



SERVING ADOPTIVE PARENTS, BIRTH PARENTS AND ADOPTED PERSONS SINCE 1945

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December 19, 2019

Office of Grants Policy, Oversight and Evaluation
U.S. Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue SW
Washington, DC 20201

RE: Health and Human Services Grants Regulation, Proposed Rule RIN 0991-AC16

To Whom It May Concern:

On behalf of The Barker Adoption Foundation (“Barker”), please accept these comments in response to the Notice of Proposed Rulemaking for RIN 0991-AC16 (the “Proposed Rule”). Barker is a nonprofit, licensed adoption agency built on the fundamental belief that all children deserve safe, loving, and permanent families. Barker serves all people regardless of age, race, gender, religion, national origin, sexual orientation, gender expression, gender identity, or socioeconomic background. Barker has placed more than 7,500 children into the welcoming arms of adoptive parents and has provided pre-adoption and post-adoption counseling and related support services to more than 30,000 women and their families.

Barker was founded in 1945. At the request of the U.S. Department of Navy, Barker ensured that Women Accepted for Volunteer Emergency Service (“WAVES”) experiencing an unplanned pregnancy were provided with adoption options and support for themselves and their children. Today, Barker provides crisis pregnancy counseling and adoption services for women and their partners who need emotional support, housing and food, education about their options, and connections with community resources. Barker also recruits, trains, assesses, and supports loving, permanent adoptive families for older children in the foster care system through its Project Wait No Longer program. This program strives to address the national crisis of children languishing in public foster care. There are an estimated 400,000 children in the U.S. foster care system and over 100,000 of these children and youth are legally eligible for adoption. Tragically, these children remain in temporary and often transient foster care situations.

Barker’s services do not end when a child is placed with a family. Barker recognizes that adoption is a lifelong journey, with normal developmental challenges. Accordingly, Barker provides post-adoption support and services, including individual and group counseling, to all members of the adoption circle—adopted persons, adoptive parents, birth parents, and family members.

As explained below, Barker strongly urges the U.S. Department of Health and Human Services (“HHS”) to reconsider the Proposed Rule. The use of non-merit factors—such as sexual orientation and gender identity—to identify prospective adoptive and foster parents is not only discriminatory but, as we explain below, also leads to health and economic disparities for children in foster care. The current regulation expressly prohibits this discrimination. By seeking to excise the regulation’s protective language, the Proposed Rule will discriminate against lesbian, gay, bisexual, transgender, and queer (“LGBTQ”) adoptive parents and further deepen the disparities borne by foster children, particularly LGBTQ children, rather than serve the best interests of our most vulnerable children.

BACKGROUND

The decision to adopt or foster a child is among the most private an individual or couple can make. Adoption and fostering creates a perpetual bond, fulfills yearnings for connection and intimacy, and, perhaps most importantly, provides children waiting to be adopted with hope. Children in foster care have many hopes—hope that they will be able to establish meaningful and loving connections with a permanent family; hope that they will have a safe and supportive environment in which to achieve their full potential; and hope that they will be accepted unconditionally. But, by removing the protections previously afforded to LGBTQ adoptive parents and children, the Proposed Rule will quash many of those hopes.

Shortly after the Supreme Court’s watershed marriage equality decisions in *United States v. Windsor*¹ and *Obergefell v. Hodges*,² HHS outlined an expectation of non-discrimination for grantees of HHS. Specifically, the regulation precluded adoption and foster service providers from receiving HHS funds if they discriminated against LGBTQ prospective foster or adoptive parents or children.³ And in accordance with the Supreme Court’s decisions in *Windsor* and *Obergefell*, it also required HHS award recipients to treat as valid the marriages of same-sex couples.⁴

In promulgating the rule, HHS noted that these regulatory changes were “important” but also “non-controversial.”⁵ The requirement that grant recipients not discriminate based on “non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation” would serve to “codif[y] for all HHS service *grants* what is already applicable for all HHS service *contracts*, as required by the HHS Acquisition Regulation (HHSAR) 352.237-74.”⁶ This HHSAR provision makes explicit HHS’s non-discrimination policy when obligating appropriations for solicitations, contracts, and orders that deliver services under HHS’s programs directly to the public. The rule thus ensures that this non-discrimination provision applies equally to grants. HHS further explained that the provision also would codify HHS’s interpretation of these Supreme Court decisions and “ensure[] that same-sex spouses, marriages, and households

¹ 133 S. Ct. 2675 (2013).

² 135 S. Ct. 2584 (2015).

