



U.S. House of Representatives

COMMITTEE ON WAYS AND MEANS
1139 LONGWORTH HOUSE OFFICE BUILDING
Washington, DC 20515

November 27, 2023

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services (HHS)
200 Independence Avenue, SW
Washington, DC 20201

***Re: Safe and Appropriate Foster Care Placement Requirements for Titles IV-E and IV-B
[RIN 0970-AD03]***

Dear Secretary Becerra,

As Members of the Committee entrusted with overseeing state child welfare programs, and the vulnerable children and families they serve, we write to express profound concerns regarding the Department's proposed rule, *Safe and Appropriate Foster Care Placement Requirements for Titles IV-E and IV-B [RIN 0970-AD03]*, which would place new mandates on states regarding appropriate placements for children in foster care who identify as lesbian, gay, bisexual, transgender, queer, questioning, intersex, non-binary, or have non-conforming gender identity or expression (LGBTQI+).

This proposal puts the Biden Administration's left-wing "equity" agenda ahead of finding safe, healthy, loving homes for children and youth in foster care. As described in your September 27th press release, the Department appears to be promulgating this rule for the sole purpose of supporting President Biden's Executive Order, *Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals and to better support LGBTQI+ children with resources and services designed to appropriately meet their needs.*¹

As outlined further below, the Department is well outside the bounds of its statutory authority and misguided in its efforts to virtue signal the objective of supporting LGBTQI+ youth in the

¹ HHS Announces Historic Child Welfare Package to Expand Support and Equity in Child Welfare System, September 27, 2023.

foster care system, at the expense of the well-being of the nearly 400,000 children who enter foster care each year.²

However well-intentioned, by imposing mandates on states exclusively related to a unique subset of children who identify as LGBTQI+, the rule would choose winners and losers by establishing preferences for special services and training based exclusively on a child's gender identity, violate protections for foster families of free exercise of religious beliefs, while simultaneously exacerbating the nationwide shortage of foster homes.

Defining "Safe and Proper" Care Based Solely on Gender Identity

Currently, section 475(1)(B) of the Social Security Act requires states to create a case plan for each foster child to guarantee their "safe and proper care." This term has been maintained in statute to encourage states to prioritize the well-being of all children in their care. As Congress has never defined "safe and proper care," the responsibility falls on states to determine and specify the appropriate methods of providing such care.

This proposed rule would establish new special regulatory definitions and standards under the statutory term "safe and proper care"³ for state Title IV-E and Title IV-B child welfare agencies that are exclusive to children in foster care who identify as LGBTQI+. The rule would require foster parents to receive gender-affirming training in order to care for foster children who are LGBTQI+ and compel states to define only parents who undergo the LGBTQI+ training as "safe", implying that families who do not undergo training are therefore "unsafe," excluding them from being licensed as eligible foster placements. Specifically, the rule says:

"For a placement to be considered safe and appropriate for a LGBTQI+ child, the agency must place the child with a placement provider that 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." ((45 CFR 1355 Section 1355.22 (a)(1))

The proposed rule's focus on establishing a new "safe and proper care" standard only for LGBTQI+ children stands apart, as there are no other federal policies that define how a state must provide "safe and proper care" to children of other unique circumstances, such as children with disabilities, survivors of sexual abuse, or other identifiable characteristics. This would be the first time that the Department has specified what constitutes "safe and proper care" in any detail and would do so in a way that singles out new requirements for these previously undefined standards only for LGBTQI+ youth.

Impinging on the Free Exercise of Religion

By creating new classifications for foster parents, the proposed rule would have a chilling effect on many families' willingness to foster children, particularly for families of faith caring for children in the child welfare system, and exclude others outright. Research shows that people motivated by deep faith are among the most willing to welcome and serve children and families

² Adoption and Foster Care Analysis and Reporting System, Administration for Children and Families, 2022.

³ 42 U.S.C. 675 (1)(B).

in the foster care system.⁴ The proposed rule would prohibit a child identifying as LGBTQI+ from being placed with foster parents who do not believe it is in the best interest of the child to receive gender-affirming care such as hormonal treatments, surgeries, and transitioning care. Specifically, the proposed rule says states must ensure that “safe” homes and prospective foster placements must:

“...facilitate the child's access to age-appropriate resources, services, and activities that support their health and well-being, which may include services and supports related to their sexual orientation or gender identity.” ((45 CFR 1355 Section 1355.22 (a)(1)(iii))

This could push many prospective foster families away, as was recently the case in Massachusetts. Massachusetts implemented policies similar to those included in the proposed rule and offers a test case for how such policies act to exclude certain families from becoming foster parents solely on the basis of their religious beliefs, irrespective of a family’s ability to provide “safe and proper” care.

