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Submitted via regulations.gov

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Office of Refugee Resettlement
Administration for Children and Families
Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue, S.W.
Washington, D.C. 20201

**Re: HHS Docket No. ACF-2023-0009, Comments in Response to Proposed Rulemaking:
Unaccompanied Children Program Foundational Rule**

Dear Mr. Biswas:

We write on behalf of the undersigned organizations and academics in response to the Office of Refugee Resettlement's Notice of Proposed Rulemaking on the Unaccompanied Children Program Foundational Rule to address the proposed rule's lack of protections and considerations for LGBTQI+ youth in ORR custody.

LGBTQI+ youth in ORR custody are a vulnerable group, as they often confront compounding challenges and harms that are critical for care provider facilities to consider and address in serving each child's individualized needs. LGBTQI+ youth deserve to be in environments that positively affirm their LGBTQI+ identity. When LGBTQI+ youth experience discrimination or mistreatment or are placed in non-affirming environments, their mental and physical health suffer. Such environments can cause an increase in risk factors such as running away and suicide. To advance the safety and wellbeing of LGBTQI+ youth in federal custody, ORR should work towards creating an accepting and affirming environment where LGBTQI+ youth receive the support they need.

Drawing from our extensive collective experience as organizations and individuals who work directly with LGBTQI+ youth in ORR custody and/or advocate for their rights, we submit the following comments regarding the proposed rule's impact on LGBTQI+ youth and recommend changes to the regulations to advance their wellbeing. We also include general policy recommendations for changes to ORR policy so that ORR and care provider facilities can better meet the unique needs of these youth.

I. ORR Should Provide Affirming and Supportive Environments for LGBTQI+ Youth in Custody.

In accordance with its child welfare mandate under federal law, ORR should ensure that the rights and needs of LGBTQI+ youth in its care are protected. Under the Trafficking Victims Protection and Reauthorization Act, ORR is required to place unaccompanied children in ORR custody in the least restrictive setting in their best interest.¹ A primary consideration in the determination of best interests is the child’s right to identity, including their gender identity and sexual orientation.² Thus, providing affirming and supportive environments for LGBTQI+ youth is integral to ORR’s obligation to advance the best interests of LGBTQI+ youth in its care.

Ensuring strong protections for LGBTQI+ youth in custody in the final rule is also consistent with HHS’ mandate under the Executive Order on Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals, which was signed by President Biden on June 15, 2022, to advance measures to address issues facing LGBTQI+ communities, including disparities within child welfare systems related to LGBTQI+ youth.³ The EO requires the federal government to “take action to address the significant disparities that LGBTQI+ youth face in the foster care system, the misuse of State and local child welfare agencies to target LGBTQI+ youth and families, and the mental health needs of LGBTQI+ youth.”⁴ The EO also directs the Secretary of HHS to “consider how to use the Department’s authorities to strengthen non-discrimination protections on the basis of sex, including sexual orientation, gender identity, and sex characteristics, in its programs and services, consistent with Executive Order 13988 and applicable legal requirements.”⁵ It specifically states that HHS “shall, as appropriate and consistent with applicable law, use the Department of HHS’s authorities to protect LGBTQI+ individuals’ access to medically necessary care from harmful State and local laws and practices,

¹ 8 U.S.C. § 1232 (c)(2)(A).

² Interagency Working Group on Unaccompanied and Separated Children, *Framework for Considering the Best Interests of Unaccompanied Children*, p. 6, (May 2016), <https://www.law.georgetown.edu/human-rights-institute/wp-content/uploads/sites/7/2017/07/Best-Interests-Framework.pdf>, [citing to Comm. on the Rights of the Child, Gen. Comment No. 14, *supra* note 13, at ¶ 55 (“[t]he identity of the child includes characteristics such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, personality.”)]. *See also* Convention on the Rights of the Child, art. 2, Nov. 20, 1989, 1577 U.N.T.S. 3, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>.

³ The White House, *Executive Order on Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals*, (June 15, 2022), <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/06/15/executive-order-on-advancing-equality-for-lesbian-gay-bisexual-transgender-queer-and-intersex-individuals/>. *See also* The White House, *Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, (Jan. 21, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/> (calling on every head of agency to account for and combat discrimination based on sexual orientation and gender identity and “overlapping forms of discrimination such as discrimination on the basis of race or disability”).

