the state places a child in state-regulated foster care, the state has entered into a special relationship with that child which imposes upon it certain affirmative duties.”); see also *Hernandez v. Tex. Dep’t of Protective & Regulatory Servs.*, 380 F.3d 872, 880 (5th Cir. 2004) (foster children enjoy a substantive due process right “to personal security and reasonably safe living conditions” based on the special relationship between them and the State); *Lintz v. Skipski*, 25 F.3d 304, 305 (6th Cir. 1994) (“[D]ue process extends the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes.”); *K.H. through Murphy v. Morgan*, 914 F.2d 846, 848–49 (7th Cir. 1990) (“The extension to the case in which the plaintiff’s mental health is seriously impaired by deliberate and unjustified state action is straightforward.”); *Griffith v. Johnston*, 899 F.2d 1427, 1439 (5th Cir. 1990) (while in State custody, the child is entitled to “constitutionally adequate care”); *M.D. v. Abbott*, 152 F. Supp. 3d 684, 696 (S.D. Tex. 2015) (foster children have the right to “personal security and reasonably safe living conditions” and to protection from psychological abuse) (citation omitted); *Marisol A. by Forbes v. Giuliani*, 929 F. Supp. 662, 675 (S.D.N.Y. 1996) (children in foster care “have a substantive due process right to be free from unreasonable and unnecessary intrusions into their emotional well-being”), *aff’d sub nom. Marisol A. v. Giuliani*, 126 F.3d 372 (2d Cir. 1997). See also *Doe ex rel. Magee v. Covington Cnty. Sch. Dist. Ex rel. Keys*, 675 F.3d 849, 859 (5th Cir. 2012); *Tamas v. Dep’t of Soc. & Health Servs.*, 630 F.3d 833, 846–47 (9th Cir. 2010); *Norfleet v. Arkansas Dep’t of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993); *Yvonne L. v. New Mexico Dep’t of Human Servs.*, 959 F.2d 883, 891–93 (10th Cir. 1992); *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 476 (6th Cir. 1990); *Taylor By & Through Walker v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987); *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1156 (D. Haw. 2006); *Andrea L. ex rel. Judith B. v. Children & Youth Servs. of Lawrence Cnty.*, 987 F. Supp. 418, 423 (W.D. Pa. 1997).

¹⁵ Family First Prevention Services Act, Pub. L. No. 115-123 (2018) § 50722; *id.* §§ 50731, 50741.

to their ability to care is at odds with these priorities because it impedes the ability to place children in loving homes.

Providers of foster care and adoption services are a gatekeeper in the child welfare system between at-risk children and safe, loving families. They recruit, screen, train, and certify prospective foster and adoptive parents. When these agencies perform their responsibilities to serve a religious objective rather than the best interests of children, it violates federal statutes. See 42 U.S.C. §§ 675(1)(B), (1)(F), (1)(G), (5)(A), (5)(C), (5)(E), (10)(A) (using the best interests of children as the guiding standard for the child welfare system); 42 USCA § 673b (i)(2) (prioritizing the best interests of children for adoptions out of the foster care system). Because this Rule effectively serves to prioritize discrimination in the interests of religious views over the interest of achieving permanency, safety, and wellbeing, it will make it exceedingly difficult for child welfare agencies to follow the law and meet their obligations to the children in their care.

4. Young People in the Child Welfare System and Alumni of the Child Welfare System Oppose This Rule and Believe it is Harmful to the Well-Being and Growth of Children

In August of this year, the Children’s Bureau released an Information Memorandum (IM) that highlighted the critical role of family and youth voice to a well-functioning child welfare system and encouraging public agencies to ensure that their voices remain central to child welfare planning and improvement efforts.¹⁶ Juvenile Law Center wholeheartedly agrees with this IM and believes that listening to youth is necessary for a child welfare system that is centered on the needs of children and is committed to equity. This rule contradicts the Children Bureau’s directive and ignores the years of work that youth with first-hand experience in foster care have done to identify, create and recommend policies and practices to protect youth in care from discrimination. The youth in Juvenile Law Center’s Youth Advocacy Programs who are in the foster care system or alumni of the foster care system have made clear to us that they oppose any actions that allow discrimination to exist in the child welfare system. Youth Fostering Change has submitted their own comments. (See Comment Tracking Number: [1k3-9dyj-r4jh](#)). They oppose the proposed rule because they believe it would reduce the number of homes for children in foster care, reduce the diversity of homes available to care for youth, put individual youth at risk of being treated poorly because they are not accepted and are stigmatized, and because they believe that discrimination is harmful to everyone. We believe that their views are wise and should be taken into account as HHS considers implementing rules that will significantly impact their lives.

Conclusion

The goal of the child welfare system is to keep families together and help children find family when they cannot be reunified. This core goal must be achieved while ensuring children’s safety and well-being. When agencies use non-objective criteria to discriminate against individuals of different identities and religions as foster and adoptive parents that do not correspond with the best interest and needs of the child, they are operating at odds with the laws and purpose of the child welfare system. By reducing the

¹⁶ Engaging, Empowering, and Utilizing Family and Youth Voice in All Aspect of Child Welfare to Drive Case Planning and System Improvement, Administration for Children and Families, Information Memorandum ACYF-CB-IM-19-03 (August 1, 2019).

pool of individuals who can provide care to all youth and allowing individuals to care for children who may endorse discriminatory views, the proposed Rule puts the obligation to provide permanency and ensure the safety and well-being of countless at great risk. For the reasons outlined above, Juvenile Law Center urges the U.S. Department of Health and Human Services not to proceed with the proposed rule and instead to commit to enforcing existing antidiscrimination law and policies.

Sincerely,

Jennifer Pokempner

Marcia Hopkins

Juvenile Law Center

1800 John F. Kennedy Blvd. Ste. 1900B

Philadelphia, PA 19103-7412

215-625-0551

jpokempner@jlc.org, mhopkins@jlc.org

Erin Palacios

Youth Law Center

832 Folsom Street, Suite 700

San Francisco, CA 94107

415-543-3379

epalacios@ylc.org