

Comments of The Barker Adoption Foundation
Submitted During Its Meeting with
Office of Management and Budget, Office of Information and Regulatory Affairs
June 19, 2020
3:00-3:30 pm

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

The Barker Adoption Foundation (“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.

<https://www.barkeradoptionfoundation.org/>

Introduction provided by Antonio Reynolds, Partner at Wiley and adoptive LGBTQ father of two children from the foster care system. Professional bio: <https://www.wiley.law/people-AntonioReynolds>

- Children need safe and permanent families, and the LGBTQ community serves a significant percentage of the more than 400,000 children in our nation’s foster care system. According to the Williams Institute, same-sex couples are six times more likely than their different-sex counterparts to be raising foster children. Williams Inst., *LGBT Parenting in the United States*, Feb. 2013, <https://williamsinstitute.law.ucla.edu/publications/lgbt-parenting-us/>. These studies were cited in Barker’s Comments on the Proposed Rule.
- The Proposed Rule would allow persons, organizations, and government entities who discriminate based on gender identity and sexual orientation to receive HHS grants.

- In *Bostock v. Clayton County, Georgia*, No. 17-1618, 590 U.S. ____ (June 15, 2020), the U.S. Supreme Court ruled—in a 6-3 decision—that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” Slip op. at 9. While the context of *Bostock* was employment discrimination under Title VII, the implications are far broader. In sweeping terms, *Bostock* holds that “discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.” *Id.* at 19. HHS would surely not condone an adoption agency that refused to place children with men or with women because HHS recognizes that sex-based discrimination is simply not acceptable. Now that the Supreme Court has clarified that sex-based discrimination includes discrimination based on sexual orientation and gender identity, HHS must withdraw this Proposed Rule.
- HHS does not identify any specific or regulatory burdens of the current rule, nor does it identify who, specifically, is harmed or burdened by the current rule. Of equal note, no court had held that the current regulation is improper on its merits.
- All the major child welfare advocacy organizations in the United States uniformly oppose allowing sexual orientation as a placement factor in the public child welfare system.
- The landscape and make up of our nation have changed, and this week’s U.S. Supreme Court decision related to the rights of individuals who identify as LGBTQ should cause the Administration to pause and consider the implications of proceeding with a rule that so blatantly permits discrimination and harms the wellbeing of children.

Societal Impact of this Proposed Rule provided by Cynthia Cubbage, Director of Family and Post Adoption Services at The Barker Adoption Foundation and adoptive LGBTQ parent of two children. Professional bio: <https://www.barkeradoptionfoundation.org/about-us/staff>

- The Proposed Rule negatively impacts children waiting to be adopted because it:
 1. 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 the Proposed Rule 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.”
- I want to tell you about my LGBTQ Adoptive Family. I am not “less capable of serving as a parent.” My children have given back to this nation through participation in local, national, and international relief efforts to provide financial, food, and other essential needs

assistance to ALL types of families in need. One of my children is a Latino Academic Scholar for the state we live in, and the other is a leader in the school's climate committee that focuses on bringing about positive change in the school community and outside the school community. These accomplishments in our LGBTQ Adoptive Family are all a part of our family values, and this Proposed Rule would negatively impact families created like ours.

- The Proposed Rule does not focus on children and youth in foster care, but rather the needs of agencies that serve them. The fundamental guiding principle of the child welfare system is that decisions must always be made in the best interests of the child. This Proposed Rule puts the focus squarely on the prejudices of the agencies that serve children.
- Our previously submitted Comments relied heavily upon peer-reviewed research that soundly demonstrated the devastating effects for children and families if this Proposed Rule were to go into effect.
- Among the greatest concerns noted is an expected significant reduction in the pool of qualified parents able to provide adoptive and foster homes. LGBTQ individuals and couples are critical to the public child welfare system with 21.4 percent of same-sex parents raising adopted children (compared to just 3 percent of opposite-sex parents) and 2.9 percent of same-sex parents caring for children in foster care (compared to 0.4 percent of opposite-sex parents).
- By shutting out these loving parents, the Proposed Rule would increase the length of time children spend in foster care, increase resulting health and economic disparities for these vulnerable children, and lower adoption rates, thus resulting in children remaining in foster care and aging out of the public child welfare 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.
- 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. LGBTQ children are overrepresented in the system by at least a factor of two. See page 9 of our December Comments for references to the studies.
- HHS previously recognized the need to protect LGBTQ youth in foster care. In 2016, HHS published an Information Memorandum stating that LGBTQ children are entitled to “safe, loving and affirming foster care placement.” The Proposed Rule contravenes this statement.
- 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. Similarly, almost half of all foster care youth end up in prison within 2 years of aging out of the system. By impeding the ability of LGBTQ individuals and couples to adopt or foster children, the Proposed Rule will worsen these already alarming statistics. See page 8 of our December comments for references to the studies.