⁴ *Id.*

⁵ *Id.*

and shall promote the adoption of promising policies and practices to support health equity, including in the area of mental healthcare, for LGBTQI+ youth and adults.”⁶ In alignment with its legal obligations under this EO, ORR’s regulations should incorporate legal protections against anti-LGBTQI+ discrimination and concrete measures to address issues faced by LGBTQI+ youth in ORR custody.

A. Many LGBTQI+ Immigrant Youth in ORR Custody Come from Countries with Widespread Anti-LGBTQI+ Sentiment and Violence.

In our experience, most youth in ORR custody come from countries where cultural and political persecution of LGBTQI+ individuals is widespread. Some LGBTQI+ youth immigrating from deeply patriarchal countries mask their sexuality and/or gender identity. Others do not consider their sexuality or gender identity due to fear of the repercussions they would face and only begin to do so while in custody. For instance, LGBTQI+ people from the Central American countries of Guatemala, El Salvador, and Honduras, where most youth in ORR custody are from, face particularly violent oppression, hate, and violence.⁷ Much of this anti-LGBTQI+ oppression is rooted in *machista*⁸ culture, where those who express themselves outside of gender norms are ostracized, and often targeted for violence.⁹

Some of our organizations have worked with youth from African countries who were forced to flee home to escape anti-LGBTQI+ violence. LGBTQI+ youth in custody from Middle Eastern and Caribbean countries have similarly expressed fears of attack in their home countries due to their actual or perceived sexual orientation and gender identities.¹⁰ In many cases, these children

⁶ *Id.*

⁷ Human Rights Watch, “Every Day I Live in Fear”: Violence and Discrimination Against LGBT People in El Salvador, Guatemala, and Honduras, and Obstacles to Asylum in the United States, (Oct. 2020), https://www.hrw.org/sites/default/files/media_2020/10/centralamerica_lgbt1020_web_0.pdf.

⁸ Alicia Nuñez et al., *Machismo, Marianismo, and Negative Cognitive-Emotional Factors: Findings from the Hispanic Community Health Study/Study of Latinos Sociocultural Ancillary Study*, 4 J. OF LAT PSYCHOL. 202, p. 3 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5102330/>.

⁹ Andrea Fernández Aponte, *Left in the Dark: Violence Against Women and LGBTI Persons in Honduras and El Salvador*, LATIN AMERICA WORKING GROUP EDUCATION FUND 1, 10 (Mar. 7, 2018), https://www.lawg.org/wp-content/uploads/storage/documents/Between_Dangers_Part_8.pdf.

¹⁰ See e.g., Rightify Ghana, ‘Left Behind’: Discriminatory School Policies, Violence Cut Short Education of Ghanaian LGBTQI Students, (Mar. 31, 2022), <https://rightifyghana.org/2022/03/31/left-behind-discriminatory-school-policies-cut-short-the-education-of-ghanaian-students-suspected-to-lgbtqi/>; Human Rights Watch, ‘All This Terror Because of a Photo:’ Digital Targeting and its Offline Consequences for LGBT People in the Middle East and North Africa, 13, (Feb. 21, 2023), https://www.hrw.org/sites/default/files/media_2023/03/lgbt_mena0223web.pdf; Human Rights Watch, ‘I Had to Leave to Be Me:’ Discriminatory Laws Against LGBT People in the Eastern Caribbean, 35, (Mar. 21, 2018), https://www.hrw.org/sites/default/files/report_pdf/easterncaribbean0318_web_0.pdf. (Describing several accounts of youth ostracized from their church communities due to their perceived sexual orientation and gender identities. “I was in the church youth. I was very feminine, but I try to hide it...I would just feel strange because of my feminineness,” one youth shared.)

were too afraid to report the abuse to local police due to anti-LGBTQI+ laws and widespread discrimination. Many youth also travel through countries hostile towards LGBTQI+ people before entering ORR custody. The pervasiveness of anti-LGBTQI+ sentiment influences some cisgender and heterosexual children in ORR custody to likewise discriminate against their LGBTQI+ peers.

B. LGBTQI+ Youth, Especially Those Who are in the Child Welfare System, Face Challenges Due to their Marginalized Identities.

