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DEPARTM

Administration for Children and Families

45 CFR Part 1355

RIN 0970-AD03

Designated Placement Requirements under Titles IV-E and IV-B for LGBTQI+ Children

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: Final rule.

SUMMARY: This rule finalizes requirements under titles IV–E and IV–B for children in foster care who are LGBTQI+ (an umbrella term used in this regulation). The proposed rule was published on September 28, 2023. Federal law requires that state and tribal title IV–E and 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. To meet these and other related statutory requirements, this final rule requires agencies to ensure that placements for all children are free from harassment, mistreatment, and abuse. The final rule requires that title IV-E and IV-B agencies ensure a Designated Placement is available for all children who identify as LGBTQI+ and specifies the Designated Placement requirements.

DATES: This final rule is effective on [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Title IV–E and IV–B agencies must implement the provisions of this final rule on or before October 1, 2026.

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SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Executive Summary
  - Overview of Notice of Proposed Rulemaking
  - Overview of Final Rule
  - Legal Authority for the Final Rule
- II. Background
  - LGBTQI+ Children in the Child Welfare System
    - Overrepresentation of LGBTQI+ Children in Foster Care
    - Impact of Family and Caregiver Behavior on LGBTQI+ Child Wellbeing
    - Experience of LGBTQI+ Children in Foster Care
    - Mental Health Needs of LGBTQI+ Children
    - Current Approaches to Meet the Needs of LGBTQI+ Children in Foster Care
- III. Regulatory Provisions and Responses to Comments
  - Summary of Commenters
    - Summary of Comments from State and Local Child Welfare Agencies
    - Summary of Comments from Congressional Members
    - Summary of Comments from Advocacy Organizations, Providers, and Universities
    - Summary of Comments from Individual Commenters
  - Section by Section Discussion of Regulatory Provisions
    - Title and Definition of LGBTQI+
    - Section 1355.22(a) Protections Generally Applicable
    - Section 1355.22(b)(1) Designated Placements and Services for LGBTQI+ Children
    - Section 1355.22(b)(2) Process for Notification of and Request for Designated Placements
    - Section 1355.22(b)(3) Placement and Services Decisions and Changes
    - Section 1355.22(c) Process for Reporting Concerns About Placements and Concerns About Retaliation
    - Section 1355.22(d) Retaliation Prohibited
    - Section 1355.22(e) Access to Supportive and Age- or Developmentally Appropriate Services
    - Section 135.22(f) Placement of Transgender and Gender Non-Conforming Children in Foster Care
    - Section 1355.22(g) Compliance with Privacy Laws
    - Section 1355.22(h) Training and Notification Requirements
    - Section 1355.22(i) Protections for Religious Freedom, Conscience, and Free Speech
    - Section 1355.22(j) No Penalties for Providers That Do Not Seek to Qualify as Designated Placements
    - Section 1355.22(k) Severability
    - Section 1355.22(l) Implementation
    - Section 1355.22(m) No Effect on More Protective Laws or Policies
    - Section 1355.34(c) Criteria for Determining Substantial Conformity

Comments on Cross-Cutting Issues
Kinship Caregivers
Impact of the Regulation on Foster Provider Availability and Participation
Youth Disclosure of LGBTQI+ Status
Research on LGBTQI+ Children in Foster Care
Nondiscrimination Provisions
Implementation Costs
Requests for Technical Assistance and Implementation Supports and Questions about Implementation and Compliance Monitoring
IV. Response to Comments Raising Statutory and Constitutional Concerns
First Amendment and Religious Freedom
Statutory Authority
Arbitrary and Capricious
Spending Clause
Federalism Principles
Nondelegation Doctrine
Major Questions Doctrine
Fulton v. City of Philadelphia
V. Implementation Timeframe
VI. Regulatory Impact Analysis
VII. Tribal Consultation Statement

I. EXECUTIVE SUMMARY

Overview of Notice of Proposed Rulemaking

On September 28, 2023 (88 FR 66752), HHS issued a notice of proposed rulemaking (NPRM) called *Safe and Appropriate Foster Care Placement Requirements for Titles IV-E and IV-B*. ACF proposed the NPRM to support states and tribes in complying with Federal laws that require that all children in foster care receive safe and proper care. In the NPRM, ACF proposed that it would require agencies to implement specific processes and requirements to ensure that children in foster care who identify as LGBTQI+ would be placed with foster care providers who were trained to meet their specific needs related to their sexual orientation and gender identity and who would facilitate access to age-appropriate services to support their health and wellbeing. The NPRM referred to these specially designated placements as “Safe and Appropriate”

placements for LGBTQI+ youth. Under the proposed rule, agencies would be required to ensure that such placements were available for any child in foster care who identifies as LGBTQI+ and provided to any such child in foster care. However, the NPRM would not have required providers to become designated as such a placement for LGBTQI+ children. The NPRM also proposed agency procedures to ensure a child who identifies as LGBTQI+ would not experience retaliation – regardless of whether the child was in a specially designated "Safe and Appropriate" placement, or whether the child was placed with a foster care provider who had chosen not to seek such a designation.

The NPRM proposed that title IV-E/IV-B agencies would be required to notify specified children (including all children at or above the age of 14) about the availability of these placements, the process to request such a placement, and the process to report placement concerns. The NPRM also set forth specific steps for the placement of transgender, intersex, and gender non-conforming children in sex-segregated child care institutions and required specific training for title IV–E/IV–B agency caseworkers and supervisors on how to appropriately serve LGBTQI+ children.

Finally, the proposed rule explained that HHS would monitor a state agency's compliance with the requirement in proposed § 1355.22(a)(1) through the Child and Family Services Reviews (CFSRs). As explained in the proposed rule, 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 currently 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.

Overview of Final Rule

In this final rule, ACF clarifies how title IV–E/IV–B agencies must meet title IV–E and IV–B statutory requirements to appropriately serve LGBTQI+ children in foster care.

ACF received a total of 13,768 comments on the NPRM and has carefully considered each comment. A summary of comments and responses are included in sections III and IV of this preamble. Based on comments received, ACF has made modifications to the final rule.

To address requests from many commenters for further clarity about the meaning of "safe and appropriate," and its applicability to all placements, the final rule distinguishes between the requirement of a safe and appropriate placement, which is applicable to all children in foster care, and a Designated Placement for LGBTQI+ children, which is the term used in the final rule to describe providers who meet specified requirements described in the rule to serve as a designated provider for LGBTQI+ children. Because Federal law requires that every child in foster care receive "safe and proper" care and placement in the "most appropriate setting available," ACF reiterates that *all* foster care placements must be safe and appropriate for *all* children – including LGBTQI+ children. This general protection that all foster care placements must be safe and appropriate reiterates existing statutory and regulatory requirements that title IV-E/IV-B agencies must meet to comply with Federal law for all children in foster care. This final rule specifies that as part of meeting the requirement to provide a safe and appropriate placement for all children in foster care, the title IV-E/IV-B agency must ensure that placements, including those for LGBTQI+ children, are free from harassment, mistreatment, and abuse, including related to a child's sexual orientation or gender identity.

As set forth in the NPRM, HHS recognizes that LGBTQI+ youth face significant disparities in the child welfare system. In order for LGBTQI+ youth to receive care that meets Federal statutory guarantees that each child in foster care will receive safe and proper care that is consistent with the best interest and special needs of the child, title IV-E/IV-B agencies must ensure LGBTQI+ children have access to specially designated placements that are prepared to meet their unique needs and create a supportive environment. This final rule refers to those specially designated placements as "Designated Placements." The requirements of a Designated Placement are consistent with the requirements proposed in the NPRM for specially designated

placements for LGBTQI+ children (which the NPRM referred to as "Safe and Appropriate" placements), with some clarifying text added. Recognizing that safe and proper treatment for LGBTQI+ children requires attention to certain particular harms and risks that this population faces, this final rule specifies that Designated Placement providers must have particular training and provide particular protections for LGBTQI+ children that may not be relevant or necessary for non-LGBTQI+ children.

The final rule does not require any provider to become a Designated Placement. Further, the rule specifies that nothing in the rule should be construed as requiring or authorizing a state to penalize a provider that does not seek or is determined not to qualify as a Designated Placement provider. It also says that nothing in this rule shall limit any State, tribe, or local government from imposing or enforcing, as a matter of law or policy, requirements that provide greater protection to LGBTQI+ children than this rule provides.

The rule requires that the title IV–E/IV–B agency ensure a Designated Placement is available for, and may be requested by, any child in foster care who identifies as LGBTQI+. In order to be considered a Designated Placement for an LGBTQI+ child, the placement must satisfy three conditions, each of which goes beyond the general requirements that apply to all placements. First, the provider must commit to establishing an environment that supports the child's LGBTQI+ status or identity. Second, the provider must be trained 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. Third, the provider must facilitate the child's access to age- or developmentally appropriate resources, services, and activities that support their health and well-being. HHS has concluded that these conditions are generally necessary to effectuate the statutory promise of a safe and appropriate placement for children who are LGBTQI+ because of the extensive evidence of the specific needs LGBTQI+ children have which require more specialized support. This rule requires title IV-E/IV-B agencies to

ensure that the totality of their child welfare system includes sufficient placements for LGBTQI+ children that meet each of these standards.

As explained further below, when making placement and services decisions related to an LGBTQI+ child, the title IV-E/IV-B agency must give substantial weight to the child's concerns or request for a Designated Placement in determining the child's best interests.

The final rule requires agencies to notify certain children about the availability of Designated Placements, the process to request one, and the process to report concerns about their current placement or about retaliation against them. Notification requirements apply to all children age 14 and over, as well as those under age 14 removed from their home due, in whole or part, to familial conflict about their sexual orientation, gender identity, gender expression, or sex characteristics; or if they have disclosed their LGBTQI+ status or identity; or whose LGBTQI+ status or identity is otherwise known to the agency. The final rule also requires that the title IV–E/IV–B agency ensure that LGBTQI+ children have access to age and developmentally 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.

A number of commenters emphasized that, in many cases, if a child requests services and a current placement chooses to accept them, that could make a current placement more appropriate for an LGBTQI+ child and prevent any need for a placement change. Other commenters raised concerns about the potential for disruptive placement changes as a result of the proposed rule. In response, the final rule recognizes that, in addition to requesting a change in placement to a Designated Placement, a child could also request that services be offered to stabilize their current placement. Moreover, if a child requests a Designated Placement, the final rule clarifies that to promote placement stability, the title IV-E/IV-B agency must first consider whether, if the current provider wishes to accept additional services, it would allow the current provider to voluntarily meet the conditions for a Designated Placement. Promoting such stability is

particularly important in cases where children are placed with kin, siblings, close to families of origin, and in family-like settings. In making the determination about the child's best interests, the agency is required to give substantial weight to the child's request. If the child's current provider elects to become a Designated Placement, in accordance with the case review system and protocols, the title IV-E/IV-B agency must regularly review the status of the placement to ensure it progresses towards meeting the relevant conditions. ACF expects this process will in some cases enable title IV-E/IV-B agencies to provide Designated Placements while preserving placement stability, particularly in settings where children are placed with kin, with siblings, in close proximity to families of origin, or in family-like settings as recommended by commenters.

The final rule also requires that the title IV–E/IV–B agency have a procedure to protect LGBTQI+ children in foster care from retaliation for disclosure of their LGBTQI+ status and/or identity, if they are reported or perceived to have LGBTQI+ status and/or identity, or for requesting a Designated Placement. It also requires training for title IV–E/IV–B agency caseworkers and supervisors on how to appropriately serve LGBTQI+ children and on how to implement the procedural requirements of the rule. The final rule requires title IV–E/IV–B agencies to ensure that agency contractors and subrecipients who have responsibility for placing children in foster care, making placement decisions, or providing services, as well as all placement providers, are informed of the procedural requirements of the rule.

The statute at 42 U.S.C. 671(a)(8) enumerates safeguards which restrict the use or disclosure of information concerning children in foster care. These critical safeguards ensure the privacy and confidentiality of children with very limited exceptions. Consistent with title IV-E and IV-B confidentiality requirements at 42 U.S.C. 671(a)(8) and 45 CFR 1355.21(a), 1355.30(p)(3), and 205.50, the final rule provides that agencies are prohibited from disclosing information about a child's LGBTQI+ status or identity except as provided by statute and that any such disclosure must be the minimum necessary to accomplish the legally-permitted purposes. In response to comments, the final rule clarifies the privacy and confidentiality protections for information

related to an LGBTQI+ child's status or identity. The Children's Bureau will monitor a state agency's compliance through the CFSRs, 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 currently 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. All requirements of the rule will be subject to the partial review process.

The final rule expressly provides that insofar as the application of any requirement under the rule would violate applicable Federal protections for religious freedom, conscience, and free speech, such application shall not be required. The rule does not require any provider to become a Designated Placement, and specifies that nothing in the rule should be construed as requiring or authorizing a state to penalize a provider that does not seek or is determined not to qualify as a Designated Placement from participation in the state's program under titles IV-E and IV-B. The final rule also clarifies that the rule does not limit any State, Tribal or local government or agency from imposing or enforcing as a matter of state, tribal or local law or policy, requirements that provide greater protection to LGBTQI+ children than this rule provides.

Legal Authority for the Final Rule

Titles IV–E and IV–B of the Social Security Act (the Act) require title IV–E/IV–B agencies to provide case plans for all children in foster care. Under section 475(1)(B) of the Social Security Act, 42 U..C. 675(1)(B), case plans must include a plan for assuring that the child receives safe and proper care and that services are provided 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. The plan must also discuss the appropriateness of the services provided to the child under the plan. 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) of the Social Security Act, 42 U.S.C. 675(5)(A)) In order to receive title IV–E and IV–B funds, agencies must have plans approved by ACF that provide for case plans and case review systems that meet these statutory requirements (sections 471(a)(16) and 422(b) of the Social Security Act, 42 U.S.C. 671(a)(16) and 622(b)).

Additionally, in order to receive title IV– E funds, states and tribes must certify in their title 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 [and] that the preparation will be continued, as necessary, after the placement of the child" (section 471(a)(24) of the Social Security Act, 42 U.S.C. 671(a)(24)). The Act also requires that agencies ensure that foster parents, as well as at least one official at any child care institution providing foster care, receive training on how to use and apply the "reasonable and prudent parent standard," a "standard characterized by careful and sensible parental decisions that maintain the health, safety, and best interests of a child while at the same time encouraging the emotional and developmental growth of the child, that a caregiver shall use when determining whether to allow a child in foster care under the responsibility of the State to participate in extracurricular, enrichment, cultural, and social activities" (Social Security Act 471(a)(24) and (a)(10) and 475(10)(A), 42 U.S.C. 671(a)(24) and (a)(10) and 675(10)(A)).

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 (Social Security Act section 471(a)(22), 42 U.S.C. 671(a)(22)).

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 titles IV–E and IV–B, implementing regulations promulgated by the Secretary and the states' approved state plans (section 1123A of the Social Security Act, 42 U.S.C. 1320a-2a).

Finally, the Act authorizes the Secretary to "make and publish such rules and regulations...as may be necessary to the efficient administration of the functions with which [the Secretary] is charged under [the Social Security Act]." (Section 1102 of the Social Security Act, 42 U.S.C. 1302)

II. BACKGROUND

LGBTQI+ Children in the Child Welfare System

As the NPRM explained, a significant body of evidence demonstrates that LGBTQI+ children are overrepresented in the child welfare system and face poor outcomes in foster care.[1]

Overrepresentation of LGBTQI+ Children in Foster Care

LGBTQI+ children are overrepresented in the foster care population. One recent confidential survey revealed that 32 percent of foster youth ages 12–21 surveyed report that they identify as having a diverse sexual orientation or gender identity.[2] Another large confidential survey found that 30.4 percent of foster children aged 10-18 identify as LGBTQ+.[3] A recent study using nationally representative survey data found that youth with a minority sexual orientation, such as

[1] Some studies cited below defined their scope as LGBTQ, LGBT, or Lesbian, Gay, and Bisexual (LGB) children or youth specifically. Where one of those studies is cited, this regulation uses the same acronym as the study itself.

[2] 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 LBTQ2S Children and Youth in Foster Care (2021). Cuyahoga Youth Count: A Report on LBTQ+ Youth Experience in Foster Care, *https://theinstitute.umaryland.edu/media/ssw/institute/Cuyahoga-Youth-Count.6.8.1.pdf*

3 Baams, L., Russell, S.T, and Wilson, B.D.M. 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.*

lesbian, gay, and bisexual youth, are nearly two and a half times as likely as heterosexual youth to experience a foster care placement.[4]

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 LGBTQ+ juvenile-justice involved youth were three times more likely to have been removed from their home and twice as likely to have experienced being physically abused in their homes prior to removal than their non-LGBTQ+ juvenile-justice involved counterparts.[5]

LGBTQI+ children are overrepresented in the child welfare system because of a confluence of factors. Studies suggest that LGBTQ+ children face higher rates of parental physical abuse and are more likely to run away from home or be kicked out than their non-LGBTQ+ counterparts, often because of conflict over their sexual orientation or gender identity.[6] These experiences place LGBTQI+ children at greater risk of entering foster care and mean that many LGBTQI+ children 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. As a result of reviewing this research, and hearing from LGBTQI+ individuals with lived experience

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[4] 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/*

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

[6] 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://ajph.aphapublications.org/doi/full/10.2105/AJPH.2009.190009*. Pearson, J., Thrane, L., & Wilkinson, L. (2017). Consequences of runaway and thrown away 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*. 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*

in foster care, we have developed this regulation to improve how title IV-E/IV-B agencies address the needs of this population.[7]

Impact of Family and Caregiver Behavior on LGBTQI+ Child Wellbeing

Research shows that the support LGBTQI+ children 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 2022 survey 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 expression, and educating themselves about LGBTQ people and issues. That survey found that LGBTQ youth who felt high social support from their family in these ways reported less than half the number of suicide attempts than LGBTQ youth who experienced low or moderate social support from their family.[8] Another study quantified the negative impacts of family rejection of LGBTQ children, which can lead to greater representation in foster care.[9] The study found that family behaviors, including excluding LGBTQ children from family events and activities because of their identity, not letting their child learn about their LGBTQ identity, or trying to change their child's LGBTQ identity increased the risk of depression, suicide, illegal drug use, and other serious health risks. The study also found that family behaviors that support LGBTQ children, including standing up for their child when others mistreat them because of their LGBTQ identity, had positive outcomes, helped promote self-esteem, overall health, and protected against suicidal

[7] ACF held two listening sessions with LGBTQI+ youth with lived experience in foster care on February 9, 2023, and December 18, 2023.

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

[9] See 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]. 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. 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), https://publications.aap.org/pediatrics/article-abstract/123/1/346/71912/Family-Rejection-as-a-Predictor-of-Negative-Health?redirectedFrom=fulltext

behavior, depression, and substance abuse. The study found that lesbian, gay, and bisexual 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 lesbian, gay, and bisexual counterparts from families that reported no or low levels of family rejection.[10] Studies found improved health outcomes in youth whose caregivers demonstrated supportive behavior towards the child's LGBTQ+ identity, including connecting the child to an LGBTQ+ adult role model.[11] Moreover, caregiver behavior that is not affirming, including refusing to use a child's chosen name and pronouns, or ridiculing or name-calling because of the child's LGBTQ+ identity, contributes to increased risks for serious health concerns for the child, such as depression, suicidal thoughts, suicidal attempts, and illegal drug use.[12]

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 mental health and well-being needs often being unmet. 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 proper, as required by statute.[13]

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[10] 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), *https://publications.aap.org/pediatrics/article-abstract/123/1/346/71912/Family-Rejection-as-a-Predictor-of-Negative-Health?redirectedFrom=fulltext*

i 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, https://lgbtqfamilyacceptance.org/wp-content/uploads/2021/11/FAP-Overview_Helping-Diverse-Families6.pdf

ibid.

[13] For examples, see Weston 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

LGBTQI+ children in foster care report experiencing mistreatment related to their sexual orientation or gender identity. One study found that "one of the most consistent themes that LGBTQ youth in foster care have conveyed in focus groups and qualitative interviews is a tendency to be harassed, teased, and bullied by staff, peers, and [foster] 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."[14]

Children in foster care who identify as LGBTQI+ are more likely to be placed in congregate care settings (group homes and residential care rather than family like settings), experience multiple placements, and have adverse experiences in their placement than non-LGBTQI+-identifying youth.[15] 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.[16]

A 2021 study showed that children in foster care who identify as LGBTQ+ report a perception of poor treatment by the foster care system more frequently than their non-LGBTQ peers and feel less frequently that they can be themselves.[17] Children in foster care who identify

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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, *https://www.proquest.com/scholarly-journals/because-were-fighting-be-ourselves-voices-former/docview/2056448509/se-2*. ACF held two listening sessions with LGBTQI+ youth with lived experience in foster care on February 9, 2023, and December 18, 2023.

[14] 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*

[15] Wilson, B.D.M., & Kastanis, A.A. (2015). Sexual and gender minority disproportionality and 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*

[16] Poirier, J., Wilkie, S., Sepulveda, K & Uruchima, T., *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*.

[17] 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*.

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.[18]

In one study that looked at LGBTQ+ status-related discrimination, 37.7 percent of children in foster care ages 12 through 21 who identify as LGBTQ+ reported poor treatment connected to their gender expression, sexual minority status, or transgender status. The study also showed that LGBTQ+ foster youth were more likely than their non-LGBTQ+ foster youth counterparts to have been hospitalized for emotional reasons or been homeless at some point in their life.[19]

Research has also demonstrated strong correlations between LGBTQI+ children who spent time in foster care and who later experienced housing instability, homelessness, and food insecurity. LGBTQI+ youth who reported past housing instability or a current homeless episode were six times more likely to have been in foster care than LGBTQI+ youth who did not report any housing instability.[20]

These many findings illustrate the need for child welfare personnel and foster parents to be trained on their critical role in the lives of LGBTQI+ children to avoid re-traumatization and further victimization of children.[21] Implementing strategic training and recruitment to meet the well-being needs of children who are LGBTQI+ is critical.

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[18] Poirier, J., Wilkie, S., Sepulveda, K & Uruchima, T., *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*

[19] 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*

[20] 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*

[21] 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.*

Mental Health Needs of LGBTQI+ Children

Research consistently shows that when LGBTQI+ youth experience supportive environments and services, they experience the same positive mental health outcomes as other youth.[22] 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 LGBTQ youth in foster care were more than two and a half times more likely to report a past year suicide attempt than LGBTQ youth who were not in foster care, with 35 percent of LGBTQ foster youth reporting such an attempt. Reports of past year suicide attempt rates were even higher among LGBTQ+ foster youth of color (38 percent) and non-binary and transgender foster youth (45 percent).[23]

One area of particular concern for the mental health of LGBTQI+ youth in foster care is possible exposure to sexual orientation or gender identity or expression change efforts (so-called "conversion therapy"), as well as other actions to change, suppress or undermine a child's sexual orientation, gender identity, or gender expression. Such efforts 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.[24] The American Psychological Association (APA) has concluded that any behavioral health or other effort that attempts to change an individual's gender identity or expression is inappropriate and, further, can cause harm and/or suffering. After reviewing scientific evidence on gender identity change efforts, harm, affirmative treatments, and professional practice

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[22] 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.*
[23] The Trevor Project, 2022 National Survey on LGBTQ Youth Mental Health, *https://www.thetrevorproject.org/survey-2022/assets/static/trevor01_2022survey_final.pdf*
[24] Substance Abuse and Mental Health Services Administration, FAQs About Finding LGBTQI+ Inclusive Providers, *https://www.samhsa.gov/behavioral-health-equity/lgbtqi/faqs*

guidelines, the APA has affirmed gender identity change efforts are associated with reported harm, and the APA opposes these practices because of their association with harm.[25] Likewise, according to the APA, sexual orientation change efforts are "coercive, can be harmful, and should not be part of behavioral health treatment.[26] A literature review by Substance Abuse and Mental Health Services Administration (SAMHSA) discussed in its 2023 report, "Moving Beyond Change Efforts: Evidence and Action to Support and Affirm LGBTQI+ Youth" concluded that [sexual orientation change efforts] were not effective and may cause harm." It found that no research has "demonstrated that gender identity change efforts are effective in altering gender identity." In fact, the review found that "exposure to gender identity change efforts...is associated with harm, including suicidality, suicide attempt, and other negative mental health outcomes such as severe psychological distress."[27]

Current Approaches to Meet the Needs of LGBTQI+ Children in Foster Care

Current approaches for meeting the needs of LGBTQI+ children in foster care 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 a report on "Protecting the Rights and Providing Appropriate Services to LGBTQI+ Youth in Out-of-Home Care" ("Report").[28] 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

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[25] American Psychological Association, APA Resolution of Gender Identity Change Efforts, February 2021, *https://www.apa.org/about/policy/resolution-gender-identity-change-efforts.pdf.*
[26] American Psychological Association, APA Resolution on Sexual Orientation Change Efforts, February 2021, *https://www.apa.org/about/policy/resolution-sexual-orientation-change-efforts.pdf.*
[27] 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, *https://store.samhsa.gov/product/moving-beyond-change-efforts-evidence-and-action-support-and-affirm-lgbtqi-youth/pep22-03-12-001*
[28] 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/.*

child's ability to be safe and free from discrimination; have access to needed care and services; and be placed in "safe and supportive" 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. The Report found that eight states and the District of Columbia offer developmentally appropriate case management that helps child welfare workers support LGBTQI+ youth. The Report found that 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.

However, the Report also demonstrates that a majority of title IV-E/IV-B agencies do not have laws, regulations, or policies to make appropriate services and supports or Designated Placements available to an LGBTQI+ child in foster care. Without such laws or policies, agencies may not adequately meet statutory requirements that guarantee that LGBTQI+ children in foster care, like all foster children, receive a safe and proper 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 LGBTQI+ child who is at risk of entering or is in foster care.[29] ACF believes this final rule will help address the extensively documented risk factors and adverse outcomes for LGBTQI+ children in foster care.

