



AMERICAN ATHEISTS

June 18, 2019

Kathleen McHugh
U.S. Department of Health and Human Services
Administration for Children and Families
Director, Policy Division
330 C Street S.W.
Washington, D.C. 20024
cbcomments@acf.hhs.gov

Re: Proposed Rulemaking amending the Adoption and Foster Care Analysis and Reporting System (AFCARS) to remove questions relating to sexual orientation (Apr. 19, 2019) [RIN 0970-AC72]

Dear Ms. McHugh:

American Atheists, on behalf of its many thousands of constituents who have engaged with our nation's child welfare systems, writes to comment on the Notice of Proposed Rulemaking (NPRM) amending the Adoption and Foster Care Analysis and Reporting System (AFCARS). We are writing in response to the request for public comments (RIN 0970-AC72) that proposes to eliminate data collection on sexual orientation for youth and prospective parents in AFCARS. Having appropriate data collection is essential to an effective child welfare system. American Atheists believes that the proposed rulemaking is unnecessary, that it is harmful to the effective administration of our nation's child welfare systems, and that it is motivated by religious bigotry, and therefore we strongly oppose this proposed rule.

American Atheists is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the "wall of separation" between government and religion created by the First Amendment. We strive to create an environment where atheism and atheists are accepted as members of our nation's communities and where casual bigotry against our community is seen as abhorrent and unacceptable. We promote understanding of atheists through education, outreach, and community-building and work to end the stigma associated with being an atheist in America.

As advocates for the health, safety, and well-being of all Americans, American Atheists opposes the exclusion of sexual orientation from the AFCARS data collection. Eliminating sexual orientation data from the AFCARS data collection will harm American children and potential parents who identify as LGBTQ, undermining the ability of child welfare systems to effectively meet their needs. This proposed rule is especially concerning due to the overrepresentation of vulnerable LGBTQ youth in the child welfare system.

Various states have made some progress in their efforts to address the needs of LGBTQ young people, and the Every Child Deserves a Family (ECDF) Act was recently introduced in the House and the Senate¹ to provide nondiscrimination protections at the federal level. However, tremendous work yet remains to

¹ Every Child Deserves a Family Act, S.1791, H.R. 3114, 116th Cong. (2019).

be done to understand the needs of and better care for LGBTQ young people. Regardless of whether ECDF passes, there is a demonstrable need to collect data and study trends on LGBTQ youth to provide these young people with the best care to suit their specific needs.

Moreover, there are currently 10 states that allow adoption and foster care agencies to discriminate against potential parents (and in some cases young people themselves) for non-merit related reasons, including being LGBTQ. These laws deprive children of loving homes and result in LGBTQ children and youth being placed into hostile environments where they will not be accepted because of their identity or possibly subject to dangerous practices like conversion therapy. The Administration's approach on this issue has been wrongheaded and destructive.² Broadening these religious exemptions will only allow for more discrimination, putting religious dogma above the health and safety of vulnerable children. By erasing the sexual orientation components of AFCARS, the Administration clearly hopes to hide the harm being done to LGBTQ young people and potential parents.

Collecting data on LGBTQ youth in foster care and adoptive programs is critical to identify trends in types of placements, rate of disruptions, and the number of foster placements within LGBTQ families that will translate into permanent adoptive placements. It has been 25 years since AFCARS was last updated, and the AFCARS 2016 Final Rule made significant progress for LGBTQ youth to be seen, heard, and to have their needs met. Since 1993 (the last time AFCARS was updated) we have also made substantial advances in the technology that can make the data collection a less time consuming, onerous process and provide greater security for those providing this data.

The data collected through this system will also inform federal law, policy, and funding determinations. Eliminating this data collection mechanism would not only harm individual youth and adults involved in the child welfare system, it would cause a greater systemic harm for the entire LGBTQ community. Given the current lack of explicit nondiscrimination protections for LGBTQ young people and adults in this country, it is imperative that we learn as much as we can about the health and safety disparities affecting the LGBTQ community. Preventing the collection of this national dataset will undermine the ability to track demographic trends and identify gaps in services, which will place LGBTQ young people and prospective parents at continued risk of harassment and discrimination across our nation.

