

July 2, 2021

Shalanda Young  
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Office of Management and Budget  
725 17th Street, NW  
Washington, D.C. 20503

Submitted via <https://www.regulations.gov/>

**Re: Request for Information: Methods and Leading Practices for Advancing Equity and Support for Underserved Communities Through Government (May 5, 2021) [86 FR 24029]**

Dear Ms. Young:

Thank you for the opportunity to comment on Area sections 1, 2, and 5 of the Request for Information (“RFI”) at 86 FR 24029 on *Methods and Leading Practices for Advancing Equity and Support for Underserved Communities Through Government*. Family Equality, Center for the Study of Social Policy, CenterLink: The Community of LGBT Centers, Child Welfare League of America (CWLA), Children's Defense Fund, Equality California, FosterClub, Hugh Lane Wellness Foundation, interACT: Advocates for Intersex Youth, Lambda Legal, National Black Justice Coalition, National Center on Adoption and Permanency, National Center for Lesbian Rights, OutCenter of Southwest Michigan, PFLAG National, True Colors United, and Voice for Adoption are pleased to provide these recommendations on behalf of the [Every Child Deserves a Family Campaign](#)<sup>1</sup> (“Campaign”) for promoting equity in child welfare services for lesbian, gay, bisexual, transgender, queer, questioning, gender nonconforming, nonbinary, intersex, and Two Spirit (“LGBTQ+”) children, families of origin, prospective foster and adoptive parents, kin, and others touched by the child welfare system, as well as children and families with intersectional identities.

We are civil rights, LGBTQ+, and child welfare organizations who are members of the Campaign, which is co-chaired by CWLA, Family Equality, FosterClub, Lambda Legal, PFLAG National, True Colors United, and Voice for Adoption. This Campaign is composed of over 700 faith, child welfare, civil rights, LGBTQ+, and allied organizations and individuals. The Campaign’s mission is to promote the best interests of all children in the foster care and adoption system by supporting families of origin, by promoting family acceptance of LGBTQ+ children, and by increasing the access of all children to affirming, loving and stable homes. The campaign works to ensure safe and supportive care for all children and families, including LGBTQ+ children and families, Black, Indigenous, and other children and families of color, children, parents, and relatives with disabilities, and those with intersectional identities.

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<sup>1</sup>The Campaign has had no public-private partnerships with Federal, State, tribal, territorial, or local governments in the last three years. Please direct any questions about this comment letter to Julie Kruse, Director of Federal Policy at Family Equality, Campaign Co-Chair, at [jkruse@familyequality.org](mailto:jkruse@familyequality.org).

Many of the recommendations herein are derived from the Campaign’s transition recommendations to the Biden-Harris administration, which can be viewed at <https://everychilddeservesafamily.com/transition-recommendations>.

## **Executive Summary**

The primary goal of the child welfare system is to ensure that the best interests of children are served through promoting their well-being, safety, and permanency. LGBTQ+ people touched by the federally funded child welfare system—children, families of origin, foster and adoptive parents, and kin—face well-documented and widespread discrimination and mistreatment while in care and experience disproportionately poor outcomes as a result.

As set forth more fully below:

- Discrimination against, mistreatment of, and denials of service to LGBTQ+ children and youth in foster care are commonplace and lead to well-documented safety concerns, trauma, and poor outcomes for them.
- Discrimination against and denials of service to LGBTQ+ and religious minority foster and adoptive parents prevent, reduce, and delay placements available to children and youth in the U.S. foster care system, reducing the pool of available families and the number of affirming placements for LGBTQ+ and religious minority children and youth.
- Discrimination against LGBTQ+ families of origin and kin and Black, American Indian/Alaska Native (“AIAN”), and other families of color prevents children from maintaining ties to relatives, including being placed with kin.
- LGBTQ+ children, families, and adults of color and transgender, nonbinary, and gender nonconforming people suffer worse outcomes and experiences in child welfare than their white and cisgender counterparts.
- Intersex youth face many of the same challenges as LGBTQ+ youth generally, as well as additional medical traumas and stigma related to their sex characteristics.

With one in three foster youth identifying as LGBTQ+ and reporting abysmal treatment and outcomes,<sup>2</sup> and LGBTQ+ families also facing inequitable barriers in child welfare services, we stand at a crisis point that requires urgent action by the U.S. Department of Health and Human Services (“HHS”). Two critical gaps in urgently needed federal services stand in the way of remedying these

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<sup>2</sup>Laura Baams, Bianca D.M. Wilson, & Stephen T. Russell, *LGBTQ Youth in Unstable Housing and Foster Care*, 143(3): e20174211 *Pediatrics* (2019), available at: <https://pediatrics.aappublications.org/content/pediatrics/early/2019/02/07/peds.2017-4211.full.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), available at: <https://cssp.org/resource/out-of-the-shadows/>; Theo G. M. Sandfort, *Experiences and Well-Being of Sexual and Gender Diverse Youth in Foster Care in New York City : Disproportionality and Disparities*, Administration for Children’s Services (2020), available at: <https://www1.nyc.gov/assets/acs/pdf/about/2020/WellBeingStudyLGBTQ.pdf>; Marlene Matarese, Angela Weeks, Elizabeth Greeno, & Paige Hammond, *The Cuyahoga youth Count: A Report on LGBTQ+ Youth Experience in Foster Care*, The Institute for Innovation and Implementation (2021), available at: <https://theinstitute.umaryland.edu/institute-news/study-finds-overrepresentation-of-lgbtq-youth-in-midwest-foster-care-system.php>

inequities: (1) a lack of sexual orientation and gender identity (“SOGI”) data collection on LGBTQ+ children, adults, and families in federally funded child welfare services; and (2) a lack of nondiscrimination protections and enforcement for these same people. The dearth of nationwide SOGI data collection on LGBTQ+ children, families of origin, foster and adoptive parents, and kin obfuscates the harms and inequities these groups face in child welfare and is a barrier to effectively remedying the inequities. The lack of nondiscrimination regulation and enforcement sends a terrible message to federally funded service providers: that discrimination and inequities are acceptable and can continue.

With all this in mind, we urge HHS to take immediate steps to address these inequities and barriers in federally funded child welfare services:

1. Reinstate requirements that sexual orientation and tribal data be collected in the HHS Adoption and Foster Care Analysis and Reporting System (“AFCARS”); and, add gender identity to the list of required data elements in AFCARS.
2. Resume immediate enforcement of the HHS grants rule barring discrimination based on sexual orientation, gender identity, religion, and other characteristics; and clearly communicate to states, tribes, and agencies that such discrimination is unlawful.
3. Carry out additional changes, as detailed below, to training and technical assistance for grantees, HHS programs and policies, as well as research and dissemination of effective program models to serve this population.
4. Engage LGBTQ+ youth and young adults with lived experience in foster care—as well as foster parents, families of origin, and kin—in policy and program development.

As set forth below, it is urgent that HHS take immediate steps to address this crisis.