- Discrimination has absolutely no place in our child welfare services and Barker strongly rebukes any attempt at such publicly sanctioned discrimination.

Financial Impact provided by Sue Hollar, Executive Director and CEO of The Barker Adoption Foundation: <https://www.barkeradoptionfoundation.org/about-us/staff>

The financial implications of excluding LGBTQ individuals or couples from fostering and adopting children have been studied for decades and the research is clear. The financial implications are negative; in fact, they are devastating. There was an absence of cost/benefit analysis for the Proposed Rule.

- Shrinking the pool of prospective parents through blatant publicly sanctioned discrimination against LGBTQ individuals and couples will cost taxpayers money. For example, youth end up in group homes when there are insufficient foster family homes in which to place them. It costs states seven to 10 times more to place a foster youth in a group home rather than a foster family placement. Frank J. Bewkes et al, *Welcoming All Families: Discrimination Against LGBTQ Foster and Adoptive Parents Hurts Children*, CENTER FOR AMERICAN PROGRESS (Nov. 20, 2018, 8:30 AM) <https://www.americanprogress.org/issues/lgbtq-rights/reports/2018/11/20/461199/welcoming-all-families/>
- Overwhelmingly, adoptions from foster care save taxpayer dollars when compared with funding for children to remain in foster care. The largest portion of federal funding for child welfare comes from Title IV-E of the Social Security Act. Comparing the estimated annual per-child cost of a child receiving adoption assistance with the cost of maintaining a child in foster care, the child adopted from foster care costs the government only 25 percent as much as the child who remains in foster care. *Id.* at 14.
- Due to the complexity of child welfare funding and waivers, however, a recent report looked at the 22 nonwaiver states for the most straightforward approximation of average spending for Title IV-E foster care. *Id.* at 13. These 22 states had 36,645 children eligible for Title IV-E foster care in 2016, based on average monthly estimates. *Id.* The total federal and state/local costs for foster care maintenance payments and administrative costs for these children was \$1.411 billion. The average cost per child was \$38,513. *Id.*
- By comparison, average monthly estimates indicate that there were 456,713 children eligible for Title IV-E adoption assistance in 2016. *Id.* The total federal and state/local costs for adoption assistance payments and administrative costs for these Title IV-E-eligible children were \$4.478 billion. *Id.* The average cost per child was \$9,804. *Id.*

- Comparing the estimated annual per-child cost of a child receiving adoption assistance with the cost of maintaining a child in foster care, the child adopted from foster care costs the government only 25 percent as much as the child who remains in foster care. *Id.* at 14.
- The money saved by moving a child who would otherwise remain in foster care to adoption is significant, even when including ongoing adoption assistance. *Id.* Allowing for discrimination against LGBTQ individuals and couples would directly correspond there being fewer families available to adopt children from foster care. *Id.* That, in turn, likely means more children are aging out of the foster care system without a permanent family, which will cost taxpayers a significant amount of money over the duration of the children's time in care. *Id.* If the child welfare system finds adoptive families for just 1,000 10-year-old children who would otherwise have aged out of foster care at 18, a rough estimate suggests it would save \$230 million of taxpayer money over eight years. *Id.*

These statistics are available from the studies we uploaded to Reginfo before this meeting.

Conclusion (Antonio Reynolds)

Barker joins all the major child welfare advocacy organizations in the United States in our uniform opposition to allowing the use of sexual orientation and sexual identify as a placement factor in the public child welfare system.

Of the 121,039 comments the HHS received on this Proposed Rule, only 8,524 were made publicly available. Perhaps one or more of those remaining 112,515 spoke to the advantages that children would experience as a result of such publicly sanctioned discrimination, but no credible research suggests such benefits to children exist.

- We respectfully and strongly suggest that HHS should clarify the rationale for the Proposed Rule and identify any specific or regulatory burdens of the current rule as well as any cost savings that might counter the increased costs we have identified today. HHS has not presented a cost-benefit analysis. Furthermore, we continue to hold that this Proposed Rule is in direct conflict with the primary and fundamental belief that all children have right to grow up in a safe, stable, and permanent family, including families who are a part of the LGBTQ community.
- We ask that the Proposed Rule be reopened to permit a review of and further comment on any scientific and financial data that HHS may offer in support of the proposition that the proposed discrimination is in the best interest of children.

Thank you.