[29] 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*.

III. REGULATORY PROVISIONS AND RESPONSES TO COMMENTS

Summary of Commenters

The comment period for the NPRM was open for 60 days and closed on November 27, 2023. We received a total of 13,768 comments consisting of:

- Comments from 15 state or local child welfare agencies and governmental entities, such as state attorneys generals (AG) and a state civil legal aid office;
- Two letters representing 26 congressional members;
- Comments from 65 advocacy organizations, providers, and university institutes; and
- 13,536 comments from individuals, more than 12,000 of which consisted of two form letters, one in support and one in opposition.

We also received comments that were submitted on a different NPRM, were out of scope, or were duplicate submissions, and will therefore not be addressed. No comments were received by the deadline from Indian Tribes, Tribal organizations or consortiums, or organizations that represent Tribal interests. The comments are available in the docket for this action on https://www.regulations.gov/docket/ACF-2023-0007/comments. We reviewed and analyzed all of the NPRM comments and considered them in finalizing this rule.

Below is a summary of comments received. We include a detailed response to comments in section IV of this preamble.

Summary of Comments by Commenter Type

Summary of Comments from State and Local Child Welfare Agencies

Four states or government entities expressed support: three were supportive of ACF's goal to improve care for LGBTQI+ children but also expressed concerns and recommended substantive changes to the proposal, and one expressed a neutral position. The supporters expressed that they are currently undertaking efforts to meet the needs of LGBTQI+ children in foster care, such as state-level non-discrimination laws, a foster children's bill of rights, resource groups for LGBTQI+ community outreach, requiring providers to demonstrate an ability to

support LGBTQI+ children, and training for their workforce on cultural competency and sensitivity related to sexual orientation and gender identity. State agencies and governments who supported the rule expressed appreciation for the efforts of HHS to establish protections for LGBTQI+ children in foster care. They also supported some of the NPRM's requirements around assessing that placements meet the unique needs of LGBTQI+ children, reporting concerns with such placements, and placing children in sex-segregated child care institutions according to their gender identity.

Four states or government entities and the three letters representing 20 state attorneys general opposed the proposal. The state agencies and governments who opposed the rule stated a general belief that the NPRM creates a separate and distinct process for LGBTQI+ children that violates privacy and raised concerns related to the religious beliefs of providers. Additional concerns raised included that the NPRM would require an "upfront" conversation about a child's sexual orientation and gender identity instead of allowing a child to decide when to share this information with their case worker. Those states or entities who opposed the NPRM also argued that it creates a "cumbersome fix" for a problem that lacks clear definition while states are currently having issues finding enough providers for all children in foster care. They also argued that the NPRM's provisions would disincentivize families who may object to providing specially designated care for LGBTQI+ children from serving as foster parent providers and would "drive individuals and organizations of faith away." They also expressed concerns that most congregate care providers are not currently equipped to meet the provisions around placing children according to their gender identity. Finally, there were objections to what they saw as unfunded burdens on the agencies to develop new trainings, modify licensing and placement rules, and revise case management systems to track placements, notifications, and other requirements in the NPRM.

Letters from State attorneys general raised legal concerns that the NPRM violates various statutory and constitutional requirements; these concerns are addressed in section IV.

Suggestions for revisions from state and local child welfare agencies and Government entities included:

- Expanding the approach proposed in the NPRM to apply the process to report placement concerns and provide notice to all children in foster care and not only to those specified in the NPRM, such as those over age 14;
- Providing clear guidance related to all of the rule's requirements and specifically the treatment of kin placements;
- Providing more funding to establish or enhance services for LGBTQI+ children within the states; in rural areas; and for recruitment, retention, and training of child welfare workers and foster care providers; and
- Replacing specific terms or phrases to broaden or provide flexibility to certain requirements, such as replacing "retaliation" with "discrimination" and replacing "age-appropriate" with "developmentally appropriate."

Summary of Comments from Congressional Members

Two sign-on letters from a total of 26 congressional members expressed opposition to the NPRM. They generally expressed a belief that the NPRM imposes mandates on a subset of children based exclusively on the child's gender identity and sexual orientation while there are no Federal policies that define "safe and proper care" for other children with unique characteristics, such as those living with a disability. They argued that the proposed rule would dissuade families of faith from being foster parents, thus impacting availability of foster care placements and that the training requirements would impact availability of caseworkers. They also expressed concern that the proposed rule will impose "significant financial and administrative burdens" on title IV-E agencies. They expressed concerns about the NPRM's requirements for transgender children and that placing children according to their gender identity could result in children being placed in settings "they find uncomfortable and invasive or, at worst, unsafe."

Summary of Comments from Advocacy Organizations, Providers, and Universities

Of the 65 advocacy organizations, providers, and university institutions that commented, 34 were supportive of the Department's goal to improve care for LGBTQI+ children but also recommended substantive changes to the proposal. Seven expressed support without recommending changes to the proposal, and 24 opposed.

Those organizations, providers, and university institutions who supported the rule without making changes concurred with the research summarized in the NPRM that demonstrates the complex challenges faced by LGBTQI+ children in foster care and agreed that the NPRM would help prevent discrimination and retaliation against LGBTQI+ children by allowing them to express their identities without fear of discrimination. They argued that the NPRM balances the exercise of religion with the need to ensure child wellbeing and represents an essential step towards creating an inclusive and supportive child welfare community. Some of the providers who commented expressed support for the NPRM and outlined the programs, policies, and procedures that they currently undertake to assist LGBTQI+ children in foster care. These practices included training kin caregivers and families of origin on affirming care, helping youth identify lasting affirming connections, having a mix of residential facilities for children, and training for facilities staff.

The 34 advocacy organizations, providers, and university institutes that expressed general support but also concerns with the NPRM's requirements appreciated ACF's commitment to ensuring that LGBTQI+ children in foster care are protected from harm. They agreed that LGBTQI+ children are overrepresented in the child welfare system and appreciated that ACF's summary of research documents the discrimination and challenges LGBTQI+ children in foster care face.

However, some of the advocacy organization and providers that commented expressing overall support also raised concerns about the approach of the NPRM and some stated that it was vague, lacking clarification at various decision-making points, and would negatively impact the

availability of providers, specifically kin and religious providers. Commenters raised concerns over freedom of religion and the legality of the NPRM's proposed requirements. Several organizations argued the NPRM as drafted could harm, instead of help, LGBTQI+ children in foster care. Specific concerns about the NPRM raised by these commenters include that the proposed rule added a layer of bureaucracy on child welfare agencies; may present a burden for kin caregiver providers to meet; creates a "two-tiered system" where non-LGBTQI+ children have an expectation of safety anywhere, but for LGBTQI+ children only certain placements are "safe and appropriate"; places the onus on children to request a placement change, requiring them to disclose their identity when they may not feel comfortable doing so; did not explicitly contain anti-discrimination policies; lacked additional funding to implement the rule's requirements; and questioned whether CFSR would be the best mechanism for monitoring. As with all comments noted in these summaries, these concerns are addressed in the comment and response section that follows.

A number of the commenters who opposed the NPRM said that, while they agreed that every child in foster care should feel safe and be in a hostility-free environment, they were concerned that the NPRM only applied to LGBTQI+ children. Those that opposed generally argued the NPRM infringes upon religious liberties, questioned whether it was legal in its approach, and stated it minimized the contributions of faith-based providers. Some providers who submitted comments said the NPRM would have "unintended consequences" such as exacerbating the placement shortage. They also argued the NPRM was overly broad and vague, for example stating that not defining "hostility, mistreatment, and abuse" was "deliberate" to enable labeling providers as unsafe for "simply disagreeing with the state's so-called 'appropriate' method for caring for LGBT children." They expressed concern that the NPRM would preclude "reasonable efforts" to help children think through their "current feelings and assumptions" arguing that foster parents should be free to offer their views. They also expressed concerns that "age-appropriate services and supports" could require gender-affirming care for

transgender minors, which they argued creates various risks for children and should not be provided. Some commenters said that the NPRM's provision to place children according to their gender identity would "threaten girls' privacy" and that requiring use of a youth's chosen pronouns is a violation of free speech. A few commenters suggested instead creating a certification process for providers who have undergone training to be particularly supportive and affirming for LGBTQI+ children in foster care, such as something similar to having training to be a therapeutic foster care placement.

Summary of Comments from Individual Commenters

As noted earlier, we received approximately 13,536 comments from individuals, more than 12,000 of which consisted of two form letters. Of those, over 1,700 form letters expressed support, and over 10,000 form letters expressed opposition. Additionally, over 100 non-form letters expressed support, over 1,300 non-form letters expressed opposition, and 25 non-form letters expressed a neutral position. In general, the supportive commenters agreed that LGBTQI+ children are overrepresented in foster care, applauded HHS for requiring agencies to maintain enough safe and appropriate placements for LGBTQI+ children, and expressed their belief that this rule would be a "huge step forward" in keeping children safe. They also agreed that LGBTQI+ foster children should not be subjected to abuse or discrimination, including by placements that practice "conversion therapy." Some commenters stated that agencies have no policies that protect LGBTQI+ children in foster care and that the proposals in the NPRM will create important mandates for agencies and providers. Others expressed that ensuring that providers are trained and equipped with skills to provide for a child's needs regarding sexual orientation and gender identity is the "next step in improving the well-being of the LGBTQI+ youth in foster care." Supportive commenters asked who will define "safe and proper care."

Commenters who expressed opposition expressed a belief that the approach taken in the NPRM would harm, rather than help, children in foster care. They argued that it would disqualify most faith-based providers and label people of faith and religious organizations as "unsafe" and

“inappropriate.” The individuals and anonymous commenters who opposed the NPRM expressed concerns that the proposal would reduce the number of available providers, exacerbate the placement shortage, and discourage religious families and individuals from becoming foster parents or seeking employment in the child welfare profession. There were also a substantial number of commenters who appeared to misunderstand or misinterpret the NPRM’s provisions, including a substantial number of comments discussing the appropriateness or lack thereof of gender-affirming care for children. These comments are outside the scope of the rule because this rule does not establish any particular standard of medical care or require that anyone receive any particular medical services.

The 25 commenters who expressed neutral positions shared personal stories of their experience with LGBTQI+ children or foster care, views on child rearing, or generally that placements should be free from hostility and mistreatment.

Section by Section Discussion of Regulatory Provisions

We respond to the relevant comments we received in response to the NPRM in this section-by-section discussion.

Title and Definition of LGBTQI+

In the proposed rule we proposed the title of § 1355.22 to be “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.” The proposed rule used the terms “LGBTQI+ status” and “LGBTQI+ identity” in various locations to refer to LGBTQI+ children.

Comments: Some commenters encouraged ACF to amend the rule to explicitly include other identities – such as children who are Two Spirit – to be as inclusive as possible and provide clarity for providers. Some commenters encouraged ACF to explicitly include children with a variation in sex characteristics in addition to intersex children, as not all such children identify as intersex. Other commenters encouraged ACF to include protections based on “LGBTQI+

identity" in addition to "LGBTQI+ status" to provide maximum clarity about which children are entitled to Designated Placements.

Response: ACF agrees that addressing the needs of Two Spirit youth in the child welfare system is an important part of this regulation. ACF also agrees with the importance of providing clarity to title IV-E/IV-B agencies and providers about the meaning of the term "LGBTQI+." For the purposes of this rule, the term refers to children who identify as lesbian, gay, bisexual, transgender, queer or questioning, intersex, as well as children who are non-binary, Two-Spirit, or have non-conforming gender identity or expression, all of whom are referred to under the umbrella term of LGBTQI+ for this regulation.

For streamlining purposes, ACF updated the final rule's regulatory text to read "LGBTQI+ children (including children who are lesbian, gay, bisexual, transgender, queer or questioning, and intersex)." The word "including" clarifies that the umbrella term LGBTQI+ includes children who are non-binary, Two-Spirit, or have non-conforming gender identity or expression as well.

We also agree with commenters that the use of both "LGBTQI+ status" and "LGBTQI+ identity" offers greater clarity. The term "LGBTQI+ status" is frequently used in reference to protecting LGBTQI+ individuals from discrimination, harm, and mistreatment based on their "LGBTQI+ status." Protecting a child from mistreatment based on their "LGBTQI+ status" would include protections should the child disclose their LGBTQI+ identity, should a third party identify a child as LGBTQI+, or should the child be perceived as having an LGBTQI+ identity. Other sections of the NPRM provided protections to children based on their "LGBTQI+ identity." The term "LGBTQI+ identity" is frequently used when a person self-identifies as LGBTQI+. For this final rule, ACF uses the term "LGBTQI+ status or identity," and any reference to LGBTQI+ children is intended to include both children with LGBTQI+ status and

LGBTQI+ identity. For brevity, ACF has revised the title of this final regulation to be "Designated Placement requirements under titles IV-E and IV-B for LGBTQI+ children."

In regard to questions about children with variations in sex characteristics, ACF acknowledges that not all children with variations in sex characteristics self-identify with the term intersex but believes that the term LGBTQI+ provides sufficient clarity that the rule's protections apply to such children.

Final Rule Change: ACF updated the title of the regulation to "Designated Placement requirements under titles IV-E and IV-B for LGBTQI+ children" and updated the rule text to read "LGBTQI+ children (including children with lesbian, gay, bisexual, transgender, queer or questioning, and intersex status or identity)."

Section 1355.22(a) Protections Generally Applicable

In § 1355.22(a)(1) of the proposed rule, ACF proposed to require that title IV-E/IV-B agencies ensure that a safe and appropriate placement is available for and provided to all children in foster care, including each LGBTQI+ child in foster care. The proposed rule referred to specially designated placements for LGBTQI+ children in foster care as "Safe and Appropriate" placements. The NPRM proposed that a "Safe and Appropriate" placement for an LGBTQI+ child would be a placement in which (1) the provider will establish an environment free of hostility, mistreatment, and abuse based on the child's LGBTQI+ status; (2) the provider is required to be trained on 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) the provider will facilitate the child's access to age-appropriate resources, services, and activities that support their health and well-being. The NPRM further clarified that providers would not be required to be "Safe and Appropriate" as the rule does not compel any particular provider to seek a special designation to provide supportive care to LGBTQI+ children.

Comments: Numerous commentors, including those who supported and opposed the requirements of the proposed regulation, provided recommendations for using clearer terminology in the final rule.

Some commenters suggested that every child is already entitled to a safe and appropriate placement under Federal child welfare law, and that the final rule should clarify that this requirement applies to all children in foster care, not just to children in specially designated placements for LGBTQI+ children.

A number of commenters were opposed to applying the protections in paragraph (a) of the NPRM only to LGBTQI+ children for various reasons, including that it could appear that LGBTQI+ children are provided protections not guaranteed to others. Another commenter stated that there are no other Federal policies that define how a state must provide "safe and proper care" to children of other unique circumstances.

Many commenters expressed concern with the terminology “safe and appropriate” placements, interpreting that such a placement was only available to LGBTQI+ children. One commenter expressed the belief that using the term “safe and appropriate” permits the state to place the child with caregivers who are merely tolerant of the child’s sexual orientation or gender identity rather than in a home that is fully supportive. Commenters stated the rule does not go far enough to affirm children, and that the “free from hostility, mistreatment, and abuse” threshold was insufficient.

A number of commenters recommended that the final rule should require all placement providers to meet the requirements to be a safe and appropriate placement, unless they obtain a waiver based on a religious objection. Other commenters argued that unless all placement providers are required to be supportive, some LGBTQI+ foster children will not receive the benefit of such placements because they are not comfortable disclosing their identity to their caseworker.

Conversely, many commenters wrote that the proposed rule relies on a false assumption that only placements that support a child's LGBTQI+ identity are safe and proper. A commenter explained that the proposed rule would create a two-tiered system for both foster families and child-placing agencies in which consideration is given to homes that promote a liberal view of sexuality and gender. Commenters stated that this could particularly impact providers with religious beliefs and viewpoints that oppose same-sex marriage and believe that there are only two genders, for example. One commenter stated that, absent clear definitions and parameters for a safe home, foster families who hold certain religious convictions are at risk of being inappropriately deemed unsafe. One commenter stated that a foster family should not have to agree with a child's beliefs and that the foster parent's belief regarding sexuality and gender identity does not compromise their ability to provide safe and appropriate care for non-LGBTQI+ children.

Response: ACF appreciates commenters' views and suggestions. ACF agrees that the terminology used in the NPRM, which referred to placements that are specially designated for LGBTQI+ children as "Safe and Appropriate," needed clarification.

First, consistent with comments received, ACF confirms that Federal law requires all foster care placements to be safe and appropriate. ACF did not intend to suggest otherwise with the terminology it used in the NPRM. The agency sought to clarify how these Federal statutory requirements should be met in the context of LGBTQI+ children who, as the preamble to this rule demonstrates, have specific needs related to placements and services. One important aspect of a safe and appropriate placement for all children is that the placement be free of harassment, mistreatment, and abuse, and at 45 CFR 1355.22(a), we have incorporated regulatory language making clear that this requirement applies to all children in all placements, including LGBTQI+ children. We discuss the change to using the term "harassment" rather than the term "hostility"—the term we had employed in the NPRM—below.

Second, ACF acknowledges the concerns of commenters that families who do not meet or seek to meet specified requirements to serve as a designated provider for LGBTQI+ children could be mislabeled as "unsafe" under the terminology of the proposed rule. ACF acknowledges the particular concerns of faith-based providers and families of faith who serve as foster families. We appreciate the vital role that many families and providers of faith play in the child welfare system, and ACF is committed to upholding Federal legal protections for religious exercise, free speech, or conscience as further discussed in the "Response to Comments Raising Statutory and Constitutional Concerns" section of this preamble.

In response to these concerns, HHS has revised the terminology used in the final rule. The rule now uses the phrase "Designated Placements" as shorthand to refer to providers that are specially designated to serve LGBTQI+ children because they have made a set of commitments and undergone training to better meet the needs of LGBTQI+ children. State and Tribal agencies must have available a sufficient number of these placements as part of their responsibilities to satisfy the statutory requirement that all children in foster care have access to a safe and appropriate placement.

ACF disagrees with commenters who asserted that placements that affirm the identity of LGBTQI+ children are not beneficial for the child. As described in the introductory section of this preamble addressing Mental Health Needs of LGBTQI+ Youth, an extensive body of research consistently shows that when LGBTQI+ youth experience supportive environments and services, they experience the same positive mental health outcomes as other youth. Further, evidence from 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. In view of the data, ACF disagrees with the commenter's view that supportive placements are not necessarily desirable for safe and appropriate placement of children.

Comments: Multiple commenters asked for clarification of what specific requirements would apply to placement providers (i.e., foster family homes, child care institutions) that do not choose to become Designated Placements for LGBTQI+ children. Commenters asked that ACF provide examples of what such providers would and would not be required to do. For example, some commenters vocalized the importance of allowing placement providers to talk with children about their own feelings, and to have the ability to offer alternative viewpoints to LGBTQI+ children. Conversely, many commenters also suggested that the rule be expanded to require that all foster parents should be able to meet the needs of any child who enters their home to ensure that all children, including those who identify as LGBTQI+, are able to thrive in care.

Response: As noted above, ACF appreciates the opportunity to clarify that all children in foster care are entitled to safe and appropriate care under Federal law, regardless of whether they are LGBTQI+ or not, and if they are LGBTQI+, regardless of whether they are in a Designated Placement. Titles IV–E and IV–B of the Act provide protections that are designed to ensure that while in foster care, all children receive "safe and proper care" (Social Security Act section 475(1)(B), 42 U.S.C. 675(1)(B)). Specifically, as part of its title IV–E and IV–B plans, an agency must develop a case plan for each child in foster 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" (*Id*.). This statutory process 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 (Social Security Act sections 422(b), 471(a)(16), 475(1)(B), and 475(5), 42 U.S.C. Sections 622(b), 671(a)16), and 675(5)). The responsibility to develop and implement foster children's case plans lies with the child welfare agency. Child welfare agencies assign foster children to placement providers in accordance with their case plans. These decisions are individualized and take many aspects of a child's circumstances into

account. These general protections for safe and appropriate foster care placements apply to all placements and all children.

ACF appreciates the opportunity to further clarify what these general statutory provisions require. These statutory terms, which apply to all placements, at a minimum mean that the placement must be free from harassment, mistreatment, and abuse – including related to a child's sexual orientation, gender identity, or LGBTQI+ status. In this final rule, we use the term "harassment" in place of the term "hostility" used in the proposed rule. We agree with the concern, articulated by commenters, that the term "hostility" is insufficiently clear to provide guidance to providers. By using the term "harassment," we seek to clarify that the general protections focus on the provider's conduct; a provider will not violate this rule simply because of the view or beliefs the provider may have or by good-faith and respectful efforts to communicate with LGBTQI+ children about their status or identities. Under its settled meaning in the law, the concept of harassment requires conduct that is sufficiently severe or pervasive to create an unsafe or hostile environment based on the child's characteristics. *See*, *e.g.*, *Oncale v. Sundowner Offshore Servs*., Inc., 523 U.S. 75, 78 ("When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated.") (citation omitted).

Of course, children in foster care are especially vulnerable and rely on their providers to provide a supportive and protective environment. Protecting LGBTQI+ children from harassment, mistreatment, or abuse in all foster care placements is of particular importance given the vulnerability of these children. For example, as described in the preamble to this rule, a significant body of evidence demonstrates a connection between the risk that a LGBTQI+ child will consider or attempt suicide and the conduct and treatment of their caregivers towards the child's sexual orientation or gender identity. A 2009 study cited above showed that "LGB young adults who reported higher levels of family rejection during adolescence were 8.4 times more

likely to report having attempted suicide [and] 5.9 times more likely to report high levels of depression" compared with children of families of low or no such behaviors.[30] Application of the legal definition of harassment must necessarily attend to this context. *See Oncale*, 523 U.S. at 81(1998) (determination of harassment "requires careful consideration of the social context in which particular behavior occurs and is experienced by its target").

Harassment does not include an isolated hurtful remark or action. But it can include deprivation of key resources. *See id.* at 650-651 (actionable harassment exists when it keeps "female students from using a particular school resource—an athletic field or a computer lab, for instance"). Conduct need not physically deprive an individual of such a resource to constitute harassment; harassment includes conduct that so undermines and detracts from the victims' ... experience [with the program], that the victim[s] are effectively denied equal access to [the program's] resources and opportunities." *Id.* at 651.

Harassment, mistreatment, or abuse of any child in foster care is impermissible in any placement. A provider that harasses a child about that child's religious beliefs or practices violates the general guarantee that all foster placements must be safe and appropriate. Similarly, a provider that harasses a child about that child's LGBTQI+ status or identity violates the same guarantee.

In response to commenters who sought clarity about what conduct would or would not be permissible in placements that had not sought designation as a Designated Placement, ACF appreciates that some providers, like some caregivers, parents, and kin, may struggle to understand an LGBTQI+ child's identity, or have questions or concerns about a child's wellbeing upon learning that a child in their care is LGBTQI+. Good-faith and respectful efforts to engage children appropriately do not constitute harassment, mistreatment, or abuse. However,

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[30] 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), https://publications.aap.org/pediatrics/article-abstract/123/1/346/71912/Family-Rejection-as-a-Predictor-of-Negative-Health?redirectedFrom=fulltext

though the inquiry must be fact specific, providers can cross the line into harassment, mistreatment, or abuse if they are found to have engaged in behaviors such as punishing the child, subjecting the child to harsher rules, or excluding the child from community activities because they are LGBTQI+; or disparaging the child, calling them shameful, or using slurs or derogatory language because they are LGBTQI+. Such conduct can also constitute prohibited retaliation as outlined in paragraph (d) of this rule.

ACF understands that many providers will be learning over time how to best engage LGBTQI+ children. As discussed below at *Section 1355.22(b)(3) Placement and Services Decisions and Changes*, ACF recognizes that some providers may be willing to accept and benefit from additional resources and training in order establish a supportive environment for an LGBTQI+ child. ACF will provide technical assistance and guidance to agencies to support training and resources for providers who desire such training. ACF again notes that good-faith and respectful efforts to communicate with LGBTQI+ children about their status or identity do not constitute harassment, mistreatment, or abuse.

Additionally, consistent with the proposed regulation, this final rule requires that the title IV-E/IV-B agency ensure that no LGBTQI+ child experience retaliation in any placement, including those that are not Designated Placements. Revisions to the rule's nonretaliation provisions are described below. Accordingly, if a placement provider were to engage in (or attempt to engage in) retaliation against an LGBTQI+ child, the title IV-E/IV-B agency must take steps to protect the child from such retaliation. Depending on the circumstances and child's wishes, those steps could include moving the child to a new Designated Placement.

ACF reiterates that the final rule does not directly regulate the actions of individual foster care providers, as title IV-E/IV-B agencies are responsible for ensuring that each placement the agency makes meets requirements that it is safe and appropriate. As with all provisions of this rule, caseworkers who make individualized placement decisions about each child in foster care

will make case-by-case determinations about which placement is in the best interest of the child to implement the requirements of Federal statutory protections as well as this rule.

ACF reiterates that this rule does not prohibit individuals and organizations from continuing to participate as foster care providers if they do not wish to serve as Designated Placements. Although states and tribes must have sufficient Designated Placements for LGBTQI+ children, the final rule does not require any placement to meet the requirements of a Designated Placement. The fact that a given provider has not sought to become a Designated Placement is not evidence that the provider has engaged in harassment, mistreatment, or abuse. We have added a new provision at § 1355.22(j), which states that nothing in this rule requires or authorizes a State to penalize a provider in the state's titles IV-E and IV-B program because the provider does not seek or is determined not to qualify for the status of a Designated Placement under this rule.

Consistent with the NPRM, this rule also requires that placement providers who have not chosen to become Designated Placements for LGBTQI+ children are informed of the procedural requirements to comply with the rule, including the non-retaliation provision, described below.

