December 19, 2019


Pursuant to notice published in the Federal Register on November 19, 2019 (84 Fed. Reg 16572), the National Association of Counsel for Children (NACC) submits these comments to strongly oppose proposed rulemaking to re-promulgate and revise certain provisions of 45 CFR part 75 originally set forth in a 2016 final rule published in the Federal Register at 81 FR 89393. NACC is a non-profit membership association of child welfare professionals dedicated to advancing the rights, well-being, and opportunities of children impacted by the child welfare system through high-quality legal representation. Our members include attorneys who represent children, parents, and agencies in these cases as well as judges, academic experts, CASAs, social workers, and pediatricians.

“We should let families lead and refrain from dictating to them what’s best. We have to be role models, and model what we expect others to do.”

- Lynn Johnson, Assistant Secretary for the Administration for Children and Families

By revoking important protections for targeted protected classes (sex, religion, gender identity, and sexual orientation), the proposed rule invites precisely the type of government interference that Assistant Secretary Johnson wisely cautioned against. Instead of allowing youth and families to “lead” - which necessitates affirming their personal identities and lived experiences - the rule authorizes child welfare agencies to intervene in the most private and sacred aspects of family life and “dictate” prescribed norms and behaviors. It thereby permits agency convictions - established by religious leaders, board directors and funders seated far from the realities of children and families experiencing foster care - to supersede the expertise of individuals and communities. Most egregiously, it prioritizes the interests and needs of providers over the well-being of the core beneficiary of HHS funded child welfare services: children and families. In doing so, it carves out a pathway for government-sanctioned, taxpayer-funded discrimination that contradicts the Administration for Children and Families’ own express commitment to elevating youth and family voice, and undermines its valuable recommendations for working with


2 “Engaging, Empowering, and Utilizing Family and Youth Voice in all Aspects of Child Welfare to Drive Case Planning and System Improvement.” ACYF-CB-IM-19-03. 1 August 2019. Available at: https://www.acf.hhs.gov/cb/resource/im1903
LGBTQ families, and weakens the agency’s overall strategic vision for reshaping the American child welfare system.

In its Notice of Proposed Rulemaking published on the Federal Register, the U.S. Department of Health and Human Services (HHS) provides insufficient and misplaced justification for this decision. As rationale for revocation, it references generalized grantee and subgrantee concerns and requests for exceptions from the non-discrimination rule, without providing specificity as to their volume, frequency, or veracity. Fiscal grantees and subgrantees are not entities that HHS is intended or authorized to serve. Rather, the agency is funded by Congress “to enhance and protect the health and well-being of all Americans” (including children and families served by the child welfare system) and these citizens, not agencies or contractors, are the ultimate constituents of HHS resources, services and policies. As child welfare attorneys, we are duty-bound to speak out against state-sponsored injustices and stand with our child and adult clients in opposing this change.

**Safety, permanency** and **well-being** are the three pillars of sound child welfare law, policy and practice. Despite differences in geography, academic discipline, and experience level, there is consensus among professionals that these three goals are the touchstones of quality decision-making for youth experiencing foster care. The rule change would effectively jeopardize and contravene all three of these core values:

- **Safety:** LGBTQ+ youth are overrepresented in the U.S. foster system. Many enter state custody after being displaced from their biological family. “One study found that more than 30% of LGBTQ+ youth reported suffering physical violence by a family member after coming out.” Child welfare practitioners will attest that family assessments of safety are inherently complex and require nuanced, child-specific evaluation of risks, harms, and strengths. The proposed rule

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3 “Working with Lesbian, Gay, Bisexual, Transgender, and Questioning (LGBTQ) Families in Foster Care and Adoption.” Child Welfare Information Gateway. September 2016. (“Prospective LGBTQ parents often fear that they will be more highly scrutinized or held to different standards than their heterosexual counterparts. Make it clear that your agency does not discriminate and ensure that this is truly the case.”) Available at: [https://www.childwelfare.gov/pubPDFs/f_profbulletin.pdf#page=10&view=The%20basics%20of%20creating%20a%20welcoming%20agency](https://www.childwelfare.gov/pubPDFs/f_profbulletin.pdf#page=10&view=The%20basics%20of%20creating%20a%20welcoming%20agency)

4 “About HHS.” Available at: [https://www.hhs.gov/about/index.html](https://www.hhs.gov/about/index.html)

5 American Bar Association Model Rules of Professional Responsibility, Preamble (“A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice”). Available at: [https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/)


would permit a child welfare agency to override a tailored process completed by credentialed professionals with personal knowledge of the child and family and instead prioritize discriminatory beliefs, potentially maintaining young people in unsafe situations and fostering conflict. Conversely, under this rule an agency could refuse to work with a family in which the caregivers are cohabitating, same-sex, or if they do not share the agency’s religious beliefs. As federal child welfare legislation and executive action align to increase investments in prevention, this rule will undermine the goal of avoiding unnecessary placements in foster care.