According to a lawsuit filed in August of this year, Mike and Kitty Burke, a Catholic family from Massachusetts, were denied a foster care license because they were unwilling to support gender experimentation for minors as that is against the teachings of the Catholic Church.⁵ As stated by Representative Pete Stauber (R-MN) and eighteen Members of the U.S. House of Representatives and U.S. Senate in a letter sent to the HHS Office of Civil Rights on November 7, 2023, “throughout the application process, the Massachusetts Department of Children and Families (DCF) repeatedly acknowledged that Mike, an Iraq War veteran, and Kitty, a former paraprofessional for special needs children, were strong candidates for adoption. When a final decision was made on their application, however, DCF deemed the Burkes unfit to be parents, allegedly over a belief that they would not be affirming to a child who identified as LGBTQIA.”⁶

We note that this proposed rule is subject to federal requirements pursuant to the Religious Freedoms Restoration Act (RFRA). In 1993, Congress passed RFRA recognizing the free exercise of religion as a Constitutional right under the First Amendment. RFRA codified that “governments should not substantially burden religious exercise without compelling justification,”⁷ a point that the Department has failed to address adequately. Although the Department has acknowledged it is bound by RFRA, it has fallen short of adequately addressing concerns by failing to explain to the public how it will consider RFRA when there is a free exercise concern regarding the proposed rule.

Exacerbating a Nationwide Shortage of Foster Homes and Caseworkers

The proposed rule would require states to sufficiently recruit and retain a certain percentage of LGBTQI+ affirming homes that could be deemed “safe” rather than focusing on recruiting loving homes for all children. Further, it would require states to place transgender children in foster care placements and congregate care group homes consistent with their gender identity. In practice, this would presumably require states to place a transgender teen male who identifies as

⁴ 5 Things You Need to Know About Adoption. (2013). Barna.

⁵ Massachusetts bans faithful Catholics from adopting children (2023). Becket Law.

⁶ Letter to HHS Civil Rights Director. (November 7, 2023).

⁷ Pub. L. 103–141, §2, Nov. 16, 1993, 107 Stat. 1488.

a female in a setting where he would sleep, shower, and live with females. This potentially places other foster youth, primarily young girls, at risk of additional trauma and harm rather than protecting *all* children's needs for safety and care. Specifically, the rule states:

“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.” ((45 CFR 1355 Section 1355.22 (b))

States across the country are reporting shortages in foster parents and foster homes. Since 2018, there has been an average decline of six percent of available foster parents each year, with some states, such as South Carolina, reporting a 61 percent decline in licensed foster homes despite a growing number of children entering care.⁸ States have reported that the proposed rule would cause serious implementation challenges due to the current lack of foster homes of any type, much less those that would meet the prescriptive new LGBTQI+ specific standards that act to exclude some families and placements entirely.

Appendix A provides a quick view of the severity of this nationwide problem with a collection of over 80 articles, published since January, highlighting how states are grappling with significant challenges to recruit and retain foster parents, resulting in children sleeping in jails, emergency rooms, caseworker offices, hotels, and other unlicensed placements. If this rule were to be finalized, it would undoubtedly make this problem worse and result in fewer homes for foster children.

Finally, the rule would require state agencies to spend state and federal dollars on gender-affirming LGBTQI+ training for their workforce. There is a national shortage of caseworkers with high turnover rates being attributed to high caseloads and reporting requirements impeding frontline workers' ability to support children.⁹ This rule adds to the lengthy list of caseworker requirements without regard to the capacity of child welfare workforce to provide quality services to the children and families they serve.

For these reasons, we ask the Department to immediately withdraw this proposed rule and work with Congress to address the nationwide shortage of foster homes in a way that does not discriminate or exclude families on the basis of religion, sex, race, age, or disability.