Comment: Many commenters said the proposed rule did not define the terms "hostility," "mistreatment," and "abuse" and sought clarity on their meaning. One commenter suggested the final regulations provide greater specificity about what actions by providers/social workers cannot be permitted because they undermine, rather than create safe and appropriate spaces for, LGBTQI+ and other children.

Response: As described elsewhere in this preamble, we are clarifying that as part of meeting the requirement to provide a safe and appropriate placement for all children in foster care, the title IV-E/IV-B agency must ensure that placements, including those for LGBTQI+ children, are free from harassment, mistreatment, or abuse. As we explain above, we now use the term "harassment" in place of the term "hostility" used in the NPRM in response to requests from commenters for greater clarity. Applying the "harassment, mistreatment, or abuse" test

advances the goal of providing a safe environment to children while ensuring that agency staff and foster care providers will not violate those general protections simply for holding any view or belief or for good-faith and respectful efforts to communicate with LGBTQI+ children about their status or identity. Since those requirements and all of the rule's retaliation requirements apply to all foster care placements, they also necessarily apply to all placement providers, including Designated Placements. We note, as well, that the final rule's non-retaliation provision is not limited to providers. Thus, similar actions by caseworkers would also be prohibited by this rule. And because the general protections apply to all children, this final rule prohibits harassment, mistreatment, or abuse even when not directed against a child based on LGBTQI+ status or identity. For example, harassment of a child because of their religious beliefs or cultural practices would violate those general statutory protections. For further discussion of these issues, we refer the reader to the beginning of this section.

Final Rule Changes: We have revised the final rule so that 45 CFR 1355.22(a) now provides that as part of meeting the requirement to provide a safe and appropriate placement for all children in foster care, the title IV-E/IV-B agency must ensure that placements, including those for LGBTQI+ children, are free from harassment, mistreatment, or abuse.

Section 1355.22(b)(1) Designated Placements and Services for LGBTQI+ Children

The NPRM preamble explained that title IV-E/IV-B agencies should have a sufficient number of placements specially designated to serve LGBTQI+ children throughout their foster care system to meet the requirement of the proposed rule to ensure that a safe and appropriate placement is available for and provided to each LGBTQI+ child in foster care.

Comments: Several commenters asked for clarification on preamble language regarding "sufficient placements." For the determination of "sufficient" placements, they expressed concern that, in their view, the NPRM preamble failed to clearly articulate how agencies must determine whether their networks would include enough providers. Commenters cautioned that depending on how sufficient numbers are calculated, educational continuity and keeping children

in their communities could be undermined. Commenters also stated the proposed rule failed to clarify how different placement types would be factored into determinations of sufficient numbers of providers. One commenter emphasized the need for geographic representation of placements.

Response: As noted above, the final rule clarifies that all providers must be safe and appropriate for all children. Title IV-E/IV-B agencies need to have sufficient Designated Placements to be responsive to the needs of LGBTQI+ children. Consistent with the proposed rule, this final regulation does not prescribe a specific number of Designated Placements that will be needed in a given child welfare program. Title IV-E/IV-B agencies are in the best position to determine the number of such placements that will be required to meet their local needs and comply with this regulation. Accordingly, the regulation does not mandate a specified number of placements, but rather mandates what the title IV-E/IV-B agency must do to provide access to Designated Placements. The title IV-E/IV-B agency will need to determine the number of placements needed to meet these requirements. In recognition of the diversity of programs and local contexts across the Nation, we are not seeking to establish a uniform, standard requirement that applies to all jurisdictions and populations. Each state and tribe is unique and best suited to identify their placement needs and how to meet the provision in the final rule based on considerations such as variation in population; geographical disbursement including rural, remote, and urban populations; and the number of children in need of foster care placements, among other consideration. ACF encourages agencies to use data, modeling, and case work to estimate how many Designated Placements may be needed. ACF will provide further technical assistance to states and tribes to help them achieve this requirement. As we discuss below, this final rule clarifies that nothing in this rule shall be construed to require or authorize a state or tribe to penalize a provider in the title IV-E and IV-B program because the provider does not seek or is determined not to qualify as a Designated Placement under this rule.

The final rule also clarifies the requirements for a placement to be considered a Designated Placement for LGBTQI+ children. First, in addition to the protections generally applicable, the provider must commit to establish an environment that supports the child's LGBTQI+ status or identity. We have added the term "commit" to reflect that assent to this designation will be documented by title IV-E/IV-B agencies and in recognition that current placements, working toward designation as part of a placement stabilization plan, may express their commitment while working to establish the environment as described in the rule. The criteria for Designated Placements include provider training as discussed below. Finally, a Designated Placement must facilitate the child's access to age- or developmentally appropriate resources, services, and activities that support their health and well-being.

Provider Training for Designated Placements

The proposed rule clarified that for a placement to be considered specially designated for an LGBTQI+ child, the provider must be "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." In the NPRM, we requested comments on how ACF can ensure training curriculums for foster care providers are of high quality.

Comment: Many commenters responded with recommendations on how ACF can ensure training curricula for foster care providers are of high quality. Many commenters recommended ACF work with LGBTQI+ youth with lived experience and other experts in the community to develop core elements that should be presented in high quality trainings. One commenter recommended that trainings and measures of success should be reviewed and evaluated by LGBTQI+ youth with lived experience. Several commenters recommended ACF ensure trainings are certified by organizations with experience serving LGBTQI+ children. One commenter recommended ACF develop a set of guidelines for placement providers' trainings to ensure the trainings address a robust set of topics. One commenter recommended ACF create a few standards for key concepts that must be included in trainings, at minimum, and discuss how to

create supportive and inclusive environments for all sexual orientations and gender identities. The commenter also recommended trainings provide strategies on how to ask and respond to questions around these topics in a respectful way and that therapists who work with LGBTQI+ youth in care should provide evidence-based services and care. One commenter recommended all training include information about the critically important role of faith for the mental health of LGBTQI+ youth and that ACF should urge states to approve diverse training options, including at least one approved training sequence designed by and for theologically conservative faith-based providers. Several commenters recommended provider training should be offered annually for new resource families or as an opportunity for a training "refresher" and ideally should be coupled with coaching opportunities to reinforce training content. One commenter recommended training modules be updated and provide for recurring trainings as the agency best sees fit and that ACF should put in place a system to implement a data check to understand the effectiveness of these training programs. Several commenters recommended ACF highlight programs that have been developed to work with existing resource families and recommend that States provide similar programs to placement providers who are assessed as not yet supportive to LGBTQI+ children. One commenter recommended ACF should provide specific funding and grant opportunities to assist states and tribes to provide appropriate training pertaining to LGBTQI+ children in foster care.

Many commenters had suggestions about foster care provider training, such as requiring that providers receive relevant trainings and resources that enable and empower them to care for LGBTQI+ children; agencies offer the same provider training requirements for kinship caregivers, and offer expanded provider training to ensure that all kinship and foster caregivers are equipped to be safe and appropriate, regardless of the child's sexual orientation or gender identity; and incentives are offered to agencies using evidence-based trainings. Another commenter said that being designated to provide care for LGBTQI+ children should not be solely defined by the receipt of specific provider training and instead be determined by an ability

and willingness of the caregiver to meet the child's needs. Commenters also requested clarity on what constitutes "appropriate knowledge" and "skills," recommending ACF work with faith-based groups on provider training development, while others suggested not to be overly specific. Other commenters disagreed saying that there is no "official federal training available" for providers and that since foster care training curriculum are administered by state and county authorities, enforcing specific provider training requirements would violate individual state statues. Other commenters suggested adding information about professional standards as part of the provider training requirement.

One commenter suggested expanding the rule to include training for all service providers, including attorneys and guardians ad litem.

Response: We considered all of the recommendations and comments. We have revised the final rule in paragraph (b)(1)(ii) to add additional specificity to the training for foster care providers. In addition to requiring the training to reflect evidence, studies, and research about the impacts of rejection, discrimination, and stigma on the safety and wellbeing of LGBTQI+ children, the final rule also requires the training to provide information for providers about professional standards and recommended practices that promote the safety and wellbeing of LGBTQI+ children. Those recommended practices should reflect evidence-based supportive behaviors shown to improve health and other outcomes for LGBTQI+ children and exclude behaviors shown to lead to poor health outcomes for LGBTQI+ children. ACF acknowledges that training materials could be improved through engagement with people with lived experience, and strongly encourages title IV-E/IV-B agencies to do so, though we have not chosen to make it a requirement. So long as the requirements in this final rule are satisfied, ACF will defer to states and tribes on how to best incorporate these additional requirements into their training. ACF will provide technical assistance to help agencies implement this requirement.

The final rule does not extend these training requirements in paragraph (b)(1)(ii) beyond the foster care provider, as the training is focused on becoming a Designated Placement for a

child. ACF acknowledges title IV-E/IV-B agencies should offer training and services to kinship caregivers and foster families that opt to become Designated Placements for LGBTQI+ children, particularly those currently placed with them. The final rule in § 1355.22(b)(2) states that services and training can be offered to current providers, including kin, to help them become a Designated Placement if they wish and thus promote sibling unification, and retaining sibling, kinship, family, and community ties. ACF acknowledges that training on supportive services for LGBTQI+ children could be beneficial for guardians ad litem and attorneys. However, requirements for training attorneys are beyond the scope of this rule.

Other Comments on Designated Placement Requirements

Comment: One commenter wanted the rule to more clearly specify who is included in the term placement provider.

Response: Placement providers are foster family homes, child care institutions, or other facilities that provide foster care to children, consistent with the definition of foster care at 45 CFR 1355.20.

Comment: One commenter requested clarification on whether short-term, emergency placements are exempt from the Designated Placement requirements for an LGBTQI+ child if a designated provider is unavailable. One commenter expressed the need to afford flexibility for states to offer exceptions or alternatives for LGBTQI+ children placed with kin caregivers when it is in the best interest and desire of an LGBTQI+ child.

Response: The issues raised by the commenters regarding short-term or emergency placements are related to agency decision making and provider licensing which are determined at the local level. State and Tribal title IV-E/IV-B agencies that have placement and care responsibility of children who are in foster care have the authority to make placement decisions for the child. In doing so, they must consider the Federal statutory and regulatory requirements for foster care placements and must balance all of these factors in making a placement decision on a case-by-case basis. This requirement includes relative placement preferences, jointly placed

sibling placement requirements, least restrictive placement requirements, and requirements for placements in close proximity to the parent's home and the child's school of origin. However, we are not revising the final rule to provide specific exemptions. ACF encourages title IV-E/IV-B agencies to work with foster care placement providers who wish to become Designated Placements, including relative placements to build their capacity to provide such placements through coaching, training, and education. As noted above, ACF encourages agencies to use case work, data, and modeling to ensure that there are enough placements as needed in specific geographic areas, which will help ensure that children are placed in proximity to the parent's home and child's school of origin. Ensuring adequate numbers of Designated Placements will also help increase the likelihood that LGBTQI+ children will be placed with siblings.

Comment: Several commenters had suggestions or requested clarification regarding the terms used in this provision of the NPRM. Several organizations suggested using the term "developmentally appropriate" instead of "age-appropriate."

Response: We agree with commenters that in addition to age-appropriate resources, services and activities, a child should have access to developmentally appropriate resources, services, and activities. Therefore, we are revising the final rule to read "age- or developmentally- appropriate." This is to be consistent with the definition in section 475(11)(A) of the Act (Social Security Act Section 475(11)(A), 42 U.S.C. 675(11)(A)).

Final Rule Changes: The final rule provides requirements for a placement to be considered a Designated Placement, which goes beyond the general protection of an environment free of harassment, mistreatment, and abuse, which is now described as safe and appropriate. To be considered Designated, a placement must meet the criteria described in § 1355.22(b)(1).

Section 1355.22(b)(2) Process for Notification of and Request for Designated Placements

Section 1355.22(b)(2) describes the process the title IV–E/IV–B agency must implement to notify an LGBTQI+ child that they may request a Designated Placement or request that services be offered to their current placement to become a Designated Placement. In the NPRM,

where the provision to request a placement for an LGBTQI+ child was located at § 1355.22(a)(2), ACF proposed that title IV-E/IV-B agencies must implement a process by which a child identifying as LGBTQI+ may request a placement specially designated as meeting specified requirements for LGBTQI+ children, and that the title IV-E/IV-B agency must consult with such child to provide an opportunity to provide input into that placement. The NPRM proposed that this process must safeguard the privacy and confidentiality of the child. It also proposed to require that title IV-E/IV-B agencies notify all children over the age of 14 that specially designated placements for LGBTQI+ children are available, as well as providing such notification to children under the age of 14 who have been removed from their home due to familial conflict about their LGBTQI+ status, and children who have disclosed their LGBTQI+ identity or whose LGBTQI+ identity or status is known to the agency. The NPRM further proposed that the notice should be provided in an age-appropriate manner both verbally and in writing, and that the notice must inform the child about how they request a safe and appropriate placement.

Notification Requirements – Frequency, Age, and Developmental-Appropriateness

Comment: Many commenters provided recommendations on how often the agency must provide the child notification and recommended providing multiple notifications to children. Suggestions included providing notice at least two times a year; continuously; at regular intervals; and no less than twice per year. One commenter stated that children should be notified within 72 hours of entering foster care that having a safe and appropriate foster placement is a right. They also recommended that youth should acknowledge receipt of rights at case hearings and placement changes and that rights be publicly posted in congregate care facilities, and accessible to youth in foster homes.

Response: There are existing mandated requirements for agencies to provide care and services to children in foster care. This includes conducting an initial case plan within 60 days of a child's removal and conducting monthly home visits with the child. These are opportunities

that agencies already have in their ongoing work that will allow them to provide proper notifications in accordance with the rule; while the rule specifies information that must be included in the notice, agencies are not required to establish a new process to notify children that Designated Placements are available. ACF intends to clarify opportunities to ensure children are informed through technical assistance. We encourage agencies to use all opportunities available to ensure children are well informed. Therefore, we have determined not to make these changes in the final rule. However, ACF takes this opportunity to clarify that in response to comments about enforcement of the rule's provisions, the final rule provides for the notification requirement to be monitored through the CFSRs, 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. This change is discussed below under *Section 1355.34(c) Criteria for Determining Substantial Conformity*.

Comment: Numerous commenters recommended that the notice of availability of safe and appropriate placements should be provided to all children regardless of age, rather than the age of 14 as specified in the NPRM. One organization commented that notice at age 14 is too late and should be provided at an earlier age. Another suggested varying ages at which to begin offering notifications.

Response: ACF appreciates the comments about the importance of providing notification to children. In the final rule, ACF has kept the age requirement for notification to all children 14 and over, in alignment with the existing case plan requirement in section 475(1)(B) of the Social Security Act.

Moreover, in addition to requiring agencies to notify all children age 14 and over, the final rule also requires agencies provide notice about Designated Placements to those under age 14 who are removed from their home due, in whole or part, to familial conflict about their sexual orientation, gender identity, gender expression or sex characteristics; have disclosed their LGBTQI+ status or identity; or whose LGBTQI+ status or identity is otherwise known to the

agency. It also requires that the title IV–E/IV–B agency ensure that LGBTQI+ children have access to age- or developmentally 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.

Comment: Many commenters recommended that the NPRM requirement for the written and verbal notice to be provided in an "age-appropriate" manner be revised. They recommended that age appropriate be changed to "developmentally appropriate."

Response: We agree with commenters that in addition to providing written and verbal notice in an age-appropriate manner, the notice should also be provided in a developmentally appropriate manner. Therefore, we are revising the final rule to read "age- or developmentally appropriate." This is to be consistent with the definition in section 475(11)(A) of the Social Security Act, 42 U.S.C. 675(11)(A).

Requested Placements

Comment: A number of commenters stated that while the NPRM proposed that the agency must notify the child specified in the NPRM that a safe and appropriate placement was available, they understood it as written that a safe and appropriate placement is only available if the child requested the placement. Some commenters indicated that this would be too heavy a burden on the child to self-identify and to initiate the request, which would exacerbate negative health outcomes for these children. One commenter recommended removing all of paragraph (a)(2) in the NPRM because if all placements are safe and appropriate as required, there would be no need to request one, and others commented that they support this section as proposed.

Response: As we have previously discussed, the final rule expressly provides that all placements, including placements for LGBTQI+ children, must be safe and appropriate. However, we have clarified that because not all placements will be Designated Placements, the rule provides for a process by which a Designated Placement may be offered or requested. HHS

intends that there are multiple processes through which Designated Placements may be provided to an LGBTQI+ child, including when initiated by a child's request.

Final Rule Changes: The final rule provides for a process by which an LGBTQI+ child may request a Designated Placement or request that their current placement be offered services. The final rule maintains the proposed rule's minimum age of notification of 14 and over, and continues to require agencies to provide notice about Designated Placements to those under age 14 who are removed from their home due, in whole or part, to familial conflict about their sexual orientation, gender identity, gender expression, or sex characteristics; have disclosed their LGBTQI+ status or identity; or whose LGBTQI+ status or identity is otherwise known to the agency. In addition, the final rule adds a requirement that the notice given to children must also inform the child of non-retaliation protections and the process whereby a child may report concerns about retaliation.

Section 1355.22(b)(3) Placement and Services Decisions and Changes

Comments: A number of commenters raised concerns about the impact that they believed the proposed regulations would have on the placement stability of LGBTQI+ youth. One commenter raised a concern that if only some foster care providers are designated safe and appropriate for LGBTQI+ children, it may result in decreased placement stability for LGBTQI+ children. Other commenters stated that the result of an LGBTQI+ child requesting a placement that affirms their identity will be to move to another provider, and that such placement changes cause upheaval and trauma for children. Some commenters said that LGBTQI+ youth, especially those who are in placements with their siblings, would avoid requesting Designated Placements for fear of being separated from their siblings, community, or school.

Response: ACF agrees that placement stability is a vitally important component of a youth's experiences and outcomes in foster care, and that placement stability is impacted by a foster care provider being able to meet a child's individual needs. ACF further acknowledges

that research shows that LGBTQI+ youth in the child welfare system have lower levels of placement stability compared with other youth.[31]

In response to concerns about placement stability, we note first that the placement stability of LGBTQI+ youth will be positively impacted by a title IV-E/IV-B agency's success in ensuring there are sufficient Designated Placements to meet the needs of LGBTQI+ youth. As clarified in the NPRM, IV-E agencies may claim Federal funds under title IV-E for certain activities to comply with this rule, including recruiting and training providers to be Designated Placements.

ACF further acknowledges that one consequence of an LGBTQI+ child requesting a Designated Placement may be a move to a new placement and that in certain instances, the child's first preference may not be a change in placement but rather that steps be taken to make the current placement more supportive of the child's LGBTQI+ status or identity. Accordingly, we revised the final rule in several important ways.

First, we have made clarifications at § 1355.22(b)(2) related to notification requirements. In addition to the requirement that title IV-E/IV-B agencies implement a process under which a child may request a Designated Placement, this final rule further requires that this process also enables a child to request services for a *current* placement to receive services to become supportive. Agencies must provide notice that the child can request a placement change or services for a current placement, and the process the agency will use for responding to the request. The final rule also clarifies that the title IV–E/IV–B agency's process for considering such a request must provide the child with an opportunity to express their needs and concerns.

Second, we have added a new section at § 1355.22(b)(3) which provides further clarity on how the title IV-E/IV-B agency should reach placement and services decisions. The final rule

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31 Wilson, B.D.M., & Kastanis, A.A. (2015). Sexual and gender minority disproportionality and disparities in child welfare: A population-based study. Children and Youth Services Review, 58, Pages 11–17, ISSN 0190–7409, *https://doi.org/10.1016/j.childyouth.2015.08.016.* Poirier, J., Wilkie, S., Sepulveda, K & Uruchima, T., *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.*

clarifies that when making placement and service decisions related to an LGBTQI+ child, the title IV-E/IV-B agency shall give substantial weight to the child's expressed concerns or requests when determining the child's best interests. As noted in the final regulatory text, placement decisions should give substantial weight to the child's requests; determining a child's best interests will require that the title IV-E/IV-B agency engage directly with the child to understand their needs and concerns.

The final rule further provides that, to support placement stability, when a request for a placement change or services is made, the title IV-E/IV-B agency must first determine whether actions could be taken to support the current provider in voluntarily meeting the conditions of a Designated Placement, and if the provider is willing to meet the conditions of a Designated Placement, requires that the title IV-E/IV-B agency use the case review process to regularly review the provider's compliance in providing a supportive environment. We believe this clarification in the final rule will allow more LGBTQI+ children to be safely served in their current placement.

Under these revised provisions, if an LGBTQI+ child expressed their preference to receive a Designated Placement, but their current provider had not sought to become a Designated Placement provider, the title IV-E/IV-B agency would be required to consider whether actions could be taken to support the current provider in meeting the conditions of a Designated Placement to maintain the child's placement stability, if the provider wishes to become such a placement. For example, the current placement provider could be offered the opportunity to receive the training needed to become a Designated Placement to better meet the needs of the LGBTQI+ child. Other steps to promote placement stability could include – consistent with child's best interests and the willingness of the provider – more regular visits by the caseworker, or counseling for the child alone or in conjunction with the placement provider to address any challenges.

As noted throughout this rule, we reiterate that nothing in this rule compels any provider to seek to become a Designated Provider. In the case of a provider who is not interested in becoming a Designated Placement for an LGBTQI+ child currently in their care, the title IV-E/IV-B agency could meet the child's needs by placing the child with a Designated Placement provider or, consistent with the child's preference for placement stability and the agreement of the current provider, by providing training and services necessary to make the current placement more supportive. To further support the placement stability of LGBTQI+ children, we reiterate that this rule's prohibition on retaliation encompasses unwarranted placement changes for a child because of their LGBTQI+ status or identity.

Compliance with some requirements of this rule will be assessed through the CFSRs and all requirements are subject to the partial review process. In pertinent part, the CFSRs assess the degree to which States have the necessary array of placement options available to serve the needs of all children who come into their care. The reviews also assess state performance in ensuring placement stability.

Section 1355.22(c) Process for Reporting Concerns About Placements and Concerns About Retaliation

Section 1355.22(3) of the proposed rule described the process the agency must implement for LGBTQI+ children to report concerns about a placement that does not meet the requirements of this rule and concerns about retaliation. The NPRM proposed to require that title IV-E/IV-B agencies implement a process for LGBTQI+ children to report concerns about any placement that fails to meet the requirements of a placement that is specially designated for LGBTQI+ children. The NPRM proposed that this process must safeguard the privacy and confidentiality of the child. Like the requirement that certain children be notified that specially designated placements for LGBTQI+ children are available, the NPRM proposed that the same children be notified verbally and in writing about the process to raise concerns about a placement. Finally, the NPRM proposed to require that IV-E agencies "respond promptly" to a

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.

Comment: Several commenters expressed their views on how an agency should respond to the child’s placement concerns, when to make a placement change, and foster family home licensing considerations, such as placing the license on a hold while the family engages in training and is reassessed.

Response: State and Tribal title IV-E/IV-B agencies have placement and care responsibility for children who are in foster care, and this allows such agencies to make placement decisions for each child on a case-by-case basis. In reference to whether there should always be a placement change when a child expresses a concern, we want to clarify that, absent a safety concern or the specific desires of the child, placement changes should not necessarily be the first course of action. As noted above, the final rule requires that before initiating any placement changes, the title IV-E/IV-B agency must consider whether additional services and training would allow the current provider to meet the conditions for a Designated Placement, and whether the current provider is willing to meet the conditions of a Designated Placement. Thus, with the child’s consent and subsequent agreement by the provider, we encourage the agency to offer the foster care provider supports including training, coaching, and information to enable the provider to provide an affirming home for the child. This approach should be prioritized when a child wishes to remain in their placement for reasons of sibling unification, proximity to family and community of origin and schools, wish to remain in a family-like setting, or generally to avoid placement disruption. Where caregivers agree to accept such services and training, we encourage agencies to work in an ongoing way to build caregivers’ capacity to provide this kind of care for LGBTQI+ children.

Prompt Response to Concerns

In the NPRM, we requested public comment on whether and how best to define "promptly" as applied to the requirement at proposed paragraph (a)(3)(iii) that an agency respond promptly to a child's reported concerns.

Comment: Many commenters offered suggestions on how to define "promptly" as it applies to this paragraph. Many commenters responded with several suggestions recommending "promptly" be defined as immediate and that these instances should be investigated sooner than current agency timelines for investigating reports of abuse or neglect. Many included a timeframe for response in their recommendation to occur within two hours to 24 hours. Several expressed that any reported concerns should be handled with urgency as the LGBTQI+ population is already identified in the rule as having significant risk. Other commenters recommended ACF not define the term, leave flexibility to states to define it, and suggested that these requests be handled by an independent entity, such as an ombudsman.

Response: ACF has reviewed all of the suggestions, and, while we appreciate the comments, we are not defining "promptly" in the final rule. ACF is not mandating a uniform timeframe for agencies to respond to a placement concern as that would be unnecessary when agencies already have established protocols to respond to reports of child abuse and neglect investigations. As such, the title IV-E/IV-B agency will determine the timeframe for responding promptly to a child's report consistent with their existing timelines for agency child abuse and neglect reporting and investigating procedures commensurate with the seriousness of the child's concern. 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. As part of its existing monitoring process, ACF may evaluate whether a title IV-E/IV-B agency is responding to all concerns promptly, including that those raised by LGBTQI+ children are responded with the same level of promptness as it responds to other comparable concerns. While this final rule does not dictate a timeline for

response, a title IV-E/IV-B agency that treated concerns raised by LGBTQI+ children about the safety of their placements with lesser priority than concerns raised by other youth may be subject to the partial review process to determine compliance with this requirement.

Other Comments on Reporting Concerns about a Placement

Comment: Several commenters suggested that ACF monitor and enforce these provisions for responding to placement concerns to the maximum extent possible.

