

# RECENT RULING ENABLES HHS TO DISCRIMINATE ON THE BASIS OF GENDER IDENTITY OR SEXUAL ORIENTATION; OPPORTUNITY FOR PUBLIC COMMENT UNTIL DECEMBER 19, 2019

## BRIEF

DECEMBER 2019  
Washington state

### SUMMARY

On November 1, 2019, the Trump Administration issued a [Notice of Proposed Rulemaking](#) (NPRM) that would enable Health and Human Services grantees, including Child Placing Agencies, to discriminate against individuals on the basis of sexual orientation or gender identity. An immediate [Notice of Nonenforcement](#) of current protections was issued along with the proposed rule. The passage of this rule has the potential to reduce significantly the number of licensed foster and adoptive homes available and limit significantly the placement of LGBTQ+ children in homes affirming their identity. Public comment is accepted on the Federal Register until 12/19/19.

### PRIOR RULE

The administration is seeking to revise several provisions of a federal regulation ([45 CFR Part 75](#)) that protect against discrimination in agencies receiving federal funding through the Department of Health and Human Services (HHS). This rule was [extended](#) in December 2016 to include protections for individuals who may experience discrimination on the basis of gender identity and sexual orientation while seeking services from HHS-funded programs. These protections were in addition to protections already in place for groups covered under the [Civil Rights Act of 1964](#).

This rule has a strong and wide impact, as funding from HHS is awarded to a wide range of social and health services. These include not only child welfare, but also many others such as Temporary Assistance for Needy Families (TANF), the Supplemental Nutrition Assistance Program (SNAP, or food stamps), the Low Income Home Energy Assistance Program (LIHEAP), child care assistance, Head Start, services for youth experiencing homelessness, and many more. Many of these programs are accessed disproportionately by individuals involved with the child welfare system.

### RULE CHANGE

The administration argues they are making the change for two reasons. The primary is “several complaints, requests for exceptions, and lawsuits” they [claim](#) to have received since

the regulation was [extended](#) under the Obama Administration. However, as [noted](#) in the publication of the Final Rule from 2016, only 12 comments were received during the public comment period, all of which were “strongly supportive of the codification of the non-discrimination provisions in HHS awards and the recognition of same-sex marriages.” Furthermore no public record exists of lawsuits against HHS concerning this rule. A [multi-state lawsuit](#) was filed against HHS regarding a [similar rule change](#) made earlier this year that allows clinicians to refuse to provide services which violate their conscience.

The rule announcement also references a recent a U.S. District Court Case, *Buck v. Gordon*, as evidence that the protections in the current rule are problematic. The most recent [injunction](#) filed in this case claimed that denying funds to agencies who discriminate against LGBTQ+ individuals will cause the agencies to close, and closure would lessen the total capacity of the system to place children in foster and adoptive homes. However, given the research cited above regarding the willingness of LGBTQ+ families to foster or adopt, in fact, more openness would actually increase the number of available placements and permanent homes for all children caught up in the system and also provide more stable homes for children who are LGBTQ+.

As a secondary reason, the administration cites the fiscal impact on [small entities](#) as a result of the prior rule, claiming that the requirement to offer services regardless of sexual orientation and gender identity is burdensome enough to substantially affect the revenue of these organizations. [Over 70%](#) of social service, welfare, and community action agencies qualify as small entities. This assertion that discrimination against LGBTQ+ families is so endemic to the work of many of these agencies that that conducting business without discriminating is no longer feasible is alarming.

#### OPPORTUNITY FOR PUBLIC COMMENT

The proposed rule was published in the Federal Register on November 19, 2019 and will remain open for public comment until December 19<sup>th</sup>. Comments can be made [directly through Regulations.gov](#) or <https://www.federalregister.gov/documents/2019/11/19/2019-24385/office-of-the-assistant-secretary-for-financial-resources-health-and-human-services-grants>.

If you haven't made a public comment before, regulations.gov created [this](#) reference guide as a resource.

#### CHILD WELFARE CONTEXT

Throughout the United States, the child welfare system is [struggling](#) to place youth in foster homes. Here in Washington, 100 children collectively spent [over 1,000 nights](#) in hotels last year because the state had nowhere to put them. At the same time, foster parent retention is declining, and turnover is up to [30-50%](#) nationwide. More foster families are drastically needed to fill the gaps in this overwhelmed system.

The good news is that [research done by the Human Rights Campaign](#) identified that 84% of LGBTQ+ adults would consider adoption or foster care in the future. Same-sex couples are already [seven times](#) more likely to be raising adopted and foster children than different-sex couples, and with [over 11 million adults](#) in United States identifying as LGBTQ+, more than enough homes could be provided for the [almost 440,000 children currently in care](#). Same-sex couples raising adopted children have also [been found](#) to be older, more educated, and have more economic resources than other adoptive parents. However, the same HRC study also found that 70% of LGBTQ+ adults surveyed were concerned or unsure about their ability to find a welcoming agency and 8% of those who had applied for adoption or foster care had actually been denied due to their true or

perceived sexual orientation or gender identity. It is imperative that a more welcoming environment be created for LGBTQ+ adults to foster or adopt.

While this move to provide safe and loving homes would benefit all children, it would have a particularly strong impact for LGBTQ+ youth. A [study in Los Angeles County](#) found that 17-21 year old youths in foster care who identify as LGBTQ+ were more than twice as likely as their peers to report being treated "not very well" while in care and 2.5 times as likely to be placed in a group home rather than a family home. They were also over six times as likely as their non-LGBTQ+ peers to be kicked out of a placement or to have run away from a home or placement because they are LGBTQ+. On the other hand, LGBTQ+ youth [have been shown](#) go to great lengths to maintain a placement when they feel their identity is accepted by their caregivers.

Data on the sexual orientation of youth in foster care is not collected in national child welfare databases, so comprehensive nationwide data on the prevalence of LGBTQ+ youth in foster care is not available. However, it is well-established that LGBTQ+ youth are very disproportionately represented in the child welfare system. For example, a [large school-based study in California](#) in 2013-2015 found that 30% of middle and high school age youth in foster care identify as LGBTQ+ -- almost three times the percentage of youth who identified as LGBTQ+ in a nationally representative sample (11%). Because of this disproportionality, proposed rule has the potential to do significant harm to a large subset of youth who are already not being well served by the child welfare system overall.

#### COST TO TAXPAYERS

If same-sex couples stopped fostering altogether, 9,000 – 14,000 children who would otherwise have safe homes would be displaced. The cost for taxpayers is estimated at [\\$87 to \\$130 million](#).

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