

November 27th, 2023

The Honorable Xavier Becerra  
Secretary  
United States Department of Health & Human Services  
Hubert H. Humphrey Building  
200 Independence Ave, S.W.  
Washington, D.C. 20201

Dear Secretary Becerra,

The American Public Human Services Association (APHSA), the bipartisan membership association representing state and local human services agencies and the child welfare systems they oversee, is pleased to submit this comment letter in response to the Notice of Proposed Rulemaking *Safe and Appropriate Foster Care Placement Requirements for Titles IV-E and IV-B*. APHSA gathered extensive feedback through its affinity group of child welfare directors – the National Association of Public Child Welfare Administrators (NAPCWA) – as well as via conversations with a broad cross-section of human services executives responsible for oversight of the public child welfare system.

In exploring the intent and impact of the proposed rule, APHSA heard a wide spectrum of perspectives from its members; however, our membership was united in a common set of beliefs in regard to the provision of safe and appropriate care for children in foster care –

- Child welfare practitioners must follow the evidence and listen to individuals with lived experience in child welfare to design systems of safe and appropriate care that place children in settings that reflect their wants and needs;
- The child welfare system must place particular focus and intention on how we deliver this care to communities that are overrepresented and experience disproportionate adverse outcomes in child welfare, and;
- We have much work left to do to build capacity, address previous harms, and evolve the child welfare system to consistently live up to these values for youth who experience marginalization, including children who identify as LGBTQI+, are non-binary, or have non-conforming gender identities.

The proposed rule lays out a path for federal oversight that delineates specific ways child welfare agencies must meet these principles through requirements to (1) designate safe and appropriate placement providers for children who identify as LGBTQI+, are non-binary, or have non-conforming gender identities (referred to under the umbrella term LGBTQI+ for purposes of this comment); (2) notify children who identify as LGBTQI+ of their rights to safe and appropriate care and establish reporting and non-retaliation processes for children; (3) provide access to age appropriate supports, including mental and behavioral health care supports, and; (4) provide training to agency staff and providers and collect data necessary to demonstrate rule compliance through state case review systems.

Child welfare agencies have expressed varying opinions on whether the specific approach delineated in the proposed rule would have the intended impact of improving safe and appropriate foster care for children who identify as LGBTQI+. Many APHSA members raised concerns with their ability to implement the rule, unaddressed provider capacity issues that could be further aggravated, and nuanced considerations for how children in foster care wish to be identified, supported, and cared for based on their LGBTQI+ status.

We believe that a broader framework is needed to orient the entirety of the child welfare system towards providing safe and appropriate placements for children in foster care. Adoption of a broader framework for federal oversight would ensure states are held accountable to fostering conditions for safe and appropriate care based on the individual experiences and identities of children, while specific emphasis in the regulatory structure could ensure agencies are responsive to the evidence demonstrating what communities are experiencing marginalization and require tailored strategies to meet their needs. To build this comprehensive system of safe and appropriate care, flexibility in the specific state and local strategies deployed to meet this standard would be critical to ensure child welfare agencies are able to be nimble and adaptive to the needs that surface within their communities. Below, APHSA provides specific feedback on what such a regulatory approach could look like.

### **Proposed Approach to Federal Oversight of Safe and Appropriate Care**

In establishing a regulatory structure for safe and appropriate care, APHSA recommends ACF widen its lens to establish a standard that could be applied to all children in care, while creating flexibility for how states apply the standard to meet needs that are identified. The care standard should require explicit focus on population groups at greatest risk for experiencing an inappropriate placement, which would likely include but not be limited to children that identify as LGBTQI+.

The definition of a safe and appropriate placement as described in the current proposed rule we believe makes sense, slightly amended to apply consistently across the entirety of the child welfare system.

*A safe and appropriate placement reflects a provider that:*

- (i) Will establish an environment free of hostility, mistreatment, or abuse;*
- (ii) Has the appropriate knowledge and skills to provide for the unique needs of each child;*
- (iii) Facilitates the child's access to age-appropriate resources, services, and activities that support their health and well-being.*

In lieu of requiring specific methods for how child welfare agencies designate providers, collect data, conduct trainings, and provide supports, APHSA recommends instead that ACF establish a targeted Safe and Appropriate Placement Plan within states' five-year Child and Family Services Plans (CFSPs) that require states to describe their approach to:

- Provide access to safe and appropriate placements for all children in foster care;



- Identify populations in foster care with heightened risk factors related to accessing such placements and strategies to mitigate these risks;
- Communicate availability and rights to such placements for children in foster care.
- Train staff and providers in a manner necessary to meet safe and appropriate placement needs, and.
- Monitor progress and track issues in fulfilling access to safe and appropriate placements.

