

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Part 1355

RIN 0970-AD03

Safe and Appropriate Foster Care Placement Requirements for Titles IV-E and IV-B

AGENCY: Children's Bureau (CB), Administration on Children, Youth and Families (ACYF), Administration for Children and Families (ACF), Department of Health and Human Services (HHS).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: Federal law requires that state and tribal title IV-E/IV-B agencies ("agencies") ensure that each child in foster care receives "safe and proper" care and has a case plan that addresses the specific needs of the child while in foster care to support their health and wellbeing. Federal law also requires that for children ages 14 and over, agencies must consult with them about their case plans. To ensure agencies meet these and other related statutory requirements, ACF proposes to specify the steps agencies must take when implementing the case plan and case review requirements for children in foster care who identify as lesbian, gay, bisexual, transgender, queer or questioning, intersex, as well as children who are non-binary, or have non-conforming gender identity or expression (all of whom are referred to under the umbrella term LGBTQI+ for purposes of this regulation).

DATES: In order to be considered, ACF must receive written comments on or before November 27, 2023. We intend to notify tribal title IV-E/IV-B agency leadership about the opportunity to provide comment on this NPRM no later than September 28, 2023.

ADDRESSES: You may submit comments, identified by the Regulatory Information Number (RIN), by any of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments.

- *Email:* CBComments@acf.hhs.gov. Include the RIN number in subject line of the message.

Instructions: All submissions received must include the agency name and RIN for this rulemaking. All comments received by the methods and due date specified above may be posted without

change to www.regulations.gov, including any personal information provided. However, the Department may redact certain non-substantive content from comments before posting, including threats, hate speech, profanity, graphic images, or individually identifiable information about a third-party individual other than the commenter. In addition, comments or material designated as confidential or not to be disclosed to the public will not be accepted. Comments may be redacted or rejected as described above without notice to the commenter, and the Department will not consider in rulemaking any redacted or rejected content that would not be made available to the public as part of the administrative record.

FOR FURTHER INFORMATION CONTACT: Kathleen McHugh, Director, Policy Division, Children's Bureau, (202) 205-8618. Telecommunications Relay users may dial 711 first. Email inquiries to cbcomments@acf.hhs.gov. Upon request, the Department will provide an accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for the proposed regulations. To schedule an appointment for this type of accommodation or auxiliary aid, please call (202) 205-8618 for assistance or email cbcomment@acf.hhs.gov.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Statutory Authority To Issue NPRM
- II. Background
- III. Overview of Proposal
- IV. Section-by-Section Discussion of Proposed Regulatory Changes
- V. Regulatory Process Matters
- VI. Tribal Consultation Statement

I. Statutory Authority To Issue NPRM

Titles IV-E and IV-B of the Social Security Act (the Act) require title IV-E/IV-B agencies (referred to as "agencies") to provide case plans for all children in foster care that include "a plan for assuring that the child receives safe and proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate return of the child to his own safe home or the permanent placement of the child, and address the needs of the child while in foster care." Section 475(1)(B). Agencies must also have case review systems through which they ensure that each foster child's case plan is "designed to achieve placement in a safe setting that is the least restrictive (most family like) and most appropriate

setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child[.]" Section 475(5). In order to receive IV-E and IV-B funds, title IV-E/IV-B agencies must have plans approved by ACF that provide for case plans and case review systems that meet these statutory requirements. Section 471(a)(16) and section 422(b).

Additionally, in order to receive IV-E funds, states and tribes must certify in their IV-E plans that they will ensure that before a child in foster care is placed with prospective foster parents, the prospective foster parents "will be prepared adequately with the appropriate knowledge and skills to provide for the needs of the child . . .". In addition, the preparation "shall include . . . knowledge and skills relating to the developmental stages of the cognitive, emotional, physical, and behavioral capacities of a child." Section 471(a)(24). Agencies must also ensure that at least one staff member at any child-care institution providing foster care receives this training. Section 471(a)(10).

The Act authorizes the Secretary of Health and Human Services (the Secretary) to review state compliance with the title IV-E and IV-B program requirements. Specifically, the Act requires the Secretary to determine whether state programs are in substantial conformity with state plan requirements under IV-E and IV-B, implementing regulations promulgated by the Secretary, and the states' approved state plans. Section 1123A.

Section 1102 of the Act authorizes the Secretary to publish regulations as may be necessary for the efficient administration of the functions for which the Secretary is responsible under the Act.

II. Background

Titles IV-E and IV-B of the Act set forth numerous requirements for state and tribal title IV-E/IV-B agencies (referred to as "agencies") to meet for children in foster care. This NPRM applies to the state or tribal agency administering or supervising the administration of the title IV-E and title IV-B plans.

Titles IV-E and IV-B of the Act provide protections that are designed to ensure that while in foster care, children receive safe and proper care. As part of its title IV-E and IV-B plan, an agency must develop a case plan for each child in care that, among other things, assures that the child receives "safe and proper" care, and "address(es) the needs of the child while in foster care." (Title IV-E, section 475(1)(B) of the Act). This

includes a “discussion of the appropriateness of the services that have been provided to the child under the plan” (*Id.*). Similarly, the title IV–E/IV–B case review system requires that the agency have procedures for assuring that each child has a case plan designed to achieve placements in the most appropriate setting available, consistent with the best interests and special needs of the child (422(b), 471(a)(16), 475(1)(B), and 475(5)).

In addition, the Act requires the agency to certify that foster parents are “prepared adequately with the appropriate knowledge and skills to provide for the needs of the child [and] that the preparation will be continued, as necessary, after the placement of the child” (471(a)(24)). Finally, the Act requires agencies to develop and implement standards to ensure that children in foster care placements are provided quality services that protect their safety and health (471(a)(22)).

Overrepresentation of LGBTQI+ Children in Foster Care

LGBTQI+ children are overrepresented in the foster care population. One recent confidential survey revealed that 32 percent¹ of foster children ages 12–21 surveyed report that they identify as having a diverse sexual orientation or gender identity. A recent study using nationally representative survey data found that youth with a minority sexual orientation, such as lesbian, gay, and bisexual youth, are nearly 2.5 times as likely as heterosexual youth to experience a foster care placement.²

A study published in 2016 of the population of youth who have been involved in both the foster care and juvenile justice systems found that LGBTQI+ juvenile-justice involved youth were much more likely to have been removed from their home and to have experienced being physically abused.³

¹ Institute for Innovation and Implementation at University of Maryland’s School of Social Work and the National Quality Improvement Center on Tailored Services, Placement Stability, and Permanency for LGBTQ2S Children and Youth in Foster Care (2021), *The Cuyahoga Youth Count: A Report on LGBTQ+ Youth Experience in Foster Care*, <https://theinstitute.umaryland.edu/media/ssw/institute/Cuyahoga-Youth-Count.6.8.1.pdf>.

² Fish, J., Baams, L., Wojciak, A.S., & Russell, S.T. (2019). Are Sexual Minority Youth Overrepresented in Foster Care, Child Welfare, and Out-of-Home Placement? Findings from Nationally Representative Data. *Child Abuse and Neglect*. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7306404/>.

³ Irvine, Angela, and Canfield, Aisha. *The Overrepresentation of Lesbian, Gay, Bisexual, Questioning, Gender Nonconforming and Transgender Youth within the Child Welfare to*

LGBTQI+ youth are overrepresented in the child welfare system because of a confluence of factors. Studies suggest that many LGBTQI+ youth face higher rates of parental physical abuse,⁴ and are more likely to run away from home or be kicked out, often because of conflict over their sexual orientation or gender identity.⁵ These experiences place LGBTQI+ youth at greater risk of entering foster care, and mean that many LGBTQI+ youth enter foster care with complex needs and trauma related to the discrimination and stigma they have experienced because of their sexual orientation or gender identity.⁶

Impact of Family and Caregiver Behavior on LGBTQI+ Youth Wellbeing

Research shows that the treatment LGBTQI+ youth receive from their families and caregivers related to their sexual orientation or gender identity is highly predictive of their mental health and wellbeing. For example, a 2021 survey⁷ found that “LGBTQ youth who felt high social support from their family reported attempting suicide at less than half the rate of those who felt low or moderate social support. Moreover, the survey⁸ found the five most common ways that LGBTQ youth reported feeling supported by their parents or caregivers included having been welcoming to their LGBTQ friends or partners, talking with them respectfully about their LGBTQ identity, using their name and pronouns correctly, supporting their gender

Juvenile Justice Crossover Population, 24.2 Am. U. J. Gender Soc. Pol’y & L., 243–261 (2016), <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1679&context=jgsp>.

⁴ Friedman, M., Marshal, M., Guadamuz, T., Wei, C., Wong, C., Saewyc, C., and Stall, R., 2011: A Meta-Analysis of Disparities in Childhood Sexual Abuse, Parental Physical Abuse, and Peer Victimization Among Sexual Minority and Sexual Nonminority Individuals. *American Journal of Public Health* 101, 1481–1494, <https://doi.org/10.2105/AJPH.2009.190009>.

⁵ Pearson, J., Thrane, L., & Wilkinson, L. (2017). Consequences of runaway and throwaway experiences for sexual minority health during the transition to adulthood. *Journal of LGBT Youth*, 14(2), 145–171, <https://www.tandfonline.com/doi/full/10.1080/19361653.2016.1264909>.

⁶ For a review of risk factors impacting children in foster care see Matarese, M., Greeno, E. and Betsinger, A. (2017). Youth with Diverse Sexual Orientation, Gender Identity and Expression in Child Welfare: A Review of Best Practices. Baltimore, MD: Institute for Innovation & Implementation, University of Maryland School of Social Work, https://qiclgbtq2s.org/wp-content/uploads/sites/6/2018/05/LGBTQ2S-Lit-Review_-5-14-18.pdf.

⁷ The Trevor Project, 2022 National Survey on LGBTQ Youth Mental Health, https://www.thetrevorproject.org/survey-2022/assets/static/trevor01_2022survey_final.pdf.

⁸ *Ibid.*

expression, and educating themselves about LGBTQ people and issues.⁹

Another study further quantified the negative impacts of family rejection of LGBTQI+ children, which can lead to greater representation in foster care. The study found that family behaviors, including excluding LGBTQI+ children from family events and activities because of their identity and not letting their child learn about their LGBTQI+ identity, that tried to change their child’s LGBTQ identity increased the risk of depression, suicide, illegal drug use and other serious health risks.¹⁰ The study also found that family behaviors that support LGBTQI+ children including by standing up for their child when others mistreat them because of their LGBTQI+ identity had positive outcomes, helped promote self-esteem, overall health, and protected against suicidal behavior, depression and substance abuse.¹¹ The study found that LGB young adults who reported high levels of family rejection during adolescence were more than eight times more likely to report having attempted suicide, nearly six times more likely to report high levels of depression, and more than three times more likely to use illegal drugs compared with their LGB counterparts from families that reported no or low levels of family rejection.¹² Moreover, rejecting caregiver behavior—including refusing to use a child’s chosen name and pronouns, ridiculing or name-calling because of the child’s LGBTQI+ identity, or isolating behaviors such as blocking access to LGBTQI+ friends, events, and resources—contributes to higher rates of health and mental health problems.¹³

⁹ *Ibid.*

¹⁰ Innovations Institute, University of Connecticut School of Social Work, Family Acceptance Project, and National SOGIE Center (n.d.). *Parents & Families Have a Critical Impact on Their LGBTQ Children’s Health Risks & Well-Being* [Fact Sheet] <https://lgbtqfamilyacceptance.org/family-matters/>. Data for the fact sheet is drawn from Ryan, C (2021) *Helping Diverse Families Learn to Support Their LGBTQ Children to Prevent Health and Mental Health Risks and Promote Well-Being*, San Francisco, Family Acceptance Project, San Francisco State University. Available at https://lgbtqfamilyacceptance.org/wp-content/uploads/2021/11/FAP-Overview_Helping-Diverse-Families6.pdf and Ryan, C., Huebner, D., Diaz, R.M., & Sanchez, J. (2009). *Family rejection as a predictor of negative health outcomes in white and latino lesbian, gay, and bisexual young adults*. *Pediatrics*, 123(1), Retrieved from <http://pediatrics.aappublications.org/content/123/1/346>.

¹¹ *Ibid.*

¹² Ryan, C., Huebner, D., Diaz, R.M., & Sanchez, J. (2009). *Family rejection as a predictor of negative health outcomes in white and latino lesbian, gay, and bisexual young adults*. *Pediatrics*, 123(1), Retrieved from <http://pediatrics.aappublications.org/content/123/1/346>.

¹³ Ryan, C (2021) *Helping Diverse Families Learn to Support Their LGBTQ Children to Prevent Health*

Conversely, the study found improved health outcomes in youth whose caregivers demonstrated supportive behavior towards the child's LGBTQI+ identity, including connecting the child to an LGBTQI+ adult role model.¹⁴

Experience of LGBTQI+ Children in Foster Care

A meaningful body of research demonstrates that LGBTQI+ children in foster care face disproportionately worse outcomes and experiences than other children in foster care due to their specific health and well-being needs are often unmet. LGBTQI+ youth in foster care report experiencing mistreatment related to their sexual orientation or gender identity. One study¹⁵ found that, "one of the most consistent themes that LGBTQ youth have conveyed in focus groups and qualitative interviews is a tendency to be harassed, teased, and bullied by staff, peers, and care providers . . . LGBTQ youth are often excluded and rejected by their peers and caretakers . . . It is common for LGBTQ youth in group home and foster home settings to be isolated to their own bedroom or to their own wing of the house due to fears of placing them with youth of the same sex."