Response: These provisions in the final rule are monitored as part of the partial review process. This means that if ACF becomes aware of a potential non-compliance issue with the provisions in § 1355.22, it will initiate a "partial" review, which is a review of state and tribal title IV-E/IV-B plan requirements (45 CFR 1355.33(e)). If there is evidence of non-conformity identified through the partial review process, the state/tribal title IV–E/IV–B agency will be required to enter into a program improvement plan and make necessary changes to come into compliance. Therefore, since there is already an established protocol for monitoring, no changes to the final rule are warranted.

Comment: Several commenters recommended adding a requirement to engage LGBTQI+ youth with lived experience in process development. One commenter recommended that it should be required for agencies to have an independent forum for reporting, investigating, and resolution of reported concerns, such as a Foster Care Ombudsman. One commenter recommended that agencies provide updates about the "investigation" to youth and allow options for ongoing communication to keep youth updated such as phone call or email.

Response: We considered these comments and determined to retain the provision as proposed in the NPRM to allow agencies to design their notification processes. Instead, technical assistance is available to states and tribes as warranted in implementing in a manner consistent with best practices, including by engaging youth with lived experience. Therefore, we are not making changes to the final rule.

Comment: Many organizations recommended adding that the written and verbal communication needed to be developmentally appropriate, rather than age appropriate.

Response: We agree with commenters that in addition to developmentally-appropriate services, a child should have access to developmentally-appropriate communications. Therefore, we are revising the final rule to read that "notice must be provided in an age- or developmentally appropriate manner, both verbally and in writing." This is to be consistent with the definition in section 475(11)(A) of the Social Security Act, 42 U.S.C. 675(11)(A).

Final Rule Changes: As part of the final rule, ACF clarifies that, absent a safety concern or the specific desires of the child, placement changes should not necessarily be the first course of action. The final rule requires the process for reporting concerns about a child's placement also include reports about retaliation. In addition, it adds that a child should receive developmentally-appropriate notice both verbally and in writing of the process for reporting concerns about a placement or retaliation.

Section 1355.22(d) Retaliation Prohibited

In the proposed rule, ACF proposed to require that title IV-E/IV-B agencies must have a procedure to ensure that no LGBTQI+ child in foster care experiences retaliation for disclosing their LGBTQI+ identity, for requesting a specially designated placement for LGBTQI+ children, or for reporting concerns that their current placement does not meet their needs related to being LGBTQI+. The proposed rule described examples of what would be considered retaliatory under the rule.

Comment: Many commenters strongly supported the NPRM's prohibition on retaliation and said that such protections were important for the safety, health, and wellbeing of LGBTQI+ children who face heightened risks when they disclose their sexual orientation or gender identity.

Other commenters raised concerns about the retaliation prohibition and said that religious providers could be accused of retaliation for merely disagreeing with a child's sexual orientation or gender identity. As discussed in Section IV, a couple of commenters asserted that concepts

included in the proposed rule that relate to a child's identity place individuals and organizations of faith at risk of being accused of retaliation that would unconstitutionally infringe on their free exercise of religion.

Response: ACF appreciates commenters' views on the rule's prohibition on retaliation. We agree with commenters who observed that LGBTQI+ children are particularly vulnerable to retaliation when their sexual orientation or gender identity is disclosed. We also acknowledge the concerns of some providers who worried about being accused of retaliation when engaged in conduct related to their faith or beliefs. As we address more fully below in our response to the First Amendment and Religious Freedom comments, ACF is committed to upholding Federal protections for free speech, religious exercise, and conscience for all providers and children in the child welfare system. In particular, we have developed this rule in a manner that respects these guarantees. The Department will apply Federal protections for religious exercise, free speech, and conscience, including by applying the Department's regulatory protections for seeking religious accommodations.

In response to requests for clarification, we are first more clearly specifying the actions for which retaliation is impermissible. The proposed rule had referred to retaliation for the child disclosing their LGBTQI+ identity; requesting a placement specially designated for LGBTQI+ children (which the final rule now refers to as Designated Placement); or for reporting concerns about the safety and appropriateness of their current placement. To this list, the final rule makes clear that the intended reference is to both LGBTQI+ status and identity, and further specifies that retaliation is impermissible for having a child's LGBTQI+ status or identity disclosed by a third party; for the child being perceived to have an LGBTQI+ status or identity; or for the child's request or report related to requirements for placements or services.

The proposed rule had specified that 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. In response to commenters' requests for greater clarity on what actions would constitute retaliation, the final rule provides additional detail about such actions and how they interact with other provisions of the rule, such as the prohibition on harassment, mistreatment, or abuse in all foster placements.

Comment: Some commenters expressed concern that, in their opinion, the proposed rule did not provide sufficient reassurance that LGBTQI+ children would be protected from retaliation, whether for disclosure of their status or identity, requesting a new placement, or reporting a placement that is not safe and appropriate. One commenter expressed concern that absent Federal protections "caseworkers could further harm children by engaging in discriminatory behavior," and shared the example of a caseworker blaming a child for mistreatment they experienced as a result of their status or identity. This commenter was also concerned that the rule "fails to protect all families, including kin, and current and prospective foster and adoptive parents" from discrimination in their interactions with the child welfare system. Finally, this commenter noted that absent Federal protections, officials might use retaliatory child protection investigations, such as a state investigating a parent because of bias toward the child's or the parent's disclosed or perceived identity or status.

Response: We agree with commenters that it is important that children have strong protections against retaliation for having disclosed their LGBTQI+ identity or status and having requested a new placement or reporting a placement that is not safe and appropriate. As a result, we have made several adjustments in the final rule.

First, we specify in paragraph (d)(2)(v) that the title IV-E/IV-B agency will be considered to have retaliated against a child if it uses information about the child's LGBTQI+ identity or status to initiate or sustain a child protection investigation or discloses information about the child's LGBTQI+ identity or status to law enforcement in any manner not permitted by law. While both of these actions already fall under the definition of retaliation in paragraph (d)(2)(iv), which includes "disclosing the child's LGBTQI+ status and/or identity in ways that cause harm

or risk the privacy of the child," we believe it is appropriate to name these actions directly in order to give assurance to LGBTQI+ children that such actions are not allowable.

Second, in paragraph (d)(2)(vi), we clarify that the prohibition on retaliation includes retaliation against current or potential caregivers (including foster parents, pre-adoptive parents, adoptive parents, kin caregivers, and birth families) for supporting a child's LGBTQI+ status or identity. We believe this is necessary to ensure that children can benefit from the protections of this rule, as we are concerned that retaliation against a supportive adult could be used in an effort to prevent or discourage an LGBTQI+ child from requesting or receiving a Designated Placement or necessary services. While we do not define all of the actions that could constitute "retaliation" in this context, as it may vary significantly depending on circumstances, we understand it to mean any harmful action taken against a current or potential caregiver for an LGBTQI+ child because of their support of that child's LGBTQI+ identity or status.

Third, § 1355.22(b)(3)(iii) of the final rule includes a requirement that children receiving notice of the availability of Designated Placements also be provided notice of the retaliation protections in this final rule and describe the process by which a child may report a concern about retaliation. The title IV-E/IV-B agency must provide this information in an age- and developmentally appropriate manner, verbally and in writing, and must safeguard the confidentiality of the child. At a minimum, the agency must provide the notice about this process to: 1) all children age 14 and over, and 2) children under age 14 who have been removed from their home due to familial conflict about their sexual orientation, gender identity, gender expression or sex characteristics or have disclosed their LGBTQI+ status and/or identity, or it is otherwise known to the agency. In addition, the agency must respond promptly to the child's concerns, consistent with the agency's timeframes for investigating child abuse and neglect reports.

Finally, in response to comments raising concerns about enforcement of these provisions and safeguards on keeping a child free from retaliation, ACF welcomes the opportunity to clarify

that state agencies' compliance with the final rule's requirements will be monitored by CB through the CFSRs, 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.

Comment: Several commenters recommended that the provision be expanded to all children in foster care to ensure no child experiences retaliation. One commenter recommended modifying the final rule to include a prohibition on retaliation of the disclosure of the child's LGBTQI+ "status" in addition to the child's identity.

Response: We agree with commenters that retaliation against any child because of their characteristics or identity is harmful and impermissible. For example, title VI of the Civil Rights Act of 1964, which prohibits all recipients of Federal financial assistance from discriminating on the basis of race, color, or national origin, specifically prohibits retaliation against anyone seeking to vindicate a right under that law. This prohibition includes discrimination and retaliation against children based on their shared ancestry or ethnic characteristics, including children who are perceived to be Jewish, Christian, Muslim, Sikh, Hindu, or Buddhist, or of another religious group, if the discrimination is based on their ancestry or ethnic characteristics. The purpose of this rule is to clarify the specific protections necessary for LGBTQI+ youth to receive safe and proper care in an appropriate placement. In particular, safe and proper care for LGBTQI+ youth requires that no child in foster care experiences retaliation as a result of their LGBTQI+ status or identity or for being perceived to have an LGBTQI+ status or identity. This intent is reflected in the current text of the final rule.

Comment: One commenter recommended modifying the final rule to include that a child should not experience retaliation if an LGBTQI+ child's identity is disclosed by a "third party."

Response: We agree with the commenter and modified the final rule to ensure a child does not experience retaliation as a result of disclosure of an LGBTQI+ child's identity or status by a third party. As such, the provision now includes a prohibition on retaliation whether the child or a third party discloses the LGBTQI+ child's status or identity. This is to ensure that the

provision is applied as broadly as needed and provides protection for a child whose identity or status is shared with another party resulting in the possibility of retaliation as discussed in the preamble of the proposed rule.

Comment: Several commenters recommended that retaliation include restricting normalcy activities (e.g., attempts to restrict access to activities that allow youth to make and maintain friends, and develop problem solving skills) due to their sexual orientation or gender identity. One commenter recommended modifying the final rule to reflect that retaliation is not limited to items listed and can include restriction of access to supportive community resources.

Response: ACF agrees that restricting an LGBTQI+ child's access to age- and developmentally appropriate supportive resources or activities, or access to supportive peers or family members, based on their LGBTQI+ status or identity, would constitute retaliation under this rule. We also agree that disclosing the child's LGBTQI+ status and/or identity in ways that cause harm or risk the privacy of the child are impermissible forms of retaliation. The final rule clarifies the conduct that will be considered retaliation includes the examples listed at § 1355.22(d)(2)(i) through (vi).

Comment: One commenter voiced concern about a "lack of an enforcement policy related to retaliation" and stated without significant enforcement policy, the provision is hollow.

Response: We considered the commenters concern and, to provide further clarity, modified the regulatory provisions for monitoring in the final rule. The final rule now includes monitoring a state agency's compliance with the requirements of § 1355.22(d) through the CFSR.

Final Rule Changes: Consistent with the Protections Generally Applicable for all placements, discussed above, the final rule clarifies that harassment, mistreatment, or abuse would also be considered retaliation. In response to comments on other possible retaliatory actions against LGBTQI+ children or their caregivers, the final rule also specifies that a title IV-E/IV-B agency, provider, or any entity acting on behalf of an agency or provider will be considered to have retaliated against a child if it restricts access to developmentally appropriate

materials or community resources; discloses private information in a way that causes harm or violates the rights of a child; or uses information about the child's LGBTQI+ status or identity to initiate or sustain an investigatory action. The final rule extends the prohibition on retaliation to include retaliation against current or potential caregivers. It clarifies a requirement that children receiving notice of the availability of Designated Placements also be provided notice of the retaliation protections, and it provides for monitoring state agency compliance through the CFSR.

Section 1355.22(e) Access to Supportive and Age- or Developmentally Appropriate Services

Section 1355.22(a)(5) of the proposed rule described the requirements for the agency to provide access to services that support the child's LGBTQI+ status and/or identity and includes clinically appropriate mental and behavioral health care that is supportive of their sexual orientation and gender identity and expression.

Comment: Many organizations suggested adding medical care (some referred to this as health care) and clarifying what this entails. Several commenters said it was unclear whether the rule allows or requires gender-affirming medical care, with some commenters opposing access to gender-affirming care and others supporting such access. Many organizations suggested the rule should state that gender-affirming medical care is among the potential age-appropriate resources and services that may support transgender children's health and well-being. Other commenters said that gender-affirming care should never be considered "appropriate" services.

Response: This rule does not establish any standard of medical care. Title IV-E agencies determine what services to provide to an individual child, on a case-by-case basis, in accordance with statutory requirements. Specifically, the case plan must assure "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, including a discussion of the appropriateness of the services that have been provided to the child under the plan". See section 475(1)(B) of the

Social Security Act, 42 U.S.C. 675(1)(B). What services are appropriate for an individual child would depend on many individual factors, including physicians' recommendations, the input and consent of the child's authorized legal representative or parent, the child's input, and the best available medical guidance at the time. Nothing in this rule preempts state laws regulating the practice of medicine or prohibiting particular treatments.

Comment: Many commenters recommended explicitly defining mental and behavioral health care as broad and inclusive of wellness practices and alternative supports.

Response: Mental and behavioral health supports are examples of required supports for which the agency must provide access to all children in foster care, including LGBTQI+ children. As such, ACF has determined it is not necessary to provide a definition for these examples. Title IV-E/IV-B agencies will determine what mental and behavioral health care services are needed on a case-by-case basis in accordance with a child's case plan to, among other things, facilitate the child's safe return home or the permanent placement of the child.

Comment: Several commenters suggested explicitly prohibiting the use of so-called "conversion therapy" and other harmful interventions that undermine and conflict with a youth's identity. Other commenters asked about the definition and ability to use "talk therapy." Others provided information that addressed out of scope issues regarding this topic.

Response: As we stated in the NPRM, efforts to change or suppress a child's sexual orientation, gender identity, or gender expression – also known as so-called "conversion therapy" – 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. The final rule, at § 1355.22(d)(2)(ii), includes "Attempts to undermine, suppress, change, or stigmatize a child's sexual orientation or gender identity or expression through so-called "conversion therapy" as a form of prohibited retaliation against any child known or perceived to have an LGBTQI+ status or identity.

Section 1355.22(e) requires that the title IV–E/IV–B agency must ensure that LGBTQI+ children have access to age- or developmentally appropriate services that are supportive of their sexual orientation and gender identity or expression, including clinically appropriate mental and behavioral health supports, which can include forms of talk therapy.

Comment: Several commenters had suggestions or requested clarification regarding the terms used in this provision. Several organizations suggested using the term "developmentally appropriate" instead of "age-appropriate."

Response: We agree with commenters that in addition to age-appropriate services, a child should have access to developmentally appropriate services. Therefore, we are revising the final rule to read "age- or developmentally appropriate". This is to be consistent with the definition in section 475(11)(A) of the Social Security Act, 42 U.S.C. 675(11)(A).

Comment: A few commenters recommended ACF provide technical assistance, consultants, or funding to support recruitment of providers in rural areas to support LGBTQI+ children in foster care. Several organizations expressed their views on working with local and national agencies and individuals with lived experience to maintain a list of national resources to assist agencies in identifying supportive and age-appropriate services and to add standards of care for what constitutes clinically appropriate care and services.

Response: ACF has a current solicitation for a training and technical assistance contractor to assist states and tribes by providing training to increase Designated Placements for LGBTQI+ children and youth in foster care. ACF intends to issue implementation guidance for the final rule incorporating many of these recommendations for recruiting Designated Placement providers including in rural areas, including partnering with local and national agencies serving LGBTQI+ youth, and approaches which are informed by the lived experiences of LGBTQI+ children and youth in foster care.

Final Rule Changes*:* The final rule states that attempts to undermine, suppress, change, or stigmatize a child's sexual orientation or gender identity or expression through so-called

“conversion therapy” is a form of prohibited retaliation against any child known or perceived to have an LGBTQI+ status and/or identity. The final rule also adds that, in addition to age-appropriate services, a child should have access to developmentally appropriate services.

Section 135.22(f) Placement of Transgender and Gender Non-Conforming Children in Foster Care

In the NPRM, ACF proposed that 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 NPRM further proposed to require that IV–E/IV–B agency also consult with the transgender, gender non-conforming, or intersex child to provide an opportunity to voice any concerns related to the placement when the agency is considering a placement in such a facility.

Comment: A commenter asked that the final rule clarify placement procedures for non-binary and Two-Spirit children living in sex-segregated child care institutions.

Response: As explained in the preamble to the final rule for § 1355.22, non-binary and Two-Spirit children are included throughout this regulation under the term LGBTQI+. Thus, this provision for the agency to place the child consistent with their gender identity also applies to non-binary and Two-Spirit children and we have added the language to reflect this in the preamble for clarity. When making placement decisions for children whose gender identity doesn’t meet the sex-segregated options at the child care institution, the title IV-E/IV-B agency should engage with the child to determine the safest living arrangement that is in the child’s best interest among the options that are available, giving substantial weight to the child’s request.

Comment: Some commenters expressed concern about the NPRM requirement for children to be placed in sex segregated child care institutions consistent with their self-identified gender identity, not their “biological sex.” They stated it is a danger and “disregards the child’s safety and privacy interests to be placed in a mixed-sex setting” that a child “may find uncomfortable and invasive or, at worst, unsafe.” One state recommended that the final rule

allow for discussions that incorporate the child's preference as well as safety and risk concerns.

Response: ACF agrees that it is important to incorporate a child's preference for all placements. While ACF believes the requirement to offer a transgender or gender non-conforming child a placement consistent with their gender identity is most applicable to placements in child care institutions and sex segregated facilities, we have determined that it is necessary to extend that requirement to apply to all placements for transgender and gender non-conforming children. ACF accordingly updated the final rule text to apply to all placements for transgender and gender non-conforming children. The final rule text states that, when considering placing a child, the title IV–E/IV–B agency must offer the child a placement consistent with their gender identity. The updated regulatory text is consistent with the statutory requirement to place children in the "most appropriate setting available" (section 475(5) of the Social Security Act, 42 U.S.C. 675(5)(A)) and the rule's requirement that title IV-E/IV-B agencies must give substantial weight to the child's expressed concerns or requests when determining the LGBTQI+ child's best interest when making placement and service decisions.

ACF disagrees with the assertion that allowing transgender and other youth to access sex-segregated facilities consistent with their gender identity will diminish safety or privacy. Courts have held that all individuals' safety and privacy can be protected without also excluding transgender individuals from accessing sex-separate facilities and activities consistent with their gender identity.[32] Title IV-E/IV-B agencies have a range of tools at their disposal to accommodate any individuals' privacy concerns in a nondiscriminatory manner. However, a title IV/IV-B agency will be in violation of this rule if it refuses to offer a child a placement consistent with their gender identity. We also note that no application of this rule shall be required insofar as it would violate Federal religious freedom, conscience, or free speech law and

[32] *See, e.g.,* Grimm v. Gloucester City, 972. F.3d 586 (2020).

that providers may request an accommodation from any rule provision as described in Section IV of the preamble, below.

In addition, the NPRM proposed to require consultation with the child and the final rule maintains this requirement. The final rule requires that the title IV-E/IV-B agency consult with the child to provide an opportunity for the child to voice any concerns related to their placement when the agency is considering placing the child in such a facility.

Comment: One commenter was concerned that the NPRM did not account for the preferences of parents whose rights are intact in these agency placement decisions.

Response: Title IV-B/IV-E agencies have an established responsibility to engage with parents. For example, under 45 CFR 1356.21, title IV-E agencies "must make reasonable efforts to maintain the family unit and prevent unnecessary removal of a child from [their] home, as long as and the child's safety is assured; [and] to effect the safe reunification of the child and family if temporary out-of-home placement is necessary to ensure the immediate safety of the child." Under state and tribal law, parents often also retain certain rights even after their children have been removed from their physical and/or legal custody. We expect that agencies will act with appropriate awareness of parental rights under the law of the applicable state or tribe.

Comment: A few commenters expressed concerns that the provision may conflict with state laws and policies that govern sex-segregated childcare institutions and that many sex-segregated childcare institutions are not equipped to meet these placement requirements.

Response: The requirement to offer children a placement consistent with their gender identity is based on ACF's careful consideration of current research on best practices to promote children's health and wellbeing, as described in Section II of the preamble. This regulatory requirement does not preempt state or tribal laws regarding sex-segregated institutions. It simply requires that a child be offered a placement that is consistent with their gender identity. It thus clarifies, for children in foster care, the IV-E statutory requirement to place foster children in "a safe setting...consistent with the best interest and special needs of the child." Section 475(5) of

the Social Security Act, 42 U.S.C. 675(5)(A). If a state law prohibits placement in sex-segregated institutions based on gender identity, then the title IV-E/IV-B agency should explore all other placement options in order to offer a foster child a placement consistent with their gender identity, while also meeting the child's other particular needs. ACF further notes that pursuant to § 1355.22(d)(2)(iii), agencies may not place children in child care institutions solely due to their sexual orientation or gender identity or expression or allow child care institutions or other providers to segregate or isolate children on the basis of their sexual orientation or gender identity or expression.

Comment: Some commenters suggested having single or private rooms for youth who are non-binary and Two-Spirit who are placed in sex-segregated childcare institutions to ensure their comfort.

Response: ACF appreciates the commenter's concern for the privacy of such children and notes nothing in this rule would preclude those entities from accommodating the privacy needs of any child in their care. Appropriate placements should be determined based on the child's individual needs and their expressed preferences. We understand the commenters' concern that such children might feel especially uncomfortable in sex-segregated childcare institutions and encourage agencies to work with such children to ensure they receive appropriate placements.

Comment: Commenters made recommendations throughout about how Federal funding should be used and that it should be prohibited in specified circumstances, such as if a childcare institution does not allow children to be placed according to their gender identity.

Response: The final rule does not regulate how Federal funding under title IVE is reimbursed to states and tribes. Eligibility for title IV-E reimbursement of the placement of a particular child is based on many factors, including that the child is placed in a child care institution or foster family home as defined in section 472 of the Social Security Act. The final rule implements title IV-E and IV-B plan requirements, and not the particulars of title IV-E

foster care funding. Therefore, the recommendations are not within the purview of this final rule and no changes were made to the final rule.

Final Rule Change: The final rule clarifies that the requirement for title IV-E/IV-B agencies to offer placements for transgender and gender non-conforming children consistent with a child's gender identity applies to all placements, not exclusively to sex-segregated child care institutions.

Section 1355.22(g) Compliance with Privacy Laws

As explained in the NPRM, 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) of the Social Security Act. Information about a foster child's LGBTQI+ identity or status, 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.

Comments: Commenters provided input on the impact of the regulations on the privacy and confidentiality of LGBTQI+ youth. In addition, in the NPRM we requested public comment on what further guidance states may need on producing administrative records to monitor and track requests for safe and appropriate placements for LGBTQI+ children, while protecting the privacy and confidentiality of all children.

Several commenters expressed concerns that children may feel unsafe disclosing their LGBTQI+ identity or reporting mistreatment in their current out-of-home placement due to their

sexual orientation or gender identity. LGBTQI+ youth with lived experience in foster care have shared in comment letters, surveys, and testimony that they do not disclose their sexual orientation, gender identity or expression to foster parents and caseworkers for fear of lack of acceptance, unwarranted placement changes, fear of separation from siblings and/or unwarranted placements in congregate care facilities, feeling a "taboo" against sharing their LGBTQI+ identity, fearing prejudice, and lacking privacy. Commenters additionally stated that state laws restricting discussion of LGBTQI+ identities in school may have a chilling effect on whether children feel safe disclosing their sexual orientation or gender identity.

A few commenters made suggestions related to enhanced confidentiality provisions for data collection on a child's sexual orientation, gender identity, or sex characteristics. These included a recommendation to include a provision to require the agency to disclose information only when necessary for the wellbeing of the child or required by court, to regulate permissible uses of data, data sharing, and data security/storage protocols, to require consistency with confidentiality requirements for health data, and to require the child's consent to any disclosure under section 471(a)(8) of the Social Security Act (42 U.S.C. 671(a)(8)) about a specific child's sexual orientation, gender identity, or sex characteristics. Two commenters recommended provisions on how to store, seal and maintain a child's record. Specifically, they stated that the final rule should require agencies to seal physical records related to a child's sexual orientation, gender identity or expression and separately maintain the information from the case record and that electronic records should be maintained under separate, heightened data security levels.

Response: These experiences and concerns illustrate the need for data confidentiality, and protections from retaliation for disclosure or presumption of a child's LGBTQI+ identity and status. Such requirements are essential to help ensure that children will feel safe to disclose their identity and request Designated Placements.

Some states have existing privacy and data confidentiality requirements related to foster children's sexual orientation, or gender identity or expression. For example, California law provides that all children in foster care have the right "to maintain privacy regarding sexual orientation and gender identity and expression, unless the child permits the information to be disclosed, or disclosure is required to protect their health and safety, or disclosure is compelled by law or a court order." Cal. Welf. & Inst. Code sec. 16001.9(a)(19). In response to comments, and to address risks related to the disclosure of a child's LGBTQI+ status or identity and to help ensure children feel safe in making such disclosures and requesting Designated Placements, the final rule includes a number of important protections. First, § 1355.22(b)(2) provides that the process for requesting a Designated Placement or services to make a current placement a supportive one must safeguard the privacy and confidentiality of the child, consistent with section 471(a)(8) of the Social Security Act (42 U.S.C. 671(a)(8)) and 45 CFR 205.50. Second, § 1355.22(c) provides that the process for reporting concerns about a current placement must safeguard the privacy and confidentiality of the child, consistent with section 471(a)(8) of the Act (42 U.S.C. 671(a)(8)) and 45 CFR 205.50. Third, § 1355.22(d)(2)(v) provides that prohibited retaliation includes disclosing the child's LGBTQI+ status or identity in ways that cause harm or risk the privacy of the child or that infringe on any privacy rights of the child. Fourth, § 1355.22(g) specifies that the title IV-E/IV-B agency must comply with all applicable privacy laws, including section 471(a)(8) of the Act (42 U.S.C. 671(a)(8)) and 45 CFR 205.50, in all aspects of its implementation of this section, and that information that reveals a child's LGBTQI+ status or identity may only be disclosed in accordance with law and any such disclosure must be the minimum necessary to accomplish the legally-permitted purposes. The amount of information necessary to achieve the purpose of the disclosure would be determined on a case-by-case basis and in consideration of the best interest of the child. For example, the information needed to make a referral for a child to receive services related to the child's identity or status could be greater than another type of referral for services. In addition, states that allow

open courts would want to be mindful about the information shared in reports to the court as that information could be later shared openly.