Furthermore, if removal is necessary, this rule would also threaten safety for youth in out-of-home placements. In one study, a full 100% of LGBTQ+ youth in group homes reported verbal harassment and 78% of youth had been removed or ran away from placement because of hostility to their LGBTQ status.8 “If a youth feels she is being judged based on her sexual orientation…she is likely to withhold information that may jeopardize her safety or permanency.”9 By revoking protections around sex, gender identity and sexual orientation, this rule renders an already vulnerable cohort of youth at increased and dangerous risk, as agencies would be permitted to ignore discriminatory and even perpetuate hostile behavior from peers or staff.

- **Permanency:** Similarly, revocation of non-discrimination language may diminish the quantity and quality of services available to help families safely reunify. Allowing providers to discriminate will pose heightened challenges for certain parents and caregivers seeking to address mental health needs, overcome addiction, or resolve other barriers that prevent them from safely parenting. Absent ready access to these services, children will languish in government custody when they could return to safe and loving families.

Other permanency pathways will likewise be stymied. For example, the rule change would allow qualified prospective foster and adoptive parents to be turned away, simply by virtue of their religious identity, gender identity or sexual orientation. This is an alarming possibility, given frequent accounts of young people sleeping in child welfare agencies, hotels, or even cars due to the lack of available placements in America’s overwhelmed foster care system.10 NACC’s

members commonly provide legal representation for children without appropriate or stable foster care placements. When these concerns are brought to the attention of the court, agencies often cite to endemic challenges recruiting and retaining a sufficient pool of adoptive and foster parents. Yet research shows that same-sex couples are four times more likely than married, opposite-sex couples to raise an adopted child, and six times more likely to raise foster children.\footnote{Gates, Gary. “LGBT Parenting in the United States.” The Williams Institute. February 2013. \url{http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf}} While the Federal Register’s language hypothesizes that this rule is needed to prevent current faith-based providers from ceasing services, close examination of this claim in at least four local contexts demonstrated no merit.\footnote{See, e.g., Brief of Appellees City of Philadelphia, Department of Human Services and Commission on Human Relations, \textit{Fulton v. City of Philadelphia}, No. 18-2574 (3rd Cir. Sept. 27, 2018) (“The district court credited DHS’ testimony and found that closure of intake to [Catholic Social Services] did not impact child welfare, increase the number of children in congregate care, or otherwise change the availability of placements for children in DHS’ custody”); See also Brief of Amici Curiae [17 states and the District of Columbia] in Support of Philadelphia No. 18-2574 (3rd Cir. Oct. 4, 2018) (explaining that when faith-based providers chose not to operate in Massachusetts “...a network of agencies stepped in to fill the gap” and “children continued to be placed in similar numbers” and that “similar transitions occurred in the District of Columbia and Illinois.”).} The faith community has similarly spoken out in opposition to the change.\footnote{The Every Kid Needs a Family Campaign, which has vigorously spoken out in opposition to this rule, includes numerous faith organizations. For more information, visit: \url{https://everychilddeservesafamily.com}} Thus, this rule change would unnecessarily create added barriers to expanding and developing an appropriate array of placement and permanency options. HHS’s policy and technical practice guidance to the field has, historically, been rooted in sound social science. This move to sanction government-funded agencies’ use of criteria unrelated to healthy parenting behaviors when evaluating the suitability of caregivers is a shocking and concerning departure.

Moreover, the rule would allow an agency to maintain a child in a group home rather than place them within a qualified foster family home with caregivers – including kin - who identify as LGBTQ+ or who do not identify with a certain faith. Discriminating against potential kinship caregivers denies children what research shows to be their most stable opportunity for placement\footnote{Epstein, Heidi. “Kinship Care is Better for Children and Families.” \textit{Child Law Practice Today.} ABA Center on Children and the Law. 1 July 2017. Available at: \url{https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/ vol-36/july-aug-2017/kinship-care-is-better-for-children-and-families/}} and will needlessly undermine the goals and new financing opportunities within the landmark Family First Act.\footnote{See, e.g., “New Opportunities for Kinship Families: Action Steps to Implement the Family First Prevention Services Act in Your Community.” Available at: \url{https://familyfirstact.org/sites/default/files/new-opportunities-kinship-families%20%282%29.pdf}} LGBTQ+ youth are also more likely to age out and to later experience homelessness, a deep and concerning disparity that will be aggravated by implementing this change.\footnote{Forge, Nicholas et. al. “LGBTQ Youth Face Greater Risk of Homelessness as They Age Out of Care.” (“Given that 50 percent of youth aging out of foster care experience homelessness within 18 months of exiting the foster care system, LGBTQ youth in the child welfare system are more likely to experience homelessness than non-LGBTQ youth”). Housing Matters: An Urban Institute Initiative. 3 April 2019. Available at:} This decision therefore will have negative ripple effects to other
HHS-administered entities, such as Administration of Children and Families’ Runaway and Homeless Youth (RHY) Program.