Children in foster care who identify as LGBTQI+ are more likely to be placed in congregate care settings (group homes and residential care), experience multiple placements, and have adverse experiences in their placement than non-LGBTQI+-identifying youth.¹⁶ One study found that LGBTQI+ youth in foster care are more likely to experience at least 10 foster care placements, with youth of color who are LGBTQ reporting the highest rates.¹⁷ Moreover, older children identifying as LGBTQI+ in foster care report less satisfaction with their child welfare experience and had higher rates of negative outcomes, including emotional distress, greater rates of homelessness, and more placements.¹⁸

and Mental Health Risks and Promote Well-Being, San Francisco, Family Acceptance Project, San Francisco State University. Available at https://lgbtfamilyacceptance.org/wp-content/uploads/2021/11/FAP-Overview_Helping-Diverse-Families6.pdf.

¹⁴ Ibid.

¹⁵ McCormick, A., Schmidt, K., and Terrazas, S. (2017) LGBTQ Youth in the Child Welfare System: An Overview of Research, Practice, and Policy, *Journal of Public Child Welfare*, 11:1, 27–39. DOI: 10.1080/15548732.2016.1221368, <https://doi.org/10.1080/15548732.2016.1221368>.

¹⁶ Wilson, Cooper, Kastanis & Nezhad (2014).

¹⁷ Jeffrey Poirier, *Jim Casey Youth Opportunities Initiative: Experiences and Outcomes of Youth Who Are LGBTQ*, 96.1 *Child Welfare*, 1–26 (2018), <https://www.proquest.com/docview/2056448464>.

¹⁸ Wilson, B.D.M., & Kastanis, A.A. (2015). Sexual and gender minority disproportionality and

Children in foster care who identify as LGBTQI+ report a perception of poor treatment by the foster care system more frequently than their non-LGBTQI+ counterparts, and feel less frequently that they can be themselves.¹⁹ Children in foster care who identify as LGBTQI+ are less likely to report at least "good" physical and mental health, and are less likely to have at least one supportive adult on whom they can rely for advice or guidance, than their non-LGBTQI+ counterparts in foster care.²⁰

In one study that looked at LGBTQI+ status-related discrimination, 37.7 percent of children in foster care ages 12 through 21 who identify as LGBTQI+-reported poor treatment connected to their gender expression, sexual minority status, or transgender status.²¹ The study also showed that LGBTQI+ foster youth were more likely than their non-LGBTQI+ foster youth counterparts to have been hospitalized for emotional reasons or been homeless at some point in their life.²² Youth in foster care identifying as LGBTQI+ have also reported more fights in school and more mental health problems compared with their non-LGBTQI+ counterparts.²³

Research has also demonstrated correlations between LGBTQI+ children who spent time in foster care and who later experienced housing instability, homelessness, and food insecurity.²⁴

disparities in child welfare: A population-based study. *Children and Youth Services Review*, 58, 11–17, and Bianca D.M. Wilson, Angeliki A. Kastanis, Sexual and gender minority disproportionality and disparities in child welfare: A population-based study. *Children and Youth Services Review*, Volume 58, 2015, Pages 11–17, ISSN 0190–7409, <https://doi.org/10.1016/j.childyouth.2015.08.016>.

¹⁹ Matarese, M., Greeno, E., Weeks, A., Hammond, P. (2021). The Cuyahoga youth count: A report on LGBTQ+ youth's experience in foster care. Baltimore, MD: The Institute for Innovation & Implementation, University of Maryland School of Social Work. <https://theinstitute.umaryland.edu/media/ssw/institute/Cuyahoga-Youth-Count.6.8.1.pdf>.

²⁰ Jeffrey Poirier, *Jim Casey Youth Opportunities Initiative: Experiences and Outcomes of Youth Who Are LGBTQ*, 96.1 *Child Welfare*, 1–26 (2018), <https://www.proquest.com/docview/2056448464>.

²¹ Wilson, B.D.M., Cooper, K., Kastanis, A., & Nezhad, S. (2014). Sexual and Gender Minority Youth in Foster care: Assessing Disproportionality and Disparities in Los Angeles, The Williams Institute, UCLA School of Law <https://williamsinstitute.law.ucla.edu/wp-content/uploads/SGM-Youth-in-Foster-Care-Aug-2014.pdf>.

²² Ibid.

²³ Baams, Laura., Stephen T. Russell, and Bianca D.M. Wilson. LGBTQ Youth in Unstable Housing and Foster Care, *American Academy of Pediatrics*, Volume 143, Issue 3, March 2019. <https://doi.org/10.1542/peds.2017-4211>.

²⁴ DeChants, J.P., Green, A.E., Price, M.N., & Davis, C.K. (2021). Homelessness and Housing Instability Among LGBTQ Youth, West Hollywood, CA, The Trevor Project, <https://www.thetrevorproject.org/wp-content/uploads/2022/02/Trevor-Project-Homelessness-Report.pdf>; Dworsky, A., 2013. "The Economic Well-Being of Lesbian, Gay, and Bisexual

These many findings illustrate the need for child welfare personnel and foster parents to be educated and trained on their critical role in the lives of LGBTQI+ youth to avoid re-traumatization and further victimization of youth.²⁵ Implementing strategic foster parent training and recruitment to meet the well-being needs of children who are LGBTQI+ is critical.

Mental Health Needs of LGBTQI+ Youth

Research consistently shows that when LGBTQI+ youth experience supportive environments and services, they experience the same positive mental health outcomes as other youth.²⁶ However, research demonstrates that LGBTQI+ youth in foster care face significant mental health disparities that result from experiences of stigma and discrimination. A 2020 survey found that LGBTQI+ youth in foster care were 2.6 times more likely to report a past year suicide attempt than LGBTQI+ youth who were not in foster care, with 35 percent of LGBTQI+ foster youth reporting such an attempt.²⁷ Reports of past year suicide attempt rates were even higher among LGBTQI+ foster youth of color (38 percent) and non-binary and transgender foster youth (45 percent).²⁸ Additionally, two child welfare agency studies showed that foster youth who identified as LGBTQI+ were more likely to be hospitalized for emotional reasons compared to non-

Youth Transitioning Out of Foster Care," *Mathematica Policy Research Reports Mathematica Policy Research*, https://www.acf.hhs.gov/sites/default/files/documents/opre/opre_lgbt_brief_01_04_2013.pdf.

²⁵ For a review of best practices for child welfare practitioners, see Matarese, M., Greeno, E. and Betsinger, A. (2017). *Youth with Diverse Sexual Orientation, Gender Identity and Expression in Child Welfare: A Review of Best Practices*. Baltimore, MD: Institute for Innovation & Implementation, University of Maryland School of Social Work. https://qiclgbtq2s.org/wp-content/uploads/sites/6/2018/05/LGBTQ2S-Lit-Review_-5-14-18.pdf.

²⁶ Substance Abuse and Mental Health Services Administration (SAMHSA): *Moving Beyond Change Efforts: Evidence and Action to Support and Affirm LGBTQI+ Youth*. SAMHSA Publication No. PEP22–03–12–001. Rockville, MD: Center for Substance Abuse Prevention. Substance Abuse and Mental Health Services Administration, 2023. <https://store.samhsa.gov/sites/default/files/pep22-03-12-001.pdf>.

²⁷ The Trevor Project. *The Trevor Project Research Brief: LGBTQ Youth with a History of Foster Care* (2021), https://www.thetrevorproject.org/wp-content/uploads/2021/07/LGBTQ-Youth-with-a-History-of-Foster-Care_-May-2021.pdf.

²⁸ The Trevor Project. *The Trevor Project Research Brief: LGBTQ Youth with a History of Foster Care* (2021), https://www.thetrevorproject.org/wp-content/uploads/2021/07/LGBTQ-Youth-with-a-History-of-Foster-Care_-May-2021.pdf.

LGBTQI+ foster youth.²⁹ Due to the mental health challenges experienced by LGBTQI+ children in foster care it is essential to place LGBTQI+ children in placements that can provide the support and specialized resources necessary to support their health and wellbeing. We encourage the public to submit additional data, including personal stories from current and former LGBTQI+ foster children and others, that speak to the risks to children of placements that are not safe and appropriate, and the advantages of placements that are.

One area of particular concern for the mental health of LGBTQI+ youth in foster care may be the possible exposure to so-called “conversion therapy.” Efforts to change or suppress a child’s sexual orientation, gender identity, or gender expression are not supported by credible evidence and have been rejected as harmful by the American Academy of Child and Adolescent Psychiatry, the American Academy of Pediatrics, the American Psychiatric Association, the American Psychological Association, and the National Association of Social Workers, among others.³⁰ The American Psychological Association (APA) has concluded that any behavioral health or gender identity change effort that attempts to change an individual’s gender identity or expression is inappropriate.³¹ After reviewing scientific evidence on gender identity change efforts, harm, affirmative treatments, and professional practice guidelines, the APA has affirmed gender identity change efforts are associated with reported harm, and the APA opposes gender identity change efforts because of their association with harm.³² Likewise, according to the APA sexual orientation change efforts are “coercive, can be harmful, and should

not be part of behavioral health treatment.”³³

Further, evidence from qualitative studies, listening sessions, and Congressional testimony makes clear that many LGBTQI+ foster youth do not currently receive placements or services that are safe and appropriate, as required by statute.³⁴

Current Approaches for Meeting the Needs of LGBTQI+ Children in Foster Care

Current approaches for meeting the needs of LGBTQI+ children vary across states and tribes. Some agencies use, or are working towards implementing, child welfare practice models that address the specific needs of LGBTQI+ children, in line with existing Federal statutory requirements applicable to all children in foster care. In 2023, the Child Welfare Information Gateway issued *Protecting the Rights and Providing Appropriate Services to LGBTQI+ Youth in Out-of-Home Care* (the Report).³⁵ The report provides a review of state laws, regulations, and policies related to reducing the negative experiences of any child who identifies as LGBTQI+, including laws and policies that support a child’s ability to be safe and free from discrimination; have access to needed care and services; and be placed in safe and appropriate placement settings with caregivers who have received appropriate training. The Report found that 22 states and the District of Columbia require agencies to provide youth who identify as LGBTQI+ with services and supports that are tailored to meet the specific needs of an LGBTQI+ child, such as providing

clothing and hygiene products and referring to the child by the name and pronouns that align with their gender identity.³⁶ Eight states and the District of Columbia offer developmentally appropriate case management that helps child welfare workers support LGBTQI+ youth.³⁷ Fifteen states and the District of Columbia require training on LGBTQI+ issues for foster caregivers and related staff, including on how to communicate effectively and professionally with youth who identify as LGBTQI+, and education on current social science research and common risk factors for LGBTQI+ youth experiencing various negative outcomes.³⁸

However, the Report also demonstrates that a majority of agencies do not have laws, regulations, or policies to make appropriate services and supports, or safe and appropriate placements, available to a child in foster care who identifies as LGBTQI+. Without such laws or policies, agencies may not adequately meet statutory requirements that guarantee LGBTQI+ youth in foster care face, like all foster youth, a safe and appropriate placement. In March 2022, ACF published Information Memorandum (IM) ACYF–CB–IM–22–01 which included suggestions on how agencies could best provide services and supports to each child who identifies as LGBTQI+ who is at risk of entering or is in foster care.³⁹ ACF is proposing this NPRM to address the extensively documented risk factors and adverse outcomes that children in foster care who identify as LGBTQI+ experience.

III. Overview of Proposal

To support states and tribes in complying with Federal laws that require that all children in foster care receive safe and proper care, in this NPRM, ACF is proposing to require that agencies implement specific processes and requirements to ensure children in foster care who identify as LGBTQI+ are provided with placements the agency designates as safe and appropriate for an LGBTQI+ child, and with services that are necessary to support their health and wellbeing. These requirements clarify how title IV–E/IV–B agencies must meet IV–E and IV–B statutory requirements, including for the case review system and case plan, to appropriately serve children in foster care who identify as LGBTQI+. While

²⁹ Wilson, B.D.M., Cooper, K., Kastanis, A., & Nezhad, S. (2014). *Sexual and Gender Minority Youth in Foster care: Assessing Disproportionality and Disparities in Los Angeles*. Los Angeles, The Williams Institute, UCLA School of Law. Also see Institute for Innovation and Implementation at University of Maryland’s School of Social Work and the National Quality Improvement Center on Tailored Services, Placement Stability, and Permanency for LGBTQ2S Children and Youth in Foster Care (2021), *The Cuyahoga Youth Count: A Report on LGBTQ+ Youth Experience in Foster Care*, <https://theinstitute.umaryland.edu/media/ssw/institute/Cuyahoga-Youth-Count.6.8.1.pdf>.

³⁰ Substance Abuse and Mental Health Services Administration, *FAQs About Finding LGBTQI+ Inclusive Providers*. <https://www.samhsa.gov/behavioral-health-equity/lgbtqi/faqs>.

³¹ American Psychological Association, *APA Resolution of Gender Identity Change Efforts*, February 2021, <https://www.apa.org/about/policy/resolution-gender-identity-change-efforts.pdf>.

³² *Ibid.*

³³ American Psychological Association, *APA Resolution on Sexual Orientation Change Efforts*, February 2021, <https://www.apa.org/about/policy/resolution-sexual-orientation-change-efforts.pdf>.