The incorporation of these provisions is consistent with existing legal requirements relating to privacy and confidentiality. As discussed earlier in the preamble, title IV-E/IV-B agencies are required to maintain a child's information confidentially and may disclose it only for purposes specifically authorized by law. 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. Regarding the statutory provision that allows title IV-E/IV-B agencies to disclose a child's information for investigations, prosecutions, criminal or civil proceedings, or audits "conducted in connection with the administration of any [Federal assistance] programs," the requirement that the proceeding or audit be "conducted in connection with the administration" of title IV-E or another Federal assistance program strictly limits the disclosures allowed. Title IV-E/IV-B agencies may not disclose information for purposes such as investigating whether children or families are in compliance with generally-applicable state or local laws, as such investigations would not be conducted in connection with the administration of a Federal assistance program.

Final Rule Changes: The final rule includes several revisions to address privacy protections. Paragraph (g) was added to make explicit that title IV-E/IV-B agencies must comply with all applicable privacy laws, including section 471(a)(8) of the Act and 45 CFR 205.50. Information revealing a child's LGBTQI+ status or identity may only be disclosed in accordance with law. Such disclosure should be the minimum necessary to accomplish the legally-permitted purposes. The final rule also includes disclosing the child's LGBTQI+ status or identity in ways that cause harm as conduct that constitutes prohibited retaliation. It also specifies that the title IV-E/IV-B agency must comply with all applicable privacy laws.

Section 1355.22(h) Training and Notification Requirements

In the NPRM, ACF proposed to require that in order to meet the requirements of the rule, title IV-E agencies must ensure that its employees who have responsibility for placing children in foster care, making placement decisions, or providing services are trained to implement the procedural requirements of this section, and are adequately prepared with the appropriate knowledge and skills to serve an LGBTQI+ child related to their sexual orientation, gender identity, and gender expression. The NPRM further proposed that the IV-E agency must 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. Finally, the NPRM proposed that the IV-E agency must 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.

Comment: Several organizations recommended engaging LGBTQI+ youth with lived experience in development and implementation, providing guidance or resources on minimum number of hours, frequency of trainings, curricula, topics, developing a list of curricula, or core elements for training requirements for employees. Many of the commenters provided specific topics and/or core elements and suggested curricula. A few commentors also recommended that the trainings be certified by certain non-profit agencies.

Response: We have reviewed all the recommendations and appreciate recommendations for high-quality training. ACF has determined not to make any changes to the final rule in order to provide appropriate flexibility to agencies to determine the breadth of training consistent with the statute and rule and not prescribe specific requirements on hours, frequency, development, implementation, topics, or core elements. ACF intends to issue implementation guidance for the final rule which incorporates many of these recommendations for high-quality initial and

ongoing training for providing supportive care for LGBTQI+ children. We expect the guidance will be informed by the lived experiences of LGBTQI+ children and youth in foster care, and we encourage title IV-E/IV-B agencies to engage LGBTQI+ youth with lived experience in foster care in developing employee trainings. Further, ACF is committed to providing ongoing training and technical assistance to assist states, tribes, and agencies to provide training to increase Designated Placements for LGBTQI+ children in foster care.

Comment: Several commenters recommended that training should be mandatory for all staff, including all contractors and subrecipients of the child welfare agency.

Response: ACF has determined not to make any changes to the final rule for the following reasons: it would be overly burdensome to title IV-E/IV-B agencies to have specific training requirements for those employees who do not have responsibility for placing children in foster care, for making placement decisions, or for providing services. The rule is designed to effectuate Designated Placements in the least burdensome manner possible. Thus, the final rule retains the provision as proposed.

Comment. Some commenters recommended that all agency contractors must be informed of the procedural requirements.

Response: The requirement to be informed of the requirements in the final rule is essential only for those contractors that are fulfilling foster care placements and services. We are not expanding the requirement to include contractors and subrecipients who are not going to be involved with placements because it is unnecessary and overly burdensome for the agency to notify such contractors and subrecipients about the requirements of the rule. Thus, no changes to the final rule are warranted.

Comment: Some commenters recommended that all providers, including those that are seeking to serve as a designated placement for LGBTQI+ children must be informed of the procedural requirements.

Response: We agree with the commenters and have revised the final rule to ensure that all foster care providers are informed about the provisions in the final rule. Providers who are Designated Placements will receive additional training to meet the needs of the LGBTQI+ child, as knowing the full protections required for these children is necessary for fulfilling their role as a Designated Placement.

Final Rule Changes**:** The final rule clarifies agencies must ensure that all placement providers are informed of the procedural requirements to comply with this rule, including the required non-retaliation provisions.

Section 1355.22(i) Protections for Religious Freedom, Conscience, and Free Speech

Comment: Many commenters raised concerns that religious families and organizations will have sincerely held religious beliefs that conflict with the rule and as a result, those families and organizations will be deemed to not be "safe and appropriate" by the Federal Government. These commenters asserted that both individuals and organizations of faith will be discouraged from applying or continuing to provide foster care services because they will be penalized for their beliefs. Another commenter said that if adhering to a certain view of sexuality equates to a hostile environment, faith-based institutions and religious foster parents will not fit the standard. Similarly, a commenter wrote that a "safe and appropriate" placement designation implies that a home that espouses certain ethics of marriage, sexuality, and gender identity is harmful to LGBTQI+ children. Several commenters also stated that in order to be considered a safe and appropriate placement, a provider would be 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.

Response: ACF appreciates the vital role that faith-based providers and families of faith play in the child welfare system. Indeed, many families of faith are compelled by their religious beliefs to provide loving care to children in foster care, including LGBTQI+ children. ACF

further anticipates that some faith-based providers and families of faith will seek to become Designated Placements for LGBTQI+ children, while others will choose not to do so.

ACF remains fully committed to complying with all religious freedom, free speech, and conscience laws and regulations, 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’’). A provider requesting any accommodation would submit the request to their state’s or tribe’s title IV– E/IV–B agency. If the title IV-E/IV-B agency determines that the request concerns an objection based on religious freedom, conscience, or free speech to an obligation that is required or necessitated by this rule, the title IV– E/IV–B agency must promptly forward the request to ACF, which will consider the request in collaboration with the HHS Office of the General Counsel. ACF will carefully consider any organization’s assertion that any obligations imposed upon them that are necessitated by this final rule conflicts with their rights under the Constitution and Federal laws that support and protect religious exercise, free speech, and freedom of conscience. Under ACF’s established practice, a state or tribe may not disqualify from participation in the program a provider that has requested the accommodation unless and until the provider has made clear that the accommodation is necessary to its participation in the program and HHS has determined that it would deny the accommodation. See 45 CFR 87.3(c) and (q) (2014).

We reiterate that this rule does not diminish each state’s and tribe’s obligation to ensure that faith-based 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) (2014). Further, states and tribes are prohibited from discriminating for or against an organization on the basis of the organization’s religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to favor or disfavor a similarly situated secular organization. *Id*.

Finally, to address some of the concerns that religious providers who decline to become designated as a placement provider for LGBTQI+ children could be deemed unsafe, the final rule uses different and clearer terminology, as outlined earlier in this preamble. The preamble notes that all placements must be safe and appropriate for all children, regardless of their sexual orientation or gender identity. And the final rule clarifies that all placements of LGBTQI+ children, like all other children, must be safe and appropriate, whereas placements that are offered by providers who decide to become specially designated to provide care for LGBTQI+ children will be referred to as Designated Placements. As we have explained elsewhere in this preamble, the general requirement to avoid harassment, mistreatment, and abuse—which applies to all children in all placements—does not turn on a provider's religious or nonreligious motivation for engaging in conduct that rises to the level of harassment, mistreatment, or abuse. Nor would a provider's merely holding particular views about sex and gender, whether for religious or nonreligious reasons, nor would respectful efforts to communicate with LGBTQ+ children about their status or identities violate that general requirement.

Comment: Some commenters discussed the impact of the rule on kinship caregivers who are people of faith, and who may have religious concerns or objections to provisions within this rule. For example, one commenter said that the proposed rule would require training for relatives of children who are LGBTQI+ in some circumstances. The commenter wrote that such a rule would violate the religious beliefs of kinship caregivers. Another commenter said that although the rule provides an exemption framework for religious providers, that framework does not appear to apply to individual foster parents. Similarly, the commenters expressed concern about how the proposed rule would impact individual foster care providers with deeply held religious beliefs that are not affiliated with a faith-based organization – which could include kinship caregivers.

Response: ACF appreciates that kinship caregivers often provide the best possible placement for a child in foster care. That includes kinship caregivers who are people of faith.

Title IV-E agencies should seek to comply with the requirements of this rule while continuing to prioritize placements with kinship caregivers whenever a caseworker has determined that doing so is in the best interest of a child.

To be clear as to the training requirement, this final rule only requires that providers, including kinship caregivers, be informed of the procedural requirements of this rule, including the non-retaliation provision. The separate training requirement in paragraph (b)(1)(ii) applies only to those providers who voluntarily choose to offer Designated Placements. ACF understands that there could be instances in which a kinship caregiver has a religious objection to a requirement in this rule. But that does not mean the rule violates the religious beliefs of all kinship caregivers, or any other providers, irrespective of whether they have requested an accommodation. As with any provider that requests a religious accommodation, a kinship caregiver with a religious objection to a requirement of the rule could seek an accommodation by submitting the request to their state's or tribe's title IV– E/IV–B agency, which should then follow the same process that applies to other providers. As discussed more fully above, under that process, if the title IV-E/IV-B agency determines that the request concerns an objection based on Federal legal protections for religious exercise, free speech, or conscience an obligation that is required or necessitated by this rule, the title IV– E/IV–B agency must promptly forward the request to ACF, which will consider the request in collaboration with the HHS Office of the General Counsel.

As ACF acknowledged in the proposed rule preamble, in *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021), the Court held that Philadelphia's decision to apply a non-discrimination requirement to a specific faith-based foster care provider, having made clear that the city had "no intention" of granting an exception to that organization, violated the Free Exercise Clause of the First Amendment. *Id*. at 535. In contrast, in the preambles to both the proposed rule and this final rule, ACF has made clear that the agency is fully committed to carefully considering any provider's assertion that any obligations imposed upon them that are necessitated by this final

rule conflict with their rights under the Constitution and Federal laws and regulations supporting and protecting religious exercise and freedom of conscience. ACF will enforce these Federal protections by granting religious accommodations that are consistent with them where appropriate. RFRA protects the religious liberty rights of individuals as well as "corporations, companies, associations, firms, partnerships, societies, and joint stock companies." 42 U.S.C. 2000bb–1; 1 U.S.C. 1. This practice of considering such requests on a case-by-case basis is consistent with applicable department-wide regulations at 45 CFR 87.3(b) and (c). This individualized approach to any religious accommodation requests is also practical because ACF expects that many other care providers of varying religious or nonreligious backgrounds will be willing to be Designated Placements. ACF also recognizes that the facts that are relevant to any potential objection may vary considerably because the involvement of the child welfare system in kinship care varies from jurisdiction to jurisdiction as each state or tribe has its own laws and practices. For example, while some potential kinship care providers may have a pre-existing relationship with a child in foster care, others may not.

Through the religious accommodation process to which ACF refers above, this rule recognizes that, insofar as the application of any requirement under this section would violate applicable Federal protections for religious freedom, conscience, and free speech, such application shall not be required. It also states that nothing in this rule shall be construed to require or authorize a state to penalize a provider in the state's titles IV-E and IV-B program because the provider does not seek or is determined not to qualify as a Designated Placement.

Final Rule Change: The final rule clarifies that insofar as the application of any requirement under the rule would violate applicable Federal protections for religious freedom, conscience, and free speech, such application shall not be required. The proposed rule did not include this provision in the proposed regulation text.

Section 1355.22(j) No Penalties for Providers That Do Not Seek to Qualify as Designated Placements

Comment: Several commenters suggested that any agency contractors or subcontractors and their licensed foster care providers who do not seek a special designation to serve LGBTQI+ children should not have a contract with the state or at a minimum should not be able to utilize or claim any Federal funds. Other commenters asserted that the rule will penalize those providers who do not seek that designation and will thus discourage them from applying or continuing to provide foster care services.

Response: ACF does not intend for this final rule to require any provider to seek the status of a Designated Placement. To make that point clear, we have added a new § 1355.22(j). This provision states that nothing in this rule requires or authorizes a State to penalize a provider in the state's titles IV-E and IV-B program because the provider does not seek or is determined not to qualify for the status of a Designated Placement under this rule. It therefore underscores our intent that, as far as Federal law is concerned, the choice to become a Designated Placement is a voluntary one to be made by each foster care provider. By adopting this structure, ACF ensures that LGBTQI+ children in the foster care system will have Designated Placements available to them without requiring states or tribes to override the choices of providers who do not wish to be Designated Placements.

Final Rule Change: The final rule clarifies that nothing in the rule shall be construed to require or authorize a state or tribe to penalize a provider in the state's titles IV-E and IV-B program because the provider does not seek or is determined not to qualify as a Designated Placement under this rule. The proposed rule did not include this provision.

Section 1355.22(k) Severability

Section 1355.22(e) of the Proposed Rule described the severability provision in the event that a portion of the rule, if final, is determined by be invalid or unenforceable.

We received no comments about this section and made no changes to the final rule, as it appears at § 1355.22(k).

Section 1355.22(l) Implementation

Comment: We received comments expressing concerns that the provisions in the rule added burden on child welfare agencies. One commenter indicated that its state would require two to three years to implement these new provisions.

Response: We acknowledge that agencies will need time to come into compliance with these provisions, and this final regulation provides approximately two Federal fiscal years for implementation. The implementation date is on or before October 1, 2026.

Section 1355.22(m) No Effect on More Protective Laws or Policies.

Comment: Commenters sought clarity about whether this regulation would preempt conflicting state laws.

Response: As noted throughout this preamble, this rule does not preempt state laws that regulate health care or other matters that extend beyond the federally funded title IV-E/IV-B system. Rather, it interprets key terms that delineate the care title IV-E/IV-B agencies must provide to foster children in the programs carried out with Federal title IV-B and IV-E financial assistance. It is within HHS' authority to implement the requirements applicable to the receipt of Federal matching funds under the Social Security Act for the administration of the title IV-B and IV-E programs, and nothing in this regulation requires state agencies or other persons to fail to comply with general state laws that regulate matters like health care that go beyond the foster care system.

This rule sets a Federal floor for safe and appropriate care of LGBTQI+ children in the title IV-B/IV-E program. But it does not limit states from providing additional protections to those children. To clarify that point, in this final rule, ACF has added a new § 1355.22(m), entitled "No effect on more protective laws or policies." This provision applies to the entirety of the final rule and makes clear that nothing in the rule shall limit any State, Tribal, or local

government from imposing or enforcing, as a matter of state law, requirements that provide greater protection to LGBTQI+ children than this rule provides. This provision makes clear that, in the context of LGBTQI+ children, the final rule creates a Federal floor to enforce Congress's mandate that children in title IV-E/IV-B programs receive safe and appropriate care. The rule requires that states ensure that they have a sufficient number of Designated Placements to serve all children in foster care who identify as LGBTQI+ and request or would benefit from such a placement. It imposes certain specific requirements on providers who have voluntarily agreed to serve as Designated Placements. It reaffirms that all children in title IV-E/IV-B programs, including LGBTQI+ children, are entitled to protections against harassment, abuse, and mistreatment, regardless of their placement. And it creates specific nonretaliation protections for LGBTQI+ children, also regardless of their placement.

ACF believes that these provisions, taken together, advance the statutory guarantee that children in title IV-E/IV-B programs receive safe and appropriate care. But those provisions set a floor only. States and tribes may legitimately decide that the welfare and interests of LGBTQI+ children require greater protection. Nothing in titles IV-E and IV-B authorizes ACF to stand in the way of those state decisions, and ACF makes clear in this provision it has no intention to do so.

ACF understands that a number of States have adopted statutes or policies that provide protections for LGBTQI+ children that go beyond those in this rule. Some of these States require training on how to support LGBTQI+ youth for all providers. See, *e.g.*, N.M. Admin. Code 8.26.5.18.A.(3) (requiring policies to "educate prospective and current foster or adoptive families on how to create a safe and supportive home environment for youth in foster care regardless of their sexual orientation, gender identity or gender expression"). Others have adopted their own detailed requirements governing placements for LGBTQI+ children. See, *e.g.*, MD Policy SSA-CW #23-05 (Dec. 15, 2023). In a recent review of state laws and policies, ACF found that "[l]aws and policies in 22 States and the District of Columbia require that agencies

provide youth who identify as LGBTQIA2S+ with services and supports that are affirming of the youth's LGBTQIA2S+ identity and are tailored to meet their specific needs." Children's Bureau, *Protecting the Rights and Providing Appropriate Services to LGBTQIA2S+ Youth in Out-of-Home Care* at 2 (2023) (footnote omitted). In particular, "[p]olicies in 21 States and the District of Columbia address the needed qualifications for persons who provide out-of-home care for children or youth who identify as LGBTQIA2S+." *Id.* at 4 (footnote omitted). And "[f]ifteen States and the District of Columbia require training on LGBTQIA2S+ issues for foster caregivers and related staff." *Id.* (footnote omitted). These state laws and policies rest on the State's authority to provide protections for children in its foster care system, not on this final rule. The State's authority to provide those protections preexisted this final rule, and nothing in this final rule limits a State's, tribes, or local government's power to impose or enforce laws and policies like these.

Final Rule Change: The final rule clarifies that nothing in the rule shall limit any State, tribe, or local government from imposing or enforcing, as a matter of law or policy, requirements that provide greater protection to LGBTQI+ children than the rule provides. The proposed rule did not include this provision.

Section 1355.34(c) Criteria for Determining Substantial Conformity

Section 1355.34(c)(2)(i) describes an amendment to the Child and Family Services Review (CFSR) to monitor compliance with requirements in § 1355.22(b)(1).

Comment: Several commenters expressed support of this provision; however, one state expressed concern with monitoring the proposed placement provisions through the CFSR, stating it is already a cumbersome review process. In addition, a few commenters provided recommendations that are not within the purview of this final rule, such as changing the overall CFSR process and others suggested expanded monitoring processes in addition to the CFSR. Several commenters raised the concern that the proposed rule's prohibition on retaliation would not be enforced.

Response: We are modifying the final rule to expand the requirements in the rule to be monitored through the CFSR to include the retaliation provisions in paragraph (d) and Designated Placements and services requirements in paragraph (b), as applicable. Under the current CFSR regulations, the Children's Bureau reviews how state title IV–E agencies ensure the appropriateness of foster care placements as required by the title IVE/IVB case review system. Monitoring through the CFSR is the appropriate vehicle because the final rule implements these statutory case review system requirements that agencies must meet for LGBTQI+ children in foster care.

Comment: One state questioned how ACF intends to monitor compliance with these regulations and whether ACF anticipates making changes to reporting requirements for LGBTQI+ children and youth.

Response: As stated in the NPRM preamble, ACF will monitor both state and tribal title IV–E/IV–B agency plan compliance with the requirements of § 1355.22 using the partial review process outlined in § 1355.34 (c)(2)(i). If ACF becomes aware of a potential non-compliance issue with § 1355.22, it will initiate the partial review process. In addition, the final rule now includes monitoring a state agency's compliance with § 1355.22(b) and (d) through the CFSR. Related to changes in reporting, the requirements in the final rule must be included in the state or tribe's title IV–E plan that ACF must review and approve.

Comment: One commenter recommended HHS clarify how, if at all, this proposed rule will impact state laws and questioned whether it was HHS’s position that this rule will preempt state law? Would such state laws disqualify states from receiving funding for foster care or lead to an enforcement action by HHS? One commenter expressed concern that enforcing the requirements for safe and appropriate placements for LGBTQI+ children would constitute Federal overreach. The commenter also stated that the final rule would “enforce a narrow definition of this requirement that usurps a state’s constitutional authority to determine what is in the best interests of a child in its foster care system.”

Response: ACF refers commenters to our responses in section IV of the preamble to comments regarding federalism, nondelegation and Spending Clause concerns. As noted there, this rule does not preempt generally-applicable state laws. Rather, it interprets key terms regarding the care title IV-E/IV-B agencies must provide to foster children in order to qualify for the Federal title IV-B and IV-E Federal financial assistance programs. ACF also refers commenters to the new § 1355.22(m), entitled "No effect on more protective laws or policies," which is discussed above.

Comment: A few commenters recommended to expand agency accountability beyond monitoring through the CFSR or to modify the CFSR process. Suggestions included to engage with impacted youth and families, youth advisory boards, and other experts, develop qualitative data collection and reporting processes, and provide annual reports to ACF.

Response: ACF reviewed the suggestions provided but we are not making any changes to add other monitoring requirements. Several of the recommendations are outside the authority of this final rule because they are suggestions for changing ACF's monitoring process or adding new monitoring processes for the provisions in the rule. However, ACF would like to note that the CFSR process includes reviewing qualitative data and consultation with youth and others as required under those regulations. For example, as part of the Round 4 CFSRs, through a series of focus groups, 18 young people with self-identified lived child welfare experience were asked about the best methods of recruiting, engaging, supporting, and retaining young people in all aspects of the CFSRs.

Final Rule Changes*:* ACF is retaining the provision in the final rule as proposed to review § 1355.22(b)(1) (which was numbered as § 1355.22(a)(1) in the NPRM) and adding provisions to also review § 1355.22(b) and (d) through the CFSR, which is the authority that governs reviews of title IV-B and IV-E programs.

Comments on Cross-Cutting Issues

In the proposed rule, ACF requested public comment on various topics and provisions in the NPRM. Responses to these questions are described below.

Kinship Caregivers

In the NPRM, we requested public comment on how agencies can best comply with the requirements of the proposed rule and prioritize placements with kinship caregivers. In particular, we invited public comment on what resources agencies might need from HHS to support kinship caregivers in caring for an LGBTQI+ child.

Comments: Many commenters suggested that kinship caregivers should have access to specific training and support to ensure that they can provide a caring and nurturing environment for their LGBTQI+ child in foster care. Several commenters emphasized that the training should be culturally responsive and developed, delivered, and evaluated in partnership with youth with lived experience in foster care, kinship caregivers, and foster parents. They identified specific programs such as Family Builders' Youth Acceptance Project, Affirm for Caregivers, and Trans-Generations. A few commenters suggested specific faith-based trainings or faith-based partnerships to train and support religious families and kinship caregivers to promote family reconciliation and preservation, decreasing the need for foster care services, and improving outcomes for LGBTQI+ youth.

Many commenters expressed that Federal funding for recruitment, retention, and support of kinship caregivers is limited, and made suggestions for additional or enhanced funding for title IV-E/IV-B agencies. Several commenters recommended flexibility for states to offer exceptions or alternatives to the requirements of this rule for kinship caregivers when it is in the best interest and desire of a child.

A few commenters also urged HHS to enhance support for kinship placements, such as finding ways for agencies to get more Federal funding for pre-placement and in-placement supports, like mental or behavioral health services, skills-based trainings, and the ability to

become a therapeutic foster home. They suggested that agencies enhance the staff dedicated to kinship support, increase engagement with kin early in a case, increase assistance to kinship navigator programs, and offer more support to kin to become licensed.

Other commenters said that LGBTQI+ children should not be placed with kin caregivers unless those caregivers have been designated as supportive for LGBTQI+ youth, meeting the requirements the rule would impose on any other placement.

Response: ACF recognizes the vital role that kin caregivers play in supporting children in the child welfare system. Indeed, a robust body of evidence suggests that children in foster care have better outcomes when they are placed with kin caregivers.[33]

ACF appreciates the opportunity to clarify that title IV-E/IV-B agencies are encouraged to continue their work to improve access to kinship care alongside implementing the requirements of this regulation. Indeed, ACF anticipates that in many instances, expanding access to kinship care and complying with the requirements of this rule will not be in tension. For example, some LGBTQI+ children may enter the foster care system unrelated to a familial conflict over their sexual orientation or gender identity. Other children who enter foster care because of a conflict with family over their LGBTQI+ status or identity may have a supportive relative who is willing to serve as a kin caregiver and a Designated Placement.

While ACF is not adopting commenter's requests to include an exception from the requirements of this rule for kin caregivers, ACF has revised the final rule, as explained above, to provide that when a request for a placement change or services is made, the title IV-E/IV-B agency must consider whether additional services and training would allow the current provider to meet the conditions for a Designated Placement. If so, the title IV-E/IV-B agency must use the case review system to regularly review the status of a placement that has elected to become a

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[33] Epstein, (2017) Kinship Care is Better for Children and Families; Generations United. (2016). Children Thrive in Grandfamilies: *https://www.grandfamilies.org/Portals/0/Documents/General%20Kinship%20Publications/ABA%20CLP%20full%20kinship%20edition%20-%20julyaug2017.pdf*. Miller, "Creating a Kin-First Culture," July 1, 2017; 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/)*

Designated Placement to ensure progress towards meeting the conditions of such a designation. These steps would also apply to kin placements.

ACF strongly encourages title IV-E/IV-B agencies to identify or develop services that effectively prioritize preserving placement stability by offering kin caregivers the resources, training, and support needed to serve as Designated Placements and otherwise meet the specific needs of LGBTQI+ children

In many instances, ACF anticipates that kin caregivers will be the provider who can best meet the needs of an LGBTQI+ child. In some cases, the kinship caregiver will not wish to seek designation or serve as a supportive placement for a child as identified in paragraph (b)(1). Where the child prefers the kinship placement, and where the kinship caregiver can provide a safe and appropriate placement under this rule, even if it is not a Designated Placement as outlined in paragraph (b)(1), the kinship placement may often be in the children's best interest; in those circumstances, the kinship placement would not be inconsistent with this rule.