³ See 45 C.F.R. § 75.300(c).

⁴ *Id.* § 75.300(d).

⁵ 81 Fed. Reg. 45,271, 45,272.

⁶ *Id.* at 45,272 (emphasis added).

are treated the same as opposite-sex spouses, marriages, and households in terms of determining beneficiary eligibility or participation in grant-related activities.”⁷ This question of grantee obligations was not at issue in *Windsor* or *Obergefell*, so it is unclear, especially given the new language of the Proposed Rule, whether HHS continues to believe that grant recipients must treat same-sex marriages as valid. We sadly conclude that HHS does not.

In 2016, HHS received 12 comments on the current rule’s nondiscrimination provisions, all of which were strongly supportive of the inclusion of express nondiscrimination language.⁸ Commenters praised HHS for seeking to protect vulnerable populations facing discrimination. Barker, consistent with the unanimous response of commenters, also welcomed the current rule and viewed it as necessary to fulfill Barker’s mission of ensuring that all children are adopted into loving, supportive homes and that parents are able to adopt children, whether through infant placements or through the foster care system.

Despite this public reception, in an unusual about-face, HHS has proposed to reverse the nondiscrimination protections provided under 45 C.F.R. §§ 75.300(c) and (d) by excising the express language that offers such protection.⁹ As a result, the Proposed Rule would allow persons or organizations who discriminate based on gender identity or sexual orientation to receive HHS grants. Furthermore, it would allow grant recipients—contrary to *Obergefell*—to refuse to treat as valid the marriages of same-sex couples. At bottom, the Proposed Rule appears to be a deceptive and unjustified attempt to enshrine anti-LGBTQ sentiments into law. The revisions appear motivated by animus and seem little more than a masked attempt to permit adoption and foster agencies that receive federal grants to discriminate on the basis of sexual orientation and gender identity, some under the guise of religious objections. The agency offers no other rationale for its proposed revisions. Indeed, the Proposed Rule does not identify any specific regulatory burdens of the current rule, nor does it identify who, specifically, is harmed or burdened by the current rule.¹⁰ In sum, HHS purports to justify its action on unspecified “comments” and “requests for exceptions,” but none of these complaining entities apparently voiced any concerns during the

⁷ *Id.*

⁸ See, e.g., Comment from The Trevor Project re Proposed Rule on Grants Regulation (0991-AC06) (Aug. 11, 2016), available at <https://www.regulations.gov/document?D=HHS-OS-2016-0012-0014>; Comment from The National Council of Jewish Women re Proposed Rule on Grants Regulation (0991-AC06) (Aug. 11, 2016), available at <https://www.regulations.gov/document?D=HHS-OS-2016-0012-0014>.

⁹ HHS would strike the following italicized language from the current rule: “It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services, *based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation,*” and replace this language with the following: “*to the extent doing so is prohibited by federal statute.*” 84 Fed. Reg. 63,831, 63,832 (Nov. 19, 2019).

¹⁰ *Id.* HHS notes only that some grantees have stated that if they require certain subgrantees to comply with the current rule, which they say they will, those subgrantees will leave the program and cease providing services due to “their religious objections.”

2016 rulemaking, nor does HHS identify them now. Finally, of equal note, no court has held that the current regulation is improper on the merits.¹¹

OVERVIEW

As the Supreme Court recognized in *Obergefell*, “the first bond of society is marriage; next, children; and then the family.”¹² The Proposed Rule is an assault on all three bonds. As discussed in greater detail below, the Proposed Rule:

1. Negatively impacts children waiting to be adopted because it creates a practical barrier to adoption and fostering, will increase the time many children spend in foster care; and makes it less likely that all children who need post-adoption services will receive them;
2. Negatively impacts LGBTQ children in particular because it will increase the likelihood that these children will be placed in homes that are not affirming of their sexual identity or orientation; and
3. Negatively impacts LGBTQ people everywhere because it sends the most hurtful and humiliating message—one not grounded in any data and refuted by evidence time and time again—that LGBTQ individuals are somehow less capable of serving as parents.

ARGUMENT

I. The Proposed Rule Will Negatively Impact All Children Waiting To Be Adopted Or Fostered

The number of children in foster care has increased, rising more than 10 percent between 2012 and 2018, the most recent year for which national data are available. And the number of children in foster care *waiting to be adopted* increased by nearly 7 percent between 2012 and 2018.¹³ As of September 30, 2018, there are currently 437,283 children in foster care, of which 125,422 children are waiting to be adopted.¹⁴ With so many children waiting for loving families, it is important that all qualified caregivers—regardless of their race, sexual orientation, religion, or gender identity—be given the opportunity to serve as foster or adoptive parents. The Proposed Rule significantly jeopardizes the chances that many of these children will be placed in permanent homes.

