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**EO 12866 Meeting
“Safe and Appropriate Foster Care Placement
Requirements for Titles IV-E and IV-B”
RIN 0970-AD03**

**Rachel N. Morrison
HHS Accountability Project
Ethics & Public Policy Center**

Thank you for the opportunity¹ to provide comments on OIRA’s review of the Department of Health and Human Services (HHS) Administration for Children and Families’ (ACF) rule, “Safe and Appropriate Foster Care Placement Requirements for Titles IV-E and IV-B.”² This rule would establish specific steps state and tribal Title IV-E/IV-B agencies must follow for “LGBTQI+ children” to fulfill their obligation under the Social Security Act to provide “safe and proper care” to children in foster care.³

My name is Rachel Morrison, and I’m an attorney and fellow at the Ethics and Public Policy Center, where I direct the HHS Accountability Project. I am also a former attorney at the Equal Employment Opportunity Commission. I, along with my EPPC colleague and fellow attorney Mary Rice Hasson—the Kate O’Beirne Senior Fellow and co-founder of EPPC’s Person and Identity Project (an initiative that equips parents and faith-based institutions to counter gender ideology and promote the truth of the human person)—submitted a public comment on this rulemaking.⁴

Today, I will provide six points of particular interest for OIRA.

I agree that consistent with statutory requirements, all children in foster care should receive “safe and proper” care, including children who identify as “LGBTQI+.” This rule,

¹ As OMB cancelled a previous EO 12866 meeting it scheduled with EPPC on another rule, I am glad you are willing to hear an EPPC scholar’s input on this rule. See Rachel N. Morrison, *Biden and Becerra Kill Democratic Norms in Rush to Fund Big Abortion*, National Review, Oct. 8, 2021, <https://www.nationalreview.com/bench-memos/biden-and-becerra-kill-democratic-norms-in-rush-to-fund-big-abortion/>.

² 88 Fed. Reg. 66752 (Sept. 28, 2023), available at <https://www.federalregister.gov/documents/2023/09/28/2023-21274/safe-and-appropriate-foster-care-placement-requirements-for-titles-iv-e-and-iv-b>.

³ *Id.* at 66752 (“LGBTQI+ children” is defined as 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.”).

⁴ EPPC, EPPC Scholars Comment Opposing HHS Proposed Rule “Safe and Appropriate Foster Care Placement Requirements for Titles IV-E and IV-B,” RIN 0970-AD03 (Nov. 27, 2023), <https://eppc.org/wp-content/uploads/2023/11/EPPC-Comment-Opposing-HHS-Foster-Care-Proposed-Rule.pdf>.

however, is radical. It is premised on two incorrect and harmful assumptions: (1) not “affirming” a child’s self-proclaimed LGBTQI+ identity is unsafe and abusive; and (2) foster care providers who hold traditional beliefs (religious or otherwise) about marriage, sexuality, and gender are unable to provide LGBTQI+-identifying children with safe and loving homes. These premises are not only false but are harmful to children in foster care and will undermine religious freedom and parental rights far beyond the foster care context.

As I will discuss, the rule also misrepresents research and data, fails to define key terms and requirements, overstates its benefits, and undercounts its costs, making it arbitrary and capricious.

I. ACF must account for the far-reaching consequences of the rule’s incorrect and harmful premises.

- Under the rule, agencies would be required to “implement specific processes and requirements” to ensure LGBTQI+-identifying children in foster care are provided with “placements the agency designates as safe and appropriate” and “services that are necessary to support their health and wellbeing.”⁵ ACF claims that “supportive” treatment results in better outcomes.⁶ Such support includes “having been welcoming to their LGBTQ friends or partners, talking with them respectfully about their LGBTQ identity, using their name and pronouns correctly, supporting their gender expression, and educating themselves about LGBTQ people and issues.”⁷
- Agencies would also be required to:
 - Prohibit retaliation against a child who identifies as or is perceived to be LGBTQI+, including: (i) “unwarranted placement changes including unwarranted placements in congregate care facilities”; (ii) “restriction of access to LGBTQI+ peers”; (iii) “attempts to undermine, suppress, or change the sexual orientation or gender identity of a child”; and (iv) “other activities that stigmatize a child’s LGBTQI+ identity.”⁸
 - Place children in sex-segregated child-care institutions “consistent with the child’s self-identified gender identity.”⁹
- Underlying ACF’s rule are two incorrect and harmful assumptions. First, the proposal assumes that *only* “affirmation” of a child’s asserted LGBTQI+ identity is “safe and appropriate” and conversely, “non-affirmation” of a child’s sexual desires or behaviors and self-proclaimed “gender” is unsafe and abusive. Second, the proposal assumes that any foster care provider that holds traditional beliefs about marriage, sexuality, and gender—including but not limited to faith-based foster care providers with differing

⁵ 88 Fed. Reg. at 66755.

⁶ *Id.* at 66753.

⁷ *Id.*

⁸ *Id.* at 66768.

⁹ *Id.* at 66760.

convictions about how best to love LGBTQI+-identifying children—is unable to provide LGBTQI+-identifying children with a safe and loving home.

- As detailed below, these assumptions are incorrect, harmful, and contradicted by the best social science. If ACF disagrees that its rule is premised on these assumptions, I ask ACF clarify this misunderstanding in its final rule.
- Otherwise, ACF must acknowledge and take into account the rule’s profound ramifications. If it is legally established that not affirming a child’s asserted LGBTQI+ identity in any given moment constitutes “mistreatment” or “abuse,” this standard could have massive consequences for families seeking to adopt, biological parents of children both in and out of foster care and individuals who work with children. Indeed, that appears to be the very intent.¹⁰

II. The rule misrepresents research and data, undermining the need for rulemaking.

- ACF based its rule on an ideological narrative thinly constructed from poorly supported claims, cherry-picked data, misrepresented study findings, and biased sources. Such a flawed narrative undermines ACF’s purported need for its rulemaking.