**Background: LGBTQ+ children and adults face significant inequities in child welfare services.**

*We are seeing a rise in hostility toward LGBTQ+ foster youth in rural and small town communities. The situation is particularly dire for trans youth of color in those areas, and I literally fear for their lives. We must address this crisis. If we take action to improve the lives of rural trans foster youth of color, it will have a ripple effect and improve the lives and outcomes of all foster youth.*<sup>3</sup>

*-Mary Jo Schnell, Executive Director, [OutCenter of Southwest Michigan](#), June 10, 2021*

The situation of LGBTQ+ children, families of origin and kin, and foster and adoptive parents impacted by the child welfare system is dire. Discrimination occurs in child welfare systems across the U.S. Eleven states have passed laws explicitly allowing anti-LGBTQ+ discrimination in child welfare services; in at least eight of them, those laws extend to agencies that are funded with federal tax dollars.<sup>4</sup> Only seven states and the District of Columbia have laws or regulations explicitly prohibiting

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<sup>3</sup> Mary Jo Schnell Statement to Family Equality (June 10, 2021), available to OMB upon request.

<sup>4</sup> *State Foster Care & Adoption Resources*, Every Child Deserves a Family (Jun. 16, 2021), available at: <https://everychilddeservesafamily.com/state-resources>.

discrimination against qualified potential foster parents on the basis of SOGI, and only 15 states prohibit discrimination against all LGBTQ+ children in care.<sup>5</sup> Unfortunately, research shows that, even in those states, discrimination and mistreatment persist, underscoring the need for federal action to address inequities.

### Discrimination Faced by LGBTQ+ Foster Children

The experiences and outcomes of the one in three youth in foster care who identify as LGBTQ+<sup>6</sup> are nothing short of horrific. They are twice as likely to report mistreatment while in foster care, compounding the trauma of neglect or abuse they experienced prior to entering care, as well as the trauma of removal.<sup>7</sup> Numerous studies show that LGBTQ+ youth experience longer stays in residential care rather than in family-like settings and greater rates of multiple placements, criminal justice involvement, hospitalization for emotional reasons, and homelessness.<sup>8</sup> Indeed, foster care is a primary pathway for LGBTQ+ youth entering homelessness.<sup>9</sup>

A recent survey by the Trevor Project of over 40,000 youth showed that LGBTQ+ youth in foster care had nearly three times greater odds of reporting a past-year suicide attempt compared to LGBTQ+ youth who were never in care (35% vs. 13%); these numbers were even higher for LGBTQ+ youth of color in care (38%) and highest for transgender and nonbinary youth in care (45%). LGBTQ+ youth who had been in foster care had over three times greater odds of being kicked out, abandoned, or running away due to treatment based on their LGBTQ+ identity compared to those who were never in care (27% vs. 8%); these numbers were even higher for LGBTQ+ youth of color (30%) and highest for transgender and nonbinary youth (40%).<sup>10</sup>

In addition to suffering the same kinds of discrimination, stigma, and abuse as other LGBTQ+ youth, those born intersex also suffer medical trauma from non-consensual early genital or sterilizing surgeries—sometimes with state agencies consenting on behalf of the child.<sup>11</sup> An estimated 1.7 percent of the population is born with intersex traits, meaning millions of Americans are intersex. Based on this

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<sup>5</sup> *Id.*

<sup>6</sup> *Supra* n. 3.

<sup>7</sup> Bianca D.M. Wilson, Khush Cooper, Angeliki Kastanis, & Sheila Nezhad, *Sexual and Gender Minority Youth in Foster care: Assessing Disproportionality and Disparities in Los Angeles*, The Williams Institute (2014), available at: <https://williamsinstitute.law.ucla.edu/publications/sgm-youth-la-foster-care/>

<sup>8</sup> *Id.*

<sup>9</sup> See Berberet, H. M. (2006). *Putting the Pieces Together for Queer Youth: A Model of Integrated Assessment of Need and Program Planning*. Need and Program Planning. *Child Welfare*, 85, 2; Nicholas Forge, Robin Hartinger-Saunders, Eric Wright, & Erin Ruel, *LGBTQ Youth Face Greater Risk of Homelessness as They Age Out of Foster Care*, Urban Institute (2019), available at: <https://housingmatters.urban.org/research-summary/lgbtq-youth-face-greater-risk-homelessness-they-age-out-foster-care>

<sup>10</sup> *National Survey on LGBTQ Youth Mental Health 2020*, The Trevor Project (June 16, 2021), available at: <https://www.thetrevorproject.org/s>

<sup>11</sup> Amnesty International, *First, Do No Harm: Ensuring the Rights of Children Born Intersex* (2017), available at: <https://www.amnesty.org/en/latest/campaigns/2017/05/intersex-rights/>; Human Rights Watch, “*I Want to be Like Nature Made Me*”: *Medically Unnecessary Surgeries on Intersex Children in the US* (2017), available at: <https://www.hrw.org/report/2017/07/25/i-want-be-nature-made-me/medically-unnecessary-surgeries-intersex-children-us>; Physicians for Human Rights, *Unnecessary Surgery on Intersex Children Must Stop* (Oct. 20, 2017), available at: <https://phr.org/news/unnecessary-surgery-on-intersex-children-must-stop/>.

estimate, there could be over 60,000 intersex births in the U.S. every year, and thousands of intersex youth in foster care.<sup>12</sup>

### Discrimination Against Prospective Foster Parents

LGBTQ+ adults seeking to foster or adopt also face widespread discrimination. Far too often, agencies turn away qualified LGBTQ+ families, which prevents, deters, and delays them from providing safe and loving homes to children in need.<sup>13</sup> With over 420,000 children in foster care, 120,000 of whom are eligible for adoption,<sup>14</sup> such discrimination deprives children in the system of safe, loving families.<sup>15</sup> Indeed, given that same-sex couples are seven times more likely to foster and adopt than their opposite-sex counterparts,<sup>16</sup> and are more likely to foster and adopt harder-to-place children (including older children, those with disabilities, and large sibling groups),<sup>17</sup> discrimination reduces the pool of foster and adoptive parents. Turning away qualified LGBTQ+ parents is particularly harmful to the one in three youth in care who identify as LGBTQ+, as it reduces the number of affirming families and sends a message that they are less worthy and less capable of forming loving families of their own.<sup>18</sup>

Limiting the pool of foster parents by allowing discrimination will also increase placement instability for all youth, regardless of their sexual orientation or gender identity. It is not sufficient to simply have enough foster parents for the number of children in the system. Child welfare agencies need to have a diverse array of foster parents in order to find the *right* family for each child. Limiting the pool of foster parents by faith, sexual orientation, or gender identity prevents agencies from effectively matching children to families that can support and affirm the diverse and complex identities and needs of children in care, which ultimately leads to placement disruptions and worse outcomes for children.

In addition, when federally funded agencies turn away qualified prospective parents because they do not subscribe to the agency's religious tenets, the pool of available families is limited to that agency's religion and faith tradition. HHS guidance specifies that children have the right to "[p]lacement in a

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<sup>12</sup> Melanie Blackless et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 AM. J. HUM. BIOL. 151-166 (2000).

<sup>13</sup> Brief for Family Equality & PFLAG National as Amicus Curiae, *Fulton v. City of Philadelphia*, No. 19-123 (S.Ct.), filed Aug. 20, 2020), available at: <https://www.familyequality.org/wp-content/uploads/2020/08/2020-08-Family-Equality-PFLAG-Amicus-Brief-Fulton.pdf>.

<sup>14</sup> *The AFCARS Report*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, ADMINISTRATION ON CHILDREN, YOUTH AND FAMILIES CHILDREN'S BUREAU, (2020) available at: <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf>

<sup>15</sup> Brief for Family Equality & PFLAG National as Amicus Curiae, *Fulton v. City of Philadelphia*, No. 19-123 (S.Ct.), filed Aug. 20, 2020), available at: <https://www.familyequality.org/wp-content/uploads/2020/08/2020-08-Family-Equality-PFLAG-Amicus-Brief-Fulton.pdf>.