As the proposed rule laid out, title IV-E agencies may use Federal IV-E funds to provide trainings for providers seeking to become a Designated Placement or to recruit new Designated Placement providers. We appreciate the opportunity to clarify that providing additional resources and training to kinship caregivers to allow them to serve as a Designated Placement for an LGBTQI+ child, when caregivers choose to do so, would be an allowable use of IV-E funds. In addition, a recently published ACF final rule allows a title IV-E agency to claim title IV-E Federal financial participation (FFP) for the cost of foster care maintenance payments (FCMP) on behalf of an otherwise eligible child who is placed in a relative or kinship licensed or approved foster family home when the agency uses different licensing or approval standards for relative or kinship foster family homes and non-relative foster family homes.[34]

[34] 45 CFR part 1355. See 88 FR 66700, September 28, 2023 (https://www.federalregister.gov/documents/2023/09/28/2023-21081/separate-licensing-or-approval-standards-for-relative-or-kinship-foster-family-homes#:~:text=In%20addition%2C%20the%20final%20rule,related%2Fnon%2Dkinship%20foster%20family).

Impact of the Regulation on Foster Provider Availability and Participation

Requests for Comment on Recruitment of Providers to Support LGBTQI+ Children

In the NPRM, we requested public comment on how ACF can best support agencies in recruiting providers who will be able to provide safe and appropriate placements for LGBTQI+ children.

Comments: Many commenters responded with several suggestions on how to support states and tribes' recruitment efforts. Some commenters expressed concern that Federal funding for recruitment, retention, and support for foster family caregivers is limited. They suggested that HHS convene workgroups and provide more guidance/best practices/technical assistance on recruitment strategies for foster family homes, collaborate with agencies to provide training for prospective foster families and employees of childcare institutions, make additional financial resources available to foster families, target assistance to rural areas, and adopt nondiscrimination protections prohibiting agencies from rejecting prospective LGBTQI+ providers. Other commenters made suggestions on how title IV-E/IV-B agencies can increase their pool of available providers. They suggested regularly reporting to state legislatures and the public on the pool of available providers and recruitment efforts.

Several commenters recommended that agencies expand partnerships with organizations representing/working with the LGBTQI+ community, faith organizations, and individuals with lived experience, and increase use of social media to enhance recruitment within the LGTBQI+ community. They encouraged agencies to be flexible in delivering foster family trainings (such as flexible times, virtual, etc.) and to also recruit people to support LGBTQI+ youth in other ways, such as being a guardian ad litem or mentor. A few commenters made suggestions on revisions to the training curriculum related to recruitment, such as including modules on youth development.

Response: ACF appreciates commenters' recommendations for how title IV-E/IV-B agencies can improve recruitment of providers and foster families to serve as Designated

Placements. ACF agrees these are promising practices and may share additional best practices and technical assistance through additional guidance. As clarified in the NPRM, IV-E agencies may draw down funds under title IV-E for certain activities to comply with this rule, including recruiting and training providers to be Designated Placements.

Concerns about a Shortage of Providers

Comment: Many commenters (both in support and opposition of the NPRM) expressed a concern that the proposal's provisions would exacerbate a nationwide shortage of placements and services. Commenters said that the NPRM focuses on recruiting placements for LGBTQI+ children instead of all children in foster care. They also argued the NPRM did not include providing support for families and kin to become safe and supportive homes for LGBTQI+ children and expressed concern that this could lead to children being placed outside of their communities or separation from siblings. They expressed concerns either that faith-based providers would be "disqualified" from being placements or "driven away" due to their views, or that the NPRM would lead to agencies labeling faith-based families as "hostile" or "abusive" due to sincerely held religious beliefs.

Moreover, a commenter stated that placing the onus on states and tribes to confirm and affirm that a foster family home is safe and appropriate when there is already a shortage of foster homes will end up hurting the children that this regulation is purporting to protect. One commenter questioned the NPRM's assertion that enough foster parents can be found to replace those that would be lost as a result of their religious beliefs.

A few commenters elevated concerns about the lack of behavioral health care providers who specialize in working with LGBTQI+ youth. Some commenters were concerned that LGBTQI+ training would be added to the list of caseworker requirements without considering the capacity of the workforce to provide quality services. Another commenter said that some states already have a reimbursement structure that considers the unique needs of individual

children and felt this NPRM would be cumbersome to implement. Some commenters offered suggestions, including:

- Issuing ACF guidance on how agencies should balance the requirements of this NPRM with other placement considerations such as: prioritizing kinship placements; no placement change unless a child is unsafe; conferring with youth on whether they want to remain in the current placement; and factors such as sibling unification, least restrictive setting, school, friends, and community.
- Utilizing incentives for recruiting more placements and evidence-based trainings/resources for supporting the child welfare workforce and providers to become Designated Placements.
- Building in flexibility for agencies to make exceptions or alternatives to Designated Placement criteria for kinship caregivers, emergency, and short-term placements, to offer religious exemptions for staff members, and to consider the best interest of a child.

Response: ACF appreciates the concerns raised by commenters about potential impacts of the final rule on the availability of services and placements. In response to these comments and suggestions offered, we note that the rule provides a two-year ramp up period for title IV-E/IV-B agencies; that title IV-E funds may be used for recruitment and training efforts; and that we have clarified in the final rule how kin and other potential or existing placements for LGBTQI+ children can be supported to become Designated Placements. ACF also notes that the NPRM did not assert that recruitment of foster parents to provide LGBTQI+ supporting placements would "replace" providers who did not seek to qualify as Designated Placements. Rather, ACF anticipates that additional outreach efforts by states and tribes to recruit providers will expand, not reduce, overall supply. And in response to comments expressing concern that some providers and families would be lost or disqualified from providing foster placements, we added language to the final rule clarifying it shall not be construed to require or authorize penalization of any provider that is not considered or seeking consideration as a Designated

Placement for LGBTQI+ children. 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 disadvantage any faith-based organizations that express religious objections to providing Designated Placements for LGBTQI+ children.

Youth Disclosure of LGBTQI+ Status

Comment: Many commenters stated that by requiring that LGBTQI+ youth request a supportive placement, that they will be forced to disclose their sexual orientation or gender identity, and that forcing children to "come out" in order to receive services places an unfair onus on them. Several commenters provided suggestions for how to ascertain a youth's sexual orientation and gender identity information. Several commenters recommended varying ages at which it would be appropriate for a caseworker to inquire about a child's identity. Commenters said it was important to inform youth that there are resources available as part of regular, ongoing case practice. Others felt there may be many reasons why a youth will choose to not disclose their sexual orientation and gender identity, such as preventing a change in placement to stay with siblings, avoiding changing schools, or leaving communities. Examples shared included a fear of coming forward to identify as LGBTQI+ due to unforeseen consequences in their lives or a fear of rejection – consequences that represent an added burden for youth already navigating stressful experiences. Commenters questioned how the NPRM's provisions would help these youth, or youth who would be "presumed" to be cisgender/heterosexual, and that choosing nondisclosure should not prevent them from being treated appropriately.

Response: ACF understands many LGBTQI+ children may choose not to disclose their LGBTQI+ identity to their caseworker. Commenters cited research showing that two key reasons LGBTQI+ children in foster care choose not to share their sexual orientation or gender identity with their caseworker are (a) fear of rejection by the caseworker and (b) fear of a placement change. Some measures to allay those fears were provided in the NPRM and remain in the final rule, including (a) ensuring that Title IV-B and IV-E agency employees who have

responsibility for placing children in foster care, making placement decisions, or providing services are adequately prepared with the appropriate knowledge and skills to serve an LGBTQI+ child related to their sexual orientation, gender identity, and gender expression, and (b) prohibiting an unwarranted placement change as a form of prohibited retaliation due to a child's disclosure of or perceived LGBTQI+ status or identity. To further address these concerns, the final rule adds the requirement that the notice to inform children of the availability of Designated Placements or services to make their current placement more supportive must include informing the child that under no circumstances will there be retaliation against them for disclosure of their LGBTQI+ status or identity or their request for a Designated Placement, and to describe the process by which a child may report a concern about retaliation.

To further address commenters' concerns that children's fears that a request for a new placement will necessarily result in a placement change and possible separation from siblings and community, as well as the concerns of commenters who said it was important to inform youth that there are resources available as part of regular, ongoing case practice, ACF made changes in the final rule at §1355.22(b)(2) to require providing a child: 1) with the option to request their current placement be offered services to become a Designated Placement; and 2) with an opportunity to express their needs and concerns. Further, §1355.22(b)(3) of the final rule requires that, before initiating any placement changes, the title IV-E/IV-B agency must consider whether additional services and training would allow the current provider to meet the conditions for a Designated Placement, if the current provider wishes to do so, rather than necessarily generating a placement change, particularly for children placed with kin, siblings, in close proximity to their family of origin, and/or in a family-like setting. The final rule also adds at §1355.22(d)(2)(iii) that prohibited retaliation against a child with or perceived to have an LGBTQI+ identity or status includes restricting access to siblings and family members.

In response to commenters who stated that children choosing not to disclose their LGBTQI+ identity should not prevent them from being treated appropriately, the final rule

expands the definition of prohibited retaliation, requires informing children about protections from retaliation, and expands the notification requirements to subcontractors and providers of the prohibition on retaliation based on a child's actual or perceived LGBTQI+ status or identity. Specifically, as noted above, the final rule requires the notification of the availability of Designated Placements to provide information on the prohibition on retaliation and how to report retaliation. Further, the final rule retains the requirement from the NPRM that the title IV–E/IV–B agency must ensure that LGBTQI+ children have access to age- or developmentally appropriate services that are supportive of their sexual orientation and gender identity, including clinically appropriate mental and behavioral health supports, and must ensure that all 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 including the requirement to comply with prohibitions on retaliation. The final rule extends the requirement of informing placement providers of procedural requirements, including the prohibition on retaliation, to all providers.

Research on LGBTQI+ Children in Foster Care

In the NPRM, we described a significant body of evidence demonstrating that LGBTQI+ youth are overrepresented in the child welfare system and face worse outcomes.

Comment: Many commenters expressed their support and appreciation for the proposed rule's overview of research on the disparities that LGBTQI+ youth face in foster care. Other commenters raised concerns about specific studies cited by HHS. Some commenters argued that data cited by HHS overstates the extent of LGBTQI+ children in the foster care population, criticizing one study cited as having a small sample size and citing a previous local survey from 2014 which found 19 percent of foster youth surveyed identify as LGBTQI+.

Response: ACF thanks the commenters for their support for the rule's discussion of research on the disparities that LGBTQI+ youth face in foster care. In response to concerns about studies about the size of the LGBTQI+ foster youth population, ACF based its estimate on the three

recent studies cited above, one of which is a more recent (2021) local survey than the 2014 local survey, and two others which draw on larger data sources (national data in one case and California statewide data in the other).[35]

Comment: One commenter stated that research about the impact of family acceptance or rejection on LGBTQI+ youth is methodologically flawed.

Response: ACF believes that two key studies cited in the NPRM about the impact of family acceptance or rejection on LGBTQI+ youth have sound methodology. The first utilized quantitative scales to assess retrospectively the frequency and nature of parent and caregiver responses to a lesbian, gay, or bisexual (LGB) sexual orientation in adolescence. The study was based on in-depth interviews with 224 LGB young adults aged 21-25 and found dramatic disparities in health outcomes between youth who experienced high levels of family rejection compared to those who experienced low levels of family rejection.[36] An additional study cited in the NPRM on the critical importance of accepting caregiver behavior for positive mental health outcomes for LGBTQI+ youth was based on a 2022 survey of over 30,000 LGBTQ youth in the United States, which included questions regarding considering and attempting suicide that were identical to those used by the Centers for Disease Control and Prevention (CDC) in their Youth Risk Behavior Surveillance System (YRBS) and had overall findings which were corroborated by data from the YRBS survey.[37] Other studies find that it is "clear from existing research that

[35] 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*. 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/*. 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 LBTQ2S Children and Youth in Foster Care (2021). 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.
[36] 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), *https://publications.aap.org/pediatrics/article-abstract/123/1/346/71912/Family-Rejection-as-a-Predictor-of-Negative-Health?redirectedFrom=fulltext*
[37] The Trevor Project, 2022 National Survey on LGBTQ Youth Mental Health, *https://www.thetrevorproject.org/survey-2022/assets/static/trevor01_2022survey_final.pdf*

family acceptance and rejection is crucial to the health and well-being of LGBT youth."[38] This illustrates the importance of Designated Placements for LGBTQI+ children in foster care.

Comment: Two commenters criticized a 2021 study, which showed that 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, as having "significant limitations."[39]

Response: The data in this study is corroborated by five other studies cited by HHS.[40] 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.[41]

Comment: Other commenters criticized a study on mental health disparities faced by LGBTQI+ youth as being unreliable and subject to bias.

Response: We note that the study cited by HHS is based on a sample size of over 40,000 youth surveyed and provides the adjusted odds ratio and a probability value of under .001 (showing that results are highly unlikely to be due to chance), and the NPRM cited two

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[38] Katz-Wise SL, Rosario M, Tsappis M. Lesbian, Gay, Bisexual, and Transgender Youth and Family Acceptance. Pediatr Clin North Am. 2016 Dec;63(6):1011-1025. doi: 10.1016/j.pcl.2016.07.005. PMID: 27865331; PMCID: PMC5127283, *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5127283/*

[39] 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.*

[40] 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.* 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.* Poirier, J., Wilkie, S., Sepulveda, K & Uruchima, T., *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.https://www.proquest.com/docview/2056448464.* Wilson, B.D.M., & Kastanis, A.A. (2015). Sexual and gender minority disproportionality and disparities in child welfare: A population-based study. Children and Youth Services Review, 58, Pages 11–17, ISSN 0190–7409, *https://doi.org/10.1016/j.childyouth.2015.08.016.* 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, *https://www.proquest.com/scholarly-journals/because-were-fighting-be-ourselves-voices-former/docview/2056448509/se-2*.

[41] 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*

additional studies showing disproportionately poor mental health outcomes for LGBTQI+ foster youth.[42]

Nondiscrimination Provisions

Comments: Several commenters suggested that ACF issue stronger language on protections for children in foster care from discrimination on the basis of disability and gender identity. They specified that there are no anti-discrimination laws in many states to prohibit discrimination against LGBTQI+ prospective foster parents. Another commenter suggested that ACF adopt a similar anti-discrimination policy as in other Federal programs.

Other commenters recommended that the final rule forbid discrimination based on any characteristics in any part of the child welfare system. They argued that foster children, parents, kin caregivers, and prospective and current foster and adoptive parents have constitutional rights to due process and equal protection. A commenter also stated that "discrimination is the proper and appropriate term instead of retaliation" as that term was used in the proposed rule.

Response: Both the NPRM and this final rule focus on improving how the child welfare system meets the particular needs of LGBTQI+ foster children, based on the extensive evidence showing the difficulties those children disproportionately face. ACF is open to considering future policymaking that would address discrimination in broader ways, including discrimination on the basis of other characteristics, where ACF has legal authority to do so. We note that HHS's Office for Civil Rights enforces several statutes that prohibit various forms of discrimination in programs funded by the Department, including the title IV-E/IV-B program. Those statutes include section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, which prohibits disability discrimination by recipients of Federal financial assistance, and title VI of the Civil Rights Act of

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[42] 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 LBTQ2S Children and Youth in Foster Care (2021). Cuyahoga Youth Count: A Report on LBTQ+ Youth Experience in Foster Care, *https://theinstitute.umaryland.edu/media/ssw/institute/Cuyahoga-Youth-Count.6.8.1.pdf*. 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*.

1964, 42 U.S.C. 2000d, which prohibits discrimination by recipients of Federal financial assistance on the basis of race, color, or national origin, including discrimination on the basis of shared ancestry and ethnic characteristics.[43] The Department has already promulgated regulations implementing these prohibitions, see 45 CFR part 80 (title VI); *id.* part 84 (section 504). On September 14, 2023, HHS issued a proposed rule to update its section 504 regulation. 88 FR 63392. Whether additional antidiscrimination rules are necessary or consistent with ACF's statutory authority would be appropriately considered after the conclusion of this rulemaking.

In regard to the comment arguing for the use of "discrimination" in the place of retaliation, retaliation is, by definition, an intentional act. It is a form of discrimination because the individual in question is being subjected to differential treatment. Cf. Jackson v. Birmingham Board of Education, 544 U.S. 167 (2005) (holding that retaliation is a form of intentional discrimination under title IX of the Education Amendments of 1972). We use the term "retaliation" in the final rule because a key goal of this provision is to ensure that children do not experience harm that might deter them from seeking or benefiting from the protections afforded by the rule.

Implementation Costs

In the NPRM, we requested comments on whether state and tribal agencies are likely to incur additional substantial costs as a result of this rulemaking.

Comments: Numerous commenters stated there would be additional costs to implement this proposal and increased costs for FFP matching, some stating that the NPRM's estimates were too low and others describing the cost increases as "substantial" or "significant." State and state attorneys general commenters were generally concerned about increasing costs to expand recruitment, retention, and training of providers, to reprogram case management systems to track

[43] https://www.hhs.gov/civil-rights/for-individuals/special-topics/shared-ancestry-or-ethnic-characteristics-discrimination/index.html.

costs and notification requirements, and to enforce and monitor the retaliation provisions. States also expressed a concern with the increased cost for children who are not title IV-E eligible, which is outside of the scope of this rule.

Response: ACF acknowledges there will be state and tribal costs to implement the final rule. Responses to comments on the cost estimate are provided in the Annualized costs to the Federal Government section. ACF is providing a more than two-year implementation period to allow time for states and tribes to address their unique funding issues. We also reiterate that title IV-E agencies may claim allowable recruitment and training costs under the title IV-E foster care program.

Requests for Technical Assistance and Implementation Supports and Questions about Implementation and Compliance Monitoring

In the NPRM, we requested public comment on how ACF can best support agencies, including those located in rural and other resource-limited areas, in fulfilling a placement that will facilitate access to age-appropriate resources, services, and activities for LGBTQI+ children in foster care.

Comments: Many commenters responded with several recommendations on how ACF can support agencies, providing additional funding/or grants for expanding and reimbursing service costs (e.g., transportation, technology aids). A few organizations recommended ACF provide technical assistance/consultants to support rural provider recruitment. Other commenters recommended ACF utilizing local faith-based services, developing a national resource list of providers including virtual/online or telehealth services, and requiring agencies to display available resources and hotlines and to note the technical assistance that is available.

Response: We appreciate the comments and suggestions. While we are not making any changes to the final rule related to this, there are numerous technical assistance resources available through CB, for example the Capacity Building Center for States and the National Center for Diligent Recruitment. The primary manner in which ACF can support state and tribal

efforts is through CB's technical assistance providers, which is addressed in detail in the below response to comment.

Comments: Many commenters requested technical assistance, sought specifics on how compliance will be monitored, and asked questions about implementation. Several commenters recommended changes to the NPRM that would require providers to notify the agency, describe children and provide a rationale for whom they are "unwilling or unable to provide safe and appropriate placements or care."

A few commenters suggested clarification and support for challenges related to the Interstate Compact on the Placement of Children, such as the need for more placements across jurisdictional lines. Some commenters asked for clarification on licensing requirements for childcare institutions and foster family homes regarding room sharing based on gender identity and procedures for foster parents, such as identifying the children for whom they are willing to provide a home. One commenter recommended a targeted plan for specially designated placements for LGBTQI+ children within the five-year Child and Family Services Plans (CFSPs) in the NPRM. Many commenters suggested that HHS provide extensive training guidance through implementation guidelines, more funding for family acceptance training, and pilot programs in rural areas regarding the NPRM's provisions.

Commenters requested technical assistance on capacity building and recruitment strategies. Many commenters asked for clarification on how agencies should respond in circumstances where providers and agencies cannot fulfill the requirements of the NPRM and on "accountability" for the provisions.

Response: On behalf of the Children's Bureau (CB), the Capacity Building Center for States (the Center) helps state and territorial child welfare agencies strengthen, implement, and sustain effective child welfare practices. The Center provides tailored technical assistance to states and territories on a wide array of topics to improve outcomes and overall system functioning, including support for states in implementing this final rule. At the request of a

jurisdiction (or the Children's Bureau), customized assistance is available to support effective program improvement efforts. In collaboration with the state or territory (and counties as appropriate) and the Children's Bureau, the Center assists child welfare agencies in implementation and program improvement efforts. Center technical assistance support may include training, coaching, curriculum development, data analysis and individualized program consultation. Each state or territory has an identified Center Liaison who can assist in initiating technical assistance. Liaison contact information for each state and territory is readily available via the Center's website.

On behalf of the Children's Bureau, the Capacity Building Center for Tribes (the Center for Tribes) is also available to assist tribes with implementing the final rule. The Center for Tribes collaborates with American Indian and Alaska native nations to help strengthen tribal child and family systems and services. The Center for Tribes offers an array of services, including peer networking activities and individualized expert consultation. These services are available at no cost to assist with improving tribal child welfare practice and performance in several key areas, such as recruiting and training families to meet the individualized needs of children in care.

In addition, the Children's Bureau has recently funded the National Center for Diligent Recruitment, a new component of the AdoptUSKids project. This national center provides multiple forms of free technical assistance to support states, tribes, and territories in developing and implementing strategic, data-driven diligent recruitment plans. The goals of the technical assistance are to increase capacity to effectively collect and analyze quantitative and qualitative data to guide targeted recruitment efforts; to provide on-site, tailored support for the work of states, tribes, and territories in constructing robust diligent recruitment plans based on evidence-informed and evidence-based research; and to further the evidence-base of family finding, relative outreach, reunion support, and intensive recruitment and retention services within the communities of origin of the children/youth in the foster care system.

With respect to the suggestions regarding the Interstate Compact on the Placement of Children (ICPC), the Federal Government has no authority over the ICPC. Rather the compact amendments are made and ratified through agreement among the Compact members and the incorporation of those changes in respective state statutes. There is a minimum requirement of member states agreeing to changes before the Compact itself is ratified. This is outside the scope of this rule.

IV. RESPONSE TO COMMENTS RAISING STATUTORY AND CONSTITUTIONAL CONCERNS

First Amendment and Religious Freedom

Comment: As discussed above in section III of this preamble, many commenters expressed concerns that religious families and organizations will have sincerely held religious beliefs and practices that conflict with the rule and as a result those families and organizations will be deemed to not be "safe and appropriate" by the Federal Government. These commenters asserted that both individuals and organizations of faith will be discouraged from applying or continuing to provide foster care services because they will be penalized for their beliefs and practices.

Other commenters expressed concern that the proposed rule violates providers' First Amendment right to religious liberty. Commenters asserted that the proposed rule would prohibit them from fully participating in the foster care program. For example, commenters said that expressing or practicing their sincerely held beliefs about gender, sexuality, or marriage to a foster child in their home could result in being labelled as hostile or unsafe for the child.

Other commenters asserted that the rule will result in faith-based providers and individuals being excluded from helping large numbers of children in foster care. One commenter said that if ACF's data is accurate, excluding such providers would preclude them from providing care to potentially one-third of older children in foster care age 12-21.

Another commenter said that it is important to protect faith-based agencies from regulations that run contrary to their beliefs and practices; such protection, the commenter asserted, will ensure a diverse set of agencies to serve diverse populations, including placing children with specific or special needs such as older children and sibling groups.

Response: ACF values the vital role that religious families and faith-based organizations play in providing care and services for children in the Child Welfare program and appreciates that many families are compelled by their faith to offer safe and loving foster homes.

As noted previously, the final rule has been revised to clarify the general requirement that all providers must provide safe and appropriate placements for all foster children, and we believe this clarification will avoid any unintended implication that providers not wishing to offer Designated Placements would not be considered safe and appropriate.

ACF disagrees with the commenter's suggestion that this final rule discriminates against faith-based providers, as none of the provisions disqualify eligible providers from participating in the title IV–E and IV–B programs because of their religious character. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2255 (2020) (citing *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017)). This rule welcomes faith-based organizations and religious foster parents to continue participate in the program, and ACF anticipates that many will choose to do so without any religious objections. The obligation to provide an environment that supports the child's LGBTQI+ status or identity under this rule applies only to those providers who have chosen to be Designated Placements. We anticipate that numerous faith-based organizations and religious foster parents will choose to be Designated Placements. But this rule does not require any provider to make that choice, and it does not impose any penalty or adverse consequence on providers with religious objections to serving as a Designated Placement. Indeed, the final rule makes clear in paragraph (j) that nothing in the rule requires or authorizes a state or tribe to penalize a provider that—for whatever reason—chooses not to be a

Designated Placement. Rather, the rule places the responsibility on states and tribes—rather than on providers—to find Designated Placements for LGBTQI+ identifying children.

ACF agrees that it is important to protect faith-based agencies from any obligation to comply with a regulatory requirement that violates statutory or constitutional protections of religious freedom. It is also important to retain a diverse set of agencies to serve diverse populations. ACF has determined that this regulation is consistent with these goals. In ACF's view, this rule should not dissuade any entity that does not meet the definition of a Designated Placement, whether for religious or secular reasons, from continuing to participate in the foster care program. ACF does not anticipate that this rule will cause faith-based providers to discontinue their participation in the program, or that it will substantially reduce the number of placement agencies available for children. ACF expects that states and tribes will not impose burdens on religious exercise when they have the discretion to work with the objections of a faith-based provider, and that any faith-based provider with a religious objection to a requirement in this rule will exercise their right to seek an accommodation by submitting a request to their state's or tribe's title IV– E/IV–B agency, which must promptly forward the request to ACF.