A. The rule relies on biased surveys produced by ideologically-driven activist organizations.

- A few examples will suffice to show the arbitrary and capricious nature of ACF’s onerous, ideologically-based rule. First, the rule cited the Cuyahoga Youth Count study of foster care youth in claiming that children who identify as “LGBTQI+” perceive themselves as poorly treated in foster care, compared to “non-LGBTQ+ counterparts,” and feel less free to “be themselves.”¹¹ However, only 251 out of 817 eligible foster care youth even responded to the Cuyahoga survey, a 31% response rate. Of those 251 respondents, only 32% (n=81) self-identified as “LGBTQI+.” Of those 81 “LGBTQI+” youth, 67.6% (n=46) said they “had not been treated very well by the foster care system compared to 44.7% [n=67] of non-LGBTQ+ youth.”¹² The Cuyahoga study’s significant limitations, unmentioned in the rule, include a small, non-representative sample, a poor response rate, “too few responses” from youth identifying as “transgender,” and an “under-sampling of White youth.” In short, ACF’s reliance on an unrepresentative study reporting opinions of 81 self-identified “LGBTQI+” youth is arbitrary and capricious.
- Similarly, the rule cited a recent Trevor Project survey for its claim that perceived family support for “LGBTQ identities” is linked to a lower likelihood of “LGBTQ youth” suicide attempts.¹³ The Trevor Project is an LGBTQ advocacy group, and its survey

¹⁰ See Nathanael Blake, *The Biden Administration Is Scheming To Take Your Kids Away*, *Federalist*, Nov. 27, 2023, <https://thefederalist.com/2023/11/27/the-biden-administration-is-scheming-to-take-your-kids-away/>.

¹¹ 88 Fed. Reg. at 66754.

¹² Matarese, M., Greeno, E., Weeks, A., Hammond, P. (2021). *The Cuyahoga youth count: A report on LGBTQ+ youth’s experience in foster care*. Baltimore, MD: The Institute for Innovation & Implementation, University of Maryland School of Social Work.

¹³ 88 Fed. Reg. at 66753.

methodology is unreliable and subject to bias. The online survey is of “cross-sectional design” (capturing a snapshot in time), relies on self-reported recollections of past treatment (a notoriously unreliable measure), and draws from a convenience sample of participants “recruited via targeted ads on social media” (participants were recruited by targeted ads and self-selected into the survey, yielding a biased sample). The cross-sectional design precludes any conclusions about causality. Despite these methodological limitations, the rule cites the Trevor Project survey for the spurious, ideological claim that certain specified caregiver responses to “LGBTQI+” youth are “highly predictive” of how similar youth might fare in the foster care system.

- Further on, the rule cited a 2021 Trevor Project “Research Brief” to support its claim that “LGBTQI+ youth in foster care face significant mental health disparities [including suicidality] that result from experiences of stigma and discrimination.”¹⁴ However, the 2021 Trevor Project survey suffers from significant methodological defects (retrospective design, self-reported, e.g., unverified, claims of “ever” being in foster care, with no minimum duration specified, and self-reported suicide attempts (not defined); cross-sectional design precludes conclusions about causality).
- The rule also includes multiple citations to research by the Family Acceptance Project (Caitlin Ryan and colleagues) that claims specific ideologically-aligned caregiver responses produce far better outcomes for youth who identify as “LGBTQ+” in comparison to a set of ideologically-disfavored caregiver responses (labeled “rejecting caregiver behavior”). These “family acceptance” studies purport to lay the basis for the government’s imposition of specific required behaviors on foster care agencies and caregivers. However, the studies by the Family Acceptance Project are riddled with methodological flaws, including a design that precludes drawing causal conclusions, non-representative convenience samples, biased recruitment strategies (“venue-based recruitment at bars and clubs” within “100 miles” of the researchers’ California office), and a retrospective survey design (“young adults provided information about experiences that happened during their teenage years which allows the potential for recall bias in describing specific family reactions to their LGBT identity”).¹⁵
- It is arbitrary and capricious for ACF to impose burdensome regulations based on biased surveys produced by ideologically-driven activist organizations.

B. The rule relies on outdated studies and ignores a growing body of relevant international evidence.

- The rule also claimed without merit that “[e]vidence demonstrates that when transgender, intersex, or gender non-conforming youth have their gender identity respected it reduces the risk of adverse mental health outcomes and attempted suicide and provides benefits such as enhancing a child’s sense of safety and overall well-being, supporting their sense

¹⁴ *Id.* at 66754.

¹⁵ Ryan C, Russell ST, Huebner D, Diaz R, Sanchez J. Family acceptance in adolescence and the health of LGBT young adults. *J Child Adolesc Psychiatr Nurs.* 2010 Nov;23(4):205-13. doi: 10.1111/j.1744-6171.2010.00246.x. PMID: 21073595. <https://pubmed.ncbi.nlm.nih.gov/21073595/>.

of self and positively impacting their mental health. Conversely, when transgender gender non-confirming youth are forced to use sex-segregated spaces that do not align with their gender identity it can exacerbate the psychological distress related to gender dysphoria.”¹⁶ In support, ACF cited a 2023 publication by HHS’ Substance Abuse and Mental Health Services Administration (SAMHSA), titled “Moving Beyond Change Efforts: Evidence and Action to Support and Affirm LGBTQI+ Youth.”¹⁷