³⁴ For examples, see Charles Gallo testimony before the Ways and Means Committee Worker and Family Support Subcommittee Hearing on “Making a Difference for Families and Foster Youth,” May 12, 2021. <https://www.congress.gov/117/meeting/house/112622/witnesses/HHRG-117-WM03-Wstate-Charles-GalloW-20210512.pdf>. Creating Safer Spaces for Youth who are LGBTQ in Broward County, Florida: Collecting SOGIE Data for Life-Coaching Services. Vol. 96, No. 1, Special Issue: Sexual Orientation, Gender Identity/Expression, and Child Welfare (First of two issues) (2018), pp. 27–52 (26 pages) <https://www.jstor.org/stable/48628034>, Mountz, S., Capous-Desyllas, M., & Pourciau, E. (2018). ‘Because we’re fighting to be ourselves’: voices from former foster youth who are transgender and gender expansive. *Child Welfare, Suppl. Special Issue: Sexual Orientation, Gender Identity/Expression, and Child Welfare*, 96(1), 103–125. Retrieved from <https://www.proquest.com/scholarly-journals/because-were-fighting-be-ourselves-voices-former/docview/2056448509/se-2>.

³⁵ Child Welfare Information Gateway, *Protecting the Rights and Providing Appropriate Services to LGBTQIA2S+ Youth in Out-of-Home Care*, 2023, <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/LGBTyouth/>.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Children’s Bureau, *Guidance for Title IV–B and IV–E Agencies When Serving LGBTQI+ Children and Youth*, March 2, 2022, <https://www.acf.hhs.gov/cb/policy-guidance/im-22-01>.

the general requirements for the case review system are not new. ACF is proposing to prescribe how agencies must implement the requirements to provide placements and services to children in foster care who identify as LGBTQI+.

Under this proposed rule, agencies must ensure that a safe and appropriate placement is available for and provided to any child in foster care who identifies as LGBTQI+ and requests such a placement. The NPRM proposes to require agencies to ensure that the totality of their child welfare system includes sufficient placements for LGBTQI+ children that meet these standards, but would not require that every provider become designated as a safe and appropriate placement for LGBTQI+ children.⁴⁰ To be considered as a safe and appropriate placement for a LGBTQI+ child means the provider with whom the agency places the child will establish an environment free of hostility, mistreatment, or abuse based on the child's LGBTQI+ status, the provider 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,⁴¹ and the provider will facilitate the child's access to age-appropriate resources, services, and activities that support their health and well-being (671(a)(24)) if the child wishes to access those resources, services, and activities. The proposed rule also includes requirements to notify children about the availability of these placements, the process to request such a placement, and the process to report placement concerns. The proposed requirements would also prohibit retaliation against a child who identifies as or is perceived to be LGBTQI+, require specific steps before the placement of transgender, intersex, and gender non-conforming children in sex-segregated child-care institutions (CCIs), require specific training for IV-E/IV-B

agency caseworkers and supervisors on how to appropriately serve LGBTQI+ youth and on how to implement the procedural requirements of this proposed rule. The proposed requirements would also require IV-E/IV-B agencies to ensure that agency contractors and subrecipients, as well as any placement providers who do not seek designation as safe and appropriate placements, are informed of the procedural requirements of the proposed rule. These proposed requirements aim to fulfill existing case review system requirements and other statutory requirements that require that all children in foster care are appropriately placed in a safe setting consistent with the best interest and special needs of each child. The details of our proposals are described further in the section by section of the preamble below.

Furthermore, ACF is proposing to modify the current regulations in § 1355.34 to monitor a state agency's compliance with the requirement in proposed § 1355.22(a)(1) through the Child and Family Service Reviews (CFSR). The CFSRs are a formal monitoring protocol in which the state's efforts to comply with title IV-E and IV-B program requirements are assessed at the case and systems level. No tribal title IV-E agency is subject to CFSRs because none has a sufficient number of children in foster care and children receiving in-home services for ACF to apply the onsite CFSR case sampling procedures.

Upon enactment of a final rule, ACF proposes to monitor both state and tribal title IV-E/IV-B agency's plan compliance with the proposed requirements of § 1355.22(a) through (c) using the existing partial review process outlined in § 1355.34 because these requirements must be included in the state or tribe's title IV-E plan that ACF must review and approve. Therefore, no regulatory changes to the partial review process are necessary. If ACF becomes aware of a potential non-compliance issue with § 1355.22, it will initiate the partial review process. Evidence of non-conformity identified through the partial review process may result in the state/tribal title IV-E/IV-B agency entering into a program improvement plan. The program improvement plan will be developed on a case-by-case basis by ACF and the agency will consider the extent of noncompliance. If the title IV-E/IV-B agency remains out of compliance, the agency will be subject to a penalty related to the extent of the noncompliance.

Equity Impact

This NPRM is consistent with the Administration's priority of advancing equity for LGBTQI+ individuals as well as those historically underserved and adversely affected by persistent poverty and inequality (see *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (Executive Order (E.O.) 13985*), issued Jan. 20, 2021; *Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals (E.O. 14075*), issued June 15, 2022). E.O. 14075 laid out objectives to reduce disparities that LGBTQI+ children face, including in foster care. LGBTQI+ children often have greater service needs, are at an increased risk for poor outcomes, are more likely to be placed in group settings and experience more placements, including those that may harm their well-being by undermining or suppressing their identity. By requiring agencies to ensure that safe and appropriate placements are available for and provided to LGBTQI+ children, we will work with agencies to ensure compliance with statutory requirements for all children in foster care to have a safe and appropriate placement that supports their health and well-being.

IV. Section-by-Section Discussion of Proposed Regulatory Changes

Required Protections for LGBTQI+ Children in Foster Care To Receive Safe and Appropriate Placements

Section 1355.22

Title IV-E establishes case plan requirements in sections 471(a)(16), 475(1) and 475(5)(A) and (D) of the Act and 45 CFR 1356.21(g), assuring that a child in foster care receives safe and proper care consistent with the best interest and special needs of the child, and that the case plan provide a discussion of the safety and appropriateness of the child's placement. To ensure that LGBTQI+ youth receive safe and proper care consistent with their best interests and special needs, in paragraph (a), ACF proposes procedural requirements that the title IV-E/IV-B agency must meet for each child in foster care who self-identifies as LGBTQI+ or who has entered the child welfare system, in whole or in part, because of familial conflict related to their LGBTQI+ identity.

ACF proposes to require in paragraph (a)(1) that the title IV-E/IV-B agency ensure a safe and appropriate placement is available for, and provided to, any

⁴⁰ As described in the Section-by-Section Discussion of Proposed Regulatory Changes, for example, nothing in this proposed rule will limit, preclude, or deny any religious provider's ability to participate in the foster care system, as religious providers who have sincerely held religious beliefs that conflict with the policies of this proposed rule are not required to offer such placements for LGBTQI+ children.

⁴¹ Note that only providers seeking to be designated as safe and appropriate providers for LGBTQI+ children would be required to complete specific training to provide for the needs of the child related to the child's self-identified sexual orientation, gender identity, and gender expression. Training and notification requirements proposed for all other contractors and providers are outlined in the Section-by-Section Discussion of Proposed Regulatory Changes.

child in foster care who identifies as LGBTQI+.

Requirements of a Safe and Appropriate Placement

For a placement to be considered safe and appropriate for a child who identifies as LGBTQI+, we propose to require that the title IV–E/IV–B agency make available and ensure that a child is placed with a foster care provider (e.g., foster family home, child care institution) who: (1) will establish an environment free of hostility, mistreatment, or abuse based on the child’s LGBTQI+ status, (2) 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, and (3) will facilitate the child’s access to age-appropriate resources, services, and activities that support their health and well-being.

1. A Placement That Is Free From Hostility, Mistreatment, or Abuse

Title IV–E provides that each child in foster care must receive a placement that is safe. In paragraph (a)(1)(i) we propose that the agency must place the child with a placement provider (e.g., foster family home, child care institution) who will establish an environment free from hostility, mistreatment, or abuse based on the child’s LGBTQI+ identity and status. In the background section of this proposed rule, we explain the significant body of evidence which demonstrates that when LGBTQI+ children face hostility, stigma, or rejection related to their sexual orientation or gender identity they are put at significant increased risk of adverse mental health outcomes and attempt suicide at higher rates.⁴² For example, under the proposed requirement, a provider who used derogatory language or slurs about a child’s LGBTQI+ identity would not be a safe and appropriate placement. Similarly, a provider who attempted to undermine, suppress, or change the sexual orientation, gender identity, or gender expression of a child, including through the use of so-called “conversion therapy” would not be a safe and appropriate placement. As explained by the Substance Abuse and Mental Health Services Administration (SAMHSA),

⁴² See Substance Abuse and Mental Health Services Administration (SAMHSA): *Moving Beyond Change Efforts: Evidence and Action to Support and Affirm LGBTQI+ Youth*. SAMHSA Publication No. PEP2203–12–001. Rockville, MD: Center for Substance Abuse Prevention. Substance Abuse and Mental Health Services Administration, 2023.

efforts that attempt to suppress or change a child’s sexual orientation or gender identity “are inappropriate, ineffective, and harmful practices that should not be provided to children and adolescents.”⁴³ In meeting the proposed requirement, the agency must not place LGBTQI+ identifying children with a provider who unreasonably limits or denies a child’s ability to express their sexual orientation, gender identity, or gender expression. For example, to be considered a safe and appropriate placement, a provider is expected to utilize the child’s identified pronouns, chosen name, and allow the child to dress in an age-appropriate manner that the child believes reflects their self-identified gender identity and expression.

2. A Placement With a Provider Trained To Provide for the Needs of an LGBTQI+ Child

For a placement to be considered safe and appropriate for children who identify as LGBTQI+, we propose in paragraph (a)(1)(ii) that the agency must place the child with a placement provider who 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. This includes foster family home providers and staff who work in child-care institutions (CCIs) as defined in 45 CFR 1355.20.⁴⁴

Title IV–E requires the agency to certify that foster parents are “prepared adequately with the appropriate knowledge and skills to provide for the needs of the child [and] that the preparation will be continued, as necessary, after the placement of the child” (471(a)(24)). These requirements are important for protecting the safety and mental health of the child. As explained in studies cited above and SAMHSA’s 2023 report *Moving Beyond Change Efforts: Evidence and Action to Support and Affirm LGBTQI+ Youth*, research demonstrates that when a LGBTQI+ child has their identity respected and supported by the

⁴³ Substance Abuse and Mental Health Services Administration (SAMHSA): *Moving Beyond Change Efforts: Evidence and Action to Support and Affirm LGBTQI+ Youth*. SAMHSA Publication No. PEP22–03–12–001. Rockville, MD: Center for Substance Abuse Prevention. Substance Abuse and Mental Health Services Administration, 2023.)

⁴⁴ As noted throughout this document, the proposed rule would not require that all providers seek designation as a safe and appropriate placement for LGBTQI+ children, but instead requires the state or tribal title IV–E/IV–B agency to ensure that the totality of its child welfare system provides safe and appropriate placements for all LGBTQI+ children.

caregivers in their life, their risks of attempted suicide decrease dramatically.

Some states already provide training of practices to serve LGBTQI+ children, as noted on the Child Welfare Information Gateway’s State Statutes Search.⁴⁵ Many agencies have not yet incorporated provider training addressing the needs of a child who identifies as LGBTQI+ into their curriculum. We anticipate that all title IVE/IVB agencies will need to develop or revise their training curriculum to meet the proposed provider training requirements in this NPRM.

We are not proposing a specific training curriculum that agencies would need to use to train foster care providers (i.e., foster family homes and child care institutions). However, agencies would need to ensure that the training curriculum adequately prepares foster family home and child-care institution providers to meet the best interests and special needs of an LGBTQI+ child. For a training to adequately prepare a provider to meet the best interests and special needs of an LGBTQI+ child, it would need to be a training that reflects evidence, studies, and research about the impacts of rejection, discrimination, and stigma on the safety and wellbeing of LGBTQI+ youth, and provides information for providers about practices that promote the safety and wellbeing of LGBTQI+ youth. HHS seeks comments on how ACF can ensure these training curriculums for foster care providers are of high quality.

We encourage agencies to consider using or adapting foster care provider training already established by entities with specialized knowledge on this topic, such as the National SOGIE Center, a collaborative led by Innovations Institute at the University of Connecticut School of Social Work and funded by the ACF Children’s Bureau to improve permanency, stability, and well-being for this population.⁴⁶ The Child Welfare Information Gateway has also issued publications providing guidance on how to create a welcoming and safe placement for children in foster care who identify as LGBTQI+.

⁴⁵ Child Welfare Information Gateway, State Statute Search. <https://www.childwelfare.gov/topics/systemwide/laws-policies/state/>.

⁴⁶ See National SOGIE Center, Trainings, <https://sogiecenter.org/offerings/training/>. National SOGIE Center trainings include trainings for agency facilitators, such as All Children—All Families Training of Facilitators. Also see the San Francisco State University Family Acceptance Project, <https://familyproject.sfsu.edu/>.

including Supporting LGBTQ+ Youth: A Guide for Foster Parents.⁴⁷

As explained in studies cited above and SAMHSA's 2023 Moving Beyond Change Efforts: Evidence and Action to Support And Affirm LGBTQI+ Youth, research demonstrates that even just one supportive adult can positively impact the mental health of LGBTQI+ youth. This support can reduce negative mental health outcomes and risk of suicide. The placement provider can and should be a supportive adult for the children in their care. Moreover, the SAMHSA report also found that "family or caregiver, peer, school, and community support for youth of diverse sexual orientation and/or gender identity promotes better mental health and fewer negative outcomes and can lead to positive development and emotional resilience."⁴⁸ These findings demonstrate how a supportive placement can promote positive outcomes, while also illustrating how a lack of support on the part of an adult caregiver does not.