ACF takes seriously its obligations under the Constitution and Federal laws supporting religious exercise, freedom of conscience, and free speech, including the First Amendment and RFRA, and will continue to strongly enforce HHS regulations that ensure religious organizations must be considered eligible on the same basis as any other organization to participate in programs administered with title IV–E and IV–B funds. See 45 CFR 87.3(a) (2014) ("part 87"). That rule prohibits states and tribes from discriminating for or against an organization on the basis of the organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to favor or disfavor a similarly situated secular organization. Also, that rule states that nothing in that regulation "should be construed to preclude HHS from making an accommodation, including for religious exercise, with respect to

one or more program requirements on a case-by-case basis in accordance with the Constitution and laws of the United States." See 45 CFR 87.3(b) (2014). In addition, this final rule has been revised in paragraph (i) to make clear that if application of any requirement under this rule would violate Federal protections for religious freedom, conscience, and free speech, that application will not be required.

Additionally, under part 87 states and tribes must inform grant subrecipients and contractors of their religious freedom rights in both solicitations for sub-grants and awards. See 45 CFR 87.3(n) (2014). ACF will consider any request for religious accommodation under RFRA or any other applicable authority protecting religious freedom to this rule's requirements. Under ACF's established practice, a state or tribe may not disqualify from participation in the program a provider that has requested the accommodation unless and until the provider has made clear that the accommodation is necessary to its participation in the program and HHS has determined that it would deny the accommodation. See 45 CFR 87.3(c) and (q) (2014).

Comment: A number of commenters expressed concern that a final rule would abridge the First Amendment's protection of free speech. A commenter wrote that the rule would preclude legitimate sharing of ideas and perspectives and would prevent children and young people in care from encountering ideas and perspectives beyond their current ones. Some commenters argued that requiring agencies and foster families to use a child's correct pronouns or chosen name would violate the First Amendment by unconstitutionally forcing speech on foster care providers. Commenters argued that the First Amendment does not permit the government to compel ideological speech. Similarly, commenters contended that the rule would impede citizens' free speech more than would be necessary to achieve legitimate government ends. A commenter wrote that by omitting up-front exemptions, the proposed rule sought to chill speech. A couple of commenters asserted that concepts included in the proposed rule that relate to a child's identity place individuals and organizations of faith at risk of being accused of retaliation as described in the proposed rule. These commenters wrote that being penalized for

retaliation because they were exercising their religious beliefs unconstitutionally infringes on and burdens religious providers' First Amendment rights both to free speech and free exercise.

Response: ACF is committed to upholding First Amendment rights to free speech and religious exercise for all providers and children in the child welfare system.

As to the commenters' concern that this rule violates the Free Speech Clause of the First Amendment, ACF also disagrees for two reasons. First, this rule does not govern the purely independent actions of private parties. Rather, it merely sets the terms on which an entity that chooses to provide services under a federally funded program must provide those services, without imposing any restrictions on any expression those entities engage in outside of the scope of the program. ACF is entitled to ensure that the providers of federally funded services carry out the Federal program in a way that ensures that the purposes of the Federal funding are met. *See Rust v. Sullivan*, 500 U.S. 173, 192–99 (1991); *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc*., 570 U.S. 205, 217 (2013). No individual or entity is compelled to participate as a provider in the title IV–E/IV–B program—and, as this final rule makes clear, even among those who do choose to participate, no provider is compelled to become or seek to become a Designated Placement for LGBTQI+ children. And nothing in the rule purports to regulate any provider in their conduct outside of the scope of the title IV–E/IV–B program.

Second, any provider who chooses not to become a Designated Placement must simply comply with longstanding obligations under the title IV–E/IV–B programs to ensure that all foster children are placed in environments that provide safe and appropriate care for all children in foster care, as well as the nonretaliation provisions set forth in this regulation. As this final rule clarifies, the Department anticipates that as a general matter providing a placement that is safe and appropriate or complying with these nonretaliation requirements would not impose a substantial burden on providers' religious freedom, conscience or free speech rights, even aside from the voluntary nature of a provider's participation in the title IV-E/IV-B program. For example, as noted in section III of this preamble, a title IV-E/IV-B agency must ensure that each

placement is safe and appropriate, meaning that no provider engages in acts of harassment, abuse, or mistreatment. Harassment, mistreatment, and abuse as contemplated by the rule are conduct, not speech. This is particularly so because harassment under the rule requires severe or pervasive acts that create a hostile environment, a standard that applies elsewhere in the law.

ACF disagrees with the commenters' concern that this rule generally violates the Free Speech Clause of the First Amendment or the religious exercise for all providers for several reasons. ACF has a compelling interest in providing these protections for children in the foster system as a general matter. ACF provides Federal funding to states and tribes to provide appropriate foster care placements for all children; to ensure all children are placed consistent with the child's best interest; and to provide support for meeting the safety, permanency, and well-being needs of all children.

As ACF has documented in the preambles for the proposed rule and this final rule, an extensive body of 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, which the title IV–E/IV–B programs serve to protect.

This final rule requirement that all providers refrain from retaliating against children because of their sexual orientation or gender identity merely reflects the ordinary requirement that all children be provided safe and proper care in foster care. We expect that in the typical case the rule's protection against retaliation will be the least restrictive means of furthering the compelling interest in protecting the mental health and wellbeing of LGBTQI+ children. Should a provider establish that an application of the retaliation requirement imposes a substantial burden on the exercise of religion, ACF will assess whether that particular application is the least restrictive means of furthering a compelling interest.

However, as to the commenter's concern that the rule violates the right to religious exercise, we reiterate that Federal protections for religious exercise, and the Department's regulatory protections for seeking religious accommodation, continue to apply. When applying

those protections to a particular case, ACF will consider as appropriate whether the application of this rule's protections to the particular party is the least restrictive means of furthering a compelling interest. When reviewing any request for religious accommodation ACF will conduct a case-by-case analysis in assessing whether application of the Rule’s protections complies with RFRA and any other relevant Federal religious protection. We also expect title IV-E/IV-B agencies to similarly engage in assessing whether they are applying this rule and any state’s or tribe’s requirements in the manner that least restricts religious exercise.

Comment: A number of commenters noted that language protecting faith-based providers was included in the preamble of the NPRM but not in the regulation text. However, they wrote that the government’s obligation to accommodate the religious freedom and conscience rights of private foster care providers should be incorporated into the rule text to create binding law on the Federal Government, states, and tribes.

Response: While the Constitutional and statutory protections would be applicable whether or not incorporated in regulatory text, text has been added at § 1355.22(i) stating that insofar as the application of any requirement under this part would violate applicable Federal protections for religious freedom, conscience, and free speech, such application shall not be required.

ACF further notes that all providers that are impacted by this rule are already covered by an HHS regulation at 45 CFR part 87 that protects religious freedom, nondiscrimination, and conscience rights. Consistent with the regulation at 45 CFR 87.3(n) and (q) as amended in 2014, state and tribal child welfare agencies must 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. In relevant part, those 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.”

A provider that requests any religious accommodation may submit the request to its State or Tribal 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 HHS Office of the General Counsel.

Moreover, in response to concerns that the rule might be understood as requiring or authorizing the penalization of providers who decline to provide Designated Placements, the final rule has also been revised, at § 1355.22(j) to provide that nothing in this regulation shall be construed as requiring or authorizing a state or tribe to penalize a provider that does not seek or is determined not to qualify as a Designated Placement from participation in the state's or tribe's program under titles IV-E and IV-B.

Statutory Authority

Comment: A group of state attorneys general commented that they believed the proposed rule exceeded ACF's statutory authority under titles IV-B and IV-E of the Social Security Act. In support of their position, they argued that the IV-B and IV-E statutory requirements for agencies to ensure that foster children have "case plans" aimed at providing "safe and proper" care and "appropriate" placements that serve their "best interests" with providers who are "prepared adequately with appropriate knowledge and skills" do not authorize ACF to impose the specific requirements of the proposed rule. They describe the statutory requirements that ACF relies on as "generalized provisions." In addition, these commenters argued that state family laws generally view the best interest of the child standard as flexible and fact-specific in determining appropriate placements, and that Congress did not intend "to grant HHS this federal veto power over children's placements."

Response: ACF disagrees that this rule exceeds ACF's statutory authority under titles IV-B and IV-E of the Social Security Act. The rule is consistent with the authority granted to ACF

in the statutory provisions cited in the Legal Authority for the Final Rule section of this preamble, which promote the wellbeing and safety of children in foster care:

- Titles IV–E and IV–B of the Social Security Act (the Act) require title IV–E/IV–B 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, including discussion of the appropriateness of the services that have been provided to the child under the plan. Section 475(1)(B) of the Social Security Act, 42 U.S.C. 675(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) of the Social Security Act, 42 U.S.C. 675(5)(A). In order to receive title IV–E and IV–B funds, agencies must have plans approved by ACF that provide for case plans and case review systems that meet these statutory requirements. Sections 471(a)(16) and 422(b) of the Social Security Act, 42 U.S.C. 671(a)(16) and 622(b).
- States and tribes must certify in their title 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 [and] that the preparation will be continued, as necessary, after the placement of the child." Section 471(a)(24) of the Social Security Act, 42 U.S.C. 671(a)(24).

- Agencies must ensure that foster parents, as well as at least one official at any child care institution providing foster care, receive training on how to use and apply the "reasonable and prudent parent standard," a standard characterized by careful and sensible parental decisions that maintain the health, safety, and best interests of a child while at the same time encouraging the emotional and developmental growth of the child, that a caregiver shall use when determining whether to allow a child in foster care under the responsibility of the State to participate in extracurricular, enrichment, cultural, and social activities. Social Security Act 471(a)(24) and (a)(10) and 475(10)(A), 42 U.S.C. 671(a)(24) and (a)(10) and 675(10)(A).
- Agencies must develop and implement standards to ensure that children in foster care placements are provided quality services that protect their safety and health. Social Security Act section 471(a)(22), 42 U.S.C. 671(a)(22).
- The Act authorizes 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 titles IV–E and IV–B, implementing regulations promulgated by the Secretary and the states' approved state plans. Section 1123A of the Social Security Act, 42 U.S.C. 1320a-2a.

As explained in detail in the NPRM, at 45 CFR 1355.22, we implement these statutory requirements for safe and proper care, placement in appropriate settings, appropriate and quality services, and adequate preparation of placement providers by requiring that LGBTQI+ children must be offered placements with providers who are committed to establishing an environment that supports their LGBTQI+ status or identity, trained to provide for their needs, and will facilitate their access to appropriate services that support their health and well-being. We further implement these statutory requirements by requiring that LGBTQI+ children must be provided with supportive services, protected from retaliation on the basis of their LGBTQI+ identity or status, and have their privacy protected. 42 U.S.C. 675(1)(B) and (5). For transgender and

gender non-conforming children, we implement the statutory requirement for appropriate placements by requiring that they be offered placements consistent with their gender identity. ACF came to these conclusions based on our careful and thorough review of the evidence regarding LGBTQI+ children in foster care, as described in section II of the preamble.

Commenters cite a Federal district court decision, *Shane v. Cnty. of San Diego*, in support of their position. 677 F. Supp. 3d 1127, 1140 (S.D. Cal. 2023). However, that case does not address ACF's statutory authority. Instead, it addresses the standard under the doctrine of qualified immunity for holding a state government officer liable for money damages based on an alleged deprivation of a Federal right. Such cases may proceed only where the Federal right at issue is "clearly established" in case law. In *Shane*, the district court concluded that the state government officers could not be held liable for their alleged failure to include adequate mental health and substance abuse protocols in the child's case plan because "the Court has not identified any case law that establishes that a case plan must contain this level of specificity." *Id.* At 1140. (S.D. Cal. 2023). The court continued, "[n]either the Ninth Circuit nor other circuits have otherwise examined what specific treatments need to be included in a case plan to be compliant with the CWA [Adoption Assistance and Child Welfare Act of 1980]." *Id.* The district court's conclusion that existing caselaw had not addressed "what specific treatments need to be included in a case plan" (*Id.)* to comply with IV-B and IV-E is not relevant to this rulemaking. The lack of caselaw addressing a specific question regarding interpretation of the IV-E statute does not in any way limit ACF's ability to promulgate regulations interpreting and implementing the statute. With this rule, ACF specifies how the statutory "case plan" and "case review" requirements apply for LGBTQI+ foster children.

Regarding commenters' assertion that state family laws generally view the best interest of the child standard as flexible and fact-specific in determining appropriate placements, this rule does not prevent states or tribes from complying with their own state or tribal laws and policies regarding the best interest of the child in making placement decisions unless those laws or

policies directly conflict with the requirements of the rule. ACF expects that title IV-E/IV-B agencies will continue to consider the many factors (such as kinship relationship, proximity to the child's school, etc.) that go into determining the most appropriate placement for a child. ACF recognizes and values the important role child welfare agencies play in balancing multiple needs to identify the most appropriate placement for each foster child. This rule simply clarifies that, for LGBTQI+ foster children, the statutory case plan and case review requirements require access to a placement that is supportive of their LGBTQI+ status or identity.

Arbitrary and Capricious

Comment: Some state attorneys general commented that the proposed rule is arbitrary and capricious. They cite *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.* for the principle that "[a]gency analysis cannot 'run[] counter to the evidence before the agency,' must show a 'rational connection between the facts found and the choice made,' and needs to 'consider' all 'important aspect[s] of the problem' the agency is addressing. 463 U.S. 29, 43 (1983) (citation omitted)." Commenters argue that the agency did not sufficiently consider "countervailing consequences" of its proposed approach, including the additional bureaucratic requirements it creates, the cost of complying with the mandates, the risk that foster care providers would be subject to retaliation claims, the likelihood of providers leaving the system as a result, the increase in likelihood that children would have to move multiple times while in foster care and that requiring urgent investigations of complaints about placements would take resources away from physical abuse investigations. Commenters also argued that the rule would endanger children through its requirement for youth to be offered a placement consistent with their gender identity. Commenters also argued that the cost estimate is unrealistically low. Commenters also argued that the rule does not offer sufficient evidence to show that LGBTQI+ youth are overrepresented in foster care or have worse outcomes or experiences while in care.

Response: ACF has carefully considered all important aspects of this rule, including the possibility that it may have unintended negative consequences, consistent with the requirements

of *Motor Vehicle Mfrs.*, 463 U.S. 29. ACF has explained its consideration of the factors that commenters cite here in its discussion in the preamble in the discussion of regulatory provisions in Section III. ACF also considered alternatives like sub-regulatory guidance in the Regulatory Impact Analysis below. Based on its careful consideration of these factors, among many others discussed in the proposed rule and this final rule, ACF has concluded that the final rule is supported by the weight of the evidence before the agency specifically related to wellbeing of children being served in foster care.

Spending Clause

Comment: Some state attorneys general commented that they believe that the proposed rule violates the Spending Clause of the U.S. Constitution. They argue that caselaw requires that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). In their opinion, the IV-E and IV-B statutes do not authorize HHS to impose the requirements of this rule on state child welfare agencies.

Response: The IV-E and IV-B statutes are explicit that states and tribes may only qualify for IV-E and IV-B funding if they meet the statutory state plan requirements, described at 42 U.S.C. 671 and 622, which include the requirements to:

- Operate case review systems that assure that "each child has a case plan 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[.]" 42 U.S.C. 675(5), incorporated as a IV-E state plan requirement by 42 U.S.C. 671(a)(16) and as a IV-B state plan requirement by 42 U.S.C. 622(b)(8)(B).
- Ensure that case plans 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, including a discussion of the appropriateness of the services that have been provided to the child under the plan. 42 U.S.C. 675(1)(B).

- Include a certification that, before a child in foster care under the responsibility of the State 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, that the preparation will be continued, as necessary, after the placement of the child, and that the preparation shall include knowledge and skills relating to the reasonable and prudent parent standard for the participation of the child in age or developmentally-appropriate activities, including knowledge and skills relating to the developmental stages of the cognitive, emotional, physical, and behavioral capacities of a child, and knowledge and skills relating to applying the standard to decisions such as whether to allow the child to engage in social, extracurricular, enrichment, cultural, and social activities. 42 U.S.C. 671(a)(24).
- As a condition of each contract entered into by a child care institution to provide foster care, ensure the presence on-site of at least 1 official who, with respect to any child placed at the child care institution, is designated to be the caregiver who is authorized to apply the reasonable and prudent parent standard to decisions involving the participation of the child in age or developmentally-appropriate activities, and who is provided with training in how to use and apply the reasonable and prudent parent standard in the same manner as prospective foster parents are provided the training pursuant to 42 U.S.C. 671(a)(24). 42 U.S.C. 671(a)(10).

Congress has expressly authorized the Secretary to "make and publish such rules and regulations...as may be necessary to the efficient administration of the functions with which [the Secretary] is charged under [the Social Security Act]." 42 U.S.C. 1302. This rule is necessary for the Secretary to fulfill his responsibility to ensure that child welfare agencies receiving IV-B

and/or IV-E funding meet, for LGBTQI+ children in their care, the statutory mandates described above, including those to provide "safe and proper care" and "appropriate" placements.

ACF notes that the Supreme Court has held Congress need not in statute "prospectively resolve every possible ambiguity concerning particular applications of the requirements of" a spending program. *Bennett v. Kentucky Dep't of Education*., 470 U.S. 656, 669 (1985); *see also Mayweather v. Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002) ("Congress is not required to list every factual instance in which a state will fail to comply with a condition. Such specificity would prove too onerous, and perhaps, impossible. Congress must, however, make the existence of the condition itself—in exchange for the receipt of federal funds—explicitly obvious.") There is no question that the IV-B and IV-E statutes make explicitly obvious that states and tribes must comply with the IV-B and IV-E state plan requirements, including those related to case plans and case reviews, in order to qualify for Federal IV-B and IV-E funds.

Federalism Principles

Comment: Some state attorneys general and some members of Congress commented that they believe the proposed rule violates federalism principles. They stated that "the U.S. Constitution leaves significant swaths of family, health, and safety regulation to the States' exercise of their constitutionally reserved police powers" and argue that the proposed rule would shift the balance of power from states to the Federal Government. Commenters' primary concern is that the rule may preempt state laws limiting the availability of gender-affirming medical care for minors.

Response: ACF disagrees that this rule violates federalism principles. As discussed in the response directly above, the rule implements Federal statutory terms regarding the care title IV-E/IV-B agencies must provide to LGBTQI+ foster children in order to qualify for the Federal IV-B and IV-E financial assistance programs. The rule does not preempt state laws regarding gender-affirming medical care for minors generally. Thus, where the rule requires states to ensure that LGBTQI+ children have access to age- or developmentally appropriate services that

are supportive of their sexual orientation and gender identity or expression, including clinically appropriate mental and behavioral health supports, it requires access only to those services and supports that are lawful in the state. When a state accepts funds under the title IV-E/IV-B program, it agrees to provide safe and proper care to children within the system funded by that program. This rule merely elaborates on what is necessary to provide such care in the specific context of LGBTQI+ children in that program. It does not preempt or require any change to state laws regulating medical care generally.

Nondelegation Doctrine

Comment: Some state attorneys general commented that they believe that the proposed rule violates the nondelegation doctrine of the U.S. Constitution. They stated that "the nondelegation doctrine requires Congress to 'lay down' an 'intelligible principle' in an authorizing statute for the agency to follow. *Mistretta v. United States,* 488 U.S. 361, 372 (1989) (citation omitted). They then argued that the proposed rule's expansive interpretation of HHS's statutory authority "cannot be squared with this foundational constitutional check. In HHS's view, the open-ended terms 'safe and proper care' and 'best interests and special needs of the child' are empty vessels waiting to enshrine any number of highly controversial requirements favored by federal agency heads."

Response: ACF disagrees that this rule violates the nondelegation doctrine. Congress does not violate the nondelegation doctrine merely because it legislates in broad terms and leaves a certain degree of discretion to an executive agency, so long as Congress sets forth – as commenters acknowledged - "an intelligible principle" to which the agency must conform. The Supreme Court has routinely upheld delegations to the Executive Branch "under standards phrased in sweeping terms." *See Loving v. U.S.*, 517 U.S. 748, 771 (1996). Congress may permissibly delegate authority to the Executive Branch to regulate in a manner that is necessary to adhere to policy objectives in a statute. S*ee also Consumers' Rsch. v. Fed. Commc'ns Comm'n* ("The intelligible-principle test has long recognized 'that in our increasingly complex society,

replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.' [*Mistretta*, 488 U.S.] at 372, 109 S.Ct. 647; *Gundy*, 139 S. Ct. at 2123 (explaining that the Court's holdings recognize these considerations 'time and again')." 67 F.4th 773, 787 (6th Cir. 2023)\.)\.

Congress here has charged the Secretary with ensuring that states and tribes operate case review systems in which "each [foster] child has a case plan 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." 42 U.S.C. 675(5), 671(a)(16), 622(b)(8)(A)(ii). The case plan must also include a plan for assuring that each child receives "safe and proper care" 42 U.S.C. 675(1)(B). In addition, Congress has charged the Secretary with "promulgat[ing] regulations for the review of [state IV-B and IV-E] programs to determine whether such programs are in substantial conformity with—State plan requirements under such parts B and E." 42 U.S.C. 1320a–2a(a). Those regulations must, among other things, describe "the criteria to be used to measure conformity with such requirements and to determine whether there is a substantial failure to so conform." 42 U.S.C. 1320a–2a(b)(2) These portions of the statute, and others described in the Legal Authority for the Final Rule section of this preamble, provide the "intelligible principle" necessary for ACF to promulgate these regulations.

In a district court case, *CompRehab Wellness Grp., Inc. v. Sebelius*, No. 11-23377-CIV, 2013 WL 1827675 (S.D. Fla. Apr. 30, 2013), the court upheld against a nondelegation challenge a regulation promulgated pursuant to the Social Security Act's grant of rulemaking authority to the Secretary, which authorizes the Secretary to "make and publish such rules and regulations...as may be necessary to the efficient administration of the functions with which [the Secretary] is charged under [the Social Security Act]." 42 U.S.C. 1302. In finding the Social Security Act's grant of rulemaking authority to provide the necessary "intelligible principle," the court stated that "Essentially, what [the plaintiff] seeks is the invalidation of a statute granting

authority to a named agency to regulate an identified federal program using statutory language well within the bounds of what has already been deemed constitutional." Id. at 6.

Although Congress has delegated authority "from the beginning of the government," *Big Time Vapes, Inc. v. FDA*, 963 F.3d 436, 442 (5th Cir. 2020) (quoting *United States v. Grimaud, 220* U.S. 506, 517 (1911)), "[o]n only two occasions—both in 1935 as part of its resistance to New Deal legislation—has the Court found a violation of the nondelegation doctrine," *Allstates Refractory Contractors, LLC v. Su*, 79 F.4th 755, 762 (6th Cir. 2023). One of those statutory provisions "provided literally no guidance for the exercise of discretion," and the other "conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001) (citing *Panama Refin. Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)). By contrast, in the almost 90 years since, the Supreme Court has consistently upheld "Congress' ability to delegate power under broad standards," *Mistretta*, 488 U.S. at 373, and "ha[s] 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law,'" *Am. Trucking,* 531 U.S. at 474-75 (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)

Major Questions Doctrine

Comment: Some state attorneys general commented that they believe that the proposed rule violates the major questions doctrine of the U.S. Constitution. Commenters argue that the proposed rule "raises controversial questions of vast 'political significance,' yet does not reflect the type of clear congressional authorization the major-questions doctrine requires. *West Virginia v. EPA*, 142 S. Ct. 2587, 2613 (2022) (quoting *FDA v. Brown & Williamson*, 529 U.S. 120, 160 (2000))." They specifically refer to the requirement in the proposed rule for children to be offered a placement consistent with their gender identity if they are being placed in child care institutions, arguing that "this mandate overrides state policies governing sex-segregated

childcare institutions, which heed the privacy and safety interests in maintaining sex-segregated spaces—particularly for children."

Response: ACF disagrees that this rule violates the major questions doctrine. This rule does not address matters of "exceptional economic and political significance," which would be necessary for the major questions doctrine to apply. Courts have held the major questions doctrine to apply where a regulation imposes extremely large costs or has far-reaching effects on areas outside of the agency's traditional regulatory domain. (*See e.g., Biden v. Nebraska*, 143 S. Ct. 2355, 2358 (2023), overturning the Department of Education's rule that would "establish a student loan forgiveness program that will cancel about $430 billion in debt principal and affect nearly all borrowers," and *W. Virginia v. Env't Prot. Agency*, 597 U.S. 697, 724 (2022), overturning an EPA rule that would "empower[] it to substantially restructure the American energy market.")

This rule has no such exceptional reach. It implements ACF's core responsibility to promote the wellbeing of foster children in programs that receive Federal funding through requiring state and tribal compliance with titles IV-B and IV-E of the Social Security Act. Commenters do not point to any aspects of the rule which they believe are of "exceptional economic significance." With regard to "exceptional political significance," the only section they specifically point to is the requirement for child welfare agencies to place transgender and gender nonconforming youth consistent with their gender identity.[44] That requirement is not of "exceptional political significance."

Rather, it simply clarifies, for LGBTQI+ children in foster care, the IV-E statutory requirements to place foster children in "a safe setting that is the...most appropriate setting available...consistent with the best interest and special needs of the child." 42 U.S.C. 675(5). This is not a "transformative expansion in [ACF's] regulatory authority," but simply a

[44] Note that the proposed rule applied the requirement for transgender and gender non-conforming children to be offered placements consistent with their gender identity to congregate care placements, whereas the final rule makes the requirement applicable to all placements.

clarification of how to apply a longstanding statutory requirement to a specific subset of children in foster care. *See W. Virginia v. Env't Prot. Agency*, 597 U.S. 697, 724 (2022). The requirement to offer children a placement that is consistent with their gender identity is based on ACF's careful consideration of current research on best practices to promote the health and safety of such youth, as described in the Background of the preamble. This regulatory requirement does not preempt state or tribal laws regarding sex-segregated child care institutions. If a state law prohibits placement in sex-segregated institutions based on gender identity, then the title IV-E/IV-B agency should explore all other placement options in order to offer a foster child a placement consistent with their gender identity, while also meeting the child's other particular needs.