LGBTQI+ youth have the same needs for growth and learning as their non-LGBTQI+ peers, but they oftentimes also confront “misunderstandings, discrimination, and rejection” due to being LGBTQI+. ¹¹ These challenges can hinder their development and “lead to higher risks of mental and physical health issues.” ¹² In 2022, the Human Rights Campaign conducted a national survey that found that nearly 6 out of 10 LGBTQI+ youth had been bullied at school for their identity within 30 days of being surveyed. ¹³ Youth should not be made to feel ostracized and ashamed for who they are.

In our experience, LGBTQI+ youth tend to be bullied more than their cis-gendered ¹⁴ and heterosexual peers while in ORR custody. ¹⁵ For example, many young people coming from Central America have faced bullying in care provider facilities by staff or even other children due to anti-LGBTQI+ attitudes that may stem from beliefs in their home countries. Even being perceived as “unmasculine” can result in bullying. Youth in ORR custody have reported that because they liked a particular musician or styled their hair a certain way, they were considered “gay” and bullied by their peers, even though the youth themselves did not identify as LGBTQI+.

The risk of harm to children from such bullying and mistreatment cannot be overstated, and the risk is particularly acute for LGBTQI+ youth who already face heightened vulnerability, such as youth involved in the child welfare or juvenile justice systems. One study found that LGBTQI+ youth who had been in foster care were three times more likely to report a suicide attempt in the

¹¹ Children’s Bureau Center for State’s Capacity Building Collaborative, *Considerations for LGBTQ children and youth in foster care: Exploring normalcy as it relates to P.L. 113–183*, STATE’S CAPACITY BUILDING COLLABORATIVE 1, 3 (2016), <https://capacity.childwelfare.gov/states/resources/lgbtq-children-youth-foster-care>.

¹² *Id.*

¹³ Human Rights Campaign, *2023 LGBTQ+ Youth Report*, HUMAN RIGHTS CAMPAIGN (August 2023), <https://reports.hrc.org/2023-lgbtq-youth-report>.

¹⁴ Mayo Clinic Staff, *Transgender facts*, MAYO CLINIC (Feb. 14, 2023), <https://www.mayoclinic.org/healthy-lifestyle/adult-health/in-depth/transgender-facts/art-20266812>, (Defining Cisgender as “An individual whose gender identity and gender expression align with the sex assigned at birth.”).

¹⁵ See generally Madeleine Roberts, *New CDC Data Shows LGBTQ Youth are More Likely to be Bullied than Straight Cisgender Youth*, HUMAN RIGHTS CAMPAIGN (Aug. 26, 2020), <https://www.hrc.org/news/new-cdc-data-shows-lgbtq-youth-are-more-likely-to-be-bullied-than-straight-cisgender-youth>, (discussing findings from 2020 by the CDC that LGBTQI+ youth were more likely to be bullied than their straight or cis-gendered peers in school.).

past year, compared to those who had not been in foster care.¹⁶ The same study found that LGBTQI+ youth who had been in foster care were nearly four times more likely to be kicked out, abandoned, or run away due to treatment based on their LGBTQI+ identity, compared to those who had never been in foster care.¹⁷ On the other hand, the study found that when LGBTQI+ youth who had been in the foster care system attended LGBTQI+-affirming schools, they were 50% less likely to be suicidal than their peers who attended non-affirming schools.¹⁸ This study is consistent with other research and data that demonstrate that affirming and supporting environments for LGBTQI+ youth reduce health concerns and other risks such as running away¹⁹ or suicidal thoughts.²⁰

Given the data and research establishing the positive impact that affirming environments have on the health and wellbeing of LGBTQI+ youth, the Child Welfare Capacity Building Center for States has recommended that “when working with LGBTQI+ children and youth, child welfare systems should offer developmentally therapeutic approaches that...affirm sexual orientation, gender identity, and gender expression.”²¹ The Center has also recommended that child welfare providers should “identify and work to reduce sources of distress for LGBTQI+ children and youth.”²²

Fostering affirming environments is also critical in ensuring that youth who are questioning or are not ready to express their sexual orientation or gender identity are supported as they explore their identities. Most youth in ORR custody are adolescents who are “in an important period of identity formation and integration. Adolescents and young adults establish their identity by actively exploring identity-related choices and making identity commitments in their chosen directions.”²³ Thus, most ORR youth are actively exploring their identity, including their

¹⁶ The Trevor Project, *The Trevor Project Research Brief: LGBTQ Youth with a History of Foster Care*, THE TREVOR PROJECT 1, 4 (May 2021), https://www.thetrevorproject.org/wp-content/uploads/2021/07/LGBTQ-Youth-with-a-History-of-Foster-Care_-May-2021.pdf.