- However, ACF failed to acknowledge the limitations of the SAMHSA research, which relied on old studies of outdated aversion therapy and similar approaches that sought to force a change in sexual orientation. For example, the 2015 SAMHSA report—which is cited heavily in the 2023 SAMHSA document—applied past studies regarding sexual orientation change to gender identity. Nothing in the 2015 report, the 2023 document, or the rule justifies this leap.
- In addition, the rule betrayed a sloppy, negligent approach in its recommendations supporting “transgender-identified” youth or youth experiencing “gender identity” issues. The rule ignored the growing evidence of fluidity in “gender” identification, the phenomenon of de-transition, and the changes in practice protocols in Scandinavia and the United Kingdom. Substantive evidence reviews conducted by Finland, Sweden, and the UK led those countries to revise their medical protocols for treating youth diagnosed with “gender dysphoria” and “gender incongruence.” Other countries, including Norway and Denmark, have followed suit. Unlike the rule, which appears to mischaracterize “conversion therapy” as any and every approach that is not “gender-affirming,” the Scandinavian countries and the UK now recommend “psychotherapy first,” prioritizing counseling for the treatment and support of youth experiencing “gender” issues. These countries also have limited or ended the use of medical or surgical interventions for such youth.¹⁸ Even in the Netherlands, where gender clinicians pioneered medical interventions for gender-dysphoric youth, criticism of the “Dutch protocol” is growing amid calls for an investigation into the consequences of puberty suppression and other medical and surgical interventions in gender-confused youth.¹⁹
- HHS, in other contexts, has relied on the World Professional Organization for Transgender Health (WPATH) “Standards of Care” (which WPATH calls standards of care but acknowledges are merely guidelines).²⁰ WPATH is relied on as an authority by American medical groups, including the American Academy of Pediatrics and the Endocrine Society. On March 5, 2024, Environmental Progress released leaked

¹⁶ 88 Fed. Reg. at 66760.

¹⁷ Substance Abuse and Mental Health Services Administration (SAMHSA): Moving Beyond Change Efforts: Evidence and Action to Support and Affirm LGBTQI+ Youth. SAMHSA Publication No. PEP2203–12–001. Rockville, MD: Center for Substance Abuse Prevention. Substance Abuse and Mental Health Services Administration, 2023.

¹⁸ See, e.g., *Denmark Joins the List of Countries That Have Sharply Restricted Youth Gender Transitions*, Society for Evidence-Based Gender Medicine, Aug. 17, 2023, <https://segm.org/Denmark-sharply-restricts-youth-gender-transitions>.

¹⁹ “The 2023 Dutch Debate Over Youth Transitions,” Society for Evidence-based Gender Medicine, November 19, 2023, <https://segm.org/Dutch-protocol-debate-Netherlands>.

²⁰ See, e.g., HHS, Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47824, 47834 n.139, 47867-68 nn.416-17, 423 (Aug. 4, 2022) (proposed rule expected to be finalized soon).

documents called the “WPATH Files.”²¹ These documents reveal that despite public assertions about the benefits of medical “gender transition” interventions, WPATH members privately acknowledge harms of such interventions, including potential risks of bone and brain health, sexual dysfunction, and cancer. The documents further reveal that the members acknowledge that children are unable to provide informed consent, and many have serious psychiatric issues that are left untreated.

C. The rule labels children as “LGBTQI+” as if it were fixed and unchanging, despite evidence that identity in adolescence is often fluid.

- It is also arbitrary and capricious for the government to affix a permanent label (“LGBTQI+”) to youth in foster care who might identify as same-sex attracted, engage in same-sex sexual behaviors, or experience identity or body-related distress at a given point in time, but not in the future. New and growing research shows significant fluidity in sexual identity and gender identity during adolescence.²² As one study notes, adolescents experience a variety of developmental trajectories in their sexual development, affecting “the ways in which they identify and experience their developing sexualities. Results of this study demonstrate that as many as 19% of adolescents fluctuate between and within heterosexual and sexual minority identities and up to 21% of adolescents experience shifts in other- and same-sex attractions.”²³ Nor are these shifts in attraction and identity one-time experiences. “Given that youth commonly experience sexual fluidity well into their late 20s ... we expect many of these adolescents will continue to experience these shifts during the important period of emerging adulthood.”²⁴
- A recent substantive evidence review, which assessed research into changes in self-reported “sexual orientation labels and associated health outcomes among adolescents and young adults,” highlights the fluidity of “sexual orientation” among sexual minority youth in particular.²⁵ Research shows that “[p]revalence of change in self-reported sexual orientation differed by birth sex, whereby cisgender female participants were more likely to report a change than male participants. In addition, adolescents and youth identifying

²¹ Mia Hughes, Environmental Progress, The WPATH Files: Pseudoscientific Surgical and Hormonal Experiments on Children, Adolescents, and Vulnerable Adults (Mar. 5, 2024), *available at* <https://static1.squarespace.com/static/56a45d683b0be33df885def6/t/65e64b9e5cbd756da9fbbdfa/1709591479160/Final+WPATH+Report.pdf>.

²² Srivastava A, Winn J, Senese J 4th, Goldbach JT. Sexual Orientation Change among Adolescents and Young Adults: A Systematic Review. *Arch Sex Behav.* 2022 Oct;51(7):3361-3376. doi: 10.1007/s10508-022-02394-5. Epub 2022 Aug 18. PMID: 35980518. <https://pubmed.ncbi.nlm.nih.gov/35980518/>; *see also* Sabra L. Katz-Wise, Lysie R. Ranker, Aidan D. Kraus, Yu-Chi Wang, Ziming Xuan, Jennifer Greif Green & Melissa Holt (2023) Fluidity in Gender Identity and Sexual Orientation Identity in Transgender and Nonbinary Youth, *The Journal of Sex Research*, DOI: [10.1080/00224499.2023.2244926](https://doi.org/10.1080/00224499.2023.2244926).

²³ Stewart JL, Spivey LA, Widman L, Choukas-Bradley S, Prinstein MJ. Developmental patterns of sexual identity, romantic attraction, and sexual behavior among adolescents over three years. *J Adolesc.* 2019 Dec; 77:90-97. doi: 10.1016/j.adolescence.2019.10.006. Epub 2019 Nov 3. PMID: 31693971; PMCID: PMC6885553. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6885553/>.