This comment highlights the need for data collection to protect young people and to help place them with loving, accepting parents/guardians, and it demonstrates that the collection of sexual orientation data can be administered effectively, safely, and without excessive burden. The proposed withdrawal of the sexual orientation data collection will significantly harm many young people under the guise of protecting them. To truly protect the safety, permanency, and well-being of LGBTQ young people, we urge you to rescind the NPRM and proceed with the AFCARS 2016 Final Rule as issued.

The exclusion of data elements related to foster youth sexual orientation would negatively impact the safety, permanency, and well-being of LGBTQ youth in child welfare systems.

The lack of federal data related to the health disparities and unique needs of LGBTQ youth in foster care is deeply troubling in light of the fact that LGBTQ youth are disproportionately represented in out-of-

² Ariana Eunjung Cha, *Administration seeks to fund religious foster-care groups that reject LGBTQ parents*, Wash. Post (Feb. 8, 2019), https://www.washingtonpost.com/health/2019/02/08/trump-administration-seeks-authority-fund-religious-foster-care-groups-that-reject-lgbtq-parents/?noredirect=on&utm_term=.f6f186ddd7cf.

home care. This data is critical to understanding how LGBTQ youth experience the child welfare system and how these systems can best serve them.

A report that the Department issued in 2011 confirmed and reiterated “the fundamental belief that every child and youth who is unable to live with his or her parents is entitled to safe, loving and affirming foster care placement, irrespective of the young person’s sexual orientation, gender identity or gender expression.”³ The Department further stated that LGBTQ youth in foster care are overrepresented and in the population of youth experiencing homelessness. A 2013 federally-funded study of Los Angeles County’s foster care system similarly found that nearly 20% of youth identified as LGBTQ -- almost twice the percentage of LGBTQ youth estimated to be in the general population.⁴

In addition to showing that LGBTQ youth are disproportionately represented in the system, the Department’s report also showed that LGBTQ youth are over twice as likely as other youth to report being treated poorly by the foster care system.⁵ LGBTQ foster youth suffer worse outcomes in foster care than non-LGBTQ youth, such as multiple placements, longer stays in residential care, homelessness, criminal justice involvement, and greater rates of hospitalization for emotional reasons. These findings are consistent with the growing body of research demonstrating that LGBTQ youth suffer from a range of health and mental health disparities associated with family rejection, school bullying, and societal stigma and discrimination.⁶ In fact, family rejection is one of the most commonly cited reasons for LGBTQ youth entering out-of-home care.⁷ The mental anguish that accompanies this kind of familial rejection may be amplified by experiencing repeated rejection when these young people are placed with a family that either does not recognize their identity or outright rejects them. By refusing to collect the necessary data on sexual orientation, the Department is putting LGBTQ children and youth at risk of being rejected again if their identity becomes known. This is relevant even if the youth chooses to hide their identity due to fear of rejection, resulting in increased stressors, negative attitudes, anxiety, and other mental health risks.⁸

³ Administration for Children and Families, *ACYF-CB-IM-11-03, Lesbian, Gay, Bisexual, Transgender and Questioning Youth in Foster Care* (April 6, 2011), <https://www.acf.hhs.gov/sites/default/files/cb/im1103.pdf> [hereinafter “ACYF-CB-IM-11-03”].

⁴ Bianca D.M. Wilson et al., *New Report: Sexual and Gender Minority Youth in Foster Care*, WILLIAMS INST., at 6 (Aug. 2014), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS_report_final-aug-2014.pdf [hereinafter “*Sexual and Gender Minority Youth*”].

⁵ *ACYF-CB-IM-11-03*, supra note 3 (12.9% of LGBTQ youth report being treated poorly compared to 5.8% of non-LGBTQ youth).

⁶ *Sexual and Gender Minority Youth*, at 11 (“LGB young adults who reported higher levels of family rejection during adolescence were 8.4 times more likely to report having attempted suicide, 5.9 times more likely to report high levels of depression, 3.4 times more likely to use illegal drugs, and 3.4 times more likely to report having engaged in unprotected sexual intercourse, compared to their peers who reported no to low levels of family rejection.”) (citing Caitlyn Ryan, David Huebner, Rafael M. Diaz, & Jorge Sanchez, *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*, 123 *PEDIATRICS* 346 (2009)).