¹¹ HHS further purports to justify its decision based on a preliminary injunction issued to a single subgrantee, but the district court in that case issued the preliminary injunction merely “to preserve the status quo while the validity of [Michigan’s] . . . position is tested in plenary litigation,” and that order is now on appeal. *Buck v. Gordon*, No. 1:19-cv-286, 2019 WL 468425 at *1 (W.D. Mich. Sept. 26, 2019); *see also* *Buck v. Gordon*, No. 19-2185 (6th Cir.).

¹² 135 S. Ct. at 2594 (quoting Cicero in *De Officiis* 57 (W. Miller transl. 1913)).

¹³ *See* U.S. DEP’T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, *The AFCARS Report: Preliminary FY 2016 Estimates as of Oct. 20, 2017 – No. 24* (2017), available at <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport24.pdf>; U.S. DEP’T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, *The AFCARS Report: Preliminary FY 2018 Estimates as of August 22, 2019 – No. 26* (2019), available at <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport26.pdf>.

¹⁴ *See id.*

A. The Proposed Rule Will Reduce The Number Of Qualified Parents

The Proposed Rule will place a significant financial and emotional burden on prospective LGBTQ parents and will reduce the pool of qualified parents able to provide homes to children. LGBTQ individuals and couples are critical to the public child welfare system. 114,000 same-sex couples in the United States are raising children and a significant number of them became parents through adoption or fostering. 21.4 percent of same-sex couples are raising adopted children compared to just 3 percent of different-sex couples, and 2.9 percent of same-sex couples are caring for children in foster care compared to 0.4 percent of different-sex couples.¹⁵ These statistics underscore why LGBTQ individuals and couples represent an important subgroup of potential parents. And it is why all the major child welfare advocacy organizations in the United States uniformly oppose allowing the use of religious or sexual orientation as a placement factor in the public child welfare system. Doing so undermines efforts to recruit families to help satisfy the need for adoptive and foster families.¹⁶ Despite this opposition, the Proposed Rule erects practical barriers that impede LGBTQ individuals and couples from adopting or fostering children, and in so doing, will cause great harm to many children waiting to be adopted.

LGBTQ individuals and couples who are rejected by a state (or an adoption or foster care agency) because of their sexual orientation may have few, if any, remaining options for parenting in their geographic area. For example, in Arkansas, a single agency that discriminates against LGBTQ people recruits almost half of the foster homes in the state.¹⁷ Similarly, South Carolina's largest foster care organization also discriminates against LGBTQ people.¹⁸ In these states, and in many other states across the country, the lack of adoption options means that prospective LGBTQ parents will incur the additional cost of searching for suitable adoption agencies, some of which may be outside their geographic location. If prospective parents are turned away because of their sexual orientation and subjected to additional costs of locating comparable services and support (especially when these services are outside their geographic area), they are much less likely to ultimately adopt. And even if there are comparable adoption and foster care agencies nearby, by providing foster care and adoption agencies the unfettered license to discriminate, the humiliation of such discrimination may cause some LGBTQ individuals and couples not to move forward with the adoption or fostering process.

¹⁵ See THE WILLIAMS INSTITUTE, *Same-sex Parenting in the U.S.* (July 31, 2018), <https://williamsinstitute.law.ucla.edu/press/same-sex-parenting/>.

¹⁶ See, e.g., Child Welfare Information Gateway, *Providing Adoption Support and Preservation Services*, (Feb. 2018), https://www.childwelfare.gov/pubPDFs/f_postadoptbulletin.pdf (last visited Dec. 13, 2019).

¹⁷ See, e.g., Benjamin Hardy, *One Faith-Based Group Recruits Almost Half of Foster Homes In Arkansas*, ARKANSAS TIMES (Dec. 1, 2017), <https://arktimes.com/news/arkansas-reporter/2017/12/01/one-faith-based-group-recruits-almost-half-of-foster-homes-in-arkansas>.

¹⁸ See, e.g., Angelia Davis, *Miracle Hill gets religious exemption to provide foster Care in SC despite complaints*, GREENVILLE NEWS (Jan. 23, 2019), <https://www.greenvilleonline.com/story/news/2019/01/23/miracle-hill-religious-protections-greenville-sc/2647848002/>; Complaint at 2, *Welch v. U.S. Department of Health and Human Services*, No. 6:19-cv-01567 (D.S.C. filed May 30, 2019), https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/rogers_sc_20190530_complaint.pdf.