²⁴ *Id.*

²⁵ Srivastava A, Winn J, Senese J 4th, Goldbach JT. Sexual Orientation Change among Adolescents and Young Adults: A Systematic Review. *Arch Sex Behav.* 2022 Oct;51(7):3361-3376. doi: 10.1007/s10508-022-02394-5. Epub 2022 Aug 18. PMID: 35980518.

with a nonheterosexual orientation or sexual minority at baseline were more likely to report a change in sexual orientation.”²⁶

- ACF ignored the research demonstrating significant rates of sexual and gender identity fluidity in adolescents. Consequently, its proposed requirements prohibiting agencies from “attempts to undermine, suppress, or change the sexual orientation or gender identity of a child” fail to account for fluidity research or to provide guidance to agencies so they can distinguish prohibited conduct from efforts to accommodate variable developmental trajectories. For example, one study reports several factors identified by young people as “prompting” changes in sexual attraction or “sexual orientation,” including “the role of facilitating environment (such as, exposure to labels, involvement with LGBTQ community, LGBTQ friends) and social norms (such as, gendered norms on appearance and heteronormativity).”²⁷ Research shows that religion also may play a role in motivating an individual’s change in sexual behaviors or identification as “cisgender female participants for whom religion became more important, as compared to less important, had higher odds of changing to a straight orientation.”²⁸
- ACF provided no guidance for agencies on how to respect an individual’s (including a minor’s) free exercise of religion even when doing so may facilitate a minor’s “change” in “sexual orientation or gender identity.”

III. The rule fails to provide clarity, making it arbitrary and capricious.

- ACF proposed three requirements that would qualify a provider as a “safe and appropriate” placement for LGBTQI+ -identifying children:
 - The provider “will establish an environment free of hostility, mistreatment, or abuse based on the child’s LGBTQI+ status.”²⁹
 - The provider “is trained to be prepared with the appropriate knowledge and skills to provide for the needs of the child related to the child’s self-identified sexual orientation, gender identity, and gender expression.”³⁰
 - The provider “will facilitate the child’s access to age-appropriate resources, services, and activities that support their health and well-being.”³¹
- ACF claimed that these requirements “clarify” how agencies must meet their statutory obligation to “appropriately serve children in foster care who identify as LGBTQI+.”³² Yet throughout its rule, ACF failed to define important terms and clearly articulate the scope of its proposed requirements, many of which I document below.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ 88 Fed. Reg. at 66753.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 66755.

A. Requirement One: Placement Free from Hostility, Mistreatment, and Abuse

- Regarding the first requirement, the rule does not define “hostility,” “mistreatment,” or “abuse.” But it explained that such treatment would include “attempt[s] to undermine, suppress, or change” a child’s sexual orientation, gender identity, or gender expression, and “unreasonably limit[ing] or deny[ing] a child’s ability to express their sexual orientation, gender identity, or gender expression.”³³ Providers are “expected to utilize the child’s identified pronouns, chosen name, and allow the child to dress in an age-appropriate manner that the child believes reflects their self-identified gender identity and expression.”³⁴
 - What is the definition of “hostility”?
 - What is the definition of “mistreatment”?
 - What is the definition of “abuse”?
 - Does expression of sexual orientation include a child engaging in sex?
 - Does expression of gender expression include a child participating in drag?
 - If a child declares a new LGBTQI+ identity, is the child entitled to new clothes to express the new identity? Who pays for those clothes? How often may a child who expresses a “fluid” identity demand new clothes to facilitate the child’s changing gender expression?
 - To avoid abuse, is a provider required to use *any* pronoun a child claims reflect the child’s gender identity? Does this include “neopronouns”? Does this include pronouns that would otherwise be inappropriate, impolite, or offensive words?
 - Would it be considered hostility, mistreatment, or abuse for a provider to not use the following pronouns consistent with a child’s gender identity:
 - He/him to refer to a biological female;
 - She/her to refer to a biological male;
 - They/them to refer to a singular individual³⁵;
 - It/its to refer to a human being³⁶;
 - Ze/zir (or hir), xe/xyr, fae/faer, ae/aer³⁷;
 - Leaf/leafself³⁸;
 - Love/loves³⁹;
 - Pumpkin/spice⁴⁰;
 - Pup/pupself⁴¹;

³³ *Id.* at 66757.

³⁴ *Id.*

³⁵ See *Understanding Neopronouns*, Human Rights Campaign (last updated May 18, 2022), <https://www.hrc.org/resources/understanding-neopronouns>.

³⁶ See Beth Greenfield, *Here’s why some LGBTQ Youth Are now Embracing the Nonbinary Pronoun ‘it/its’*, Yahoo (Aug. 17, 2021), <https://www.yahoo.com/lifestyle/heres-why-some-lgbtq-youth-are-embracing-non-binary-pronoun-it-its-223331366.html>.

³⁷ See Scottie Andrew, *A Guide to Neopronouns, from ae to ze*, CNN (Aug. 12, 2023, 5:00 AM), <https://www.cnn.com/us/neopronouns-explained-xe-xyr-wellness-ccc/index.html>.

³⁸ See *id.*

³⁹ See <https://www.tiktok.com/@lesbiansnowwhite/video/7197266276870409515>.

⁴⁰ See <https://www.tiktok.com/@lesbiansnowwhite/video/7281473755426131242>.

⁴¹ See <https://www.tiktok.com/@lesbiansnowwhite/video/7229899571638439210>.