¹⁷ *Id.* at 2.

¹⁸ *Id.*

¹⁹ Youth.Gov, *Homelessness and Housing*, YOUTH.GOV, <https://youth.gov/youth-topics/lgbtq-youth/homelessness#:~:text=Youth%20can%20more%20easily%20heal%20when%20they%20feel,and%20decrease%20stigma%20associated%20with%20LGBT%20identity%2015> (last accessed November 21, 2023).

²⁰ The Trevor Project, *The Trevor Project Research Brief: LGBTQ & Gender-Affirming Spaces*, THE TREVOR PROJECT 3, 3 (December 2020), https://www.thetrevorproject.org/wp-content/uploads/2021/07/LGBTQ-Affirming-Spaces_-December-2020.pdf.

²¹ Children’s Bureau Center for State’s Capacity Building Collaborative, *Affirming and Supporting LGBTQ Children and Youth in Child Welfare*, CHILDREN’S BUREAU CENTER FOR STATE’S CAPACITY BUILDING COLLABORATIVE 2, 2 (2016), <https://capacity.childwelfare.gov/states/resources/affirming-supporting-lgbtq-children-youth>. See also Children’s Bureau Center for State’s Capacity Building Collaborative, *Toolkit to Support Child Welfare Agencies in Serving LGBTQ Children, Youth, and Families*, 2016, <https://capacity.childwelfare.gov/states/resources/toolkit-agencies-lgbtq-children-youth-families>.

²² *Id.*

²³ Riittakerttu Kaltiala-Heino et al, *Gender dysphoria in adolescence: current perspectives*, *Adolesc. Health Med. Ther.*, 9: 31–41, (Mar. 2, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5841333/>.

sexuality, sexual orientation, and/or gender identity. Some youth may be openly exploring their sexual orientation and gender identity or questioning gender norms. Other youth may not be ready to express their sexual orientation and gender identity while they are in ORR custody. While Child Advocates and care provider facilities may establish adequate trust with some children to learn their stories and identify appropriate support services, other children may require more time, stability, and safety to grow self-awareness and confidence in their identities. Regardless, youth are less likely to express their authentic identities in environments where they feel unsupported, invisibilized, or unsafe.²⁴ It is therefore important that ORR implement policies that create safe, nurturing environments that proactively affirm the intersectional identities – known and unknown – of all youth.

II. Recommendations for Changes to the Proposed Rule

The current proposed rule mentions LGBTQI+ youth only three times, once as a definition, and twice within lists for considerations of placements and post-release services (PRS). This minimal language is not enough to protect the rights of LGBTQI+ youth in custody and to ensure their safety and wellbeing. ORR should add provisions to the proposed rule to prevent discrimination against LGBTQI+ youth and to expand the scope of staff training, PRS, and data collection for LGBTQI+ youth.

- Recommendation #1: The Definition of LGBTQI+ within § 410.1001 Should be Expanded.

Under Proposed § 410.1001, the term “LGBTQI+” is defined as “lesbian, gay, bisexual, transgender, queer or questioning, and intersex.” We recommend expanding this definition to include an explanation of the “+” symbol. This expanded definition would make the definition more complete and would better encompass the many other identities that make up the LGBTQI+ community, such as those who identify as asexual, two-spirit, or pansexual.²⁵

Recommendation 1: § 410.1001

LGBTQI+ means lesbian, gay, bisexual, transgender, queer or questioning, and intersex. The “+” represents youth who do not identify as cisgender or heterosexual but for whom LGBTQI does not accurately capture or reflect their identity.

²⁴ Marlene Matarese & Angela Weeks, *National Coming Out Day: For many LGBTQ youth in foster care, ‘coming out’ isn’t an option*, USA TODAY (Oct. 11, 2021), <https://www.usatoday.com/story/opinion/2021/10/11/national-coming-out-day-foster-care/6026035001/>.