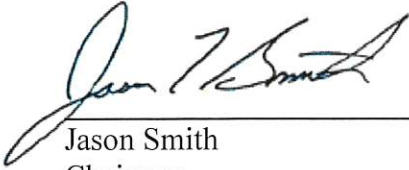
When government assumes responsibility for children, our primary goal should be to seek the best interests of *all* children placed in care and to work diligently and conscientiously to ensure the availability of foster families and placements that offer safe and nurturing environments when families are in crisis.

We must ensure that the welfare of these children remains our utmost priority above all else.


⁸ Total Licensed Foster Homes. (2022). The Imprint.

⁹ Megan Paul, Country Harrison, Jonathan Litt, Michelle Graef. Worker Turnover is a Persistent Child Welfare Challenge - So is Measuring It (2022). Quality Improvement Center for Workforce Development.

Sincerely,



Jason Smith
Chairman
Committee on Ways and Means



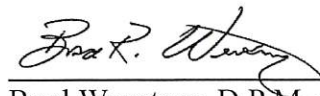
Darin LaHood
Chairman
Subcommittee on Work and Welfare
Committee on Ways and Means




Adrian Smith
Member of Congress




Mike Kelly
Member of Congress



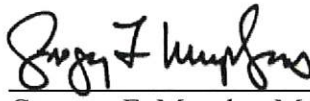
Brad Wenstrup, D.P.M.
Member of Congress



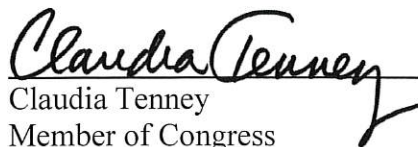
Kevin Hern
Member of Congress



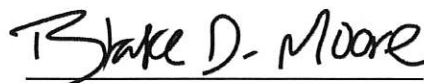
Carol D. Miller
Member of Congress



Gregory F. Murphy, M.D.
Member of Congress



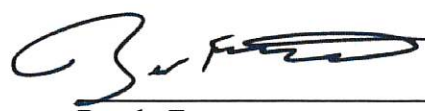
Claudia Tenney
Member of Congress



Blake Moore
Member of Congress



Beth Van Duyne
Member of Congress



Randy Feenstra
Member of Congress



Mike Carey
Member of Congress

Appendix A- Nationwide Shortage of Foster Placements

NPR: Washington state's new solution for foster parents and child care, Eilis O'Neill, January 4, 2023

KTNV: Foster mom calls for community help amid foster parent shortage, Sean DeLancey, January 18, 2023

Chicago Sun Times: State sued for holding foster children in jail due to lack of housing, Rachel Hinton, January 19, 2023

DPM: Division of Family Services aims to boost foster family recruitment amid shortage, Paul Kiefer, January 23, 2023

WSOCTV: Advocates look for people to become foster parents amid childcare crisis in NC, Almiya White, January 24, 2023

Idaho News: Idaho's Foster Care Crisis: "Our biggest barrier is having available foster homes", Ryan Hawes, January 27, 2023

WFMY: Multiple Triad counties housing foster kids elsewhere, due to lack of foster parents, Hannah Jeffries, February 3, 2023

Boston Globe: A 15-year-old stayed in a hospital for 40 days. The reason? The state child welfare system had no place to put him, Elizabeth Koh, February 11, 2023

Queen City News: Foster Children Sleeping in Jails, Emergency Rooms, and DSS Offices Amid a Foster Family Shortage, Daniel Pierce, March 1, 2023

Fox 8: North Carolina foster children sleeping in jails, emergency rooms, DSS offices amid a foster family shortage, Daniel Pierce, March 2, 2023

Dallas News: Bunking Texas foster kids in CPS offices may have ended, but bed shortage persists, Robert T. Garrett, March 6, 2023

Courthouse News Service: Critics say bills to slow influx of foster children in Georgia ignore root causes, Megan Butler, March 8, 2023

CBS8: Foster care crisis | Rise in abuse cases in San Diego County and a shortage of foster homes for teens, Dorian Hargrove and Carlo Cecchetto, March 24, 2023

WLKY: Louisville agency raising awareness as Kentucky sees a shortage of foster care homes, Alexis Mathews, March 28, 2023

WXII: Critical shortage of foster families leading to crisis in NC — over 12,000 children in need of a home, Audrey Biesk, April 6, 2023

CBS17: NC foster home shortage impacts thousands of kids, Hayley Fixler, April 8, 2023

ABC 6: Big push to find foster parents and social workers amid shortage in Franklin County, Jackie Orozco, April 24, 2023