- Fish/fishself⁴²;
 - Toy/toyself⁴³;
 - Nor/mal⁴⁴;
 - Beep/boop⁴⁵;
 - Hee/haw⁴⁶;
 - Rawr/rawrs⁴⁷;
 - Clown/clownself⁴⁸; etc.
- Does this requirement apply to children who use mixed or multiple sets of pronouns?⁴⁹ Children who continually change their pronouns?⁵⁰ Children that request that different types of people use different pronouns when referring to them?
 - Would a provider be required to use identity-based titles and honorifics?
 - Would a provider be required to use emojis as pronouns?⁵¹
 - Would a provider be required to use pronouns a child say corresponds with the child’s gender identity, but appears to mock or troll others’ pronouns?⁵² If no, how can a provider determine a “proper” use of pronouns? If a child’s gender identity is subjective and self-defined, and subject to change at any time, then on what basis does ACF recommend that a provider determine whether a child’s self-proclaimed pronouns do not actually reflect that child’s self-proclaimed gender identity?
 - Is there *any* limit on what pronouns providers would be required to use if a child claims those pronouns reflect the child’s gender identity?
- The rule specified that use of so-called “conversion therapy” and “efforts that attempt to suppress or change a child’s sexual orientation or gender identity” are not safe and appropriate.⁵³ It is unclear whether ACF intended its “conversion therapy” label to include talk therapy, which would raise concerns under the First Amendment.
 - What is the definition of “so-called ‘conversion therapy’”?
 - Does conversion therapy include talk therapy? If so, how does ACF’s requirement comply with the First Amendment?
 - Does conversion therapy include “gender exploratory therapy,” which takes “a psychological approach to psychological distress”?⁵⁴

⁴² See <https://www.youtube.com/watch?v=8XXyp58IbKo>.

⁴³ See *id.*

⁴⁴ See <https://www.tiktok.com/@lesbiansnowwhite/video/7208392801657097518>.

⁴⁵ See <https://www.tiktok.com/@lesbiansnowwhite/video/7235467934502522155>.

⁴⁶ See <https://www.tiktok.com/@lesbiansnowwhite/video/7209527043975957803>.

⁴⁷ See <https://www.tiktok.com/@lesbiansnowwhite/video/7238805383563824427>.

⁴⁸ See https://www.tiktok.com/@tom_f420/video/7201353809078045957.

⁴⁹ See Gabrielle Kassel, *How to Respect and Affirm Folks Who Use Multiple Sets of Pronouns*, Well+Good (July 12, 2021), <https://www.wellandgood.com/multiple-sets-pronouns/>.

⁵⁰ See, e.g., <https://twitter.com/libsoftiktok/status/1664097577401298945>.

⁵¹ See, e.g., <https://www.tiktok.com/@lesbiansnowwhite/video/7292246787513945386>;
<https://www.tiktok.com/@lesbiansnowwhite/video/7269234553724734763>.

⁵² See, e.g., Louis Chilton, *Star Wars: Mandalorian Star Gina Carano Accused of ‘Mocking Trans People’ with ‘Boop/Bop/Beep’ Pronouns Joke*, Independent (Sept. 14 2020, 2:28 PM), <https://www.independent.co.uk/arts-entertainment/tv/news/star-wars-mandalorian-gina-carano-trans-pronouns-bio-twitter-disney-b436015.html>.

⁵³ 88 Fed. Reg. at 66757.

⁵⁴ Gender Exploratory Therapy Association, <https://www.genderexploratory.com/>.

- Does conversion therapy include suggesting alternative perspectives to a child’s self-proclaimed identity?
- Does conversion therapy include references to marriage, gender, or sexuality in the Bible or other religious texts?
- Since ACF cites the 2021 American Psychological Association’s “Resolution on Gender Identity Change Efforts” as its authority that “gender identity change efforts” are associated with “harm,” and the APA defines harmful “gender identity change efforts” to include attempts to change “gender role behaviors that are stereotypically associated with sex assigned at birth,”⁵⁵ does refusing to provide menstrual products to a teenage male who identifies as a “trans girl” constitute “conversion therapy”?
- The rule failed to acknowledge or consider the rights of biological parents of children in foster care.
 - Does a biological parent have a say in whether their child’s LGBTQI+ identity is affirmed or how their child is referred to by a foster care provider?
 - Under this rule, could it be more difficult for children to be returned to their biological parents?
 - If a parent does not affirm a child’s LGBTQI+ identity as required of foster care providers under the rule, would the biological parent be considered abusive and not a safe or appropriate placement? Could a child be reunited with such a parent?
 - Considering ACF discusses how kinship placements have higher rates of success, how would ACF weigh kinship placements with a family member over a non-kin provider who affirms a child’s LGBTQI+ status?

B. Requirement Two: Placement with an LGBTQI+-Trained Provider

- Under the second requirement, ACF did not propose any specific training curriculum but rather insists that an agency’s 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 practices that promote the safety and wellbeing of LGBTQI+ children.”⁵⁶
 - Does HHS believe that so-called “gender affirming care” supports a child’s safety and wellbeing?
 - Does amputating a female child’s healthy breasts promote her safety and wellbeing?
 - Does amputating a child’s genitals promote the child’s safety and wellbeing?
 - Is sterilizing a child via puberty blockers, cross-sex hormones, or genital surgeries for the child’s safety and wellbeing?
 - Is impeding a child’s ability to experience sexual function in the future for the child’s safety and wellbeing?
 - Is a lifetime of medical care via hormones and life-long side-effects for a child’s safety and wellbeing?

⁵⁵ American Psychological Association, Resolution on Gender Identity Change Efforts (Feb. 2021).

⁵⁶ 88 Fed. Reg. at 66768.

- Since HHS has claimed in another recent proposed rule that a non-functioning reproductive system renders a person disabled under Section 504 and the Americans with Disabilities Act,⁵⁷ do treatments that render a child permanently disabled under HHS’s definition promote the child’s safety and wellbeing?
- Can training materials reflect the ongoing debate in the medical community, especially internationally, about the proper standard of care for gender dysphoria?
- Can training materials discuss risks and harms associated with gender affirming care?
- Can training materials include stories of “detransitioners,” “desisters,” and those who regret undergoing social and medical “gender affirming care”?
- Can training materials meet the standard under the rule if they omit recent studies and growing international evidence that social and medical transition of children is harmful? If so, on what basis?