3. A Placement That Will Facilitate Access to Age-Appropriate Resources, Services, and Activities

The title IV–E/IV–B case review system requires that the agency have procedures for assuring that each child has a case plan designed to achieve placements in the most appropriate setting available consistent with the best interests and special needs of the child (422(b), 471(a)(16), 475(1)(B), and 475(5)). To ensure that children have their special needs met, we propose in paragraph (a)(1)(ii)(B) that the agency must place the LGBTQI+ child with a placement provider will facilitate the child's access to age-appropriate resources, services, and activities that support the child's health and wellbeing, which may include services and supports related to their sexual orientation or gender identity. This proposal will ensure specifically that a child who identifies as LGBTQI+ will have access to a range of services and activities that addresses their specific health and wellbeing needs. These may include, but are not limited to, facilitating access to behavioral health supports respectful of their LGBTQI+ identity, interacting with LGBTQI+ mentors and peers, joining and participating in affinity groups, and connecting the child to available LGBTQI+ supportive resources and

events, either in person or virtually depending on local availability. A significant body of research demonstrates that these services are essential to support the child's safe and appropriate placement, and to support the emotional, developmental, and behavioral health needs of LGBTQI+ children in foster care.⁴⁹ As such, a safe and appropriate provider for an LGBTQI+ child must not discourage or prevent the child who identifies as LGBTQI+ from receiving age-appropriate services and supports that support their health and well-being related to the child's self-identified sexual orientation, gender identity, or gender expression. HHS understands that some IV–E/IV–B agencies will have more limited access to age-appropriate resources, services, and activities due to fewer service providers able to provide LGBTQI+ supportive services. HHS seeks comments on how ACF can best support agencies, including those located in rural and other resource limited areas, in fulfilling this requirement.

Prohibition of Disclosure of Sensitive Information

Title IV–E/IV–B agencies are prohibited from disclosing information concerning foster children for any purpose except for those specifically authorized by statute section 471(a)(8). Information about a foster child's LGBTQI+ identity, as well as any other information in their foster care case file, is protected by these confidentiality requirements. Foster children's personal information may only be disclosed for specific authorized purposes, which are, in paraphrase: the administration of the title IV–E plan and that of other Federal assistance programs; any investigation, prosecution, or audit conducted in connection with any of those programs; and reporting child abuse and neglect to appropriate authorities. Under ACF regulations and policy, information that the IV–E/IV–B agency discloses for those allowable purposes may not be redisclosed by recipients unless the redisclosure is also for one of the enumerated allowable purposes. 45 CFR 205.50; Child Welfare Policy Manual 8.4E.

Notification and Requests for Safe and Appropriate Placements

In paragraph (a)(2) ACF proposes to require that the title IV–E/IV–B agency establish a process by which a child identifying as LGBTQI+ may request a safe and appropriate placement as described in paragraph (a)(1). This will help the agency ensure that plan requirements regarding placements are fulfilled, consistent with the child's best interest and special needs. In paragraph (a)(2)(i), we propose that the agency's process include a notice to specified children of the availability of these placements and how to request them. Specifically, at a minimum, the agency must provide notice to a child aged 14 and over, and a child under age 14 if the child was removed, either in whole or in part, as a result of familial conflict about their actual or perceived LGBTQI+ identity, or if the child's LGBTQI+ identity is otherwise known to the agency. This proposed requirement is imposed on the state or tribal agency and is not a requirement of providers. As discussed further on in the proposed rule, this proposal gives states and tribes flexibility to determine how to work with providers to disseminate such information.

We are proposing the agency provide notification to all children aged 14 and older because the existing case plan requirement in section 475(1)(B) of the Act already requires that each child's case plan "shall be developed in consultation with the child" for children 14 and older. Nothing in this proposed rule would preclude agencies from notifying children earlier of the availability of safe and appropriate placements.

In paragraph (a)(2)(ii), ACF proposes that the notice must be provided in an age-appropriate manner, both verbally and in writing. We propose these two communication forms to provide the child with different opportunities and ways to understand that placements described in paragraph (a)(1) are available and how they can be requested. For example, having a verbal conversation provides a ready opportunity for a child to ask questions to their caseworker as needed. In contrast, written information allows the agency to provide children with uniform, consistent information that a child or youth can review at their convenience. The agency process for a child to request a placement defined in proposed paragraph (a)(1) may vary by state, tribe, and/or locality. Examples include a process for the child to: call or text the agency caseworker/other agency personnel, inform agency

⁴⁷ Child Welfare Information Gateway (2021). Supporting LGBTQ+ youth: A guide for foster parents. U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau. <https://www.childwelfare.gov/pubPDFs/LGBTQyouth.pdf>.

⁴⁹ See Substance Abuse and Mental Health Services Administration (SAMHSA): Moving Beyond Change Efforts: Evidence and Action to Support and Affirm LGBTQI+ Youth. SAMHSA Publication No. PEP22-03-12-001. Rockville, MD: Center for Substance Abuse Prevention. Substance Abuse and Mental Health Services Administration, 2023.

personnel in person, or email the agency caseworker/other agency personnel. Other options may include establishing private, secure accounts on a social media platform or smart phone application that could be used by children in foster care and accessed by designated agency caseworkers or agency personnel. In paragraph (a)(2)(iii), we propose that the notice must inform the child of how they may request a safe and appropriate placement.

Once the child's LGBTQI+ identity is known to the title IV–E/IV–B agency, it is the responsibility of the agency to provide the required information to the child, while protecting the privacy and confidentiality of the child. Regardless of the method used, agencies must ensure the privacy and confidentiality of any information shared by a child who is seeking a safe and appropriate placement.

Reporting and Responding to Concerns About Placements That Are Not Safe or Appropriate

In paragraph (a)(3), ACF proposes to require the title IV–E/IV–B agency to implement a process for children identifying as LGBTQI+ to report concerns about any placements that do not meet the requirements of paragraph (a)(1). We are proposing this requirement to ensure that agencies meet case plan requirements to assure that the child receives safe and appropriate care.

In paragraph (a)(3)(i), we propose that the agency provide a notice of the availability of this process to all children who meet the requirements of paragraphs (a)(2)(i)(A) and (B). Specifically, we propose that the agency provide the notice to all children in foster care age 14 and over, and a child under age 14 if the child was removed, either in whole or in part, as a result of familial conflict about their actual or perceived LGBTQI+ identity, or if the child's LGBTQI+ identity is otherwise known to the agency. Once the child's LGBTQI+ identity is known to the title IV–E/IV–B agency, it is the responsibility of the agency to provide the information about the agency's process to the child.

The proposed agency process for children to report concerns about their placement may vary by state, tribe, and/or locality. Examples include a process for the child to: call or text the agency caseworker/other agency personnel, inform agency personnel in person, call a hotline, or email the agency caseworker/other agency personnel. Other options may include establishing private, secure accounts on a social

media platform or smart phone application that could be used by children and accessed by designated agency caseworkers or agency personnel. Regardless of the method used, agencies must ensure the privacy and confidentiality of any information shared by a child who is seeking a safe and appropriate placement. In paragraph (a)(3)(ii), ACF proposes that the agency must provide notice to the child explaining how to report concerns about placements to the child in an age-appropriate manner, both verbally and in writing. We propose these two communication forms to provide the child with different opportunities and ways to understand the agency's process for the child to make a report about their placement concerns not meeting paragraph (a)(1). For example, having a verbal conversation provides a ready opportunity for a child to ask questions to their caseworker as needed. In contrast, written information allows the agency to provide children with uniform, consistent information that a child or youth can review at their convenience.

We propose in paragraph (a)(3)(iii) that the agency respond promptly to the child's reported concerns. The title IV–E/IV–B agency must notify all children who meet the requirements of paragraph (a)(2)(i) of the availability of this process in an age-appropriate manner, both verbally and in writing and in a manner consistent with the agency's timeframes for investigating child abuse and neglect reports.

ACF has reviewed state agencies policies and practices about investigating child abuse and neglect in order to provide context for this proposal and identified existing state agency requirements for handling such reports and responding to reports with different levels of urgency.⁵⁰ We propose that the agency determine the timeframe for responding promptly to a child's report by requiring the agency to align this proposed process with existing timelines for agency child abuse and neglect reporting and investigating procedures. All states are required to initiate a child abuse and neglect investigation in a timely manner, which is generally defined as within 72 hours. However, when there is reasonable cause to believe that a child is in imminent danger, most agencies require investigations to be initiated immediately, in as little as two hours and not longer than 24 hours after the report is made. Further, in many

agencies, the investigation must begin within 12 hours of a report if serious harm is indicated. In certain cases, we anticipate that a report from a LGBTQI+ youth that they feel their placement is not safe or appropriate should merit a response of great urgency from the agency. For example, given the extensive evidence that LGBTQI+ youth who face bullying, discrimination, or harassment related to their sexual orientation or gender identity are at significantly increased risk of violence or self-harm, we anticipate that agencies should respond with urgency when a LGBTQI+ child raises concerns that a placement that is not safe and appropriate.

ACF solicits public comment on whether and how best to define "promptly" as applied to this provision, understanding that the circumstances of the child's report may dictate the timeframes and immediacy of the action the IV–E/IV–B agency must take in responding to the report.

Protection From Retaliation

In paragraph (a)(4), ACF proposes to require that the title IV–E/IV–B agency have a procedure to ensure that no child in foster care experiences retaliation when the child has disclosed their LGBTQI+ identity, is otherwise reported or perceived to have an LGBTQI+ identity, has requested a safe and appropriate placement, or has reported concerns that the placement is not meeting the requirements of paragraph (a)(1). Retaliation in this context can be committed by title IV–E/IV–B agency personnel, the agency's contractors, or foster care providers. This proposed requirement will assist agencies in ensuring that a child in foster care receives safe and appropriate care consistent with the best interest and special needs of the child. The term retaliation means imposing negative consequences on the child because of the child's disclosure of their LGBTQI+ identity, perceived LGBTQI+ identity, request, or report. This may include such things as unwarranted placement changes (including unwarranted placement in congregate care rather than in family-like settings), restriction of access to LGBTQI+ peers or age-appropriate materials, required participation in efforts to degrade, disparage or change the child's sexual orientation or gender identity, disclosing the child's LGBTQI+ identity in ways that cause harm or risk the privacy of the child, or other activities that stigmatize a child's LGBTQI+ identity.

ACF is proposing this requirement because we are concerned about the

⁵⁰ Child Welfare Information Gateway, State Statute Search. <https://www.childwelfare.gov/topics/systemwide/laws-policies/state/>.

potential for a child who identifies or is perceived as LGBTQI+ to be subjected to negative consequences in response to disclosure of their actual or perceived LGBTQI+ identity.

The agency must ensure that children who disclose their identity, are perceived to have an LGBTQI+ identity, report a problem with a placement, or request a safe and appropriate placement are not subjected to any attempt to undermine, suppress, or change their sexual orientation, gender identity, or gender expression, efforts sometimes referred to as so-called “conversion therapy.” This includes ensuring the privacy and confidentiality of any information shared during these processes. As described in the background section of this proposed rule, these practices put LGBTQI+ youth at significant risk and are never safe or appropriate.

Access to Supportive and Age-Appropriate Services

In paragraph (a)(5), ACF proposes to require that the title IV–E/IV–B agency ensure that children who identify as LGBTQI+ have access to age-appropriate services that support their needs related to their sexual orientation and gender identity or expression. This includes clinically appropriate mental and behavioral health care supportive of their sexual orientation and gender identity and expression as needed. Clinically appropriate services means that they are based on current evidence and generally accepted medical standards of care.

Studies show that LGBTQI+ children have higher rates of suicidality than their heterosexual peers.⁵¹ Two recent child welfare agency studies showed that LGBTQI+ youth in foster care were more likely to be hospitalized for emotional reasons compared to non-LGBTQI+ youth.⁵² Being in foster care also appears to be an independent risk factor for LGBTQI+ youth: a 2020 survey found that “LGBTQ youth who reported having been in foster care had three

times greater odds of reporting a past-year suicide attempt compared to those who had not.”⁵³

The proposal to ensure that children who identify as LGBTQI+ have access to services that are tailored to their specific needs, including needs related to their LGBTQI+ identity is supported by the existing case plan requirements as defined in section 475(1)(B) of the Act, specifically, the section requiring that each child have a plan “for assuring that . . . services are provided to the parents, child, and foster parents in order to . . . address the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child under the plan.” The proposal also provides guidance to states and tribes regarding how ACF interprets, for LGBTQI+ children, the IV–E state plan requirement that agencies develop and implement standards to ensure that children in foster care placements are provided quality services that protect their safety and health. Section 471(a)(22).

ACF understands that some states also have few services providers able to provide LGBTQI+ supportive services. ACF seeks comments on how ACF can best support agencies, including those located in rural and other resource limited areas, in fulfilling this requirement.