²⁵ The Center, *Defining LGBTQ+*, THE CENTER, <https://gaycenter.org/community/lgbtq/> (last accessed Nov. 14, 2023).

- Recommendation #2: ORR should codify its legal obligation to prevent discrimination against LGBTQI+ youth.

Immigrant children are already in a vulnerable position when they come into ORR custody and are even more vulnerable if they are LGBTQI+. It is imperative for ORR to prevent discrimination against LGBTQI+ youth and minimize the various risks they face by ensuring that they are affirmed and supported while in custody. Pursuant to federal civil rights laws, ORR is prohibited from discriminating against LGBTQI+ youth in its care and “does not exclude people or treat them differently because of race, color, national origin, age, disability, religion, or sex (including pregnancy, sexual orientation, and gender identity).”²⁶ Moreover, ORR and its providers have a legal obligation to protect LGBTQI+ youth from discriminatory treatment and abuse.²⁷ This obligation is reflected in ORR Policy Guide Section 3.5.1:

LGBTQI children have the right to be free from discrimination and harassment based on actual or perceived sexual orientation or gender identity. More specifically, care providers may not label a child or youth as a likely abuser or punish a child for his or her sexual orientation, gender identity, or gender expression. All children and youth must be treated fairly and equally and provided with inclusive, safe, and nondiscriminatory services.²⁸

ORR should incorporate these obligations into the proposed regulations, especially in light of a number of states adopting anti-LGBTQI+ legislation pushed by extremist groups that seek to dismantle necessary anti-discrimination protections for LGBTQI+ people.²⁹

Recommendation 2: NEW REGULATION

ORR does not discriminate on the basis of race, color, national origin, age, disability, religion, or sex (including pregnancy, sexual orientation, and gender identity). ORR does not exclude people or treat them differently because of race, color, national origin, age,

²⁶ Office of Civil Rights, *HHS Nondiscrimination Notice*, DEPARTMENT OF HEALTH AND HUMAN SERVICES, <https://www.hhs.gov/civil-rights/for-individuals/nondiscrimination/index.html> (last updated Oct. 26, 2021).

²⁷ The White House, *Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, THE WHITE HOUSE (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>.

²⁸ ORR Policy Guide, Section 3.5.1, ORR UNACCOMPANIED CHILDREN PROGRAM POLICY GUIDE: SECTION 3, <https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-3> (last visited Nov. 30, 2023).

²⁹ Lindsey Dawson et al., *Youth Access to Gender Affirming Care: The Federal and State Policy Landscape*, KFF (June 1, 2022), <https://www.kff.org/other/issue-brief/youth-access-to-gender-affirming-care-the-federal-and-state-policy-landscape/>; Cullen Peele, *Roundup of Anti-LGBTQ+ Legislation Advancing In States Across the Country*, HUMAN RIGHTS CAMPAIGN (May 23, 2023), <https://www.hrc.org/press-releases/roundup-of-anti-lgbtq-legislation-advancing-in-states-across-the-country>.

disability, religion, or sex (including pregnancy, sexual orientation, and gender identity). All children and youth must be treated fairly and equally and provided with inclusive, safe, and nondiscriminatory services. LGBTQI+ children have the right to be free from discrimination and harassment based on actual or perceived sexual orientation or gender identity.

- Recommendation #3: ORR must ensure that LGBTQI+ children have access to gender-affirming healthcare services.

According to the HHS Office of Population Affairs, gender-affirming care is “a supportive form of healthcare. It consists of an array of services that may include medical, surgical, mental health, and non-medical services for transgender and nonbinary people...for transgender and nonbinary children and adolescents, early gender-affirming care is crucial to overall health and well-being.”³⁰ Gender-affirming care allows youth to focus on social transitions and may boost their confidence when navigating the healthcare system.³¹ The American Academy of Pediatrics (AAP) has affirmed that gender-nonconforming youth need gender-affirming care.³² As AAP Immediate Past President Dr. Lee Savio Beers has stated: “It is critically important for every child to have access to quality, comprehensive and evidence-based care — transgender and gender-diverse youth are no exception.”³³