⁷ Shannan Wilber et al., *CWLA Best Practice Guidelines for Serving Youth in Out-of-Home Care*, CHILD WELFARE LEAGUE OF AMERICA, 4 (2006), <http://www.nclrights.org/wp-content/uploads/2013/07/bestpracticeslgbtyouth.pdf>.

⁸ Hilary Daniel, Renee Butkus, *Lesbian, Gay, Bisexual, and Transgender Health Disparities: Executive Summary of a Policy Position Paper From the American College of Physicians*, *Annals of Internal Med.* (July 21, 2015) <https://annals.org/aim/fullarticle/2292051/lesbian-gay-bisexual-transgender-health-disparities-executive-summary-policy-position>.

In order to identify and address these risks, the child welfare system must affirmatively collect information about the sexual orientation of the young people in its custody. Failure to understand these aspects of a child's identity can lead to poor decisions that seriously undermine the child's permanency, safety, and well-being. When agencies know the characteristics and experiences of youth in out-of-home care, they are able to analyze whether there are gaps in care and whether there are certain groups experiencing disparities. Eliminating questions related to sexual orientation in AFCARS keeps invisible the experiences of the LGBTQ community and leaves the government blind to the unique needs of the LGBTQ community. The absence of accurate data on the national level will obscure the experiences of this vulnerable population and will make it impossible to track whether the system is making improvements to address this significant population of youth in out-of-home care. More data about the experiences and needs of LGBTQ youth is needed, not less.

Collecting sexual orientation data for foster youth can be administered effectively, and the Department should provide training and resources to states and tribes to do so.

The NPRM justifies the erasure of sexual orientation data collection of LGBTQ youth upon an unsubstantiated conclusion (unsupported by empirical evidence) that the collected data would be inaccurate and that the data could lead to breaches of confidentiality because a case worker would be gathering the information.⁹

The child welfare profession has acknowledged the importance of collecting sexual orientation and gender identity (SOGI) information about young people, along with other demographic and critical information about the young person's circumstances, in order to tailor an individualized case plan. In 2013, the Center for the Study of Social Policy, Legal Services for Children, the National Center for Lesbian Rights, and Family Builders by Adoption issued a set of professional guidelines addressing all aspects of managing SOGI information in child welfare systems.¹⁰ The guidelines address the need to collect SOGI information in order to develop case plans and track outcomes in individual cases and to engage in agency planning and assessment.

As a means of assessing risk and tracking disparities and outcomes, many public agencies already collect SOGI information on youth without experiencing the speculative harms cited in the NPRM. Sexual orientation questions have been included on school-based surveys of adolescents for decades through versions of the current Youth Risk Behavior Surveillance Survey distributed by the Center for Disease Control, and SOGI information is collected by many health care providers. Researchers have surveyed LGBTQ youth in the juvenile justice system, significantly increasing the profession's understanding of the disproportionate numbers of LGBTQ youth in detention, as well as differences in offense and detention patterns.¹¹ The regulations promulgated under the Prison Rape Elimination Act (PREA) require youth and

⁹ Adoption and Foster Care Reporting System. 84 Fed. Reg. 16572, (Apr. 19, 2019) (to be codified at 45 CFR 1355) ("It is impossible to ensure that a child's response to a question on sexual orientation would be kept private, anonymous, or confidential considering a caseworker would be gathering this information to enter into a child's case electronic record.")

¹⁰ Shannan Wilber, *Guidelines for Managing Information Related to the Sexual Orientation and Gender Identity and Expression of Children in Child Welfare Systems*, FAMILY BUILDERS BY ADOPTION (2013), <http://cssr.berkeley.edu/cwscmsreports/documents/Information%20Guidelines%20P4.pdf>.

¹¹ Angela Irvine, "We've Had Three of Them": Addressing the Invisibility of Lesbian, Gay, Bisexual and Gender Non-Conforming Youths in the Juvenile Justice System, 19 COLUM. J. OF GENDER & L. 675 (2012).

adult correctional officers to collect SOGI information as part of their initial screening process to identify inmates who may be vulnerable to sexual assault.¹² More and more state and local child welfare and juvenile justice agencies, as well as providers serving youth experiencing homelessness, have developed and successfully implemented policies requiring the collection of SOGI data.