Placement Requirements for Transgender, Gender Non-Conforming, and Intersex Children

The title IV–E statute provides that each child must have a case plan designed to achieve placements in the most appropriate setting available consistent with the best interests and special needs of the child (422(b), 471(a)(16), 475(1)(B), and 475(5)). To meet these statutory requirements, in paragraph (b), ACF proposes to require when the title IV–E/IV–B agency is placing a transgender, gender non-conforming, and intersex child with a safe and appropriate provider that is a sex segregated child-care institution, that they must make placements consistent with the child’s self-identified gender identity. Evidence demonstrates that when transgender, intersex, or gender non-conforming youth have their gender identity respected it reduces the risk of adverse mental health outcomes and attempted suicide, and provides benefits such as enhancing a child’s sense of safety and

overall well-being, supporting their sense of self and positively impacting their mental health. Conversely, when transgender⁵⁴ gender non-conforming youth are forced to use sex-segregated spaces that do not align with their gender identity it can exacerbate the psychological distress related to gender dysphoria.⁵⁵ The IV–E/IV–B agency must consult with the transgender, gender non-conforming, or intersex child to provide an opportunity to voice any concerns related to placement when the agency is considering a placement in such a facility. when the agency is considering a placement in such a facility.

Training and Informational Requirements

In paragraph (c), ACF proposes to require that title IV–E/IV–B agencies ensure that their employees who have responsibility for placing children in foster care, making foster care placement decisions, or providing services are trained to implement the procedural requirements of this proposed rule and to appropriately serve LGBTQI+ children. Such training should adequately prepare caseworkers and supervisors with the appropriate knowledge and skills to address the needs of foster children on their caseload related to sexual orientation, gender identity, and expression. The training should also ensure that all agency caseworkers and supervisors are prepared to implement and fulfill the requirements of this proposed rule. For a training to adequately prepare agency staff to meet the best interests and special needs of an LGBTQI+ child, it would need to be a training that reflects evidence, studies, and research about the impacts of rejection, discrimination, and stigma on the safety and wellbeing of LGBTQI+ youth, and provides information for agency staff about practices that promote the safety and wellbeing of LGBTQI+ youth. This proposed requirement is necessary to ensure that IV–E/IV–B agencies can properly implement the case plan and case review requirements of the Act for LGBTQI+ foster children.

In paragraph (c), ACF also proposes to require that title IV–E/IV–B agencies ensure that all agency contractors and subrecipients who have responsibility

⁵¹ The Trevor Project (2021), Facts About LGBTQ Youth Suicide. <https://www.thetrevorproject.org/resources/article/facts-about-lgbtq-youth-suicide/>.

⁵² Wilson, B.D.M., Cooper, K., Kastanis, A., & Nezhad, S. (2014). Sexual and Gender Minority Youth in Foster care: Assessing Disproportionality and Disparities in Los Angeles. Los Angeles: The Williams Institute, UCLA School of Law. <https://williamsinstitute.law.ucla.edu/wp-content/uploads/SGM-Youth-in-Foster-Care-Aug-2014.pdf>.

¹ Matarese, M., Greeno, E., Weeks, A., Hammond, P. (2021). The Cuyahoga youth count: A report on LGBTQ+ youth’s experience in foster care. Baltimore, MD: The Institute for Innovation & Implementation, University of Maryland School of Social Work. <https://theinstitute.umaryland.edu/media/ssw/institute/Cuyahoga-Youth-Count.6.8.1.pdf>.

⁵³ The Trevor Project (2021) The Trevor Project Research Brief: LGBTQ Youth with a History of Foster Care https://www.thetrevorproject.org/wp-content/uploads/2021/07/LGBTQ-Youth-with-a-History-of-Foster-Care_-May-2021.pdf.

⁵⁴ See Substance Abuse and Mental Health Services Administration (SAMHSA): Moving Beyond Change Efforts: Evidence and Action to Support and Affirm LGBTQI+ Youth. SAMHSA Publication No. PEP2203–12–001. Rockville, MD: Center for Substance Abuse Prevention. Substance Abuse and Mental Health Services Administration, 2023.

⁵⁵ Ibid.

for placing children in foster care, making placement decisions, or providing services are informed of the procedural requirements necessary to comply with this proposed rule. Similarly, we propose to require that agencies ensure that all placement providers who have not chosen to seek designation as safe and appropriate placement providers for LGBTQI+ foster children are also informed of the procedural requirements necessary to comply with this proposed rule. As part of this requirement, agencies would be required to ensure that contractors, subrecipients, and placement providers are all informed of the required non-retaliation provisions outlined in paragraph (a)(4).

Ensuring Compliance Through the Child and Family Services Review

ACF proposes to revise the Child and Family Services Review (CFSR) regulations to make clear that the CFSR process will assess agencies on their compliance with the requirements of these proposed regulations. Specifically, we propose to revise § 1355.34(c)(2)(i) to add “including placements described in § 1355.22(a)(1)” to the case review system requirement for provisions to place the child in an appropriate placement that meets their needs. We also propose to add at the end of § 1355.34(c)(2)(i) within the parenthetical “§ 1355.22(a)(1)”. Under the current CFSR regulations, the Children’s Bureau reviews how title IV–E agencies ensure the safety and appropriateness of foster care placements. This proposed amendment will ensure that the requirements proposed to be added to § 1355.22(a)(1) are included in the CFSRs, and specifically examined under the case review systemic factor outlined in § 1355.34(c)(2)(i).

In implementing the requirements proposed under this rule, ACF anticipates that agencies will likely need to produce new administrative records to monitor and track requests for safe and appropriate placements and adjudication of those requests. Such administrative records, including at the case file level, may be reviewed through the CFSR process. ACF invites public comment on what further guidance states may need on producing such administrative records, while protecting the privacy and confidentiality of LGBTQI+ youth.

Severability

For the reasons described above, ACF believes that its authority to implement each of the provisions in the proposed regulation is well-supported in law and

practice and should be upheld in any legal challenge. ACF also believes that its exercise of its authority reflects sound policy. However, in the event that any portion of the proposed rule is declared invalid, ACF intends that the other provisions be severable.

Religious Liberty and Other Freedoms

ACF appreciates the vital role that religious providers play in providing care and services to children in the child welfare system. ACF values the child welfare services that faith-based organizations provide, consistent with HHS-wide regulations governing social services ensuring that religious organizations are eligible on the same basis as any other organization to participate in child welfare programs administered with title IV–E and IV–B funds. See 45 CFR 87.3(a). ACF takes seriously its obligations to comply with the Constitution and Federal laws that support and protect religious exercise and freedom of conscience, including the First Amendment and the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb *et seq.*, as well as all other applicable Federal civil rights laws and HHS regulations including 45 CFR part 87 (“Equal Treatment for Faith-Based Organizations”). ACF will continue to operate the title IV–E and IV–B programs in compliance with these legal requirements. ACF remains fully committed to thoroughly considering any organization’s assertion that any obligations imposed upon them that are necessitated by this proposed rule as finalized conflicts with their rights under those laws.

If a title IV–E/IV–B provider alleges that any obligation that this proposed rule as finalized requires a state or tribe to impose substantially burdens the provider’s religious exercise, ACF will apply the test set out by RFRA to determine whether an exemption is required. Under RFRA, when Federal action substantially burdens an individual or entity’s exercise of religion, the Federal government must afford that individual or entity an exemption to the rule unless the government can demonstrate that applying the burden in that particular instance furthers a compelling governmental interest and is the least restrictive means of doing so. See 42 U.S.C. 2000bb–1(b). Accordingly, under RFRA, we first assess whether the particular application of the rule substantially burdens the provider’s exercise of religion. If so, we assess whether applying the requirement furthers a compelling interest and whether there are less restrictive alternatives available. Thus, even if the

rule substantially burdens a religious practice, an exemption would not be required if the burden is necessary to the advancement of a compelling government interest through the least restrictive means possible. We will apply RFRA in accordance with the statutory text and applicable case law.

When drafting this proposed rule, ACF has taken these RFRA principles into account, and has endeavored to write each provision to provide states and tribes with the flexibility to implement the measures without imposing any substantial burdens on providers’ religious exercise that we can reasonably anticipate. Most importantly, nearly all of the requirements in this proposed rule would be imposed directly on state and tribal IV–E/IV–B agencies, as opposed to on any private foster care agency, foster parent, kinship caregiver or other provider. The only requirement that would be imposed on private providers by the proposed rule is the requirement to be informed of the procedural requirements to comply with the proposed rule (including the required non-retaliation provisions outlined in paragraph (a)(4)). All other requirements would be responsibilities of the state and tribal IV–E/IV–B agencies, and ACF believes that these responsibilities have been drafted in a manner that the IV–E/IV–B agencies can satisfy without imposing any substantial burden on religious providers that is reasonably foreseeable.

As the Supreme Court has recently made clear, the First Amendment protects faith-based entities that provide foster care services. See *Fulton v. City of Philadelphia*, 593 U.S. __ (2021). Consistent with this protection, the proposed rule, if adopted, would not require any faith-based provider to seek designation as a safe and appropriate provider for LGBTQI+ children as described in this proposed rule if the provider had sincerely held religious objections to doing so. When drafting the text, ACF was cognizant that a foster care requirement that precludes a child welfare provider from participating in the program while adhering to its religious beliefs might substantially burden religious exercise. Rather than placing requirements on child welfare providers, this rule as proposed would require agencies to ensure that their child welfare networks as a whole include sufficient numbers of providers that are willing to supply safe and appropriate placements for LGBTQI+ children so that all children who request such a placement will receive an appropriate one. To the extent that current networks are insufficient, the Department believes that IV/B/IV–E

agencies will be able to meet this requirement through outreach, training and other supply-building activities to build their provider networks, and can do so without imposing substantial burdens on religious exercise of providers. When states and tribes select organizations to participate in the child welfare program, ACF would recommend that states and tribes do not adopt selection criteria that adversely disadvantage any faith-based organizations that express religious objections to providing safe and appropriate placements for LGBTQI+ children.

While this proposed rule would require title IV–E/IV–B agencies to establish processes for children to receive notification concerning the availability of safe and appropriate placements, how to request them and the means of reporting any concerns about such placements, ACF expects agencies would adopt these notice requirements without substantially burdening the religious exercise of any child welfare providers that expressed religious objections to disseminating the notices in any reasonably foreseeable way. For example, under the proposed rule, a title IV–E/IV–B agency may provide the notices directly through agency staff. Alternatively, state and tribal agencies may require the providers in their child welfare network to disseminate the notices as a general matter while exempting any entities that express religious objections to doing so and utilizing agency staff in those limited instances. In addition, HHS is not aware of any instances in which a faith-based organization has requested a religious exemption from an HHS notice requirement that is generally applicable to social service providers notwithstanding the fact that the notice informs beneficiaries of alternative providers.

This proposed rule similarly would enable title IV–E/IV–B agencies to retain discretion when determining how to ensure that contracted caseworkers and supervisors who are responsible for placing children in foster care, making placement decisions or providing services, as well as placement providers who choose not to seek designation as safe and appropriate placements are informed of the requirements of this rule. To be clear, this proposed regulatory requirement only requires that contractors/subrecipients and those placement providers who are not seeking designation as safe and appropriate placements for LGBTQI+ children are informed of the procedural requirements, including the non-retaliation provision.

This proposed rule enables title IV–E/IV–B agencies to retain flexibility to determine how title IV–E/IV–B agencies will ensure that LGBTQI+ children will upon request be transferred from any entity that will not provide a safe and appropriate placement as described by the finalized rule to one that will. ACF expects agencies to adopt transfer processes that minimize the extent of any obligations on faith-based providers that need to transfer children as a result of this proposed rule as finalized. ACF notes that it has no historical basis to anticipate religious objections to cooperating with such transfers, as HHS has not received any religious objections in other instances in which HHS required faith-based grantees to refer third parties impacted by religious objections to alternative providers.

As we have explained, we have crafted this proposed rule to minimize the likelihood that it will impose substantial burdens on religious exercise in violation of the Constitution or RFRA. Nevertheless, should any child welfare service provider incur any unforeseen religious objections to compliance with an obligation that is necessitated by this proposed rule as finalized (as opposed to any discretionary measure imposed by a state or tribe) ACF will consider requests for accommodation on a case-by-case basis in accordance with the Constitution and Federal statutes. ACF recognizes that RFRA requires a fact-specific case-by-case analysis of whether any specific obligation necessitated by this proposed rule imposes a substantial burden on religious exercise, and, if so, whether that obligation is in the particular case the least restrictive means of furthering a compelling government interest. *See Gonzales v. Centro*, 546 U.S. 418 (2006). This case-by-case analysis will allow ACF to consider whether any substantial burden imposed on the provider's exercise of religion is in furtherance of a compelling governmental interest, and is the least restrictive means of advancing that interest. This will involve considering any harm an exemption could have on third parties involved in the child welfare program. *See Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). This process provides an opportunity for service providers to raise with ACF any concerns regarding obligations necessitated by this proposed rule as finalized, which would enable ACF to determine whether an exemption or modification of the application of the provision at issue is appropriate under

the Federal religious freedom law at issue.

As to the process for filing any requests for religious accommodation, state and tribal child welfare agencies must continue to notify sub-awardees of their religious freedom rights. As required under 45 CFR 87.3(a) and (k), state and tribal child welfare agencies must continue to ensure that their notices or announcements of award opportunities include language that is substantially similar to that in section (a) of appendix A to part 87. Similarly, notices of award or contract must include language that is substantially similar to that in section (a) of appendix B to part 87. In relevant part, these appendices require that sub-awards and contracts inform sub-awardees of their right to carry out child welfare programs consistent with religious freedom, nondiscrimination, and conscience protections in Federal law, including the Free Speech and Free Exercise Clauses of the First Amendment of the U.S. Constitution, RFRA, or any related or similar Federal laws or regulations; and that religious accommodations may also be sought under many of these religious freedom, nondiscrimination, and conscience protection laws.