<sup>16</sup> Danielle Taylor, *Same-Sex Couples are More Likely to Adopt or Foster Children*, United States Census Bureau (2020), available at: <https://www.census.gov/library/stories/2020/09/fifteen-percent-of-same-sex-couples-have-children-in-their-household.html>. (last visited Dec 10, 2020).; Shoshana K. Goldberg & Kerith J. Conron, *How Many Same-Sex Couples in the U.S. Are Raising Children?*, The Williams Institute (July 2018), available at: <https://williamsinstitute.law.ucla.edu/publications/same-sex-parents-us/>

<sup>17</sup> *Expanding Resources For Waiting Children II: Eliminating Legal and Practice Barriers to Gay and Lesbian Adoption from Foster Care*, Evan B. Donaldson Adoption Institute at 12 (Sept. 2008) ("Donaldson Report"), available at: <https://docplayer.net/63117222-Policy-practice-perspective.html>

<sup>18</sup> *Supra* n.12

setting ... where their religious customs can be maintained.”<sup>19, 20</sup> And, CWLA’s Standards of Excellence for Family Foster Care Services includes “designation of the child’s religion” among the choices that parents of children in foster care “have the right to ... make.”<sup>21</sup>

Placing children in homes that share or support their faith tradition is important to a child’s identity and faith, and it makes for a smoother reintegration for the nearly half of children in care who return to their family of origin.<sup>22</sup> Finally, turning away qualified foster parents because they do not align with a placement agency’s faith may result in the agency rejecting placement with a child’s extended family members. Research shows that “children experience better outcomes with kin across three major domains: improved placement stability, higher levels of permanency, and decreased behavior problems.”<sup>23</sup> Thus, refusing placements with kin based on their religious beliefs (or any other reason unrelated to the ability to parent) is contrary to the requirement that an agency act in the best interest of the child.

### Discrimination Faced by LGBTQ+ Families of Origin and Kin

Decades of social science research shows that LGBTQ+ parents do just as well as heterosexual parents at raising happy, healthy, and well-adjusted children.<sup>24</sup> Yet, discrimination places LGBTQ+ parents at greater risk of involvement with the child welfare system. A recent study showed that lesbian and bisexual mothers are four times more likely to have lost their children to the state in child welfare proceedings than their non-LGB counterparts;<sup>25</sup> for Black, AIAN, and other families of color, this compounds the disproportionality they already face in removals.<sup>26</sup> And, to make matters worse, agency workers and court personnel are often unaware of the state’s parentage law and fail to identify that a

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<sup>19</sup> Child Welfare Information Gateway, *Reunification: Bringing Your Children Home From Foster Care*, U.S. D.H.H.S. Children’s Bureau (2016), available at: <https://www.childwelfare.gov/pubPDFs/reunification.pdf>.

<sup>20</sup> An increasing number of Americans identify as non-religious. Discrimination against non-religious prospective foster parents by faith-based agencies reduces the availability of appropriate placements for children from non-religious families of origin.

<sup>21</sup> Child Welfare League of America, *Standards of Excellence for Family Foster Care Services*, CWLA (1995).

<sup>22</sup> *Supra* n.14.

<sup>23</sup> Child Focus, *Children in Kinship Care Experience Improved Placement Stability, Higher Levels of Permanency, and Decreased Behavioral Problems: Findings from the Literature*, Child Focus, available at: [http://grandfamilies.org/Portals/0/4-%20Kinship%20Outcomes%20Review%20Handout\\_1.pdf](http://grandfamilies.org/Portals/0/4-%20Kinship%20Outcomes%20Review%20Handout_1.pdf).

<sup>24</sup> See, e.g., Michael E. Lamb, *Mothers, Fathers, Families, and Circumstances: Factors Affecting Children’s Adjustment*, 16 APPLIED DEV. SCI. 98, 104 (2012); *Obergefell v. Hodges*, 135 S.Ct.2584, 2600 (2015) (“[A]ll parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted.”).

<sup>25</sup> Kathi L.H Harp & Carrie B. Oser, *Factors associated with two types of child custody loss among a sample of African American mothers: A novel approach*, 60 SOCIAL SCIENCE RESEARCH 283-296 (2016).

<sup>26</sup> See, *Disproportionality and Race Equity in Child Welfare*, NATIONAL CONFERENCE OF STATE LEGISLATURES (2021), available at: <https://www.ncsl.org/research/human-services/disproportionality-and-race-equity-in-child-welfare.aspx>; *Disproportionality in Child Welfare Fact Sheet*, NATIONAL INDIAN CHILD WELFARE ASSOCIATION, available at: <https://www.nicwa.org/wp-content/uploads/2019/10/2019-AIAN-Disproportionality-in-Child-Welfare-FINAL.pdf>; Alicia Summers, *Disproportionality Rates for Children of Color in Foster Care*, National Council of Juvenile and Family Court Judges (2019), available at: <https://www.falmouthinstitute.com/files/LW060/NCJFCJ%202014%20Disproportionality%20TAB%20Final.pdf>; Rowena Fong, Georgina Petronella, *Underrepresented Populations in the Child Welfare System: Asian American and Native Hawaiian Islander Populations*, Child Maltreatment (Contemporary Issues in Research and Policy), vol 11 (2021), available at: [https://link.springer.com/chapter/10.1007/978-3-030-54314-3\\_7](https://link.springer.com/chapter/10.1007/978-3-030-54314-3_7)

parent's same-sex partner or former same-sex partner is also a parent under state law, entitled to reunification efforts, assistance of counsel where provided by state law, and kinship consideration.

Finally, Family Equality has received numerous stories from LGBTQ+ people who have been turned away from kinship care because of their sexual orientation or gender identity.<sup>27</sup> That is the case even though, as noted above, children experience better outcomes with kin.<sup>28</sup> When LGBTQ+ kin are turned away, children are denied the opportunity to remain connected to their families and their culture and face greater instability and worse outcomes as a result.

Given the pervasive discrimination described above, we urge HHS to take rapid action to improve care for LGBTQ+ youth, adults, and families, as outlined below.

### **Section 1: Equity Assessments and Strategies**

To identify and address mistreatment and poor outcomes that are disproportionately experienced by LGBTQ+ youth, the child welfare system must collect SOGI information for the children in its custody, their parents, and their caregivers. The data cited above on discrimination faced by LGBTQ+ young people in the child welfare system is based on localized studies, some funded by HHS, including seminal studies in California, Ohio, and New York City.<sup>29</sup> The geographic diversity of these studies, and the similarity in the results, indicate that the disproportionately poor outcomes experienced by LGBTQ+ children in care is commonplace across the U.S. However, such localized, one-time studies are NOT a substitute for the systematic data collection needed for foster care programs to identify and remedy inequities faced by LGBTQ+ children and families everywhere.

We need additional, consistent, and ongoing data collection to better understand and effectively address the needs of LGBTQ+ people whose lives are impacted by the child welfare system, especially children and youth. Put simply, it is impossible to identify and solve problems we can't quantify. As such, we strongly urge HHS to: (1) immediately reverse the 2020 AFCARS rule, 85 FR 28410<sup>30</sup> which eliminated sexual orientation data collection for children, youth, parents and guardians, as well as critically important data points needed for the implementation of the Indian Child Welfare Act (ICWA); and (2) issue new rulemaking to require data collection on gender identity of children, parents, and guardians in AFCARS.