In addition, child welfare agencies are comfortable and competent in collecting, holding, and managing sensitive information. Case workers collect data that is highly personal, private, and confidential, such as sexual abuse backgrounds, mental health diagnoses, and medications. Sexual orientation questions should not be handled any differently from the sort of sensitive information case workers have been collecting and managing for decades. Information in state and tribal systems, like all personal information, is protected by confidentiality requirements.

Child welfare professionals have acknowledged the importance of collecting SOGI information about young people in order to tailor an individualized case plan. While the NPRM confirms that it would be helpful for states to have this data to assist the children and families they work with, the Department takes the position that since there is no statutory requirement, it isn't necessary to collect this critical data.¹³ However, the law clearly allows for the collection of this data and, in fact, Congress enacted statutes requiring the Children's Bureau to add data elements to AFCARS (including information on children who have been placed in alternative child care institutions) to further improve care and promote stability.¹⁴ Further, agencies have an obligation to collect a comprehensive national data set to best effectuate federal programs.

Agencies should retain the sexual orientation question for adoptive and foster parents and guardians.

There is a chronic shortage of foster homes in the United States. Efforts to recruit and retain all qualified families (including LGBTQ families) should be a core part of an agency's recruitment strategy. LGBTQ communities continue to serve as an untapped resource for finding permanent families for children and youth in foster care, and obtaining key data on this population is an essential part of increasing the number of prospective families available for the many young people who are seeking stable families.

Increasing numbers of LGBTQ adults are interested in and actively creating their families through foster care and adoption. A 2007 study found that almost two million LGB adults expressed interest in adopting children.¹⁵ According to the same study, LGB foster parents are raising 6 percent of foster children in the United States. Finally, a 2018 study from the Williams Institute found that same-sex couples are 7 times more likely to be raising foster and adoptive children than different-sex couples.¹⁶ Yet fear of discrimination causes many prospective LGBTQ parents to turn away from foster and

¹² National Standards to Prevent, Detect and Respond to Rape, 28 CFR § 115 (2012).

¹³ Adoption and Foster Care Reporting System. 84 Fed. Reg. 16572, (Apr. 19, 2019) (to be codified at 45 CFR 1355).

¹⁴ See *Fostering Connections to Success and Increasing Adoptions Act* (public Law 110-351, 2008) and the *Preventing Sex Trafficking and Strengthening Families Act* (Public Law 113-183, 2014); See 42 U.S.C.A. § 679(d) of the Social Security Act.

¹⁵ M. V. Lee Badgett et al., *Adoption and Foster Care by Gay and Lesbian Parents in the United States*, 3 URBAN INST <https://www.urban.org/sites/default/files/publication/46401/411437-Adoption-and-Foster-Care-by-Lesbian-and-Gay-Parents-in-the-United-States.PDF>.

¹⁶ Shoshana K. Goldberg & Kerith J. Conron, *How Many Same-Sex couples are Raising Children?*, WILLIAMS INST. (July 2018), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Parenting-Among-Same-Sex-Couples.pdf>.

adoption agencies. LGBTQ parents often express uncertainty about their ability to find an agency that would welcome them as parents. And all too often they are proven correct – in a 2011 national survey of 158 gay and lesbian adoptive parents, nearly half of respondents reported experiencing bias or discrimination from a child welfare worker or birth family member during the adoption process.¹⁷ Further, qualified, loving, LGBTQ couples who have been barred from adopting at one agency are significantly less likely to apply again out of fear of similar discrimination.

Requiring sexual orientation data collection of foster and adoptive parents would encourage training that would lead LGBTQ parents to have more confidence that they would not be discriminated against. Additionally, this would lead to broader efforts to recruit and utilize LGBTQ families, ensuring a more thorough matching and placement process that would provide the greatest chance for success and permanency.