We recommend that ORR add language to the final rule that ensures LGBTQI+ children’s access to healthcare services that affirm their LGBTQI+ identity, including gender-affirming healthcare. In our experience, ORR does not ensure that medical providers, including mental health providers, serving ORR children in custody are trained in providing affirming care to LGBTQI+ youth. ORR and its care providers³⁴ should ensure that LGBTQI+ youth have access to healthcare providers that affirm children’s diverse sexual orientation and gender identities and have received training in how to work with LGBTQI+ youth. Where possible and upon an LGBTQI+ child’s request, ORR should also work in close consultation with qualified healthcare providers, the child, and their parent(s) to ensure access to medically necessary gender-affirming healthcare. As discussed above, gender-affirming healthcare includes a broad spectrum of social,

³⁰ Department of Health and Human Services Office of Population Affairs, *Gender-Affirming Care and Young People*, OASH (August 2023), <https://opa.hhs.gov/sites/default/files/2023-08/gender-affirming-care-young-people.pdf>.

³¹ *Id.*

³² Alyson Sulaski Wyckoff, *AAP continues to support care of transgender youths as more states push restrictions*, American Academy of Pediatrics (Jan. 6, 2022), <https://publications.aap.org/aapnews/news/19021/AAP-continues-to-support-care-of-transgender?autologincheck=redirected>.

³³ *Id.*

³⁴ Proposed § 410.1307(b) and § 410.1307(b)(1) state “Standard programs and restrictive placements shall be responsible for: (1) Establishment of a network of licensed healthcare providers established by the care provider facility, including specialists, emergency care services, mental health practitioners, and dental providers that will accept ORR’s fee-for-service billing system.”

psychological, behavioral and medical services, including and not limited to speech and somatic psychotherapies. Gender-affirming care includes developmentally appropriate case management and clinical services to establish a culture of compassion and mindfulness regarding all children’s gender identities. Establishing a holistic gender-affirming care practice also requires ORR care providers, including Youth Care Workers, to maintain safe spaces for gender-diverse expressions and to support youth to navigate complex emotions surrounding their identities. ORR should also ensure that children receive adequate support and consultation on medical interventions. For LGBTQI+ youth who request medically necessary interventions that require parental consent, ORR should develop clear guidance for care providers on ensuring that youth can exercise their rights under state law.

Ensuring access to affirming healthcare is consistent with HHS’ mandate under the Executive Order on Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals, which states that HHS “shall, as appropriate and consistent with applicable law, use the Department of HHS’s authorities to protect LGBTQI+ individuals’ access to medically necessary care from harmful State and local laws and practices, and shall promote the adoption of promising policies and practices to support health equity, including in the area of mental health care, for LGBTQI+ youth and adults.”³⁵ Under the EO, HHS is also required to “promote expanded access to comprehensive healthcare for LGBTQI+ individuals, including by working with States on expanding access to gender-affirming care.”³⁶ Adding language to the proposed final rule that ensures access to affirming healthcare would also align with Section 1557 of the Affordable Care Act and HHS’ proposed rule implementing Section 1557,³⁷ which affirms protections against discrimination by healthcare providers on the basis of sex, including sexual orientation and gender identity, consistent with the U.S. Supreme Court’s holding in *Bostock v. Clayton County*.³⁸

Recommendation 3: § 410.1307(a)

ORR shall ensure that all unaccompanied children in ORR custody will be provided with routine medical and dental care; access to medical services requiring heightened ORR involvement, consistent with paragraph (c) of this section; family planning services; **gender-affirming healthcare**; and emergency healthcare services.

³⁵ *Supra* note 3. The White House, *Executive Order on Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals*, (June 15, 2022), <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/06/15/executive-order-on-advancing-equality-for-lesbian-gay-bisexual-transgender-queer-and-intersex-individuals/>.

³⁶ *Id.*

³⁷ 42 U.S.C. § 18116(a).

³⁸ *Bostock v. Clayton County*, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020).

- Recommendation #4: ORR must ensure that care providers consult with LGBTQI+ youth in making placement decisions to ensure their placements are safe, appropriate, and in the least restrictive setting in their best interest.