10 WBNS: Foster Children Sleeping in County Offices; How is Ohio Addressing the Issue?, Bennett Haeberle, April 26, 2023

WCNC: 'There is a Placement Crisis': WCNC Investigation Uncovers Shocking Secret About Kids in Foster Care, Michelle Boudin, May 4, 2023

Fox 26: Foster parent shortage in Texas continues, hundreds of foster children spend Mother's Day alone, Gabby Hart, May 14, 2023

ABC WISN: Foster parents needed in SE Wisconsin to alleviate shortage, Staff, May 16, 2023

VolumeOne: Foster Parents Wanted to Open Their Homes, Hearts, May 16, 2023

12 News: Advocates shed light on shortage of foster care families in Southeast Texas, Lupita Villarreal, Kayla Choates, May 18, 2023

ABC 7: Stunning statistics show how many Bay Area foster kids are moved away from their home county, Pamela Parker, May 23, 2023

Patch: Foster Care Kids Placed Outside Hometowns Due To Provider Shortage, Kristin Danley-Greiner, May 26, 2023

Los Angeles Times: Violence and ‘Crisis’: How Hundreds of L.A. County’s Abused Children Ended Up in Hotels, Kathryn Hurd, May 28, 2023

LA Times: California has a Chronic Shortage of Places for Foster Youths, Staff, May 28, 2023

Los Angeles Times: Letters to the Editor: Foster Kids in Hotels? California Needs to Bring Back Group Homes Now, Staff, June 4, 2023

Smoky Mountain Times: Too few foster homes and a system in crisis, News Staff, June 5, 2023

St. Louis Post-Dispatch: Messenger: Missouri Couple Questions Children’s Division Rule that Denied Them Foster Children, Tony Messenger, June 7, 2023

ABC 11: ‘Love and Stability.’ Growing Need for Foster Care Families in North Carolina During Summer Months, Jamie Price, June 7, 2023

WCNC: Amid Family Shortage, Mecklenburg County Seeking Solutions for Kids Sleeping in Government Offices, Michelle Boudin, June 7, 2023

The Imprint: Hundreds of Kids in Texas Foster Care Were Still Sleeping in Hotels or Other Unlicensed Placements Last Month, Annie Sciacca, June 12, 2023

News 4 JAX: Safe Haven for Children Before Foster Care Placement Being Built in Macclenny, Brie Lsom, June 13, 2023

NPR: Kids Housed in Casino Hotels? It’s a Workaround as U.S. Sees Decline in Foster Homes, Jazmin Orozco Rodriguez, June 14, 2023

WCHS TV: Demand for Adult Foster Homes Growing in Alabama, Bobby Poitevint, June 15, 2023

Missouri Independent: ‘Truly a Crisis’: Missouri Hospitals House Children in Foster Care With No Place to Go, Rudi Keller, June 20, 2023

NPR: Kansas Lost 500 Foster Homes. A Survey of Foster Parents Who Dropped Out Shows Why, Blaise Mesa, June 29, 2023

Live 5 News: DSS in Need of Nearly 2,000 Foster Homes; Parents Frustrated with Dept. Nick Reagan, July 3, 2023

Smoky Mountain News: Jackson Addresses Foster Care Needs, Hannah Mcleod, July 4, 2023

Nevada Current: Rural Nevada Seeks More Foster, Charlotte Ledger, July 5, 2023

NC Health News: With Nowhere Else to go, Kids Needing Foster Care Sleep on the Floor in County Offices, Charlotte Ledger, July 5, 2023

WFAE: There Aren’t Enough Foster Parents in North Carolina. Kids are Sleeping in Social Service Offices, Marshall Terry, July 10, 2023

Spectrum Local News: Foster Parent Needs Increasing Since the Pandemic, Alexis Bell, July 10, 2023

WCNC Charlotte: ‘Nobody Wants Them’: Woman Pushing for Home to Assist Foster Kids With Nowhere to go, Michelle Boudin, July 10, 2023

WHAS 11: ‘This Cannot Continue’; Lawmaker Calls on Gov. Beshear to Act as Foster Children Sleep in Government Buildings, Shay McAlister, July 11, 2023

Truthout: Kids Awaiting Foster Care Placement Are Being “Housed” in Jails and Offices, Eleanor J. Bader, July 12, 2023