- **Well-Being:** The U.S. Children’s Bureau has articulated a strong vision for change that emphasizes “child welfare practice that supports the well-being of children and families.” A holistic assessment of well-being “includes the cognitive, behavioral/emotional, and social functioning and physical health and development.” There is special reason to be concerned about the well-being of LGBTQ+ youth in care; one study found that “LGB young adults who reported higher levels of family rejection during adolescence were 8.4 times more likely to report having attempted suicide, 5.9 times more likely to report high levels of depression, and 3.4 times more likely to use illegal drugs compared to peers from families that report no or low levels of family rejection.” Furthermore, this rule lays the groundwork for rules that would allow young people in foster care to be subjected to conversion therapy, a harmful and medically discredited practice attempting to change a young person’s sexual orientation or gender identity. For youth in foster care, the government assumes sacred parens patriae responsibilities and should not reinforce beliefs and behaviors that are shown to compromise well-being. Every major child welfare organization agrees discrimination is harmful to children’s well-being. Foster care agencies and courts would not allow a parent to engage in behavior that is detrimental to a youth’s best interest, and HHS grantees must be held to the same standard.

Every day, NACC’s members fight for young people who are served by struggling, under resourced public systems. NACC’s Policy Agenda includes several objectives that would be threatened by this rule:

- Children who are removed from their homes should live in a family setting with loving, nurturing and supportive caregivers, regardless of the caregiver's race, culture, ethnicity, national origin, religion or religious beliefs, disability or handicap, sex, sexual orientation, gender identity or gender expression
- All children and parents regardless of their race, culture, ethnicity, national origin, religion or religious beliefs, disability or handicap, sex, sexual orientation, gender identity or gender expression


17 Children’s Bureau’s Vision Narrative. Available at: https://www.acf.hhs.gov/sites/default/files/cb/cb_vision_narrative.pdf
18 “Well-Being.” Child Welfare Information Gateway. Available at: https://www.childwelfare.gov/topics/systemwide/well-being/
21 The full text of NACC’s 2018 Revised Policy Agenda is available at: https://www.naccchildlaw.org/page/PolicyAgenda
expression should be treated equally and with dignity and respect during all phases of their involvement with the child welfare, juvenile justice and other child-serving court system.

- Recognizing that LGBTQI (gay, lesbian, bi-sexual, transgender, queer/questioning, inter-sex) children are disproportionately over-represented in the foster care system, NACC supports efforts to ensure LGBTQI children are safe and treated equitably and to improve the outcomes and lives of LGBTQI children in the child welfare/juvenile justice systems through education, training, affirming policy and practice.
- Recognizing that LGBTQI parents and same-sex couples can and do provide safe and appropriate homes for children in foster care and adoptive homes, NACC supports efforts to provide LGBTQI kinship care and recruit and retain more LGBTQI foster and adoptive parents and is opposed to efforts to restrict their ability to provide children homes.

“One of the most important things the lawyer for the child can do is to communicate acceptance, sensitivity, and respect about sexual orientation and gender identity.”22 Child welfare agencies and systems must do the same: as Assistant Secretary Johnson observed, “We have to be role models, and model what we expect others to do.” If young people do not experience acceptance and affirmation of their identity, it is impossible for agencies to execute their legal responsibilities to understand and meet needs of young people in their legal custody. A policy that fosters a climate of fear, where children in care cannot be themselves, impedes our members’ abilities to know and advocate for their child clients and for agencies and courts to fully evaluate and address underlying harm, family conflict and service needs.

When the state intervenes to disrupt family relationships, the best interest of children is paramount. Because this rule would undermine safety, permanency and well-being, exacerbate existing challenges in the U.S. foster care system and contravene the Children’s Bureau’s express commitment to prevention and well-being, the National Association of Counsel for Children strongly urges HHS to withdraw the proposed changes.

Sincerely,

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