The Proposed Rule is also likely to reduce the pool of qualified parents because it will reduce access to post-adoption support and services, upon which prospective parents often rely. This is because not all adoption or foster care agencies provide the same level of support or services; more specifically, agencies differ widely in their offerings of post-adoption services, and some agencies provide no support at all. And “[t]here is . . . evidence that the availability of services . . . following adoption plays a role in the decision to adopt from foster care among prospective parents.”¹⁹ Accordingly, assuring prospective adoptive parents that they will have access to post-adoption services makes them more likely to adopt or foster.²⁰

For example, Barker’s post-adoption services include LGBTQ-affirming counseling. Prospective parents—notwithstanding their sexual orientation—select Barker specifically because of these services. If faith-based agencies are less likely to provide such post-adoption services because of the Proposed Rule, this adversely impacts not just prospective LGBTQ parents, but *all* prospective parents—even those who adopt or foster from discriminatory agencies. For example, couples who adopt or foster from a discriminatory agency but later discover that their child requires LGBTQ counseling, will likely not be able to turn to that agency for support.²¹ Relatedly, LGBTQ couples seeking any kind of post-adoption services or support may be denied such services by faith-based agencies for no other reason than their sexual orientation. All told, the lack of post-adoption support, and the costs of trying to find a suitable alternative, will deter prospective parents from adopting or fostering.

While this reality will unduly burden parents who will necessarily incur the additional costs of locating adoption or foster care agencies that provide these services, its most pernicious effect will be felt by the children. Post-adoption services benefit adoptees and their families in many ways; particularly, it helps them address emotional, behavioral, and developmental issues. Such positive outcomes increase public awareness of the needs and likely successful outcomes for children who are adopted from foster care. This awareness, in turn, makes it more likely that public and private agencies will successfully recruit other families to adopt, which is a critical outcome because recruitment remains a significant challenge for agencies throughout the United States.²² However, by creating barriers that make it less likely that all prospective parents—especially LGBTQ parents—will be willing to adopt or foster children, the Proposed Rule unfairly penalizes each of the nearly half-million children in foster care in need of loving and nurturing families.

B. The Proposed Rule Will Increase The Length Of Time Children Spend In Foster Care

Reducing the number of qualified parents will increase the length of time children—especially those that are statistically less likely to be adopted—spend in foster care. The average time a child

¹⁹ Child Welfare Information Gateway, *Providing Adoption Support and Preservation Services* (Feb. 2018), https://www.childwelfare.gov/pubPDFs/f_postadoptbulletin.pdf (last visited Dec. 13, 2019).

²⁰ *See id.*

²¹ Keri Williams, *What Happens When the Adopted Kids of Anti-Gay Parents Come Out?* BUZZFEED NEWS (Aug. 20, 2019), <https://www.buzzfeednews.com/article/keriwilliams/what-happens-when-the-adopted-kids-of-anti-gay-parents-come>.

²² *See supra* n.19 at 4.

spends in foster care is almost 2 years.²³ Today, about 13 percent of children in foster care (more than 32,000) spend 3 or more years in the system.²⁴ By shutting out potential willing and loving parents, the Proposed Rule will increase this number.

The longer a child remains in foster care, the more likely he or she will experience multiple placement changes and disrupted relationships caused by such changes. Indeed, more than two-thirds of children who remain in foster care for 2 years or longer will experience 3 or more changes of placement.²⁵ Placement changes are extremely harmful to a child's development and well-being for several reasons. First, children who have experienced multiple moves are less likely to form the kind of "stable attachments that undergird healthy social, mental, and emotional development."²⁶ "This is an especially critical concern for children ages 5 and under—the largest group of children in foster care—given the important role that strong and early life attachments play in healthy human development."²⁷

Second, longer periods in foster care are associated with greater risk of remaining in foster care and consequently aging out of the foster care system (i.e., turning 18 years old). After spending 12 to 18 continuous months in foster care, a child's chances of leaving the system fall precipitously. After 36 to 42 months of continuous months in foster care, a child's chances of leaving are essentially zero.²⁸ For example, as illustrated in Figure 1,²⁹ among "children who enter foster care at 12 years old or older, 70.47% had foster care as their last known placement or aged out of foster care; that percentage increases as the time spent in foster care increases, approaching 90% after 24 months and 100% after 36 continuous months in foster care."³⁰ Because LGBTQ individuals and couples are more likely to adopt children 12 years or older, the Proposed Rule makes it a virtual certainty that the percentages for the first 3 years in the system will rise and even more of these children will not be adopted.³¹

²³ See *supra* n.13.