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<sup>27</sup> See Every Child Deserves a Family, *Adoption & Foster Care Stories*, available at: <https://everychilddeservesafamily.com/stories> (last visited June 16, 2021); see also, Family Equality, *Story Library Archive*, available at: <https://www.familyequality.org/stories/> (last visited June 16, 2021).

<sup>28</sup> Child Focus, *supra* n.19.

<sup>29</sup> Wilson, *supra* n.14, at 6.; Matarese, *supra* n.5, at 6-8.; Sandfort, *supra* n.5, at 15.

<sup>30</sup> Administration for Children and Families; Adoption and Foster Care Analysis and Reporting System, 85 FR 28410 (May 12, 2020) (codified at 85 FR 28410).

***1. HHS should act immediately to reverse the 2020 AFCARS rule, 85 FR 28410,<sup>31</sup> which eliminated sexual orientation data collection for children, youth, parents and guardians and critically important data points needed for the implementation of ICWA.***

We urge HHS to immediately reverse the 2020 AFCARS rule, 85 FR 28410, and reinstate the 2016 AFCARS final rule, 45 CFR 1355 (2016 Rule).<sup>32</sup> The AFCARS data system has not been updated since the program's inception in 1993, and does not reflect child welfare practices or protections that have been added to child welfare law over the past 28 years or new state reporting requirements. The 2016 Rule sought to fill a critical gap in information about LGBTQ+ youth and foster and adoptive families by collecting voluntary sexual orientation data on youth over 14 and foster and adoptive parents and guardians. It was developed after numerous public comment periods and requests for information over several years, which clearly demonstrated the need for data collection. Robust data collection in AFCARS helps inform policy and practice to improve treatment and outcomes for children and families. Failure to collect this critical data will hinder our ability to meet the needs of those who are disproportionately failed by the system. Thus, HHS should take immediate steps to reinstate the rule.

Reinstating the 2016 Rule will also restore collection of critical data elements relating to ICWA. The 2016 Rule included crucial data ensuring that the state recognized the unique legal status of AIAN children and complied with all ICWA requirements. Eliminating the collection of demographic information regarding AIAN youth and families negatively impacts another vulnerable population with poor outcomes, and inhibits our ability to learn more about the specific experiences of LGBTQ+ and Two Spirit AIAN children and families.

***2. HHS also must act expeditiously to issue new rulemaking to require data collection on the gender identity of children, parents, and guardians in AFCARS.***

Following reinstatement of the 2016 Rule, HHS should issue a new rulemaking to add voluntary gender identity questions for youth in foster care and foster and adoptive parents and guardians. Given that youth in care, families of origin, and foster and adoptive families also face discrimination based on actual or perceived gender identity or expression, “[y]outh who are transgender and/or gender-expansive often have a difficult time in child welfare systems; violence enacted upon people who are LGBTQ is often not because they are “out” as LGBTQ, but because service providers, caretakers, and peers are policing the youth’s gender behaviors.”<sup>33</sup>

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<sup>31</sup> *Id.*

<sup>32</sup> Administration for Children and Families; Adoption and Foster Care Analysis and Reporting System, 81 FR 90524 (Dec. 14, 2016) (codified at 45 CFR 1355).

<sup>33</sup> Brandon Andrew Robinson, *Child Welfare Systems and LGBTQ Youth Homelessness: Gender segregation, instability, and intersectionality*, *Child Welfare* 96(2), 29-45 (2018) Robinson further states that “mental health treatments and other behavior modifications may be used against youth who are transgender and gender-expansive as a way to modify their gender expression (Mallon & DeCrescenzo, 2006; Marksamer, 2011). Youth of color who are transgender and gender expansive face compounding stressors and experiences of discrimination within child welfare systems, whereby ... racial profiling can shape how some youth’s behaviors, including their gender behaviors, are monitored and disciplined (Mallon & DeCrescenzo, 2006).”

Because of the particular challenges faced by transgender youth in foster care, adding gender identity questions for youth and foster and adoptive parents and guardians will help states and tribes save costs by identifying affirming placements and reducing placement instability.

Child welfare data on sexual orientation and gender identity is urgently needed.

In 2011, guidance from HHS' Administration on Children, Youth and Families ("ACF") confirmed "the fundamental belief that every child and youth who is unable to live with his or her parents is entitled to safe, loving and affirming foster care placement, irrespective of the young person's sexual orientation, gender identity or gender expression."<sup>34</sup> Failure to understand these aspects of a child's identity can lead to poor, uninformed decisions that undermine the child's stability, permanency, safety, and well-being. When agencies know the characteristics and experiences of a young person in out-of-home care, they are able to identify gaps in care and provide needed support to groups experiencing disparities. What isn't counted doesn't count and without adequate data we cannot prioritize the unique needs of LGBTQ+ youth.

Continuing the elimination of questions related to sexual orientation, and continuing to leave out questions related to gender identity in AFCARS, keeps invisible the experiences of LGBTQ+ youth, parents, guardians, and families and leaves the federal government blind to the unique needs of LGBTQ+ individuals and families. The absence of administrative data on the national level makes it impossible to track whether the system is making improvements for LGBTQ+ youth in out-of-home care. More complete and longitudinal data about LGBTQ+ youth and families would allow for a better understanding of their experiences in the foster care system and would inform better evidence-based policies and practices.

The SOGI data elements of youth in foster care can be collected in appropriate and protected ways; models exist for building capacity and providing training for staff collecting data.

Child welfare agencies "routinely collect, record, and manage sensitive information from foster children, foster and adoptive adults, and guardians. The nature of child welfare practice requires workers to establish the necessary rapport and trust to talk with children and families about a range of sensitive, private matters. AFCARS already requires case workers to collect personal, private, and confidential data, including information about sexual exploitation, mental health diagnoses, and physical and sexual abuse."<sup>35</sup> There is no reason to believe that child welfare workers are not equally equipped to collect SOGI information.<sup>36</sup>

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<sup>34</sup> Administration for Children and Families, *ACYF-CB-IM-11-03, Lesbian, Gay, Bisexual, Transgender and Questioning Youth in Foster Care* (April 6, 2011), available at: <https://www.acf.hhs.gov/sites/default/files/cb/im1103.pdf>.

<sup>35</sup> See *Brief of Amici Curiae Family Equality and National Center for Lesbian Rights*, filed in *California Tribal Families Coalition v. Becerra*, Case No. 3:20-cv-6018-MMC (N.D. Cal.) in support of Plaintiffs' Motion for Summary Judgment, available at: [https://www.familyequality.org/wp-content/uploads/2021/07/FE\\_Becerra\\_2021.06.2987-Amicus-Brief-filed603816538.1.pdf](https://www.familyequality.org/wp-content/uploads/2021/07/FE_Becerra_2021.06.2987-Amicus-Brief-filed603816538.1.pdf).

<sup>36</sup> Many public agencies outside the child welfare system already collect SOGI information on youth. Sexual orientation questions have been included on school-based surveys of adolescents for decades through versions of the current Youth Risk Behavior Surveillance Survey distributed by the Center for Disease Control, and SOGI information is collected by many health care providers. Researchers have surveyed LGBTQ+ youth in the juvenile justice system, significantly increasing the profession's understanding of the disproportionate numbers of LGBTQ+ youth in detention, as well as differences in offense and detention patterns. The regulations

Moreover, the child welfare profession has acknowledged the importance of collecting SOGI data from children, along with other critical information about their circumstances, to tailor individualized case plans. In 2013, the Center for the Study of Social Policy, Legal Services for Children, the National Center for Lesbian Rights, and Family Builders by Adoption issued a set of professional guidelines addressing all aspects of managing SOGI information in child welfare systems.<sup>37</sup> The guidelines address the need to collect SOGI information to develop case plans and track outcomes in individual cases and engage in agency planning and assessment.