A provider requesting any religious accommodation would submit the request to their state's or tribe's title IV–E/IV–B agency. If the request concerns a religious objection to an obligation that is required or necessitated by this proposed rule as finalized, the title IV–E/IV–B agency must promptly forward the request to ACF, which will consider the request in collaboration with the Office of the General Counsel.

Kinship Caregivers

A significant body of evidence demonstrates that when children in the foster care system are placed with kinship caregivers that they have better outcomes.⁵⁶ We note that a title IV–E agency shall consider giving preference to an adult relative over a non-related caregiver when determining an out-of-home placement for a child, provided that the relative caregiver meets all relevant state or tribal child protection standards (section 471(a)(19) of the Act). HHS invites public comment on how agencies can best comply with the requirements of this proposed rule and prioritize placements with kinship caregivers. In particular, HHS invites public comment on what resources

⁵⁶ Child Welfare Information Gateway. (2022). Kinship care and the child welfare system. U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau. <https://www.childwelfare.gov/pubs/f-kinshi/>.

agencies may need from HHS to support kinship caregivers in caring for an LGBTQI+ child.

Recruitment of Safe and Appropriate Providers

In order to comply with the requirements in this proposed rule, we anticipate that a majority of states would need to expand their efforts to recruit and identify providers and foster families that the state or tribe could designate as safe and appropriate placements for a LGBTQI+ child to ensure that the totality of their child welfare system includes enough safe and appropriate placements to meet the needs of LGBTQI+ children in care. To support states and tribes in meeting these recruitment needs, ACF allows sharing costs between the Federal Government and state and tribal governments, providing Federal title IV-E funding for 50 to 75 percent of the administrative, recruitment and training costs of this NPRM. HHS invites public comment on how best we can support states and tribes in recruiting providers to provide safe and appropriate placements.

V. Regulatory Process Matters

Regulatory Planning and Review Executive Orders 12866, 13563, and 14094

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 is supplemental to, and reaffirms the principles, structures, and definitions governing regulatory review as established in Executive Order 12866, emphasizing the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Section 3(f) of Executive Order 12866, as amended by Executive Order 14094, defines “a significant regulatory action” as an action that is likely to result in a rule that may: (1) have an annual effect on the economy of \$200 million or more (adjusted every 3 years by the Administrator of the Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product), or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, territorial, or tribal

governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President’s priorities or the principles set forth in the order. OIRA has determined that this proposed rule does meet the criteria for a significant regulatory action under section 3(f) of Executive Order 12866. Thus, it was subject to Office of Management and Budget (OMB) review.

Costs and Benefits

The benefits of this NPRM are that placing children in foster care with providers the agencies designate as safe and appropriate for LGBTQI+ children will reduce the negative experiences of such children by allowing them to have access to needed care and services and to be placed in nurturing placement settings with caregivers who have received appropriate training. Ensuring such placements may also reduce LGBTQI+ foster children’s high rates of homelessness, housing instability and food insecurity.⁵⁷ As thoroughly documented by SAMHSA, “[s]upportive family, caregivers, community, school, child welfare, and healthcare environments have been shown to positively impact both the short- and long-term health and well-being of LGBTQI+ youth.”⁵⁸ This proposed rule promotes a supportive environment for children in foster care who self-identify as LGBTQI+.

ACF acknowledges that there will be a cost to implement changes made by this proposed rule as we anticipate that a majority of states would need to expand their efforts to recruit and identify providers and foster families that the state or tribe could designate as safe and appropriate placements for a

⁵⁷ DeChants, J.P., Green, A.E., Price, M.N., & Davis, C.K. (2021), Homelessness and Housing Instability Among LGBTQ Youth. West Hollywood, CA: The Trevor Project, <https://www.thetrevorproject.org/wp-content/uploads/2022/02/Trevor-Project-Homelessness-Report.pdf>; Amy Dworsky, 2013. “The Economic Well-Being of Lesbian, Gay, and Bisexual Youth Transitioning Out of Foster Care,” Mathematica Policy Research Reports b2f4fb67aab149f9a5e75f558, Mathematica Policy Research; https://www.acf.hhs.gov/sites/default/files/documents/opre/opre_lgbt_brief_01_04_2013.pdf.

⁵⁸ Substance Abuse and Mental Health Services Administration (SAMHSA): Moving Beyond Change Efforts: Evidence and Action to Support and Affirm LGBTQI+ Youth. SAMHSA Publication No. PEP2203–12–001. Rockville, MD: Center for Substance Abuse Prevention. Substance Abuse and Mental Health Services Administration, 2023.

LGBTQI+ child. This cost would vary depending on an agency’s available resources to implement an eventual final rule. To inform the final rule, ACF intends to seek comments on whether state and tribal agencies are likely to incur additional substantial costs.

Alternatives Considered

As an alternative to this NPRM, ACF considered providing sub-regulatory guidance requiring agencies to implement the provisions of the NPRM for children who identify as LGBTQI+. However, this alternative was rejected because it would not have the force of law and thus could not effectively ensure that LGBTQI+ children and youth in foster care receive appropriate placements and services. ACF has already provided extensive resources and sub-regulatory guidance to agencies about improving the health and wellbeing of LGBTQI+ children in foster care, but those resources alone have not been sufficient to ensure that LGBTQI+ youth are protected from mistreatment in foster care.⁵⁹

Regulatory Flexibility Analysis

The Regulatory Flexibility Act (RFA) (see 5 U.S.C. 605(b) as amended by the Small Business Regulatory Enforcement Fairness Act) requires Federal agencies to determine, to the extent feasible, a rule’s impact on small entities, explore regulatory options for reducing any significant impact on a substantial number of such entities, and explain their regulatory approach. The term “small entities,” as defined in the RFA, comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. HHS considers a rule to have a significant impact on a substantial number of small entities if it has at least a 3 percent impact on revenue on at least 5 percent of small entities. However, the Secretary certifies, under 5 U.S.C. 605(b), as enacted by the RFA (Pub. L. 96–354), that this proposed rule will not result in a significant impact on a substantial number of small entities. Therefore, an initial regulatory flexibility analysis is not required for this document.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4) was enacted to avoid imposing unfunded Federal mandates on state, local, and

⁵⁹ Children’s Bureau, Guidance for Title IV–B and IV–E Agencies When Serving LGBTQI+ Children and Youth, March 2, 2022, <https://www.acf.hhs.gov/cb/policy-guidance/im-22-01>.

tribal governments, or on the private sector. Section 202 of UMRA requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2022, that threshold is approximately \$177 million. This proposed rule does not contain mandates that will impose spending costs on state, local, or tribal governments in the aggregate, or on the private sector, in excess of the threshold.

Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 1999 requires Federal agencies to determine whether a policy or regulation may negatively affect family well-being. If the agency determines a policy or regulation negatively affects family well-being, then the agency must prepare an impact assessment addressing seven criteria specified in the law. ACF believes it is not necessary to prepare a family policymaking assessment (see Pub. L. 105–277) because this proposed rule will not have a negative impact on the autonomy or integrity of the family as an institution.

Executive Order 13132

Executive Order 13132 requires Federal agencies to consult with state and local government officials if they develop regulatory policies with federalism implications. Federalism is rooted in the belief that issues that are not national in scope or significance are most appropriately addressed by the level of government close to the people. ACF conducted a regulatory impact analysis (RIA) to estimate costs, transfers, and benefits of provisions in the proposed rule. The cost of implementing changes made by this proposed rule would vary depending on a state's specific situation and implementation choices. This proposed rule would not have substantial direct impact on the relationship between the Federal Government and the states, or on the distribution of power and responsibilities among the various levels of government. However, we anticipate that this proposed rule will have a substantial direct impact on the cost that title IV–E agencies will incur to implement administrative procedures and recruit and train their workforce and providers. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this action has sufficient federalism implications that warrants the preparation of a federalism summary impact statement.

Federalism Summary Impact Statement

The Social Security Act requires agencies to provide children in foster care with safe and appropriate placements and services (42 U.S.C. 675(1)(b)) and ensure that prospective foster parents are prepared adequately with the appropriate knowledge and skills to provide for the needs of the child (42 U.S.C. 671(a)(24)). ACF believes this proposed regulation is necessary to ensure children in foster care who identify as LGBTQI+ are provided appropriate placements and access to support services that address the well documented disparities that LGBTQI+ youth in foster care face. LGBTQI+ youth are overrepresented in the child welfare system, far too often experience trauma, including being placed in foster care or congregate care settings that are hostile to their identity, or lacking access to health care and mental health services to support them. This proposal may have federalism implications due to the substantial direct financial impact on state or local governments. Although ACF has not consulted directly with state or local governments prior to issuing this NPRM, ACF has spent years reviewing research and agency practices, and supporting pilot programs in this area. For example, the National Quality Improvement Center (QIC) on Tailored Services, Placement Stability, and Permanency for Lesbian, Gay, Bisexual, Transgender, Questioning, and Two-Spirit Children and Youth in Foster Care (LGBTQ2S+ QIC) was led by the Institute for Innovation & Implementation at the University of Maryland School of Social Work in Baltimore along with participating core partners: Human Service Collaborative, National Indian Child Welfare Association, Ruth Ellis Center, Tufts University, and Youth M.O.V.E. National.^{60 61} State and local governments may be concerned about the cost imposed by the NPRM. ACF has attempted to meet this concern by sharing costs between the Federal government and state governments, providing Federal title IV–E funding for 50 to 75 percent of the administrative, recruitment and training costs of this NPRM. We also believe that after the first 3 years of implementation, the financial impact on state governments

would be minimal. To inform the final rule, ACF will seek to further consult with state and local governments and request that such governments provide comments on provisions in the proposed rule and on whether state and local governments are likely to incur additional substantial costs.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (Pub. L. 104–13) seeks to minimize government-imposed burden from information collections on the public. In keeping with the notion that government information is a valuable asset, it also is intended to improve the practical utility, quality, and clarity of information collected, maintained, and disclosed. The Paperwork Reduction Act defines “information” as any statement or estimate of fact or opinion, regardless of form or format, whether numerical, graphic, or narrative form, and whether oral or maintained on paper, electronic, or other media (5 CFR 1320.3(h)). This includes requests for information to be sent to the government, such as forms, written reports and surveys, recordkeeping requirements, and third-party or public disclosures (5 CFR 1320.3(c)).

Information collection requirements for case plans required under title IV–E and IV–B are currently authorized under OMB number #0970–0428. This NPRM does not require changes to the existing information collection as there will be minimal burden associated with the proposed case plan requirements. Any additional costs would be minimal because agencies are already required to provide case review protections to children in foster care, and the NPRM simply provides more specificity for an LGBTQ child. While agencies will need to develop policies to comply with some of the provisions in the NPRM, the casework to provide safe placements, consult with children, and notify them of the procedures for reporting concerns or requests for placement changes is part of the agency's ongoing work with a child in foster care.

Information collection for the CFSR is currently authorized under OMB # is 0970–0214. This NPRM does not significantly change or add burden to existing information collection requirements because the CFSR already includes reviewing case plan requirements for safe and appropriate placements and collecting information on the state's case review system under the statewide assessment. Therefore, no revisions are needed in that collection.

⁶⁰ See QIC LGBTQ2S About the QIC, <https://qiclgbtq2s.org/about-the-qic/>.

⁶¹ Also see Sexual & Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles, 2014, <https://www.acf.hhs.gov/cb/report/sexual-gender-minority-youth-foster-care-assessing-disproportionality-and-disparities-los>, a project which received Children's Bureau funding.

Annualized Cost to the Federal Government

ACF estimated that the proposed regulatory changes would cost the Federal Government \$9,712,740 over three fiscal years (2025–2027). ACF estimated that the combined total Federal and agency costs over three fiscal years would be \$40,834,548.

The estimate for this NPRM was derived using fiscal year (FY) 2021 data from the Adoption and Foster Care Analysis and Reporting System (AFCARS) on children in foster care, FY 2022 claiming data from the Form CB–496 “Title IV–E Programs Quarterly Financial Report (Foster Care, Adoption Assistance, Guardianship Assistance, Prevention Services and Kinship Navigator Programs),” National Child Abuse and Neglect Data System (NCANDS) child protection caseworker data collected between FY 2003 and FY 2014, state surveys, and the U.S. Department of Labor Bureau of Labor Statistics (BLS).

The portions of this NPRM’s requirements determined to have an identifiable impact on title IV–E/IV–B agency costs were as follows:

- To comply with the requirement that all LGBTQI+ children in foster care have access to a safe and appropriate placement, agencies will likely need to increase the recruitment of providers who are qualified to provide safe and appropriate care.
- Training agency caseworkers and supervisors on the procedural requirements in the NPRM and on how to adequately serve LGBTQI+ foster children, and training placement providers seeking to become designated as safe and appropriate placement providers on how to meet the needs of LGBTQI+ children in foster care, as required in the proposal.

Assumptions: ACF made several assumptions when calculating administrative and training costs for this proposed rule.

ACF assumes that quantifiable incremental costs with respect to the above activities will largely be incurred on behalf of children in foster care who are age 14 and older. ACF expects the population of children under age 14 who meet the proposed requirements of paragraph (a)(2)(i)(A) or (B) to be relatively small, and therefore not likely to have a significant impact on cost. We are, however, accounting for the cost to recruit and train sufficient safe and appropriate placement providers to serve all children in need of such a placement regardless of age. This is accomplished by calculating recruitment and training costs using the

maximum expected level of affirmative placement needs for children ages 14 and older.