C. Requirement Three: Placement Facilitates Access to LGBTQI+ Services

- The third requirement would ensure that children have access to a “range of services,” which “may include, but are not limited to” (i) “facilitating access to behavioral health supports respectful of their LGBTQI+ identity”; (ii) “interacting with LGBTQI+ mentors and peers”; (iii) “joining and participating in affinity groups”; and (iv) “connecting the child to available LGBTQI+ supportive resources and events, either in person or virtually depending on local availability.”⁵⁸ Further, providers “must not discourage or prevent the child who identifies as LGTBQI+ from receiving age-appropriate services and supports.”⁵⁹
 - Is a provider required to take a child to any LGBTQI+ event the child requests to attend? If a provider chooses not to attend a certain event, for any reason, will the provider be considered as preventing a child from receiving age-appropriate services and supports?
 - Is a provider required to take a child to a PRIDE parade or other PRIDE event?
 - Is a provider required to take a child to a drag show?
 - Is a provider required to take a child out of state to receive LGBTQI+ services that are not available in state?
 - Can a provider take a child to church? Can a provider take a child to a church that believes marriage is between one man and one woman?⁶⁰ Can a provider take a child to a church that believes homosexual sex and sex outside of marriage is harmful? Can a provider take a child to a church that believes God created only two sexes—male and female—and that children should be referred to according to their sex?
 - Are there any safeguards around which “LGBTQI+ mentors and peers” a child has access to? Will these mentors and peers be vetted by an agency or provider? Must a

⁵⁷ 88 Fed. Reg. 63392, 63459 (Sept. 14, 2023) (describing Proposed §84.4(1)(1)); *id.* at 63460 (“Major life activities’ includes ... the operation of a major bodily function such as ... reproductive systems”).

⁵⁸ 88 Fed. Reg. at 66758.

⁵⁹ *Id.*

⁶⁰ *See, e.g., Obergefell v. Hodges*, 576 U.S. 644, 672 (2015) (“Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.”).

- provider permit a child to access any virtual “LGBTQI+ supportive resource,” including unmonitored chat rooms, that the child desires?
- Will adult “LGBTQ+ mentors” be allowed to discuss sex or other matters of sexuality with a child? If so, starting at what age?
- The rule failed to define “age-appropriate” and “services.” It is unclear whether ACF considers puberty blockers, cross-sex hormones, and surgeries “appropriate” services that support a child’s health and wellbeing. In 2022, HHS’s Office of Population Affairs published a guidance document titled “Gender-Affirming Care and Young People,”⁶¹ controversially promoting “gender affirming” medical interventions for children.⁶² Does ACF agree with this guidance?
 - Are puberty blockers “appropriate” services that support a child’s health and wellbeing? If so, starting at what age?
 - Are cross-sex hormones “appropriate” services that support a child’s health and wellbeing? If so, starting at what age?
 - Are “transitioning” surgeries “appropriate” services that support a child’s health and wellbeing? If so, starting at what age?
 - Will a child’s biological parents be notified of what services and activities their child is being provided in foster care?
 - Will a child’s biological parents be able to prohibit a child from receiving any services of activities?
 - Would a provider that encouraged a child to wait a period of time before undergoing medical transition be considered discouraging or preventing the child from receiving age-appropriate services and supports?
 - Would a provider that believes that not every child who claims a transgender identity should undergo medical transition be considered discouraging or preventing the child from receiving age-appropriate services and supports?
 - Would a provider that believes only adults should undergo medical transition be considered discouraging or preventing the child from receiving age-appropriate services and supports?
 - The rule ignores real threats to safety experienced by LGBTQI+-identifying children, making it arbitrary and capricious. According to the rule, “[t]he agency must ensure that children who disclose their identity, are perceived to have an LGBTQI+ identity, report a problem with a placement, or request a safe and appropriate placement are not subjected to any attempt to undermine, suppress, or change their sexual orientation, gender identity, or gender expression, efforts sometimes referred to as so-called ‘conversion therapy.’”⁶³ The purpose of the rule purports to be ensuring a “placement free from hostility, mistreatment, and abuse,” yet ACF failed to address documented threats to the well-being

⁶¹ HHS, Office of Population Affairs, *Gender-Affirming Care and Young People* (Aug. 2023), <https://opa.hhs.gov/sites/default/files/2023-08/gender-affirming-care-young-people.pdf>.

⁶² See David Gortler, *HHS Guidance on Trans Pharmacology Raises More Questions Than It Answers*, Newsweek (May 19, 2022, 6:00 AM), <https://www.newsweek.com/hhs-guidance-trans-pharmacology-raises-more-questions-it-answers-opinion-1707076>.

⁶³ 88 Fed. Reg. at 66760.

of vulnerable children, including sexually predatory behavior of “LGBTQ-identified” adult “boyfriends,”⁶⁴ substance abuse,⁶⁵ and the complexity of family trauma underlying the child’s original placement.⁶⁶ Instead, ACF focused only on ensuring placements that facilitate ideologically-linked behaviors such as use of chosen name and pronouns, or “facilitat[ing] access to age-appropriate resources, services, and activities,” but without identifying appropriate safeguards for vulnerable youth accessing those resources, services, and activities.⁶⁷