²⁴ See *id.*

²⁵ See, e.g., Lanette Azzi-Lessing, *The Hidden Harms of the US Foster-Care System*, THE CONVERSATION (Jan. 22, 2016), <https://theconversation.com/the-hidden-harms-of-the-us-foster-care-system-49700>.

²⁶ *Id.*

²⁷ *Id.*

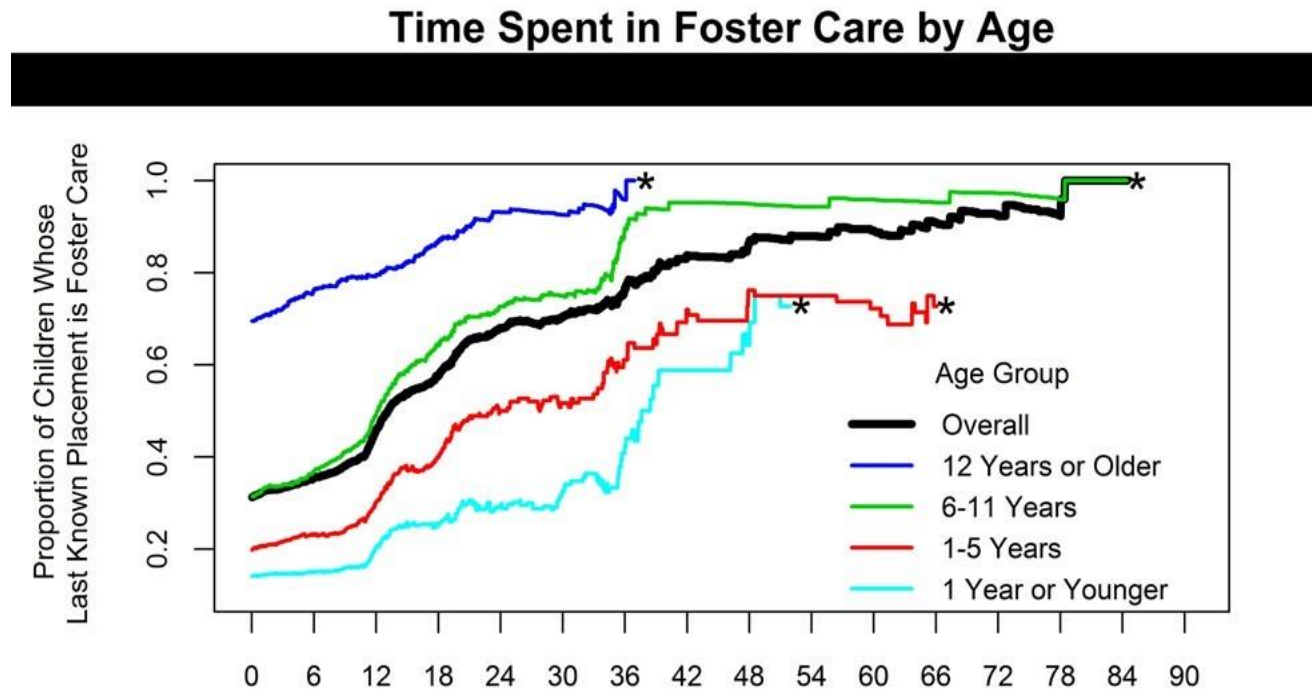
²⁸ National Survey of Child and Adolescent Well-Being, *No. 19: Risk of Long-Term Foster Care Placement Among Children Involved with the Child Welfare System*, https://www.acf.hhs.gov/sites/default/files/opre/nscaw_ltfc_research_brief_19_revised_for_acf_9_12_13_edit_clean.pdf ("Among children who spent 36 or more continuous months in foster care, foster care was the last known placement type for 77%.")

²⁹ See *id.*, Fig. 1. "*" indicates the point where the number of cases reaching the corresponding duration (i.e., 84 months) is 10 or fewer; at this point the line is cut off. Note that although the horizontal axis in Figure 1 is labeled in months, the proportions were computed for each possible number of days in foster care (i.e., 0 days, 1 day, up to 2,760 days or approximately 7.5 years). Also, note that dips in the lines represented in this figure can occur when children return home from foster care but later return to foster care again.

³⁰ *Id.* at 5.

