

Backgrounder: Department of Health and Human Services Proposed Rule on Safe and Appropriate Foster Care Placements

The Proposed Rule

A potential new regulation has raised many questions for those involved in adoption and foster care. The rule is still at the proposal stage, and its potential consequences are described in more detail below. The rule would require states to ensure safe and appropriate placements for children in foster care who identify as LGBTQI+. What it means to do this, and the impact this would have on private agencies, is uncertain. Child welfare providers who have concerns or questions about this rule may wish to submit comments on this rule before it becomes law.

Background

The Department of Health and Human Services (HHS) is the federal agency that oversees federal funding flowing to individual states for adoption and foster care services. As part of this responsibility, HHS has the ability to propose regulations that will govern how these funds are used. However, before these proposals can become law, HHS is required to receive and respond to public feedback on how their proposal will impact funding recipients and beneficiaries.

On September 28, 2023, HHS issued a Notice of Proposed Rulemaking (NPRM)¹ proposing new requirements for states receiving Title IV-E and Title IV-B funding. The regulation would require states to ensure that LGBTQI+ children in foster care are placed only with “safe and appropriate” providers.

Under subsection (a)(1) of the proposal, a provider who is safe and appropriate:

- Will establish an environment free of hostility, mistreatment, or abuse based on the child’s LGBTQI+ status;
- Is trained to be prepared with the appropriate knowledge and skills to provide for the needs of the child related to the child’s self-identified sexual orientation, gender identity, and gender expression. The training must reflect evidence, studies, and research about the impacts of rejection, discrimination, and stigma on the safety and wellbeing of LGBTQI+ children, and provide information for providers about practices that promote the safety and wellbeing of LGBTQI+ children; and
- Will facilitate the child’s access to age-appropriate resources, services, and activities that support their health and well-being.

Additionally, the NPRM would require that states:

- Implement a process through which children can request a safe and appropriate placement.
- Implement a process through which children may report placements that are not safe and appropriate.
- Implement a procedure to ensure no LGBTQ child experiences retaliation for disclosing their identity or requesting a safe placement. Retaliation is defined to include “unwarranted placement changes including unwarranted placements in congregate care facilities, restriction of access to LGBTQI+ peers, or attempts to undermine, suppress, or change the sexual orientation or gender identity of a child, or other activities that stigmatize a child’s LGBTQI+ identity.”
- Ensure that, when placing LGBTQI+ children in sex-segregated situations, children are placed consistent with their gender identity.

¹ <https://www.govinfo.gov/content/pkg/FR-2023-09-28/pdf/2023-21274.pdf>

- Train employees to have “the appropriate knowledge and skills” to serve an LGBTQ child.
- Ensure that all contractors and subrecipients with responsibility for placing children or providing services are informed of the requirements and non-retaliation provisions.
- Require states to ensure that their child welfare networks include sufficient numbers of providers willing to provide safe and appropriate placements for LGBTQI+ children.

Religious Accommodations

The NPRM acknowledges that religious providers play a “vital role” in the child welfare system and that the agency has an obligation to comply with religious protection in the Constitution and in federal law, including the First Amendment and the Religious Freedom Restoration Act (RFRA).

HHS proposes a workaround for faith-based providers that may have religious objections by placing the requirements of the NPRM on *states* rather than private entities and by clarifying that the rule “would not require any faith-based provider to seek designation as a safe and appropriate provider” if there are sincerely held religious objections. For religious objections not addressed by this workaround, HHS also sets in place a case-by-case review for any other religious accommodation requests.

Potential Concerns

Though the NPRM provides an exemption framework for religious providers, the accommodation request process does not appear to apply to individual foster parents.

The underlying assumption of the proposal is that anyone adhering to a traditional ethic of human sexuality is incapable of providing a “safe and appropriate” environment for LGBTQI+ youth. Under the plain text of the proposal, providers or foster parents who cannot affirm a child’s preferred pronouns or facilitate hormone treatments for gender transitions would be considered unfit to provide care for any LGBTQI+ child.

The definition of “safe and appropriate” is both broad and vague. Additionally, the NPRM leaves many key terms undefined, including:

- An “environment free of hostility.”
- “Mistreatment.”
- “Abuse.”
- “Age-appropriate resources.”
- “Services” or “activities” that “support [the child’s] health and well-being.”

It is also unclear how this regulation will interact with states that affirmatively partner with faith-based agencies or that have state laws protecting minors from irreversible medical transition procedures.

How to Comment

Comments are due **Monday, November 27, 2023** and may be submitted at www.regulations.gov (Docket ACF-2023-0007). For additional support, an explainer on comment submission is available here: <https://tinyurl.com/commentexplainer>

Potential items for comment include:

- Sharing stories (from the perspectives of providers, foster parents, and children) of successful LGBTQI+ placements in religious homes. *Identities may remain anonymous.*

- Raising studies on physical or mental health of LGBTQI+ youth in the child welfare system that HHS has not reviewed in the analysis of the NPRM. Ask that HHS review these studies and account for them in its final analysis.
- Raising studies and statistics on the loving and effective environments provided through faith-based care, including for LGBTQI+ youth.
- Analyzing the chilling effect the NPRM could have on the pool of available providers and the pool of available resource parents.
- Raising concerns over the impact on agencies performing licensing studies and the ability to license parents with traditional beliefs about marriage and sexuality.
- Raise concerns over the placement of religious minority children and the ability to place children with families who share their religious beliefs, which may include traditional views on marriage, sexuality, and gender.
- Attaching copies of training materials that states are already providing, demonstrating how states may interpret and apply the NPRM to faith-based providers.
- Asking HHS to provide additional data and analysis on the impact of the NPRM, including on how many faith-based group homes and families will be excluded and how rural areas will be impacted.

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