IV. The rule overstates its benefits and undercounts its costs.

- ACF summarily claimed that its rule “will reduce the negative experiences of such children by allowing them to have access to needed care and services and to be placed in nurturing placement settings with caregivers who have received appropriate training.”⁶⁸ ACF also speculated that the rule “may also reduce LGBTQI+ foster children’s high rates of homelessness, housing instability and food insecurity,” and it “promotes a supportive environment for children in foster care who self-identify as LGBTQI+.”⁶⁹
- ACF’s claimed that benefits are lacking. Considering ACF’s proposal would disqualify a large number of available foster homes, it seems more probable that the rule will decrease access to placements and housing for LGBTQI+-identifying children. ACF must provide specific evidence to the contrary. It must show that there are qualified providers available that are not yet part of the program and that under such a rule such providers would join.
- ACF acknowledged that its proposal will have costs as it “anticipate[s] that a majority of states would need to expand their efforts to recruit and identify providers and foster families that the state or tribe could designate as safe and appropriate placements for a LGBTQI+ child.”⁷⁰ The rule projected costs over \$40 million. That is a staggering amount that will be taken away from the already limited foster care resources of agencies.
- In addition to the monetary costs, perhaps the most far-reaching harm of the rule is that it would undermine parental rights. The premise of the proposal—that not “affirming” a foster child’s LGBTQI+ identity is abuse—if established, would logically extend to parents in other contexts, including adoption and custody. If it’s unsafe and abuse not to

⁶⁴ See, for example, the exploitative situations described in this qualitative study, including a boy who reported being “sexually active since age 9,” and having a “secret, ongoing relationship with a 32-year-old [gay]man,” and youth reports of “disruptive behavioral conduct” and “lack of personal responsibility” by youth, and youth “prioritizing nightlife” as reasons why LGBT youth chose to leave home. Castellanos HD. The Role of Institutional Placement, Family Conflict, and Homosexuality in Homelessness Pathways Among Latino LGBT Youth in New York City. *J Homosex.* 2016;63(5):601-32. doi: 10.1080/00918369.2015.1111108. Epub 2015 Oct 26. PMID: 26503713; PMCID: PMC4930864.

⁶⁵ McCurdy AL, Gower AL, Rider GN, Thomas D, Watson RJ, Eisenberg ME, Russell ST. Adolescent substance use at the intersections of foster care, sexual orientation and gender identity, racial/ethnic identity, and sex assigned at birth. *Child Abuse Negl.* 2023 Mar;137:106042. doi: 10.1016/j.chiabu.2023.106042. Epub 2023 Jan 25. PMID: 36706614.

⁶⁶ *Id.*

⁶⁷ 88 Fed. Reg. at 66758.

⁶⁸ *Id.* at 66763.

⁶⁹ *Id.*

⁷⁰ *Id.*

affirm a child’s LGBTQI+ identity in foster care, then it would be unsafe and abuse not to affirm a child in other contexts. The harmful precedent established by this rule will lay the groundwork for the government to take children away from their biological parents. Under the premise of abuse, the government could prohibit those with traditional religious beliefs about marriage, sexuality, and gender from working with or adopting children, or even retaining custody of their own children. Moreover, contrary to the Supreme Court’s direction in *Fulton*, this approach would disqualify willing foster parents that believe that HHS is unwise to reject what providers and politicians have learned in the UK, Finland, Sweden, Norway, Denmark, and the Netherlands. Ironically, this rule, if finalized, will enable the government to remove children from countless homes, which would only exacerbate the foster care crisis in America—the very crisis Congress sought to address in the Social Security Act.

- Further, ACF failed to address the following harms that may result from its rule:

Harms to Faith-Based Providers

- Decreasing funding for faith-based providers by requiring agencies to prioritize providers ACF deems “safe and appropriate” for LGBTQI+-identifying children.
- Inhibiting faith-based providers’ ability to care for children in foster care.
- Reducing the number of faith-based foster parents, given that many would presumably be ruled ineligible by non-faith-based providers as a result of the rule.
- Denigrating and stigmatizing religious beliefs about marriage and sexuality.

Harms to Children in Foster Care

- Decreasing overall foster care placements by disqualifying faith-based providers.
- Minimizing the number of available providers that can foster LGBTQI+-identifying children; thus, increasing the likelihood they won’t be placed.
- Increasing number of LGBTQI+-identifying children who can no longer be placed due to the rule’s requirements.
- Increasing number of children who are further encouraged to pursue an LGBTQI+ identification, leading to additional children undergoing harmful and irreversible social and medical transition.
- Increasing trauma for children in sex-specific facilities that would be forced to share living quarters and intimate spaces with someone of the other sex. This is a particularly troubling harm as children placed in foster care are more likely to have experienced sexual abuse than children not in foster care. Forced sharing of intimate spaces may lead to additional trauma and lead to assaults on girls who are placed in sex-specific facilities with teenage biological males.
- Increasing trauma from children interacting with unvetted adult “mentors.”

Harms to Parental Rights

- Increasing number of parents who will be unable to regain custody of their child in foster care because they will not affirm their child’s LGBTQI+ identity as required of foster care providers under the rule.
- Increasing abuse allegations, and by extension, disruptions to the parent-child relationship, because parents judge that it is not in their child’s best interest to use

their child’s chosen pronouns, to allow their child to dress as the other sex, or to allow their child to attend LGBTQI+ events and obtain services.

- Increasing number of parents who will no longer be able to adopt or retain custody of their children because they qualify as “abusive” under the rule’s standards.