By embedding this plan into state CFSPs, child welfare agency approaches would be subject to federal review, approval, and monitoring. Further, states could further manage their safe and appropriate placement strategies with transparency and accountability by incorporating tracking of progress into their Annual Progress and Service Reports. ACF could set further parameters for how states collect and report data to monitor their progress towards meeting safe and appropriate placements in these annual reports and use such data to identify any changes to their five-year plans.

### **Considerations for Rulemaking as Currently Proposed**

Should ACF proceed with finalizing regulations for safe and appropriate placement that are more prescriptive and targeted specifically to children who identify as LGBTQI+, APHSA would like to elevate potential implementation questions and concerns we have surfaced through conversations with our members.

Emergency Placements – APHSA recommends that the final rule clarify that short-term, emergency placements are exempt from the safe and appropriate care requirements if a designated provider is unavailable. In a crisis situation, where a child is being removed from their home or can no longer stay in the care of their current provider, agencies must mobilize rapidly to find a safe, appropriate and stable setting for that child with limited options available to avoid stays in child welfare offices or hotels. Further, at a deeply traumatic moment in a child’s life when a separation occurs, it may not be appropriate or feasible to ask a child to disclose their sexual or gender identity prior to temporary placement. The final rule should provide guidance on exceptions for such short-term, emergency placements.

Interstate Placements – If a state child welfare agency does not have an available designated safe and appropriate placement provider for a child, or otherwise cannot conform to the requirements specified in the rule, APHSA requests the rule clarifies how agencies should handle such instances. APHSA has heard concerns that the rule could result in a significant increase in interstate placements in states that lack provider capacity to meet rule requirements, causing disproportionate geographic displacement and potential unintended harm to children that identify as LGBTQI+.

Residential Care – Some APHSA members have raised specific concerns that the training and supports mandated in the rule may make it very difficult to identify adequate foster family home placements for



children that identify as LGBTQI+ in their state. This could result in this population group in such states being disproportionately placed in congregate care settings, in direct conflict with objectives to provide care in the most integrated settings possible. Should the rule be finalized, APHSA recommends that ACF consider ways it can incentivize foster family homes to become designated safe and appropriate placements for this population.

Kinship Caregivers – APHSA members consistently questioned how they should reconcile prioritizing placement with kinship caregivers if they are unable or unwilling to become designated through the criteria mandated in the proposed rule. APHSA recommends the final rule afford flexibility for states to offer exceptions or alternatives to the safe and appropriate placement criteria for kinship caregivers when it is in the best interest and desire of a child.

Legal Considerations – Many child welfare agencies operate in states that have existing laws that mandate specific practices when government entities and their contractors provide care to children who identify as LGBTQI+ and additional state legislation of these practices are likely in the future. Child welfare agencies will need assistance navigating rule implementation in such instances when state law impact how they collect data, perform trainings, or provide services either explicitly or implicitly required in the rule. We encourage ACF to consider the current legal landscape ahead of final rulemaking and offer discussion on how agencies might navigate such potential issues.

Capacity Concerns – Many of the aforementioned challenges are reflective of a broader capacity crisis child welfare agencies are struggling with across the country, regardless of a child’s LGBTQI+ identity. Especially within resource-limited areas, the criteria specified in the rule may be challenging, if not impossible, to meet. APHSA asks ACF to clarify how agencies should respond in extenuating circumstances that lead to agencies being unable to fulfill the requirements of the proposed rule.

## **Conclusion**

APHSA appreciates the opportunity to comment on the proposed rule and recognizes the critical importance, complexity, and challenge of designing and operationalizing a child welfare system that proactively fosters conditions for safe and appropriate care for children that identify as LGBTQI+ and others at risk of experiencing marginalization in foster care. The intersectionality of various components of identity development requires this thoughtful attention and requisite planning. Sustainable and structural solutions will require true partnership between state and local child welfare agencies and federal policymakers, with a commitment to listen and respond to the children we are responsible to care for. APHSA and its members are ready partners to collaborate on the significant work that is still needed.

Please contact Matt Lyons at [mlyons@aphsa.org](mailto:mlyons@aphsa.org) with any questions or comments regarding these comments.

Sincerely,



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