We assume that states and tribes will not be able to use title IV–B funding to implement this NPRM if it becomes a final rule. Children in foster care who are not title IV–E eligible are also subject to the proposed requirements based on the proposed rule’s applicability to title IV–E and IV–B agencies. Title IV–B funding is available for 75 percent Federal financial participation (FFP) for recruitment and training of placement providers (42 U.S.C. 624(a)). However, those funds are limited to an annual allotment provided to each title IV–B agency. Therefore, we assume agencies will likely need to cover 100 percent of the safe and appropriate placement provision costs on behalf of non-title IV–E eligible children in foster care.

ACF assumes an overall annual one percent caseload growth rate in the foster care population based on our current title IV–E budgetary projections. Since this NPRM focuses on older children in foster care, we increased this growth rate slightly (to an average of 1.4 percent annually) to consider an expected further growth in the age 18 and older foster care population, as more states opt to extend foster care through age 20.

ACF assumes that if the proposal becomes final, the requirements will become effective at the beginning of FY 2025 and thus will apply to the entire population of children in foster care who are age 14 and older in that FY. This will result in the majority of incremental costs for the NPRM activities occurring in FY 2025. We expect costs in FYs 2026 and 2027 to be about half of those for FY 2025 since the required activities will affect primarily those children in care who are turning age 14 in the FY, or who are newly entering care at age 14 and older. After the third year of implementation, we anticipate that incremental costs will largely be eliminated as available safe and appropriate placement providers are recruited and the proposed policies, procedures, and training requirements are implemented.

Federal cost estimate for implementation of safe and appropriate placements: The table below displays the individual calculations by line. All entries in the table and the narrative below are rounded to the nearest whole number. The calculations to obtain these amounts, however, were performed without applying rounding to the involved factor(s).

Line 1. National number of children in foster care (FC). Line 1 of the table

below displays the actual number of children in FC at the beginning of FY 2022 (baseline), which was 391,098. Line 1 also displays estimates of the annual number of children in FC in the subsequent FYs 2025, 2026, and 2027.

Line 2. National number of children in FC age 14 and older. Line 2 of the table below displays the actual number of children in FC who were age 14 and older at the beginning of FY 2022 (baseline) which was 92,852. We also provide estimates of the number of children in FC age 14 and older in the following subsequent FYs 2025, 2026, and 2027. In 2027 the caseload is estimated at 104,705.

Line 3. National average monthly number of children in title IV–E FC age 14 and older. Line 3 of the table below displays the actual number of title IV–E eligible children in FC age 14 or older at the beginning of FY 2022 (baseline), which was 36,817. This number is calculated by applying the percentage of all children in FC (title IV–E and non-IV–E eligible) that are age 14 or older to the reported count of title IV–E eligible children receiving FC administrative cost services. For example, in FY 2022 the title IV–E FC caseload for administrative costs was 155,075 and the percentage of all children in FC who were age 14 or older was 23.74 percent. Therefore, the calculated count of title IV–E eligible children in FC age 14 and older is 36,817 ($155,075 \times 23.74\%$). We also provide estimates of the number of children in FC age 14 and older in the following subsequent years: FYs 2025, 2026, and 2027.

Line 4. National number of children to be notified of safe and appropriate (S&A) placement requirements. Line 4 of the table below provides an estimate of the number of children in FC who must be notified of the safe and appropriate placement provisions in proposed § 1355.22(a)(2)(i). For the first year of implementation (FY 2025) this number is the same as the Line 2 number (national number of children in foster care age 14 and older) since all of these children are required to be so notified. For FYs 2026 and 2027, we multiplied the national number of children in FC age 14 and older (Line 2) by the proportion of this population that entered care in that FY based on baseline year AFCARS data showing 40.64 percent. This step avoids counting children that are likely to have already received the notification in a prior FY. For example, in FY 2027 the national number of children that must be notified of safe and appropriate placement requirements is 42,552 ($104,705$ (Line 2) \times 40.64% (Line 4) = $42,552$).

Line 5. Percentage of national foster care placements for children needing S&A placements. Line 5 of the table below displays the estimated percentage of national foster care safe and appropriate placements needed for children who identify as LGBTQI+. For each FY, we divided the number of children in foster care ages 14 and older (Line 4) by the expected total annual number of children entering foster care. Data available through surveys shows that about 30 percent of older children in foster care identify as LGBTQI+. For example, a 2014 survey of children ages 12 through 21 in foster care in Los Angeles County, California, found that 19 percent of children in foster care identified as LGBTQI+.⁶² Similarly, a 2021 study of foster children ages 12 through 21 in Cuyahoga County, Ohio, found that 32 percent identified as LGBTQI+.⁶³ For the purposes of this cost estimate, ACF's estimate of children age 14 and over in foster care who identify as LGBTQI+ is 30 percent. For example, in FY 2025 on Line 4, the national number of children to be notified of safe and appropriate placement provisions is 97,973 and the base year total foster care entries is 206,812. ACF estimated 30 percent of older children in foster care identify as LGBTQI+. Therefore, Line 5, the percentage of national foster care placements for LGBTQI+ children needing safe and appropriate placements, is 14.2 percent $((97,973 \times 30\%) \div 206,812)$. This estimate is purposefully high to account for some children under age 14 who may also need such safe and appropriate placements.

Line 6. Total incremental costs (Federal and non-Federal) for recruiting safe and appropriate foster care placements. Line 6 of the table below displays the estimated total cost of recruiting placement providers to meet the proposed requirements for safe and appropriate placement providers for LGBTQI+ children in the foster care system. This estimate for each FY is based on data collected from ten title IV–E/IV–B agencies across the Nation

⁶² Wilson, B.D.M., Cooper, K., Kastanis, A., & Nezhad, S. (2014). *Sexual and Gender Minority Youth in Foster care: Assessing Disproportionality and Disparities in Los Angeles*. The Williams Institute, UCLA School of Law <https://williamsinstitute.law.ucla.edu/wp-content/uploads/SGM-Youth-in-Foster-Care-Aug-2014.pdf>.

⁶³ Matarese, M., Greeno, E., Weeks, A., Hammond, P. (2021). *The Cuyahoga youth count: A report on LGBTQ+ youth's experience in foster care*. Baltimore, MD: The Institute for Innovation & Implementation, University of Maryland School of Social Work. <https://theinstitute.umaryland.edu/media/ssw/institute/Cuyahoga-Youth-Count.6.8.1.pdf>.

with respect to their current annual budgets for foster care recruitment activities. We used this data to calculate a nationwide total estimated annual foster care recruitment cost of \$185,998,176 based on an extrapolation of the provided data using FY 2022 foster care caseload information. This figure was then multiplied by the calculated portion of the FC caseload ages 14 and older, and then further reduced to 30 percent of that number (estimated LGBTQI+ identification percentage) to reflect the maximum anticipated need for new safe and appropriate placements in each FY. The resulting amount was then reduced by another 50 percent to reflect the likelihood that a significant portion of the safe and appropriate placement recruitment budget would be obtained by refocusing the existing budget for recruitment costs towards safe and appropriate placements. This would promote the agency's ability to comply with the proposed requirement in paragraph (a)(1), given agency recruitment budgets may be limited.

For example, in FY 2025 we estimate that up to 30 percent of notified children (Line 4) as a percentage of all newly placed children in that FY may require the availability of a placement that is designated by the agencies as safe and appropriate. This percentage for FY 2025 of 14.2 percent $(29,392 \div 206,812)$ is then multiplied by the national estimated foster care recruitment cost budget (\$185,998,176) resulting in a total of \$26,433,752. This figure is then reduced by 50 percent to reflect the anticipated incremental cost for safe and appropriate placement provider recruitment efforts of \$13,216,876. This estimate is purposefully high to account for some children under age 14 who may also need safe and appropriate placements. The total cost for FYs 2025, 2026, and 2027 is \$24,521,626.

Line 7. Total costs (Federal and non-Federal) for safe and appropriate placement training (caseworkers, supervisors & providers). Line 7 of the table below provides the estimated total cost of training required for safe and appropriate placements. This estimate for each FY is derived by first identifying the baseline cost of providing a model SOGIE training curriculum developed by the National Quality Improvement Center on Tailored Services, Placement Stability, and Permanency for LGBTQ2S Children and Youth in Foster Care (QIC–LGBTQ2S); a project funded by ACF. This curriculum provides for a two-hour training that can be conducted in-person or remotely for an average group of 30 participants. The identified average cost

of delivering this training is \$300 plus overhead of 100 percent bringing the total cost to \$600 or \$20 per participant. Our estimate increases this figure by three percent per year to account for inflation.

We estimate the number of caseworker and casework supervisor (staff) in FY 2025 to be 100 percent of individuals in these positions. National foster care caseworker staffing level data was obtained from reports provided by six state title IV–E/IV–B agencies representing about 16 percent of the national FY 2021 foster care population. This data was then extrapolated using FC caseloads to obtain an estimate of the total number of national FC caseworkers in FY 2021. An estimated annual caseworker growth rate of +2.2 percent was also computed using national NCANDS child protection caseworker data collected between FY 2003 and FY 2014. This data results in an estimated FY 2025 national total of 38,374 FC caseworkers. The casework supervisor count uses the generally applied ratio of one supervisor for five workers resulting in an FY 2025 number of 7,675. The provider trainee population is calculated by using the count of children to be notified of safe and appropriate placement provisions (Line 4) multiplied by 30 percent (maximum expected portion of these children identifying as LGBTQI+) and is then further reduced by the expectation that each provider will, on average, serve 1.5 children. This results in an FY 2025 safe and appropriate placement provider trainee population of 22,044. The expected number of trainees for subsequent FYs is lower based on the expected number of newly placed children in each of these FYs.

Other costs included in the training estimate are staff participation costs and travel and per diem for in-person trainings conducted outside of the local area. Staff participation costs include salary and overhead for each worker spent in the training (two hours). Caseworker title average salary data (as of May 2022) sourced from the U.S. Department of Labor; Bureau of Labor Statistics (BLS) was used in the calculation along with an estimated overhead cost rate of 100 percent. This results in an FY 2022 (baseline) hourly cost (salary + overhead) of \$55.98. The cost for two hours of activity is thus \$111.97 per participant. A cost-of-living adjustment of +2 percent per year is then added for each subsequent year. Travel and per diem costs are estimated in FY 2022 (base year) as \$100 per participant at in-person trainings which are expected to constitute 50 percent of total trainings. An inflation factor of

three percent per year is applied to these costs for later FYs. For example, in FY 2025 we expect a total of 68,092 trainees (caseworkers, supervisors & foster care providers). Therefore, the 50 percent of that total expected to have travel & per diem costs is 34,046 trainees. At an average cost of \$109 per participant the total cost in this category is \$3,711,035. The total FY 2025 estimate for safe and appropriate placement training is \$10,137,404. This amount lowers to \$3,180,036 for FY 2027. The total cost for FYs 2025, 2026, and 2027 is \$16,312,223.

Line 8. Total costs (Federal and non-Federal) for all safe and appropriate placement activities. Line 8 displays the annual estimated total (Federal + non-Federal) costs for all recruitment and training activities for LGBTQI+ children. This is the sum of lines 6 and 7. We estimate these total costs in FY 2025 as \$23,354,280 and the total cost for FYs 2025, 2026, and 2027 is \$40,834,548.

Line 9. Total title IV-E FFP for all safe and appropriate placement activity costs. Line 9 displays the annual estimated total title IV-E Federal share of costs for all placement activities for LGBTQI+ children. This is calculated by applying the applicable match rate and the estimated title IV-E participation (eligibility) rate that is generally used to allocate foster care administrative costs. Title IV-E agencies may claim FFP for 50 percent of the administrative costs that agencies incur to provide for activities performed on behalf of title IV-E eligible children in foster care, recruitment of foster homes and CCIs, and certain other administrative activities identified in 45 CFR 1356.60. The agency must pay the remaining 50

percent non-Federal share of title IV-E administrative costs with state or tribal funds.

Title IV-E agencies may claim reimbursement for 75 percent of allowable training costs to provide for activities performed on behalf of title IV-E eligible children in foster care including training of agency caseworkers and supervisors (including staff participation costs) and training of foster care providers providing care to title IV-E eligible children. The title IV-E agency must pay the remaining 25 percent non-Federal share of title IV-E training costs with state or tribal funds. For example, the FY 2025 amount is calculated by using the FY 2025 estimated title IV-E foster care participation rate of 39.65 percent along with the applicable FFP rates of 50 percent for administrative costs and 75 percent for training costs. We estimate these total title IV-E FFP costs beginning in FY 2025 as \$5,635,017 and the total cost for FYs 2025, 2026, and 2027 is \$9,712,740.

Line 10. Total title IV-E non-Federal share for all safe and appropriate placement activity costs. Line 10 displays the annual estimated total title IV-E non-Federal (state or tribe) share of costs for all safe and appropriate placement activities for LGBTQI+ children. This is calculated by applying the applicable non-Federal share match rate and the estimated non-IV-E participation (eligibility) rate that is generally used to allocate foster care administrative costs. For example, the FY 2025 amount is calculated by using the FY 2025 estimated title IV-E foster care participation rate of 39.65 percent along with the applicable non-Federal share matching rates of 50 percent for

administrative costs and 25 percent for training costs. We estimate these total title IV-E non-Federal share costs beginning in FY 2025 as \$3,625,219 and the total cost for FYs 2025, 2026, and 2027 is \$6,478,612.