³¹ See Frank J. Bewkes et al., *Discrimination Against LGBTQ Foster and Adoptive Parents Hurts Children*, CENTER FOR AMERICAN PROGRESS (Nov. 20, 2018), <https://www.americanprogress.org/issues/lgbtq-rights/reports/2018/11/20/461199/welcoming-all-families/>.

Figure 1: Proportion of children whose last known placement is foster care by number of months spent in care and age.



In addition to older children, LGBTQ individuals and couples are more likely to adopt children that are statistically less likely to be adopted, including children with special needs, and African American children (e.g., the median length of stay for Black children (56.6 months) is significantly higher than those of their Caucasian and Latino peers (49.1 and 38.5 months, respectively)).³²

Third, impeding the ability of LGBTQ individuals and couples to adopt children who are less likely to be adopted means that these children are more likely to age-out of the foster care system. It is not surprising that children who age-out fare poorly when compared to their peers. These children have a significantly greater risk of being homeless, chronically unemployed, or incarcerated, and they often struggle with mental health and substance abuse issues. The homelessness and incarceration statistics are particularly troubling.³³ A recent study estimated that 25 percent of

³² S.P. Kemp & J.M. Bodonyi, *Beyond Termination: Length of Stay and Predictors of Permanency for Legally Free Children*, CHILD WELFARE, at 58, 58–86 (Dec. 31, 2001).

³³ Patrick J. Fowler et al., *Homelessness and Aging Out of Foster Care: A National Comparison of Child Welfare-Involved Adolescents*, 77 CHILDREN & YOUTH SERVS. REV. 27 (June 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5644395/>; see also *id.* (“Several recent studies link aging out with subsequent housing problems. A two-year follow-up of aged-out youth in a large Midwestern metropolitan area estimates one-fifth remain continuously inadequately housed, while an additional 30% of youth experience at least one night of homelessness.”); Gary J. Gates, M.V. Lee Badgett, *Adoption and Foster Care by Gay and Lesbian Parents*

young adults who age-out of the foster care system will experience homelessness within the first year of leaving foster care, and half of these youth will be homeless within the first 4 years.³⁴ Similarly, almost half of all foster care youth end up in prison within 2 years of aging out of the system.³⁵ By impeding the ability of LGBTQ individuals and couples to adopt or foster children, the Proposed Rule will worsen these already alarming statistics.

C. The Proposed Rule Will Lead To More States And Federally Funded Agencies Separating Children From Their Relatives

By allowing states and federally funded agencies to discriminate against prospective LGBTQ couples, the Proposed Rule will also likely limit a child's family placement options. Under the Proposed Rule, children may not be placed with an LGBTQ family that shares the child's religious faith, even if such a placement is desired or otherwise beneficial. Even more troubling, however, the Proposed Rule may allow agencies, based on their religious beliefs, to refuse to place children in foster care with members of their extended family—a practice widely considered by advocates to be in the best interest of the child.³⁶ Accordingly, the home of a loving and nurturing LGBTQ aunt, uncle, or grandparent, or any other willing and competent LGBTQ relative, could be deemed an unsuitable placement for a child. “This outcome is contrary to the guiding principle in child welfare to prioritize the placement of children within their family of origin whenever a relative is able, willing, and eager to step in.”³⁷

II. The Proposed Rule Will Negatively Impact LGBTQ Children In Particular

Although the Proposed Rule will adversely impact all children, this is especially true with respect to LGBTQ children. Between 19 percent and 23 percent of children in the U.S. foster care system identify as LGBTQ.³⁸ LGBTQ children are overrepresented in the system by at least a factor of two.³⁹ “Many LGBTQ youth in the child welfare system are there because of rejection from their

in the United States, THE WILLIAMS INSTITUTE (Mar. 2007), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Badgett-Macomber-Chambers-Final-Adoption-Report-Mar-2007.pdf>.

³⁴ Jill Bloch, *Youth Aging Out of Foster Care Need a Runway, Not a Cliff*, YOUTH TODAY (Mar. 5, 2019), <https://youthtoday.org/2019/03/youth-aging-out-of-foster-care-need-runway-not-a-cliff/>.

³⁵ Chris Peak, *This Is How You End The Foster Care To Prison Pipeline*, NATIONSWELL (Mar. 16, 2016), <https://nationswell.com/first-place-for-youth-foster-care-transitional-support/>.

³⁶ HUMAN RIGHTS CAMPAIGN FOUNDATION, *Disregarding the Best Interest of the Child: Licenses To Discriminate in Child Welfare Services* (Dec. 2017), <https://assets2.hrc.org/files/assets/resources/licenses-to-discriminate-child-welfare-2017.pdf?ga=2.56635247.418824355.1575322361-325579382.1573747410>.