Adding sexual orientation and gender identity data for adoptive and foster parents and guardians is needed to identify and remediate the systemic inequities they face.

There is a chronic shortage of foster homes in the U.S. Efforts to recruit and retain all qualified families—including LGBTQ+ families—should be a core part of an agency’s recruitment strategy. The LGBTQ+ community is an important resource for children and youth needing both foster and permanent families.<sup>38</sup> Fear of discrimination discourages many prospective LGBTQ+ parents from contacting foster and adoption agencies, however, and service denials can deter or delay them from fostering and adopting, depriving children of homes.<sup>39</sup> A 2020 Center for American Progress study found that “more than 4 in 10 LGBTQ+ Americans overall said that finding a different ... adoption agency would be very difficult if not impossible if they faced a denial of service.”<sup>40</sup> Reported difficulties in finding alternative services was even higher for transgender people.<sup>41</sup>

Requiring collection of SOGI data relating to foster and adoptive parents will support efforts to recruit and utilize LGBTQ+ families, ensuring a more thorough matching and placement process that would provide both a larger number of homes available to children and the greatest chance for success and permanency. Sharon Pierce, the former CEO of [the Villages](#), a large Indiana foster care agency with seven locations throughout the state, stated that the key to finding stable homes for youth “is truly constantly recruiting. Just like a great ball team needs a strong bench strength ... we have to have that strong, diverse cadre of foster parents.”<sup>42</sup>

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promulgated under the Prison Rape Elimination Act (“PREA”) require youth and adult correctional officers to collect SOGIE information as part of their initial screening process to identify residents who may be vulnerable to sexual assault. See Angela Irvine, “*We’ve Had Three of Them*”: Addressing the Invisibility of Lesbian, Gay, Bisexual and Gender Non-Conforming Youths in the Juvenile Justice System, 19 COLUM. J. OF GENDER & L. 675 (2012), and National Standards to Prevent, Detect and Respond to Rape, 28 CFR § 115 (2012).

<sup>37</sup> Shannan Wilber, *Guidelines for Managing Information Related to the Sexual Orientation and Gender Identity and Expression of Children in Child Welfare Systems*, FAMILY BUILDERS BY ADOPTION (2013), available at: <http://cssr.berkeley.edu/cwscmsreports/documents/Information%20Guidelines%20P4.pdf>.

<sup>38</sup> See *supra* at n. 15.

<sup>39</sup> Brief for Family Equality & PFLAG National as Amicus Curiae, *supra* n.12.

<sup>40</sup> Lindsay Mahowald, Sharita Gruberg & John Halpinsay Mahowald, *The State of the LGBTQ Community in 2020*, CENTER FOR AMERICAN PROGRESS (Oct 6, 2020), available at: <https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/10/06/491052/state-lgbtq-community-2020/>

<sup>41</sup> *Id.*

<sup>42</sup> Making a Difference for Families and Foster Youth: Hearing Before the Worker and Family Support Subcomm., 117 Cong. (2021) (Statement of Sharon Pierce).

Tracking the data of LGBTQ+ prospective parents will promote routine discussions between them and Title IV-E agencies, normalize conversations about SOGI, and signal increased acceptance of LGBTQ+ caregivers. A national data set capturing information about prospective LGBTQ+ parents would assist agencies in recruiting, training, and retaining a larger, more diverse pool of parents who can meet the needs of children in foster care.

Thus, we urge HHS to act expeditiously to restore the 2016 Rule to ensure sexual orientation data collection for LGBTQ+ adoptive and foster parents and guardians, and issue new rulemaking to require gender identity data collection. Going forward, HHS should also assess the feasibility of collecting data on variations in intersex characteristics (also known as “intersex status”), in accordance with recommendations from the National Academies of Science, Engineering, and Mathematics.<sup>43</sup>

***3. HHS should provide publicly accessible, intersectional AFCARS data on youth and families in the child welfare system.***

Studies cited throughout this letter demonstrate that whenever the outcomes are disproportionately poor for LGBTQ+ youth in foster care—and for foster and adoptive parents, guardians, families of origin, and kin—they are even worse for Black, AIAN, and other LGBTQ+ people of color. AFCARS data on outcomes for people living at the intersections of these identities is urgently needed to improve these outcomes and to identify specific barriers experienced by LGBTQ+ children and families of color, as well as those with other intersectional identities, including tribal affiliation, disability, national origin, marital status, religion, socioeconomic status, education level, criminal justice involvement, and geography (eg. rural, suburban, and urban residence). HHS should make this data publicly available.

***4. HHS should collect baseline data from all 50 states, territories, and Title IV-E tribes on policies and practices that deny or delay child welfare services or create inequitable burdens on those involved with these services.***

HHS should conduct a study of all 50 states, U.S. territories, and the Title IV-E tribes on policies, practices, and procedures that deny, delay, or create disparate burdens to an individual’s participation in child welfare programs or services—and on child removal and reunification rates—based on the family’s or child’s sex, or sexual orientation, gender identity, or expression (“SOGIE”).

This study should include an examination of the impact of intersectional identities, including race, religion, marital status, disability, national origin, or tribal affiliation. The study should also identify existing baseline data on representation in child welfare and outcomes for LGBTQ+ children, families of origin, foster parents, and kin. In addition, it should identify existing education, training, informed consent, and healthcare decision-making practices with respect to intersex infants and children and transgender adolescents and young adults. Finally, the study should identify research needs and

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<sup>43</sup> National Academies of Sciences, Engineering, and Medicine 2020. Understanding the Well-Being of LGBTQI+ Populations. Washington, DC: The National Academies Press.

promising practices for improving care to these groups, including addressing disproportionality in child welfare removals and poorer outcomes while in the custody of the child welfare system, such as delays in reunification or adoption.

In order to support intersex youth in the foster care system, the experiences of intersex people must be included in equity data and research. ACF should expand data collection on intersex youth in foster care by developing, testing, and implementing inclusive data collection measures for sex assigned at birth, gender identity, intersex status, and sexual orientation, building on a forthcoming consensus study from the National Academies of Science, Engineering, and Mathematics.<sup>44</sup> In addition, ACF should support intersex-inclusive and -focused research, building on the National Institutes of Health's growing intersex research portfolio.<sup>45</sup>

## **Section 2: Barrier and Burden Reduction**

As outlined above, LGBTQ+ children, prospective and existing foster parents, families of origin, and kin experience multiple, cumulative barriers in the federally funded foster care and adoption system, which cause significant harm. Our recommended approaches and methods for addressing the barriers, burdens, and inequities are outlined below.