Line 11. Total title IV-B non-Federal share for all safe and appropriate placement activity costs. Line 11 displays the annual estimated total title IV-B non-Federal (state or tribe) share of costs for all safe and appropriate placement activities. This is calculated by deducting such placement activity costs that are allocable to title IV-E from such total costs. Although costs allocated to title IV-B are subject to Federal matching at the 75 percent rate, as explained previously we assume that none of these costs will be federally reimbursed through title IV-B due to the limited annual allotments for the title IV-B program. Therefore, agencies may need to fund the cost entirely from state or tribal funds or other sources of funding. We estimate these total title IV-B non-Federal share costs beginning in FY 2025 as \$14,094,043 and the total cost for FYs 2025, 2026, and 2027 is \$24,643,197.

Line 12. Total title IV-E and IV-B non-Federal share for all safe and appropriate placement activity costs. Line 12 displays the annual estimated total title IV-E and IV-B non-Federal share of costs for all safe and appropriate placement activities. This is the sum of amounts on Lines 10 and 11. We estimate these total title IV-E and IV-B non-Federal share costs beginning in FY 2025 as \$17,719,263 and the total cost for FYs 2025, 2026, and 2027 is \$31,121,809.

| Year | 2022 (baseline) | 2025 | 2026 | 2027 | Three-year total |
|------------------------------------------------------------------------------------------------------------------|-----------------|--------------|-------------|-------------|------------------|
| 1. National number of children in foster care (FC) | 391,098 | 404,273 | 410,541 | 416,548 | |
| 2. National number of children in FC age 14 and older | 92,852 | 97,973 | 101,482 | 104,705 | |
| 3. National average monthly number of children in title IV-E FC age 14 and older | 36,817 | 38,847 | 40,239 | 41,517 | |
| 4. National number of children to be notified of safe and appropriate (S&A) placement provisions | N/A | 97,973 | 41,244 | 42,554 | |
| 5. Percentage of national FC placements for children needing S&A placements | N/A | 14.2% | 6.0% | 6.2% | |
| 6. Total incremental costs (Federal and non-Federal) for S&A placement recruitment .. | N/A | \$13,216,876 | \$5,564,006 | \$5,740,744 | \$24,521,626 |
| 7. Total costs (Federal and non-Federal) for S&A placement training (caseworkers, supervisors & providers) | N/A | \$10,137,404 | \$2,995,483 | \$3,180,036 | \$16,312,223 |
| 8. Total Federal and non-Federal costs for all S&A placement activities (Lines 6+7) | N/A | \$23,354,280 | \$8,559,488 | \$8,920,780 | \$40,834,548 |
| 9. Total title IV-E FFP for all S&A placement activity costs | N/A | \$5,635,017 | \$1,993,899 | \$2,083,823 | \$9,712,740 |
| 10. Total title IV-E non-Federal share for S&A placement activity costs | N/A | \$3,625,219 | \$1,400,029 | \$1,453,364 | \$6,478,612 |
| 11. Total title IV-B non-Federal share for S&A placement activity costs | N/A | \$14,094,043 | \$5,165,561 | \$5,383,593 | \$24,643,197 |
| 12. Total titles IV-E and IV-B non-Federal share for S&A placement activity costs (Lines 10+11) | N/A | \$17,719,263 | \$6,565,589 | \$6,836,957 | \$31,121,809 |

VI. Tribal Consultation Statement

Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*, requires agencies to consult with Indian tribes when regulations have substantial direct

effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes and

either impose substantial direct compliance costs on tribes or preempt tribal law. Similarly, ACF's Tribal Consultation Policy says that consultation is triggered for a new rule adoption that significantly affects tribes,

meaning the new rule adoption has substantial direct effects on one or more Indian Tribes, on the amount or duration of ACF program funding, on the delivery of ACF programs or services to one or more Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. This proposed rule does not meet either standard for consultation.

Some title IV–E/IV–B tribal agencies may need to amend their practices to ensure that a placement is available for and provided to an LGBTQI+ child in foster care that supports the child's identity. However, we do not expect the costs to be substantial. Tribal title IV–E agencies may claim FFP for title IV–E foster care administrative and training costs for a portion of the administrative costs incurred. We intend to notify tribal title IV–E/IV–B agency leadership about the opportunity to provide comment on the NPRM no later than the day of publication. In addition, we intend to engage in consultation with tribes during the comment period of this NPRM.

Jeff Hild, Acting Assistant Secretary of the Administration for Children & Families, approved this document on September 22, 2023.

(Catalog of Federal Domestic Assistance Program Number 93.658, Foster Care Maintenance; 93.645, Child Welfare Services—State Grants).

List of Subjects in 45 CFR Part 1355

Adoption and foster care, Child welfare, Grant programs—social programs.

Dated: September 25, 2023.

Xavier Becerra,

Secretary, Department of Health and Human Services.

For the reasons set forth in the preamble, ACF proposes to amend 45 CFR part 1355 as follows:

PART 1355—GENERAL

■ 1. The authority citation for part 1355 continues to read as follows:

Authority: 42 U.S.C. 620 *et seq.*, 42 U.S.C. 670 *et seq.*; 42 U.S.C. 1302.

■ 2. Add § 1355.22 to read as follows:

§ 1355.22 Placement requirements under titles IV–E and IV–B for children who identify as lesbian, gay, bisexual, transgender, queer or questioning, intersex, as well as children who are non-binary or have non-conforming gender identity or expression.

(a) *Protections.* The title IV–E/IV–B agency must meet the following requirements for each child in foster care who identifies as lesbian, gay,

bisexual, transgender, queer or questioning, or intersex, as well as each child who is non-binary or has non-conforming gender identity or expression (LGBTQI+).

(1) *Safe and appropriate placement.* The title IV–E/IV–B agency must ensure that a safe and appropriate placement is available for and provided to all children in foster care, including those who identify as LGBTQI+. As used in this section, for a placement to be considered safe and appropriate for an LGBTQI+ child, the agency must place such child with a placement provider that:

(i) Will establish an environment free of hostility, mistreatment, or abuse based on the child's LGBTQI+ status;

(ii) 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

(iii) Will facilitate the child's access to age-appropriate resources, services, and activities that support their health and well-being.

(2) *Process for requesting safe and appropriate placement.* The IV–E/IV–B agency must implement a process by which a child identifying as LGBTQI+ may request a safe and appropriate placement, as described in paragraph (a)(1) of this section. The title IV–E/IV–B agency must consult with such child to provide an opportunity to provide input into their safe and appropriate placement. The process must safeguard the privacy and confidentiality of the child, consistent with section 471(a)(8) of the Act and 45 CFR 205.50, and must include the following components:

(i) Notice of the availability of safe and appropriate placements must be provided to, at minimum:

- (A) All children age 14 and over; and
- (B) Children under age 14 who:

(1) Have been removed from their home due, in whole or part, to familial conflict about their sexual orientation, gender identity, or sex characteristics; or

(2) Have disclosed their LGBTQI+ identity or whose LGBTQI+ identity is otherwise known to the agency;

(ii) The notice must be provided in an age-appropriate manner, both verbally and in writing; and

(iii) The notice must inform the child of how they may request a safe and appropriate placement.

(3) *Process for reporting concerns about placements.* The title IV–E/IV–B agency must implement a process for children identifying as LGBTQI+ to report concerns about any placements that fail to meet the requirements of paragraph (a)(1) of this section. The process must safeguard the privacy and confidentiality of the child, consistent with section 471(a)(8) of the Act and 45 CFR 205.50, and must include the following components:

(i) The title IV–E/IV–B agency must notify all children who meet the requirements of paragraphs (a)(2)(i)(A) and (B) of this section of the availability of this process;

(ii) The notice must be provided in an age-appropriate manner, both verbally and in writing; and

(iii) The title IV–E/IV–B agency must respond promptly to an LGBTQI+ child's reported concern, consistent with the agency's timeframes for investigating child abuse and neglect reports depending on the nature of the child's report.

(4) *Retaliation prohibited.* The title IV–E/IV–B agency must have a procedure to ensure that no LGBTQI+ child in foster care experiences retaliation for the child disclosing their LGBTQI+ identity, for requesting a safe and appropriate placement as described in paragraph (a)(1) of this section, or for reporting concerns that their current placement is not safe and appropriate. Retaliation includes 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.

(5) *Access to supportive and age-appropriate services.* The title IV–E/IV–B agency must ensure that children who identify as LGBTQI+ have access to age-appropriate services that are supportive of their sexual orientation and gender identity, including clinically appropriate mental and behavioral health supports.

(b) *Placement of transgender and gender non-conforming children in foster care.* When considering placing a transgender, gender non-conforming or intersex child in sex segregated child-care institutions, the title IV–E/IV–B agency must place the child consistent with their gender identity. The IV–E/IV–B agency must also consult with the transgender, gender non-conforming, or intersex child to provide an opportunity

to voice any concerns related to placement when the agency is considering a placement in such a facility.

(c) *Training and notification requirements.* In addition to meeting the requirements of paragraph (a)(1)(ii) of this section, the title IV–E–/IV–B agency must:

(1) Ensure that its employees who have responsibility for placing children in foster care, making placement decisions, or providing services:

(i) Are trained to implement the procedural requirements of this section; and

(ii) Are adequately prepared with the appropriate knowledge and skills to serve an LGBTQI+ child related to their sexual orientation, gender identity, and gender expression.

(2) Ensure that all of its contractors and subrecipients who have responsibility for placing children in foster care, making placement decisions, or providing services are informed of the procedural requirements to comply with this section, including the required non-retaliation provisions outlined in paragraph (a)(4) of this section.

(3) Ensure that any placement providers who have not chosen to become designated as safe and appropriate placements for LGBTQI+ children are informed of the procedural requirements to comply with this section, including the required non-retaliation provision outlined in paragraph (a)(4) of this section.

(d) *Severability.* Any provision of this section held to be invalid or unenforceable as applied to any person or circumstance shall be construed so as to continue to give the maximum effect to the provision permitted by law, including as applied to persons not similarly situated or to dissimilar circumstances, unless such holding is that the provision of this section is invalid and unenforceable in all circumstances, in which event the provision shall be severable from the remainder of this section and shall not affect the remainder thereof.

■ 3. In § 1355.34, revise paragraph (c)(2)(i) to read as follows:

§ 1355.34 Criteria for determining substantial conformity.

* * * * *

(c) * * *

(2) * * *

(i) Provide, for each child, a written case plan to be developed jointly with the child's parent(s) that includes provisions for placing the child in the least restrictive, most family-like placement appropriate to his/her needs, including placements described in

§ 1355.22(a)(1), and in close proximity to the parents' home where such placement is in the child's best interests; for visits with a child placed out of State/Tribal service area at least every 12 months by a caseworker of the agency or of the agency in the State/Tribal service area where the child is placed; and for documentation of the steps taken to make and finalize an adoptive or other permanent placement when the child cannot return home (sections 422(b)(8)(A)(ii) and 471(a)(16) 475(5)(A) of the Act and § 1355.22(a)(1));

* * * * *

[FR Doc. 2023–21274 Filed 9–27–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Part 1356

RIN 0970–AC89

Foster Care Legal Representation

AGENCY: Children's Bureau (CB), Administration on Children, Youth and Families (ACYF), Administration for Children and Families (ACF), Department of Health and Human Services (HHS).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: ACF proposes to allow a title IV–E agency to claim Federal financial participation (FFP) for the administrative cost of an attorney providing legal representation in foster care proceedings of a title IV–E agency or any other public agency or tribe that has an agreement in effect under which the other agency has placement and care responsibility of a title IV–E eligible child; independent legal representation of a child who is either a candidate for title IV–E foster care, or in title IV–E foster care (hereafter, referred to as a child “who is eligible for title IV–E foster care”), the child's parent(s), and the child's relative caregiver(s) in foster care and other civil legal proceedings when such legal representation is found necessary by the Secretary to carry out the requirements in the title IV–E agency's title IV–E foster care plan; and legal representation of an Indian child's tribe, when the child's tribe intervenes in any state court proceeding for the foster care placement or termination of parental rights of an Indian child who is in title IV–E foster care or an Indian child who is a candidate for title IV–E

foster care when such legal representation is found necessary by the Secretary to carry out the requirements in the title IV–E agency's title IV–E foster care plan.

DATES: In order to be considered, ACF must receive written comments on this NPRM on or before November 27, 2023.

ADDRESSES: ACF encourages the public to submit comments electronically to ensure they are received in a timely manner. Please be sure to include identifying information on any correspondence. To download an electronic version of the proposed rule, please go to <https://www.regulations.gov/>.

You may submit comments, identified by docket number, by any of the following methods:

- *Federal Rulemaking Portal:* <https://www.regulations.gov/>. Follow the instructions for submitting comments.

- *Email:* CBComments@acf.hhs.gov. Include [docket number and/or RIN number] in subject line of the message.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted without change to www.regulations.gov, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Kathleen McHugh, Director, Policy Division, Children's Bureau, (202) 205–8618. Telecommunications Relay users may dial 711 first. Email inquiries to cbcomments@acf.hhs.gov.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Statutory Authority To Issue NPRM
- II. Background
- III. Section-by-Section Discussion of Proposed Regulatory Changes
- IV. Regulatory Process Matters
- V. Tribal Consultation Statement

I. Statutory Authority

This NPRM is published under the authority granted to the Secretary of Health and Human Services (the Secretary) by section 1102 of the Social Security Act (the Act), 42 U.S.C. 1302. Section 1102 of the Act authorizes the Secretary to publish regulations, not inconsistent with the Act, as may be necessary for the efficient administration of the functions for which the Secretary is responsible under the Act. Section 474(a)(3) of the Act authorizes Federal reimbursement for title IV–E foster care program administrative costs, which are defined as costs “found necessary by the Secretary for the provision of child placement services and for the proper and efficient administration of the State