Fulton v. City of Philadelphia

Comment: Many commenters stated that the proposed rule impermissibly attempts to bypass the ruling in *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021), by placing obligations on states instead of directly placing them on providers. Commenters said that the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb et seq., and state-level RFRA laws cannot be circumvented merely by making states do the work of foster care provider. The commenter said that foster families of faith will be negatively affected by the proposed rule. Similarly, a group of commenters said that the rule attempts to bypass and shift responsibility for compliance with *Fulton* and will not survive a court challenge.

Response: The proposed rule and this final rule do not circumvent RFRA or otherwise undermine or attempt to bypass the Supreme Court's ruling in *Fulton v. Philadelphia*. Rather, the rule, as proposed and adopted, primarily imposes obligation on states and tribes because Titles IV-E and IV-B of the Social Security Act allocate funding to states and tribes to administer Child Welfare programs. Consequently, when obligations in this rule are imposed on states and tribes, that designation of responsibility is in keeping with the structure of the program.

ACF does not believe that administration of this rule will cause states or tribes to undertake any measures that violate *Fulton*, the Constitution, or Federal laws that support and protect religious exercise and freedom of conscience such as RFRA, applicable Federal civil rights laws or HHS regulations including 45 CFR part 87 (''Equal Treatment for Faith-Based Organizations''). As explained in the preamble to the NPRM, a provider may submit a request for religious accommodation regarding any requirement of this rule to the state or tribe, which must promptly forward the request to ACF. We will then evaluate the request to determine whether an exemption is appropriate under the standards of the Constitution, RFRA, and any other applicable law.

V. IMPLEMENTATION TIMEFRAME

We received comments expressing concerns that the provisions in the rule added a layer of bureaucracy and/or burden on child welfare agencies. ACF acknowledges that there will be additional costs placed on state and tribal title IV–E/IV–B agencies. Therefore, ACF is providing more than two fiscal years for state and tribal title IV–E/IV–B agencies to implement the provisions of this final rule on or before October 1, 2026. We added § 1355.22(l) accordingly.

VI. REGULATORY IMPACT ANALYSIS

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 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 final rule are that placing children in foster care with providers the agencies consider Designated Placements 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 negative health outcomes, homelessness, housing instability and food insecurity. This rule promotes a supportive environment for LGBTQI+ children in foster care.

ACF acknowledges that there will be a cost to implement changes made by this rule as we anticipate that a majority of states and tribes would need to expand their efforts to recruit and identify providers and foster families that the state or tribe could identify as Designated Placements for LGBTQI+ children. This cost would vary depending on an agency's available resources to implement the rule.

Alternatives Considered

As an alternative to this final rule, ACF considered providing sub-regulatory guidance requiring agencies to implement the provisions of the final rule for 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 Designated 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.

Regulatory Flexibility Analysis

The Secretary certifies, under 5 U.S.C. 605(b), as enacted by the Regulatory Flexibility Act (Pub. L. 96–354), that this rule will not result in a significant impact on a substantial number of small entities. This rule does not affect small entities because it is applicable only to state and tribal title IV-E agencies, and those entities are not considered to be small entities for purposes of the Regulatory Flexibility Act.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act (Pub. L. 104–4) requires agencies to prepare an assessment of anticipated costs and benefits before finalizing any rule that may result in an annual expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation). In 2023, that threshold is approximately $183 million. This 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.

Congressional Review

The Congressional Review Act (CRA) allows Congress to review major rules issued by Federal agencies before the rules take effect (see 5 U.S.C. 801(a)(1)(A)). The CRA defines a “major rule” as one that has resulted, or is likely to result, in (1) an annual effect on the economy

of $100 million or more; (2) a major increase in costs or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, or innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets (see 5 U.S.C. chapter 8). OMB's Office of Information and Regulatory Affairs has determined that this final rule does not meet the criteria set forth in 5 U.S.C. 804(2).

Assessment of Federal Regulations and Policies on Families

Section 654 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to determine whether a policy or regulation may affect family well-being. If the agency's determination is affirmative, then the agency must prepare an impact assessment addressing seven criteria specified in the law. This rule will not have an impact on family well-being as defined in the law.

Executive Order 13132 on Federalism

Executive Order (E.O.) 13132 requires that Federal agencies, "to the extent practicable and permitted by law," consult with state and local government officials in the development of regulatory policies with federalism implications. Consistent with E.O. 13132 and *Guidance for Implementing E.O. 13132* issued on October 28, 1999, for rules with federalism implications, the Department must include in "a separately identified portion of the preamble to the regulation" a "federalism summary impact statement" (secs. 6(b)(2)(B) & (c)(2)). In the NPRM, ACF stated the 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 anticipated that the proposed rule would have a substantial direct impact on the cost that title IV–E agencies would incur to implement administrative procedures and recruit and train their workforce and providers. Accordingly, ACF included a federalism summary impact statement in the preamble to the NPRM. In that statement, ACF wrote "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."

The Department's federalism summary impact statement for the final rule is as follows – "A description of the extent of the agency's prior consultation with state and local officials"—

The public comment period for the NPRM was open for 60 days and closed on November 27, 2023. During this time, we solicited comments via regulations.gov and email. During this comment period, we held two informational calls on October 11 and 30, 2023, for states, Indian tribes, and the public. During these calls, we provided an overview of the proposed provisions and where to submit comments.

"A summary of the nature of their concerns and the agency's position supporting the need to issue the regulation"—

As we discussed in the preamble to this final rule, some government entity commenters expressed support and appreciation for the efforts of HHS to establish protections for LGBTQI+ youth in foster care. Other government entity commenters opposed the rule and stated generally a belief that the NPRM creates a separate and distinct process for LGBTQI+ youth that violates privacy, and raised concerns related to religious beliefs of providers. Government entity critics of the NPRM also argued that it creates a "cumbersome fix" for a problem that lacks clear definition while states are currently having issues finding enough providers for all children in foster care. They also argued that the NPRM's provisions would disincentivize families from serving as foster parent providers and would "drive individuals and organizations of faith away." They also expressed concerns that most congregate care providers are not currently equipped to meet the provisions around placing children according to their gender identity. Finally, there were objections to what they saw as unfunded burdens on the agencies to develop new trainings, modify licensing and placement rules, and revisions to case management systems to track placements, notifications, and other requirements in the NPRM. The state AG letters raised legal

concerns that the NPRM violates various statutory and constitutional requirements; these concerns are addressed in section IV of this preamble.

"A statement of the extent to which the concerns of state and local officials have been met" (secs. 6(b)(2)(B) and 6(c)(2))—

As we discussed in the preamble to this final rule, safe and appropriate placements are a requirement for all children in foster care. This final rule simply clarifies that requirement for LGBTQI+ children and preserves substantial state discretion consistent with that requirement.

Paperwork Reduction Act

This final rule does not contain additional information collection requirements (ICRs) subject to review by the OMB under the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501-3520. Information collection requirements for case plans required under title IV–E and IV–B are currently authorized under OMB number #0970–0428. This rule 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 rule provides more specificity for an LGBTQI+ child. While agencies will need to develop policies to comply with some of the provisions in the rule, the casework to provide safe placements, consult with children, and notify them of the procedures for reporting concerns or requests for placement changes are 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 and no changes are needed to that collection as this rule does not significantly change or add burden to the requirements. The CFSR already includes the review of case plan requirements for safe and appropriate placements for all children in foster care.

Annualized Cost to the Federal Government

ACF estimated that the proposed regulatory changes would cost the Federal Government $10,827,381 over a three fiscal year (2027-2029) period. ACF estimated that the combined total Federal and agency costs over three fiscal years would be $45,743,070.

The estimate for this final rule 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 final rule'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 designated placement, agencies will likely need to increase the recruitment of providers who are qualified to provide safe and appropriate affirming care.
- Training agency caseworkers and supervisors on the procedural requirements in the final rule and on how to adequately serve LGBTQI+ foster children, and training placement providers seeking to become designated as a designated placement provider 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 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 (b)(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 Designated

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 designated placement needs for children ages 4 and older.

We assume that states and tribes will not be able to use title IV–B funding to implement this 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 (section 424(a) of the Social Security Act). 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 Designated 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 final rule 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.

This final rule will become effective at the beginning of FY 2027 and thus will apply to the entire population of children in foster care who are age 14 and older in that FY. ACF assumes that although implementation can begin earlier, the majority of incremental costs will be for the activities occurring in FY 2027. We expect costs in FYs 2028 and 2029 to be about half of those for FY 2027 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. It is possible that more of the costs will be concentrated in FY 2028, rather than FY 2029, if implementation occurs at a more accelerated pace. After the third year of implementation, we anticipate that incremental costs will largely be eliminated as available Designated Placement providers are recruited and the policies, procedures, and training requirements are implemented.

Federal cost estimate for implementation of Designated 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 2027, 2028, and 2029.

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 2027, 2028, and 2029. In 2029 the caseload is estimated at 105,423.

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 12 and older is 36,817 (155,075 × 23.74%). We also provide estimates of the number of children in FC age 14 and older in the following subsequent years: FYs 2027, 2028, and 2029.

Line 4. National number of children to be notified of Designated Placement requirements. Line 4 of the table below provides an estimate of the number of children in FC who must be notified of the Designated Placement provisions in proposed § 1355.22(a)(2)(i). For the first year

of implementation (FY 2027) 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 2028 and 2029, 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 2029 the national number of children that must be notified of Designated Placement requirements is 42,846 (105,423 (Line 2) × 40.64% (Line 4) = 42,846).

Line 5. Percentage of national foster care placements for children needing Designated Placements. Line 5 of the table below displays the estimated percentage of national foster care Designated 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+. An analysis of data collected from 2013 – 2015 in the California Health Kids Survey found that 30.4 percent of foster youth aged 10-18 identify as LGBTQ+.[45]Similarly, a 2021 study of foster children ages 12 through 21 in Cuyahoga County, Ohio, found that 32 percent identified as LGBTQI+.[46] 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 2027 on Line 4, the national number of children to be notified of Designated Placement provisions is 103,423 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+

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[45] Baams, L., Russell, S.T, and Wilson, B.D.M. 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.*

[46] 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 LBTQ2S Children and Youth in Foster Care (2021). Cuyahoga Youth Count: A Report on LBTQ+ Youth Experience in Foster Care, *https://theinstitute.umaryland.edu/media/ssw/institute/Cuyahoga-Youth-Count.6.8.1.pdf*

children needing designated placements, is 15.0 percent ((103,423 × 30 percent) ÷ 206,812). This estimate is purposefully high to account for some children under age 14 who may also need such designated placements.

Line 6. Total incremental costs (Federal and non-Federal) for recruiting Designated Placements. Line 6 of the table below displays the estimated total cost of recruiting placement providers to meet the proposed requirements for Designated 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 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 adjusted for expected inflation (+2.0 percent per FY) thru FY 2027 resulting in an amount of $204,597,993 and 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 Designated Placements in each FY. The resulting amount was then reduced by another 50 percent to reflect the likelihood that a significant portion of the Designated Placement recruitment budget would be obtained by refocusing the existing budget for recruitment costs towards Designated 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 2027 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 a Designated Placement. This percentage for FY 2027 of 15.0 percent (31,027 ÷ 206,812) is then multiplied by the national estimated foster care recruitment cost budget $204,597,993) resulting in a total of $30,694,652. This figure is then reduced by 50 percent to reflect the anticipated incremental cost for Designated Placement

provider recruitment efforts of $15,347,326. This estimate is purposefully high to account for some children under age 14 who may also need Designated Placements. The total cost for FYs 2025, 2026, and 2027 is $28,002,901.

Line 7. Total costs (Federal and non-Federal) for Designated Placement training (caseworkers, supervisors & providers). Line 7 of the table below provides the estimated total cost of training required for Designated Placements. This estimate for each FY is derived by first identifying the baseline cost of providing a model sexual orientation, gender identity or expression 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 2027 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 2027 national total of 39,929 FC caseworkers. The casework supervisor count uses the generally applied ratio of one supervisor for five workers resulting in an FY 2027 number of 7,986. The provider trainee population is calculated by using the count of children to be notified of Designated 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 2027 Designated Placement provider trainee population of 23,270. 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 than 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 2027 we expect a total of 71,185 trainees (caseworkers, supervisors & foster care providers). Therefore, the 50 percent of that total expected to have travel & per diem costs is 35,592 trainees. At an average cost of $115 per participant the total cost in this category is $4,093,114. The total FY 2027 estimate for Designated Placement training is $11,064,847. This amount lowers to $3,406,624 for FY 2029. The total training cost for FYs 2027, 2028, and 2029 is $17,740,168.

Line 8. Total costs (Federal and non-Federal) for all Designated 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 2027 as $26,412,173 and the total cost for FYs 2027, 2028, and 2029 is $45,743,070.

Line 9. Total title IV–E FFP for all Designated 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 child-care institutions (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 2027 amount is calculated by using the FY 2027 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 2027 as $6,333,200 and the total cost for FYs 2027, 2028, and 2029 is $10,827,381.

Line 10. Total title IV–E non-Federal share for all Designated Placement activity costs. Line 10 displays the annual estimated total title IV–E non-Federal (state or tribe) share of costs for all Designated 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 2027 amount is calculated by using the FY 2027 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 2027 as $4,139,530 and the total cost for FYs 2027, 2028, and 2029 is $7,310,288.

Line 11. Total title IV–B non-Federal share for all Designated Placement activity costs. Line 11 displays the annual estimated total title IV–B non-Federal (state or tribe) share of costs for all Designated 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 2027 as $15,939,443 and the total cost for FYs 2027, 2028, and 2029 is $27,605,401.

Line 12. Total title IV–E and IV–B non-Federal share for all Designated Placement activity costs. Line 12 displays the annual estimated total title IV–E and IV–B non-Federal share of costs for all Designated 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 2027 as $20,078,973 and the total cost for FYs 2027, 2028, and 2029 is $34,915,689.

Year	2022 (Baseline)	2027	2028	2029	Three-year total
1. National number of children in foster care (FC)	391,098	415,095	418,895	422,730	--
2. National number of children in FC age 14 and older	92,852	103,423	104,418	105,423	--
3. National average monthly number of	36,817	41,008	41,403	41,801	--

children in title IV-E FC age 14 and older					
4. National number of children to be notified of Designated Placement provisions	N/A	103,423	42,438	42,846	--
5. Percentage of national FC placements for children needing Designated Placements	N/A	15.0%	6.2%	6.2%	--
6. Total incremental costs (Federal and non-Federal) for Designated Placement recruitment	N/A	$15,347,326	$6,297,488	$6,358,087	$28,002,901
7. Total costs (Federal and non-Federal) for Designated Placement training (caseworkers, supervisors & providers)	N/A	$11,064,847	$3,268,697	$3,406,624	$17,740,168
8. Total Federal and non-Federal costs for all Designated Placement activities (Lines 6+7)	N/A	$26,412,173	$9,566,185	$9,764,712	$45,743,070
9. Total title IV-E FFP for all Designated Placement Activity costs	N/A	$6,333,200	$2,220,573	$2,273,609	$10,827,381
10. Total title IV-E non-Federal share for Designated Placement activity costs	N/A	$4,139,530	$1,572,534	$1,598,224	$7,310,288
11. Total title IV-B non-Federal share for Designated Placement activity costs	N/A	$15,939,443	$5,773,079	$5,892,879	$27,605,401

12. Total titles IV-E and IV-B non-Federal share for placement Designated activity costs (Lines 10+11)	N/A	$20,078,973	$7,345,613	$7,491,103	$34,915,689

ACF received several comments on the cost estimate.

Comment: One commenter expressed concerns that the fiscal impact calculations of this regulation are based on estimates of the number of LGBTQI+ children related to surveys conducted (one completed in California in 2014 and one completed in Ohio in 2021) rather than AFCARs data.

Response: AFCARS does not collect information on LGBTQI+ status or identity. Therefore, ACF believes that these surveys are the best available data to estimate the potential population to be served through this regulatory change.

Comment: Commenters expressed that the proposed rule underestimated the recruitment costs, and the cost estimate is unrealistic.

Response: As noted in the NPRM, the ACF estimate covers the maximum potential population for which foster home recruitment will be needed. It is also expected that as policies and procedures are modified to incorporate Designated Placements into existing recruitment activities, the incremental costs will decrease. We thus believe the estimate cost for recruitment to be reasonable.

*Comment***:** One commenter stated that the basis for the cost estimate is not clear.

Response: ACF is basing its estimate that incremental costs of recruitment will no longer be in effect after FY 2027 on an expectation that recruiting activities for Designated Placements will be incorporated into existing recruitment contracts and services as well as the development of a significant pool of existing foster family homes that are trained to serve as Designated Placements.

Comment: One commenter indicated that their experience with 'estimates' of the cost of new proposals is alarmingly low. They always cost more than originally estimated.

Response: ACF understands the concern raised and has made a careful assessment of the likely costs based on information currently available.

Comment: One commenter stated the NPRM failed to adequately consider the costs state agencies will incur to comply with mandates. For example, state agencies will need to develop protocols and systems for implementing the rule’s new oral and written notification regimes. State agencies also face significant costs to enforce and monitor the retaliation regime, including the costs of preparing and providing materials to all foster care providers.

Response: ACF determined that incremental costs for the Designated Placement regulatory changes were most likely to be concentrated in recruitment and training costs. We recognize that some other incremental costs may occur, but do not expect them to be significant.

VII. 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 state law. *Consultation and Coordination With Indian Tribal Governments*, 65 FR 67249. 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 on 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 final 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+ or Two-Spirit child in foster care that supports the child's identity. However, we do not expect the costs to be substantial and have received no comments indicating so. 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.

ACF is committed to consulting with Indian tribes and tribal leadership to the extent practicable and permitted by law. ACF engaged in consultation with Indian tribes and their leadership on the September 2023 NPRM as described below.

Description of Consultation

On September 29, 2023, ACF issued a letter to tribal leaders announcing the date, purpose, virtual location, and registration information for tribal consultation and shared it widely through a variety of peer groups and email list-serves. Tribal Consultation was held via a Zoom teleconference call on October 30, 2023. A report of the tribal consultation may be found on the CB website at: https://www.acf.hhs.gov/cb/report/tribal-consultation-nprms-legal-foster-care.

In summary, the consultation participants expressed the importance of recognizing LGBTQI+ resources that are specific to each tribe because of differing traditions. A participant made the point that that there could be a potential conflict between placing a child in accordance with the ICWA placement preferences and the NPRM provisions on safe and appropriate placements. We agree that there could be numerous factors in Federal law and the final rule that impact an agency's decision on a case-by-case basis, which they will need to take into account.

in Federal law and the final rule. Participants requested clarification on what the law requires when there is a conflict between what a child is expressing and what the parents want for the child. This issue is addressed earlier in the preamble. Several participants commented that ACF can support tribal agencies by providing flexible funding to develop resources for LGBTQI+ youth. While flexible funding is not available at this time to implement the final rule, as noted in the NPRM, title IV-E administrative costs are available to claim recruitment and training costs.

List of Subjects in 45 CFR Part 1355

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

(Catalog of Federal Domestic Assistance Program Number 93.658, Foster Care Maintenance; 93.659, Adoption Assistance; 93.645, Child Welfare Services—State Grants).

Approved: April 23, 2024.

Xavier Becerra,

Secretary,

Department of Health and Human Services.

For the reasons set forth in the preamble, ACF amends 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 Designated Placement requirements under titles IV-E and IV-B for LGBTQI+ children.

LGBTQI+ children (including children with lesbian, gay, bisexual, transgender, queer, or questioning, and intersex status or identity) shall be placed and receive services in accordance with the following requirements:

(a) *Protections generally applicable.* As part of meeting the requirement to provide a safe and appropriate placement for all children in foster care, the title IV-E/IV-B agency must ensure that all placements, including those for LGBTQI+ children, are free from harassment, mistreatment, or abuse.

(b) *Designated Placements and services for LGBTQI+ children.* The title IV–E/IV–B agency must meet the following requirements for each LGBTQI+ child in foster care:

(1) *Designated Placements.* The title IV–E/IV–B agency must ensure there is a Designated Placement available for all LGBTQI+ children in foster care who request or would benefit from such a placement. Nothing in this section requires any provider to become or serve as a Designated Placement. As used in this section, for a placement to be specifically designated for an LGBTQI+ child, the provider must meet the protections generally applicable as defined at paragraph (a) of this section and:

(i) Commit to establish an environment that supports the child's LGBTQI+ status or identity;

(ii) Be trained 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 professional standards and recommended practices that promote the safety and wellbeing of LGBTQI+ children; and

(iii) Facilitate the child's access to age- or developmentally appropriate resources, services, and activities that support their health and well-being as described in paragraph (e) of this section.

(2) *Process for notification of and request for Designated Placements.* The IV–E/IV–B agency must implement a process by which an LGBTQI+ child may request a Designated Placement as described in paragraph (b)(1) of this section or request that their current placement be offered services to become a Designated Placement. The title IV–E/IV–B agency's process for considering such a request must provide the child with an opportunity to express their needs and concerns. 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 Designated Placements and the ability to request that services be offered to their current placement 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, gender expression or sex characteristics; or

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

(ii) The notice must be provided in an age- or developmentally appropriate manner, both verbally and in writing, and must inform the child of how they may request a Designated Placement or services for their current placement and the process the title IV-E/IV-B agency will use in responding to their request; and

(iii) The notice must inform the child of the nonretaliation protections described at paragraph (d) of this section and describe the process by which a child may report a concern about retaliation.

(3) *Placement and services decisions and changes.* When making placement and service decisions related to an LGBTQI+ child, the title IV-E/IV-B agency shall give substantial weight to the child's expressed concerns or requests when determining the child's best interests. To promote placement stability, when an LGBTQI+ child requests a Designated Placement and before initiating any placement changes, the title IV-E/IV-B agency must consider whether additional services and training would allow the current provider to meet the conditions for a Designated Placement. If so, and if the current provider is willing to meet the conditions for a Designated Placement, the IV-E/IV-B

agency must use the case review system to regularly review the provider's progress towards meeting the conditions of such a designation.

(c) *Process for reporting concerns about placements and concerns about retaliation.* The title IV–E/IV–B agency must implement a process for LGBTQI+ children to report concerns about a placement that fails to meet the applicable requirements of this section, and to report concerns about retaliation as described in paragraph (d) 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. 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.

(d) *Retaliation prohibited.* (1) The title IV–E/IV–B agency must have a procedure to ensure that neither the title IV-E/IV-B agency, nor any provider, nor any entity or person acting on behalf of the agency or a provider retaliates against an LGBTQI+ child in foster care based on the child's actual or perceived LGBTQI+ status or identity, any disclosure of that status or identity by the child or a third party, or the child's request or report related to the requirements for placements or services under this part.

(2) Conduct by the title IV-E/IV-B agency, provider, or any entity or person acting on behalf of the agency or a provider that will be considered retaliation includes, but is not limited to:

(i) Harassment, mistreatment, or abuse as described in paragraph (a) of this section.

(ii) Attempts to undermine, suppress, change, or stigmatize a child's sexual orientation or gender identity or expression through "conversion therapy."

(iii) Unwarranted placement changes, including unwarranted placements in congregate care facilities, or restricting an LGBTQI+ child's access to LGBTQI+ peers, siblings, family members, or age- or developmentally appropriate materials and community resources.

(iv) Disclosing the child's LGBTQI+ status or identity in ways that cause harm or risk the privacy of the child or that infringe on any privacy rights of the child.

(v) Using information about the child's LGBTQI+ status or identity to initiate or sustain a child protection investigation or disclosing information about the child's LGBTQI+ status or identity to law enforcement in any manner not permitted by law.

(vi) Taking action against current or potential caregivers (including foster parents, pre-adoptive parents, adoptive parents, kin caregivers and birth families) because they support or have supported a child's LGBTQI+ status or identity.

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

(f) *Placement of transgender and gender non-conforming children in foster care.* When considering placing a child, the title IV–E/IV–B agency must offer the child a placement consistent with their gender identity. The title IV-E/IV-B agency must also consult with the child to provide an opportunity to voice any concerns related to placement.

(g) *Compliance with privacy laws*. The title IV-E/IV-B agency must comply with all applicable privacy laws, including section 471(a)(8) of the Act and 45 CFR 205.50, in all aspects of its implementation of this section. Information that reveals a child's LGBTQI+ status or identity may only be disclosed in accordance with law and any such disclosure must be the minimum necessary to accomplish the legally-permitted purposes.

(h) *Training and notification requirements.* In addition to meeting the requirements of paragraph (b)(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 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 (d) of this section.

(3) Ensure that all placement providers are informed of the procedural requirements to comply with this section, including the required non-retaliation provision outlined in paragraph (d) of this section.

(i) *Protections for religious freedom, conscience, and free speech.* Insofar as the application of any requirement under this section would violate applicable Federal protections for religious freedom, conscience, and free speech, such application shall not be required.

(j) *No penalties for providers that do not seek to qualify as Designated Placements.* Nothing in this section shall be construed to require or authorize a State or Tribe to penalize a provider in the titles IV-E or IV-B programs because the provider does not seek or is determined not to qualify as a Designated Placement under this section.

(k) *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.

(l) *Implementation*. Title IV-E/IV-B agencies must follow the requirements of this section beginning on October 1, 2026.

(m) *No effect on more protective laws or policies*. Nothing in this section shall limit any State, Tribe, or local government from imposing or enforcing, as a matter of law or policy, requirements that provide greater protection to LGBTQI+ children than this section provides.

3. Amend § 1355.34 by revising 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 the child's needs, 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; for documentation of the steps taken to make and finalize an adoptive or other permanent placement when the child cannot return home; and for implementation of the requirements of § 1355.22(b) and (d) as applicable (sections 422(b)(8)(A)(ii), 471(a)(16), and 475(5)(A) of the Act and § 1355.22(b) and (d));

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