### Nondiscrimination

#### ***1. HHS must restore enforcement of nondiscrimination protections based on SOGIE, as well as on religion for foster parents and kin.***

HHS must immediately rescind the Notification of Nonenforcement of the HHS Grants Rule 45 CFR 75.300 (c) and (d) ("2016 HHS Grants Rule") and carry out vigorous enforcement of the underlying regulation barring anti-LGBTQ+ and other discrimination in child welfare. Because discrimination on the basis of sex, including sexual orientation, gender identity, or sex characteristics is not barred by statute in Title IV-B and IV-E-funded child welfare services, the 2016 HHS Grants Rule is a critical source of federal protection for LGBTQ+ children and families involved with the child welfare system. Similarly, prospective foster parents and kin are not protected from discrimination based on religion under federal law or regulation, other than the 2016 HHS Grants Rule. On November 19, 2019, HHS issued a Notification of Nonenforcement of these protections.<sup>46</sup> It is far past time for HHS to rescind that Notification and once again provide urgently needed nondiscrimination protections for LGBTQ+ children, adults, and families, and religious minority and nonreligious prospective foster parents and kin.

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<sup>44</sup> National Academies of Sciences, Engineering, and Medicine, *Measuring Sex, Gender Identity, and Sexual Orientation for the National Institutes of Health*, available at: <https://www.nationalacademies.org/our-work/measuring-sexgender-identity-and-sexual-orientation-for-the-national-institutes-of-health> (accessed May 24, 2021).

<sup>45</sup> National Institutes of Health, DSD & Intersex Research Portfolio (2020), available at: [https://dpcpsi.nih.gov/sites/default/files/SGMRO\\_SnapshotDSD-Intersex\\_508.pdf](https://dpcpsi.nih.gov/sites/default/files/SGMRO_SnapshotDSD-Intersex_508.pdf) (describing 34 projects comprising 8.9% of NIH's SGM portfolio for FY 2018).

<sup>46</sup> Notice of Nonenforcement of HHS Grants Regulation, 84 Fed. Reg. 63,809 (Nov. 19, 2019) (codified at 45 C.F.R. § 75).

Once the Notification of Nonenforcement is rescinded, HHS should immediately begin enforcing sexual orientation, gender identity, and religious nondiscrimination protections in child welfare and educate all states, tribes, and agencies on those enforcement actions to send a signal that such discrimination will not be tolerated. HHS should require all grantees to affirm that they are aware of and in compliance with the 2016 HHS Grants Rule, as a condition of initial and continued federal funding. HHS also should create, post, and circulate FAQs, blogs, Dear Colleague letters, and/or guidance explaining SOGIE-inclusive nondiscrimination protections for HHS-funded programs, including child welfare services, and how to submit claims for cases of discrimination based on these characteristics. This guidance should ensure that:

- Nonbinary people are explicitly included and provided protections.
- Families of origin, kin, or foster and adoptive families who affirm their transgender or gender nonconforming children's identities are not discriminated against in removals, placements, and custody proceedings.
- Where sex discrimination is prohibited (for example, in educational services provided in residential facilities), these protections cover discrimination based on SOGIE and sex characteristics (including intersex traits) consistent with the Supreme Court's *Bostock* opinion<sup>47</sup> and per the Biden Executive Order issued January 20, 2021.<sup>48</sup>

2. ***HHS should rescind the discriminatory waivers and guidance provided to the Governor of South Carolina and the Attorney General of Texas.***

HHS should rescind the waiver granted to the Governor of South Carolina on January 23, 2019, granting an exception to faith-based foster care agencies receiving federal funding to the portion of the 2016 HHS Grants Rule which then barred discrimination based on religion.<sup>49</sup> South Carolina foster care agencies have used that waiver to justify turning away qualified LGBTQ+ foster parents, as well as those who are Jewish, Catholic, non-religious, and of other faiths than born-again Protestants.<sup>50</sup> Similarly, HHS should rescind its March 5, 2020 letter to Texas' Attorney General, granting an exception to faith-based foster care agencies receiving federal funding to the portion of the 2016 HHS Grants Rule barring discrimination based on sexual orientation, gender identity, and being in a same-sex marriage.<sup>51</sup>

3. ***HHS should initiate new rulemaking reversing 84 FR 63831 - RIN 0991-AC16.***

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<sup>47</sup> *Bostock v. Clayton County, Georgia* 590 U.S. \_\_\_ (2020)

<sup>48</sup> Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

<sup>49</sup> *Request for Deviation or Exception from HHS Regulation 45 CFR § 75.300(c)*, Administration for Children & Families (January 23, 2019), available at:

<https://governor.sc.gov/sites/default/files/Documents/newsroom/HHS%20Response%20Letter%20to%20McMaster.pdf>

<sup>50</sup> Meg Kinnard, *AP Exclusive: Lawsuit Claims Discrimination by Foster Agency*, AP NEWS (2019), available at:

<https://apnews.com/article/ed3ae578ebdb4218a2ed042a90b091c1>

<sup>51</sup> Roger T. Severino Letter to Ken Paxton, Re: Application of 45 C.F.R. § 75.300(c) & (d) in Light of the Religious Freedom Restoration Act (2020), on file at OCR at HHS.

At the same time HHS issued its Notification of Nonenforcement of the HHS Grants Rule on November 19, 2019, it initiated new rulemaking re-promulgating 45 CFR 75.300 (c) and (d) and eliminating its nondiscrimination protections altogether. That final rule, 84 FR 63831 - RIN 0991-AC16, is set to take effect in August 2021. HHS must act expeditiously to initiate new rulemaking to maintain these critical protections. HHS should ensure clear guidelines for enforcement of nondiscrimination, including clarifying how children, adults, and families facing discrimination by agencies receiving HHS funding can file complaints and receive redress. HHS should provide training to all states, tribes, and agencies on prohibited discrimination, the consequences of violations of the new rule, and how to certify compliance with the rule.

Additional recommendations to ensure LGBTQ+ children and adults receive affirming and equitable treatment in child welfare services and experience improved outcomes.

It is critical that the federal government work to improve the abysmal outcomes experienced by LGBTQ+ children, adults, and families in child welfare (outlined above)—outcomes that are dramatically worse for LGBTQ+ children, adults, and families of color than for their white counterparts. To do so, HHS must make dramatic changes in child welfare service delivery, research, training, and technical assistance, and resume enforcement of nondiscrimination protections based on SOGIE and religion as described in 2A above. These changes will require a change in culture, staffing, and policy at HHS and by states, tribes, and agencies across the U.S.

***4. HHS should establish senior staff positions tasked with equity for LGBTQ+ and older youth.***

We recommend that HHS establish a Senior Advisor to the Assistant Secretary of ACF at a GS 15 or higher position to focus on the needs of LGBTQ+ youth who are in or have been in the child welfare system or Runaway and Homeless Youth Act (“RHYA”) programs. We believe this position will ensure that improved outcomes for LGBTQ+ youth are given an appropriately high priority. Given the challenges older foster youth face when aging out of the system, a disproportionate number of whom identify as LGBTQ+, we also recommend establishing a high-profile position within ACF to focus on the needs of older youth who are in or have been in the child welfare system.