³⁷ *Id.*

³⁸ *See supra* n. 31.

³⁹ Bianca D.M. Wilson et al., *Sexual and Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles*, THE WILLIAMS INSTITUTE, HOLARCHY CONSULTING, & WESTAT (2014), https://www.acf.hhs.gov/sites/default/files/cb/pii_rise_lafys_report.pdf; Megan Martin, Leann Down, & Rosalynd Erney, *Out of the Shadows: Supporting LGBTQ Youth in Child Welfare Through Cross-System Collaboration*, CENTER FOR THE STUDY OF SOCIAL POLICY (2016), <https://cssp.org/wp-content/uploads/2018/08/Out-of-the-Shadows-Supporting-LGBTQ-youth-in-child-welfare-through-cross-system-collaboration-web.pdf>.

biological families as a result of making their sexual orientation known.”⁴⁰ Others experience multiple placements because their foster families return them after learning of their sexual orientation.⁴¹ This rejection places LGBTQ youth at a greater risk of negative life outcomes: because of their rejection, these children may have increased chances of physical health and mental health challenges, illegal drug abuse, HIV, depression, suicide, as well as lower self-esteem.⁴²

HHS previously recognized the need to protect LGBTQ youth in foster care. In 2016, it published an Information Memorandum stating that LGBTQ children are entitled to “safe, loving and affirming foster care placement.”⁴³ The Proposed Rule contravenes this statement in several ways. First, it negatively impacts the willingness of LGBTQ youth to accept and disclose their sexual orientation or gender identity.⁴⁴ Indeed, some LGBTQ youth may choose to hide their sexual orientation or gender identity from their caseworkers and caregivers or go along with harmful efforts to “convert” them for fear of losing permanency.⁴⁵

Second, it increases the likelihood that LGBTQ youth will be placed with anti-LGBTQ families who do not affirm—and in some instances, actively disavow—their sexual orientation or gender identity. “LGBTQ youth report being pressured by their foster parents or coworkers to join religious support groups that claim success in altering a person’s sexual orientation or gender identity.”⁴⁶

Finally, assuming LGBTQ children are able to receive post-adoption services—and they may not—many may not receive support and services that are affirming of their sexual orientation or gender identity. This is because faith-based adoption agencies that provide post-adoption services may not, and often do not, offer LGBTQ-affirming counseling. And because many adoption services refer children and families to post-adoption services (unlike Barker, which provides these services directly), the Proposed Rule allows these agencies to refer to services that are not LGBTQ-affirming. These services could impose discredited sexual orientation change efforts on LGBTQ youth. For example, it is estimated that 20,000 LGBTQ youth (ages 13-17) will receive conversion

⁴⁰ The Annie E. Casey Foundation, *LGBTQ in Child Welfare A Systematic Review of the Literature* (2016), <https://www.aecf.org/resources/lgbtq-in-child-welfare/>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ U.S. DEP’T OF HEALTH & HUMAN SERVS., ADMIN. ON CHILDREN, YOUTH & FAMILIES, *Information Memorandum* (Apr. 6, 2011), available at <https://www.acf.hhs.gov/sites/default/files/cb/im1103.pdf>.

⁴⁴ Anna North, *A New Trump Administration Rule Could Hurt LGBTQ Youth In Foster Care*, VOX (Nov. 7, 2019), <https://www.vox.com/2019/11/5/20947709/trump-hhs-lgbt-lgbtq-youth-foster-care>.

⁴⁵ Christy Mallory et al, *Conversion Therapy and LGBT Youth* (Jan. 2018), THE WILLIAMS INSTITUTE, <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Conversion-Therapy-LGBT-Youth-Jan-2018.pdf>.

⁴⁶ Rob Woronoff et al., *Out of the Margins: A Report on Regional Listening Forums Highlighting the Experiences of Lesbian, Gay, Bisexual, Transgender, and Questioning Youth in Care*, CHILD WELFARE LEAGUE OF AMERICA, INC. & LAMBDA LEGAL DEFENSE & EDUCATION FUND, INC. (2006), <https://www.lambdalegal.org/sites/default/files/publications/downloads/out-of-the-margins.pdf>.

therapy from a licensed health care professional before they reach the age of 18 in the states that do not ban the practice.⁴⁷