NPR: There’s a Nationwide Shortage of Foster Care Families, Scott Simon, July 15, 2023

The Nevada Independent: Foster kids in casino hotels? It happened in Nevada amid widespread foster home shortages, Jazmin Rodriguez, July 16, 2023

Oregon Live: Oregon's Failure to Stop Housing Foster Kids in hotels Draws Federal Judges Rebuke, The Associated Press, July 19, 2023

Wbur: Inside America's critical shortage of foster care homes, Paige Sutherland, Meghan Chakrabarti, and Tim Skoog, July 20, 2023

Lex 18: Kentucky's foster home shortage continues to cause issues. What can be done about it?, Christiana Ford, July 20, 2023

KOSU NPR: Inside America's critical shortage of foster care homes, Staff, July 20, 2023

Alaska's News Source: State and local agencies face desperate shortage of foster homes, Carly Schreck, July 22, 2023

Fox News: Massachusetts Bans Catholic Couple from Fostering Children Due to Beliefs on Gender, Sexuality, Lawsuit Claims, Anders Hagstrom, August 8, 2023

Post and Courier: SC children spent hundreds of nights in state offices in overloaded foster care system, Alexander Thompson, August 8, 2023

Washington Examiner: Massachusetts Denied Foster Parents' Adoption Over Transgender Views: Lawsuit, Breccan F. Thies, August 9, 2023

Post and Courier: SC's mental health care crisis lands foster kids on air mattresses in offices, Alexander Thompson, August 13, 2023

The Wall Street Journal: No Catholics Need Adopt, William McGurn, August 14, 2023

ABC 11: 'Lack of Resources': Increasingly, NC Foster Children are Having to Sleep in County Offices, Samantha Kummerer, August 17, 2023

Alaska Public Media: Alaska's child care crisis is hitting foster families especially hard, Wesley Early, August 21, 2023

Clevescene: Ohio's Foster Care Crisis Forcing Hundreds of Kids to Sleep in Offices, Nadia Ramlagan, Aug 21, 2023

New York Post: How Foster Kids are Being Damaged by a Lack of Home Care Facilities, Naomi Schaefer Riley, August 26, 2023

Boston Globe: DCF using apartments as short-term housing for foster children, Jason Laughlin, August 29, 2023

News Channel 9: Georgia's unseen crisis: Overflowing foster care system prompts desperate search for willing parents, Ereina Plunkett, August 31, 2023

The Dallas Morning News: Texas CPS vows to help foster kids lacking placements, Robert Garrett, September 8, 2023

Greensboro: Guilford's neglected children badly need foster families — but there aren't enough, Kenwyn Caranna, September 8, 2023

The Boston Globe: Child welfare housed more than 100 foster children in apartments over the past year, Jason Laughlin, September 12, 2023

NBC Boston: Social worker describes 'placement crisis' for kids in care of Mass. DCF, Karry Curran, September 12, 2023

Arkansas Advocate: Governor's working group issues suggestions to improve Arkansas' foster care system, Tess Vrbin, September 18, 2023

WFDD: As foster parent shortage reaches tipping point, county child welfare agencies focus on recruitment, April Laissle, September 27, 2023

NMPolitical Report: 'State of chaos': New Mexico's child welfare crisis is worse, monitors say, Ed Williams, October 3, 2023

ABC 13 News: 'Nobody wants me:' Lack of foster care families forces children to sleep, live inside DSS offices, Karen Zatkulak, October 6, 2023

WRALNews: 'We're still in a crisis situation': Wake County foster kids still sleeping on floors of social services building, Eric Miller, October 8, 2023

West Orlando News: Constant Scarcity: Florida's Kids Need Foster Homes, Nikki Riggsbee, October 15, 2023

The Lawrence Times: A Kansas foster care agency says kids aren't sleeping in offices anymore, but they aren't in homes, Blaise Mesa, October 25, 2023

This is Reno: Washoe County has a critical need for more foster homes, Staff, October 29, 2023

Fox 5: Clark County needs more foster parents to provide safe, loving homes for kids in need, Dani Masten, October 30, 2023

Desert News: Perspective: How churches can make a difference in the lives of children who need foster care, Naomi Schaefer Riley, October 31, 2023

Newsweek: Foster Care Crisis in America: 'We Can't Find Enough Foster Parents', Staff, November 4, 2023