***5. HHS should fund and carry out research to develop, support, and disseminate promising program models to improve child welfare services to LGBTQ+ people.***

There is a compelling need to identify and disseminate promising program models to provide a roadmap for how to reduce disproportionality in child welfare intervention and removals, redress the negative experiences and poor outcomes of LGBTQ+ youth in foster care, and eliminate the routine discrimination faced by LGBTQ+ families, kin, and prospective foster parents. Several models already exist, including those developed by HHS-funded demonstration projects.<sup>52</sup>

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<sup>52</sup> To provide some examples: The Youth Acceptance Project assists families who are struggling with the sexual orientation and/or gender identity/expression of their child. The result of this intervention is that families become accepting and affirming of their

A major effort will be required to reverse the poor track record of HHS and child welfare agencies nationwide serving LGBTQ+ children, adults, and families. As such, we recommend that HHS establish a National Resource Center for Safety, Well-Being, Placement Stability, and Permanency for LGBTQ+ Foster Youth, funded through Title IV-B, with a commensurate requested increase in the Title IV-B budget. The National Resource Center will guide HHS by:

- supporting research on why and how LGBTQ+ children are over-represented in child welfare;
- supporting research focused on the experiences of transgender and intersex children and youth in child welfare (including how agencies make medical decisions for them);
- funding demonstration projects for prevention models that deliberately address reasons that LGBTQ+ children enter care;
- encouraging the implementation of practice models to promote improved outcomes, positive development, and healthy futures for LGBTQ+ youth through counseling sessions for them and their families, wellness checks, training, and other support;<sup>53</sup>
- ensuring that research into evidence-based practices required for funding under the Title IV-E Prevention Program and other child welfare reform priorities is culturally responsive and includes programs that provide services directed toward LGBTQ+ youth and families; and
- expanding affirming, family-based alternatives for teens currently in group homes by providing research for service models, startup funds, financial incentives, and family support services; these alternatives should incorporate youth choice in recognition that some youth currently prefer LGBTQ+-affirming congregate care facilities when their other choice is a non-affirming foster family placement.

**6. HHS should provide technical assistance and training to states, tribes, agencies, and all actors implementing child welfare policy and programs.**

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child(ren), thereby reducing the time that children spend in foster care and improving outcomes with their families. See Family Builders *Helping parents of lgbtq youth in foster care to become the affirming and advocating caregivers their children need them to be*, Family Builders 2021, available at: <https://familybuilders.org/programs-services/youth-acceptance-project/>. HHS funds a collaboration between the Ruth Ellis Center, the Family Acceptance Project, and the Michigan Department of Health and Human Services. This project focuses on providing family support services to strengthen families, and on increasing support for LGBTQ+ and gender diverse children and youth who are involved in the Michigan child welfare system. See *Family Acceptance Project Family-Support Services Brochure*, Ruth Ellis Center, Family Acceptance Project, and Michigan Department of Health and Human Services (2018), available at: [http://www.acmh-mi.org/wp-content/uploads/2018/10/FAP-Family-Support\\_ServicesBrochure\\_Foster-Care\\_Michigan-rev.pdf](http://www.acmh-mi.org/wp-content/uploads/2018/10/FAP-Family-Support_ServicesBrochure_Foster-Care_Michigan-rev.pdf). Additional existing initiatives include the getREAL (Recognize, Engage, Affirm, Love) project of the Center for the Study of Social Policy which collaborates with child welfare agencies to ensure that all young people feel valued and affirmed to embrace their authentic selves in all aspects of their identity including SOGIE. See *getREAL, Create a world in which LGBTQ+ youth are supported and nurtured*, The Center for the Study of Social Policy (2021), available at: <https://cssp.org/our-work/project/getreal/>. The Human Rights Campaign Foundation's All Children - All Families Initiative promotes LGBTQ+-inclusive policies and affirming practices among child welfare agencies and formally recognizes those agencies that are leading the field with innovative approaches to inclusion. This project focuses on supporting agencies' efforts to achieve safety, permanency and well-being by improving practices with LGBTQ+ youth and families. See Human Rights Campaign, *All Children - All Families: About the Project*, The HRC Foundation 2021, available at: <https://www.thehrcfoundation.org/professional-resources/all-children-all-families-about-the-project>. The Lambda Legal Youth in Out-of-Home Care Project partners with child welfare organizations to improve services to LGBTQ+ youth, increases training of adults who work with LGBTQ+ youth in care systems, and supports public and private agencies in meeting the needs of LGBTQ+ youth in out-of-home care. *Youth in Out-of-Home Care Project*, Lambda Legal (June 16, 2021), available at: [https://www.lambdalegal.org/sites/default/files/fs\\_12042019\\_youth-in-out-of-home-care-project.pdf](https://www.lambdalegal.org/sites/default/files/fs_12042019_youth-in-out-of-home-care-project.pdf)

<sup>53</sup>These can help address the fact that LGBTQ+ youth experience higher levels of family rejection and are significantly more likely to enter foster care than non-LGBTQ+ youth and LGBTQ+ youth whose families show accepting behavior; see *supra* n. 45.

HHS should ensure affirming and supportive services and placements in child welfare by requiring non-discriminatory and culturally and linguistically sensitive services and staff training in funded programs, including for caseworkers, foster care agency staff, judges, ad litem attorneys, and others utilizing Title IV-E funding. This training should help staff learn to respect the complex social identities of service recipients, including their race, ethnicity, sex, religion, creed, color, age, gender identity, gender expression, sexual orientation, marital or partnership status, disability, genetic information, citizenship or immigration status, national origin, tribal affiliation, intersex traits, socioeconomic status, language, and intersectional identities. And, it should include training on the state laws defining a child's parents to ensure that caseworkers, foster care staff, judges, ad litem attorneys, and others can properly identify who is entitled to all the rights afforded parents under state and federal law.

This training could be based on the model described in RHYA implementing regulations 45 CFR 1351.22. HHS should ensure that these protections and affirming services are available for those deemed beneficiaries (youth) and those who are not (families of origin, kin providing or seeking to provide kinship care, and foster and adoptive parents). HHS should provide incentive and practice models for recruiting, supporting, and retaining LGBTQ+ and other underrepresented foster and adoptive families to ensure a pool of families that is reflective of the diversity of children in care.

HHS also should fund and promote initial and ongoing training and coaching to all child welfare personnel on gender identity development, gender-inclusive practices, and gender-affirming care and services, including the reality that a family of origin's choice to affirm a child's gender identity or expression does not constitute abuse or neglect. Finally, HHS should fund and promote education and training for child welfare agencies and personnel on care and medical management of intersex youth, healthy variations in sex development and characteristics, and the benefits of delaying genitourinary and sterilizing surgeries.

**7. *HHS should develop additional policies and practice recommendations and guidance to improve child welfare services for LGBTQ+ people.***

*“[As a youth in foster care] I was forced into conversion therapy. Every day after school, I would have to go to an elder at my church and hear how I have a demon possessing my soul, how that demon has infected me and if I don't cast it out, I'm going to go to hell. ... Anybody who loves me and chooses to accept that demon, is also going to go to hell with me. And so I was taught that I was wrong and for the person I loved or the people I would come to love that, that person was not okay. And that was a lot of doubt and it was a lot of fear.”*

-Schylar Baber, former youth in care in Montana, Statement to Family Equality, 2018<sup>54</sup>

*“The foster care agency that I was placed through was a Christian agency. I believe my foster parents were good people with good intentions. They attended a Christian church. I am religious, but I am not*

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<sup>54</sup> Schylar Baber Statement submitted to Every Child Deserves a Family Campaign (2018), available to OMB upon request.

*Christian. At first, I went with them to the Christian church out of curiosity. But as I got older, it became awkward and hurtful to hear that I would go to hell for being gay and that I wasn't normal. But, if I didn't go, I might be made fun of or seen as weird and different. I was worried the other kids would think there was something wrong with me or suspect I was gay."*

-Ernesto Olivares, former youth in foster care in Texas, 2020<sup>55</sup>

HHS should prohibit attempts to disparage, "change," or degrade a young person's SOGIE, and prohibit forcible religious conversion of youth in foster care.<sup>56</sup> HHS also should require child welfare personnel to intervene to protect children from any attempt to disparage, "change," or degrade a young person's SOGIE regardless of the nature of the intervention or the credentials of the person administering it. Workers should be alert to any approach or intervention that treats gender diversity, sexual orientation, or variations in sex characteristics as a defect or problem or suggests that a person's SOGIE can or should be changed. If necessary, agencies should seek a protective order to stop such practices.