This potential collective harm to LGBTQ youth is addressed by an article published in the Washington Post on December 19, 2019. The article discusses the findings of the research team at the *What We Know Project*, an initiative of Cornell University’s Center for the Study of Inequality.⁴⁸ The project sought to “better understand what is known about the link between discrimination and LGBT well-being ... conducting the largest known review of the peer-reviewed scholarship on the relationship between anti-LGBT discrimination and health harms.”⁴⁹ 11,000 peer-reviewed articles were screened, ultimately yielding 300 articles from U.S. studies that investigated a link between anti-LGBT discrimination and health and well-being. “Nearly 82 percent (245 studies) found unambiguous evidence that discrimination on the basis of sexual orientation or gender is associated with harm to the health of LGBT peoples Overall, more than 95 percent of the 300 studies showed a connection between discrimination and health harms for LGBT people.”⁵⁰ This further underscores the importance of the current rule and supports why the current rule should not be superseded.

III. The Proposed Rule Will Negatively Impact Prospective LGBTQ Parents

The Proposed Rule is a deceptive attempt to discriminate and unfairly stigmatize prospective LGBTQ parents, both individuals and couples. To date, *every* relevant study highlights the importance of laws and policies that encourage and support adoption and fostering by LGBTQ couples.⁵¹ Not only does the Proposed Rule willfully ignore this research, it appears intent upon harming and humiliating LGBTQ individuals. It tells them that they are somehow lesser; that they are less equipped to raise children and are less worthy of serving as parents. To the contrary, research has shown time and time again that children raised in same-sex households fare as well, if not better, than children of different-sex parents.⁵²

Subjecting prospective LGBTQ adoption and foster families to the painful and humiliating experience of government-sanctioned discrimination—which is not ameliorated by being able to eventually work with another agency—creates a deterrent that not only denies children waiting to be adopted access to permanency, but makes it less likely that these individuals or couples will adopt or foster. This is why the vast majority of welfare advocacy organizations demand an individual assessment of every prospective foster parent’s ability to care for a child and expressly

⁴⁷ See *supra* n.45 at 1.

⁴⁸ Nathaniel Frank & Kellan Baker, *Anti-LGBT Discrimination Has a Huge Human Toll. Research Proves It*, Wash. Post, Dec. 16, 2019, <https://www.washingtonpost.com/outlook/2019/12/19/anti-lgbt-discrimination-has-huge-human-toll-research-proves-it/>.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See THE WILLIAMS INSTITUTE, *Same-sex Parenting in the U.S.* (July 31, 2018), <https://williamsinstitute.law.ucla.edu/press/same-sex-parenting/>.

⁵² Henny Box et al., *Lesbian and Heterosexual Two-Parent Families: Adolescent-Parent Relationship Quality and Adolescent Well-Being*, J. CHILD & FAMILY STUDIES, Jan. 2014, at 1.

reject discrimination against prospective adoption or foster parents for reasons unrelated to their ability to care for a child. But the Proposed Rule expressly contravenes this principle. It shuts the door on many willing, loving, and eager prospective parents simply because of their sexual orientation.

By authorizing and allowing states and federally funded agencies to discriminate against individuals and families based on their sexual orientation, the Proposed Rule not only erects unfair barriers to adoption and fostering, it unfairly brands and stigmatizes LGBTQ individuals and couples.

CONCLUSIONS AND RECOMMENDATIONS

The Proposed Rule should not become final. It is an arbitrary and capricious attempt to enshrine anti-LGBTQ law. HHS does not name any child welfare organization that touts the Proposed Rule as being in the best interest of children. Nor is the Proposed Rule supported by any peer-reviewed literature in the field of social work that refutes the ability or fitness of LGBTQ individuals and couples to serve as parents. HHS itself offers none. And perhaps most importantly, the Proposed Rule is not supported by any data. There is no data that calls into question the ability of LGBTQ individuals or couples to serve as loving and supportive parents, capable of raising well-adjusted children of all sexual orientations and gender identities. Not surprisingly, HHS has not presented any.

For the foregoing reasons, Barker urges HHS to retain the current language of 75 C.F.R. § 75.300(c) and (d). It should remain a public policy requirement of HHS that no person otherwise eligible for adoptive or foster parenting will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation. Recipients of HHS funding should be required to continue to comply with this public policy requirement in the administration of adoptive or foster programs supported by HHS awards, and all recipients should be required to continue to treat as valid the marriages of same-sex couples.

If you should have any questions regarding these comments, please contact Sue Hollar, Executive Director & CEO, at 301-664-9664 or shollar@barkerfoundation.org, or Cynthia Cubbage, Director of Family and Post-Adopt Services, at 301-664-9664 or ccubbage@barkerfoundation.org.

Sincerely,

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