V. The rule raises religious freedom concerns.

- Under the rule, agencies would be required to ensure that “the totality of their child welfare system includes sufficient placements for LGBTQI+ children” that meet the proposed requirements (detailed below).⁷¹ But not every provider would be required to “become designated as a safe and appropriate placement for LGBTQI+ children.”⁷²
- ACF explained that it “takes seriously its obligations to comply with Constitution and Federal laws that support and protect religious exercise and freedom of conscience, including the First Amendment and the Religious Freedom Restoration Act.”⁷³ Indeed, it appears that ACF put a lot of thought into crafting a rule that would, by its calculation, not impose a substantial burden on religious liberty by (a) regulating the agencies and not the providers, and (b) not requiring that *all* providers affirm a child’s LGBTQI+ identity. The rule acknowledges the Supreme Court’s 2021 decision in *Fulton v. City of Philadelphia*, where the Court made clear that “the First Amendment protects faith-based entities that provide foster care services.”⁷⁴ “Consistent with this protection,” ACF’s proposal “would not require any faith-based provider to seek designation as a safe and appropriate provider for LGBTQI+ children as described in this proposed rule if the provider had sincerely held religious objections to doing so.”⁷⁵ For any remaining conflict a religious provider may have with the rule’s obligations, ACF will consider religious accommodation requests on a “case-by-case basis.”⁷⁶ I applaud ACF for stating that it takes seriously its constitutional and legal obligations to respect religious freedom and conscience rights.
- There are, however, a few areas where ACF fell short of its obligations to respect religious freedom. First, the underlying premise of ACF’s proposal is that those who hold traditional religious views of marriage, sexuality, and gender, or who believe “affirmation” of an “LGBTQI+” identity is harmful, are unable to provide safe homes for children who identify as LGBTQI+. This is plain religious bigotry.
- Further, there is no mention of religious accommodations for individual foster parents who partner with a non-religious provider. Would such religious parents be allowed to remain in the foster program? ACF “recommend[s] that states and tribes do not adopt selection criteria that adversely disadvantages any faith-based organizations that express religious objections to providing safe and appropriate placements for LGBTQI+”

⁷¹ *Id.* at 66756.

⁷² *Id.*

⁷³ *Id.* at 66761.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 66762.

children.”⁷⁷ I ask that this be a requirement, not just a recommendation. If not, this rule would function as HHS outsourcing impermissible religious discrimination to a third party.

- The rule explained that ACF “appreciates the vital role that religious providers play in providing care and services to children in the child welfare system” and “values the child welfare services that faith-based organizations provide.”⁷⁸ Research shows faith-based providers are “crucial” to helping children in foster care.⁷⁹ They serve children without regard to sexual orientation or gender identity. Yet this rule, if finalized, will make it less likely that faith-based providers are able to provide placements for children in foster care. Indeed, this rule labels faith-based providers with the “wrong” religious beliefs as abusers and unfit to provide safe placements.
- Following the logic of the rule, shouldn’t religious children be placed only with providers who affirm their religious identity? Shouldn’t providers be required to provide a religious child with access to age-appropriate events and supports that further their religious identity? If not, why not? Religious identity and expression are important for a child’s health and wellbeing.

VI. The rule raises federalism concerns.

- The rule acknowledged that it “has sufficient federalism implications that warrants the preparation of a federalism summary impact statement.”⁸⁰ This is most certainly true since agencies being regulated include states. Nevertheless, ACF admitted it failed to consult directly with states *prior* to issuing the proposed rule.⁸¹ HHS should consult directly with states to determine the number of LGBTQI+-identifying children in foster care that are unable to obtain what it considers “safe and proper” placements and how that number compares to non-LGBTQI+-identifying children. After such consultation, HHS should reopen a modified proposed rule for public comment, if it still believes there is need for this rulemaking.
- HHS should clarify several important points that raise potential federalism concerns. Will a state have to facilitate a foster child’s gender transition? Will state employees be required to use the preferred pronouns of a child that identifies as LGBTQI+? How do Title VII’s religious accommodations apply? Will a state be required to house biological males with biological females?
- HHS should also clarify how, if at all, this rule will impact state laws. Is it HHS’s position that this rule will preempt state law? Would such laws disqualify states from receiving funding for foster care or lead to an enforcement action by HHS?

⁷⁷ *Id.*

⁷⁸ *Id.* at 66761.

⁷⁹ Becket, *The Foster Care Crisis and Faith-Affirming Agencies*, <https://s3.amazonaws.com/becketnewsite/The-Foster-Care-Crisis-and-Faith-Affirming-Agencies.pdf>.

⁸⁰ 88 Fed. Reg. at 66764.

⁸¹ *Id.*

- Laws that may conflict with requirements under the rule could include, for example:
 - Idaho House Bill 578, signed by the governor last week Monday, March 25, 2024, that prohibits state and local governments from treating adversely any adoption or foster care agency that declines to provide services because of a sincerely held religious belief, including by denying the award of a contract. The law provides:

The state government shall not take any discriminatory action against a person who the state grants custody of a foster or adoptive child wholly or partially on the basis that the person guides, instructs, or raises a child, or intends to guide, instruct, or raise a child, based on or in a manner consistent with a sincerely held religious belief. The state government may consider whether a person shares the same religious or faith tradition as a foster or adoptive child when considering placement of the child in order to prioritize placement with a person of the same religious or faith tradition.
 - Florida’s parental rights law that prohibits instruction on sexual orientation and gender identity in certain contexts.
 - Laws in one of the over 20 states that protect children from harmful medical gender transitions.
- If HHS believes its rule will preempt state law, this would raise concerns under the “*Pennhurst* clear statement rule.” As the Supreme Court has long made clear, “if Congress intends to impose a condition on the grant of federal moneys [under its Spending Clause authority], it must do so unambiguously.”⁸² Here, Congress, via the Social Security Act, did not unambiguously impose a duty on states to promote sexual orientation and gender identity, including by facilitating social and medical gender transitions for children. It is inappropriate for ACF to do otherwise.

Conclusion

I urge OIRA to ensure that the statutory and regulatory process is upheld and that ACF’s rule has sufficient legal and economic analysis that reflects its obligations under the Constitution, the Administrative Procedure Act, federal laws protecting religious liberty, and all other relevant legal authority.

⁸² *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). “[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.” *Id.* at 17. Thus, the “legitimacy of Congress’ power to legislate under the [S]pending [Clause] ... rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract.’” *Id.* (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 585-86 (1937)). The Supreme Court has discerned that this rule is constitutionally required because, without it, Congress’s spending authority would be “limited only by Congress’ notion of the general welfare.” *South Dakota v. Dole*, 483 U.S. 203, 217 (1987) (O’Connor, J., dissenting). Given “the vast financial resources of the Federal Government,” Congress would have power “to tear down the barriers, to invade the states’ jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.” *Id.* (quoting *United States v. Butler*, 297 U.S. 1, 78 (1936)).