HHS should clarify that religious attendance for children and youth in foster care should be optional, and that child welfare agencies should fund alternative childcare or activities for children while foster parents attend religious services.

To improve child welfare services and protections for LGBTQ+ children, particularly those who are transgender, gender nonconforming, nonbinary, or intersex, and to ensure affirming care by child welfare agencies funded by HHS, we further recommend that HHS develop policies, practice recommendations, training, and guidance to:

- Ensure sibling unification, or regular visitation if siblings prefer to reside separately with kin, absent safety issues.
- Ensure that agencies work with transgender and gender nonconforming children who are developmentally able to talk about their needs to identify placements in which they feel most able to live safely and authentically, and that are most consistent with their gender identity as they currently understand and describe it. Agencies should consult children on their preferences in making placement decisions for single-sex congregate care and other child welfare facilities, and place them by their gender identity unless they request otherwise. If an LGBTQ+ child reports that a placement is non-affirming, HHS should require that the child be moved to an affirming placement if that is the child's preference—or that the foster family receive training on providing affirming care—within a specific, short amount of time.

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<sup>55</sup> The Administration's Religious Liberty Assault on LGBT Rights: Hearing Before the House Oversight and Reform Committee, 116 Cong. 17 (2020) (Statement of Ernesto Olivares), available at

<https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/Olivares%20Testimony.pdf>

<sup>56</sup> For more information on this dangerous and discredited practice and the harms it causes, see *About Conversion Therapy*, The Trevor Project (2021), available at: <https://www.thetrevorproject.org/get-involved/trevor-advocacy/50-bills-50-states/about-conversion-therapy/>

- Provide comprehensive transition-related healthcare for transgender children in foster care, and support for connecting them with LGBTQ+-friendly healthcare providers. This should include requiring child welfare agencies to contract with clinicians who provide gender-affirming care that follows established standards of care, and who work with children and their caregivers to determine appropriate treatment. These clinicians must be competent to diagnose and treat gender dysphoria by focusing on alleviating distress and facilitating a child's gender transition in whatever manner is developmentally appropriate.
- Take action to prevent unnecessary and non-consensual genital or sterilizing surgeries of intersex infants and children in foster care and ensure trauma-informed care for foster youth who have been subjected to such procedures and other medical trauma, including developing models to promote family, healthcare provider, and agency education and acceptance for intersex children and to discourage unnecessary early surgeries.
- Provide all youth in foster care with LGBTQ+-affirming sexual health education and PrEP.
- Require caseworkers of LGBTQ+ crossover (child welfare/juvenile justice/runaway/homeless) youth to remain involved, particularly with detained youth, and to advocate for appropriate placement and services within the juvenile justice system.
- Encourage states to update their Foster Youth Bill of Rights policies, including on SOGIE and sex characteristics (intersex) protections and affirming services.
- Increase understanding and acceptance of intersex traits, including by providing guidance, technical assistance, and training to states, tribes, and agencies.
- Encourage states to extend foster care through age 21, allow greater flexibility on school and work requirements for extended care, and expedite re-entry into foster care.

Finally, to address disproportionate removals of children from AIAN, Black, and LGBTQ+ families,<sup>57</sup> HHS should require grantees to examine their child removal policies and practices to determine where systemic racism and anti-LGBTQ+ biases are unintentionally or intentionally incorporated into them,<sup>58</sup> and to provide detailed plans for how they will address any racism or anti-LGBTQ+ bias in their policies and practices.<sup>59</sup> HHS should require agencies to measure removal rates by race and SOGI of parents of origin, and develop practices to address disproportionality in removing children from their biological families. HHS should ensure compliance by grantees with ICWA, which will help address disproportionality in removals from AIAN families.

### **Section 5: Stakeholder and Community Engagement.**

We recommend the following approaches to ensure input from and equitable engagement of LGBTQ+ youth and families into HHS child welfare services. As HHS engages with LGBTQ+ youth and

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<sup>57</sup> *Supra* n. 24. Note that this is already required for agencies serving AIAN families under the Indian Child Welfare Act.

<sup>58</sup> The Center for the Study of Social Policy (CSSP) has helped develop Institution Analysis (IA) quantitative and qualitative tools for precisely this purpose; see *A Quick Guide to Understanding the Institutional Analysis*, Center for the Study of Social Policy (2015), available at: <https://cssp.org/wp-content/uploads/2018/08/IA-One-Pager-web.pdf>

<sup>59</sup> For a quality improvement model, see *Youth Thrive: Opportunities in Action*, Center for the Study of Social Policy (2021), available at: <https://cssp.org/our-work/project/youth-thrive/>

families, it is crucial that agency officials trust them as experts in their assessment of their needs and experiences, and the policies, services, and practices which they experience. HHS should cultivate trust through open and honest communication which is culturally and linguistically responsive to those with intersectional identities and should share power through resources and decision-making regarding programs and services. All convenings should have clear goals and deliverables, and lead to actionable changes. The Campaign's 700+ members are a resource to assist HHS in convening LGBTQ+ children and families. We urge HHS to:

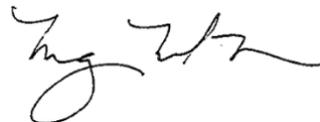
- Establish an advisory committee for ACF made up of LGBTQ+ youth in care and formerly in care to guide HHS in improving care, and ensure this committee addresses the specific needs of transgender and gender nonconforming youth. We recommend that HHS consult with youth agencies such as FosterClub<sup>60</sup> and True Colors United<sup>61</sup> to identify best practices for convening youth in care and formerly in care. The advisory committee members should be compensated for their time and expertise.
- Host a biennial convening on the needs of LGBTQ+ youth in the child welfare system.
- Host a convening with youth in foster care over age 14 on the needs of older youth, especially those who age out of foster care, focusing on permanency, connections, education, and employment.
- Convene families of origin touched by the child welfare system to identify family supports to prevent removals. Ensure that Black, AIAN, and LGBTQ+ families and families who have experienced removals are included.
- Convene LGBTQ+ foster and adoptive parents and relative caregivers to discuss barriers they face in the child welfare system and recommend program and policy changes.

Thank you again for the opportunity to provide this letter on overcoming barriers and advancing equity for underserved communities. Please contact Julie Kruse, Director of Federal Policy at Family Equality, with any questions at [jkruise@familyequality.org](mailto:jkruise@familyequality.org).

Sincerely,



Julie Kruse  
*Director of Federal Policy*  
*Family Equality*



Megan Martin  
*Vice President, Director of Public Policy*  
*Center for the Study of Social Policy*

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<sup>60</sup> The National Resource Center for Youth Development (NRCYD) and FosterClub have developed a *Youth Leadership Toolkit* providing the fundamentals of meaningful youth engagement strategies, based on the belief that youth should be involved in the design and implementation of programs, policies and practices that impact their lives, available at <https://store.fosterclub.com/youth-leadership-toolkit/>

<sup>61</sup> See True Colors United's *Youth Advocacy Toolkit* for a model for engaging impacted youth in policymaking, available at <https://truecolorsunited.org/2021/04/21/new-check-out-our-new-toolkit-for-youth-advocates-leaders/>

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