Almost 40 years of research has demonstrated that young people raised by same-sex couples are as healthy and psychologically sound as young people raised by heterosexual parents.¹⁸ Tracking the data of these prospective parents will promote routine discussions between prospective foster parents and Title IV-E agencies, normalize conversations about sexual orientation, and signal increased acceptance of LGBTQ caregivers. A national data set capturing information about prospective LGBTQ parents would assist agencies in recruiting, training, and retaining a larger pool of foster care providers who can meet the needs of children in foster care. In contrast, eliminating the collection of this data will undermine these benefits for same-sex couples seeking to foster or adopt, for children who are seeking permanent homes, and for placement agencies.

The data elements in the final rule are not overly burdensome and have already been streamlined through numerous comment periods.

When HHS released the proposed rule in 2016, the rule went through an extensive notice and comment period, during which the burden of all data elements were discussed and addressed by scores of researchers, advocates, and child welfare and social service experts. The Department already considered and dismissed the purported reasons given in the 2019 NRPM for eliminating this data.

¹⁷ David M. Brodzinsky & Evan B. Donaldson, *Expanding Resources for Children III: Research-Based Best Practice in Adoption by Gays and Lesbians*, EVAN B. DONALDSON ADOPTION INSTITUTE (2011), https://www.adoptioninstitute.org/wp-content/uploads/2013/12/2011_10_Expanding_Resources_BestPractices.pdf.

¹⁸ See Alicia Crowl et al, *A Meta-Analysis of Developmental Outcomes for Children of Same-Sex and Heterosexual Parents*, JOURNAL OF GLBT FAMILY STUDIES (Jan. 9, 2007), <https://www.tandfonline.com/doi/abs/10.1080/15504280802177615> (“extensive data available from more than 30 years of research reveal that children raised by gay and lesbian parents have demonstrated resilience with regard to social, psychological, and sexual health despite economic and legal disparities and social stigma.”); Ellen C. Perrin, Benjamin S. Siegel, *Promoting the Well-Being of Children Whose Parents are Gay or Lesbian*, AMERICAN ACADEMY OF PEDIATRICS (Apr. 2013), <https://pediatrics.aappublications.org/content/131/4/e1374>. (“Analyses revealed statistically significant effect size differences between groups for one of the six outcomes: parent-child relationship. Results confirm previous studies in this current body of literature, suggesting that children raised by same-sex parents fare equally well to children raised by heterosexual parents.”)

The 2016 Final Rule already represents a "streamlining" of the original proposed rule (2015 NPRM and 2016 SNPRM) and the burdens identified by commenters were addressed in the Final Rule. In fact, states, tribal entities, and other stakeholders have had numerous opportunities to provide public comments on AFCARS data elements including in 2003, 2008, 2010, 2015, and 2016. The Final Rule's sexual orientation data elements reflect those numerous public comments, they are not overly burdensome, and they will provide nationwide information regarding children and families whose existence and experiences have remained officially invisible. Any burden involved in implementing new data elements is outweighed by the benefit of a more informed state and federal child welfare system resulting in improved outcomes for some of the most marginalized children in these systems.

Reducing instability and achieving permanency for LGBTQ children through placement with affirming, supportive families and providing needed supportive services will also provide cost savings. A recent Center for American Progress estimate indicates that a child adopted from foster care costs the state only 25% per year as much as a child who remains in foster care, amounting to a \$29,000 cost savings per year, per child.¹⁹

Conclusion

For these reasons, American Atheists strongly opposes the elimination of the sexual orientation data elements for youth and adults through the AFCARS system. Without the data collection established by the 2016 AFCARS Final Rule there is no national data on LGBTQ foster youth or on prospective parents. Given the discrimination faced by both, it is imperative that we learn as much as possible about these too often marginalized populations. If you should have any questions regarding American Atheists' comments on the NPRM, please contact me at 908.276.7300 x309 or by email at agill@atheists.org.

Very truly yours,



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¹⁹ Frank J. Bewkes et al, *Welcoming All Families: Discrimination Against LGBTQ Foster and Adoptive Parents Hurts Children*, CENTER FOR AMERICAN PROGRESS (Nov. 20, 2018), <https://www.americanprogress.org/issues/lgbt/reports/2018/11/20/461199/welcoming-all-families/>.