We recommend that ORR add language to the final rule that requires care providers to consult with LGBTQI+ youth in making placement decisions, in order to ensure that ORR has an adequate understanding of the child’s wishes, needs, and concerns with respect to placement. It is in children’s best interests to have their views and needs considered in decisions concerning their safety and wellbeing. Placing transgender, intersex, and gender non-conforming children in spaces that do not affirm their gender identity can exacerbate psychological distress and risk long-term mental health consequences.³⁹ Providing children access to gender-affirming placement options help to support their stability and mitigates risks to their safety and wellbeing.⁴⁰ Requiring care providers to consult with LGBTQI+ youth to ensure safe placements is also consistent with the HHS Administration for Children and Families’ (ACF) recently proposed regulations on Safe and Appropriate Foster Care Placement Requirements for Titles IV-E and IV-B, which “require that agencies implement specific processes and requirements to ensure children in foster care who identify as LGBTQI+ are provided with placements the agency designates as safe and appropriate for an LGBTQI+ child, and with services that are necessary to support their health and wellbeing.”⁴¹

Recommendation 4: NEW SUBSECTION UNDER § 410.1103

(d) ORR care providers shall consult with LGBTQI+ youth in making placement decisions to ensure their placements are safe, appropriate, and affirming of their self-identified gender identity.

- Recommendation #5: ORR Staff Training under § 410.1305(a) Should be Expanded to Include Gender Identity and Sexual Orientation.

Proposed § 410.1305 describes the training that ORR care provider staff are required to have. § 410.1305(a) states: “All [staff, contractor, and volunteer] training should be tailored to the unique needs, attributes, and gender of the unaccompanied children in care at the individual care

³⁹ See Substance Abuse and Mental Health Services Administration, *Moving Beyond Change Efforts: Evidence and Action to Support and Affirm LGBTQI+ Youth*, SAMHSA, 7, 112 (2023), <https://www.samhsa.gov/resource/ebp/moving-beyond-change-efforts-evidence-action-support-affirm-lgbtqi-youth>, (Non-affirming environments, including lack of appropriately trained care providers and efforts to invisibilize or change youths’ sexual orientation and/or gender identity compounds psychological distress youth may likely be experiencing and for which they need support.).

⁴⁰ The Trevor Project, *Homelessness and Housing Instability Among LGBTQ Youth*, 19-21, 30 (Feb. 3, 2022), <https://www.thetrevorproject.org/wp-content/uploads/2022/02/Trevor-Project-Homelessness-Report.pdf>.

⁴¹ Safe and Appropriate Foster Care Placement Requirements for Titles IV-E and IV-B, 88 Fed. Reg. 66752 (Sept. 28, 2023), (to be codified at 45 CFR 1355), <https://www.federalregister.gov/documents/2023/09/28/2023-21274/safe-and-appropriate-foster-care-placement-requirements-for-titles-iv-e-and-iv-b>.

provider facility.” We recommend § 410.1305(a) be amended to require that staff training also be tailored to the sexual orientation and gender identity of the unaccompanied children in care at the facility. In order to adequately serve the needs of LGBTQI+ youth in ORR custody, ORR facility staff should receive training on best practices in serving LGBTQI+ youth and how to promptly identify issues unique to LGBTQI+ youth.

In our experience, many ORR facility staff are not adequately trained in how to work with and support LGBTQI+ youth. For instance, we are aware of one case in which a gender non-conforming youth had been held in ORR custody for nearly a year before care provider facilities realized the child’s actual gender identity and began providing care that affirmed the child’s identity. By then, the child had received dozens of Significant Incident Reports and had been stepped up to two increasingly restrictive placements that failed to provide the gender-affirming care the child needed.

Many ORR facility staff also do not understand that gender and gender identity are different. Gender is a “social and cultural construct that includes gender roles, expressions, behaviors, activities, power dynamics, and/or attributes that a given society associates with being a woman, man, girl, or boy.”⁴² Gender is assigned at birth; many individuals identify with this assigned gender. However, a person may identify as a different gender than they were assigned at birth. Gender identity is an “individual’s sense of being a man, woman, boy, girl, genderqueer, nonbinary, etc. This identity is not necessarily visible to others.”⁴³ Proper training would allow staff to better understand and identify the needs of children whose gender identity differs from their assigned gender.

Training on sexual orientation is also important for staff to better understand the unique challenges faced by youth who do not identify as straight and intervene when bullying based on sexual orientation occurs. This training should also inform care provider staff on how best to support and meet the needs of children who are questioning their gender identity or sexuality. It is crucial that care provider staff have the knowledge and tools to create an environment where youth can safely ask questions, explore expression of gender identities through personal care products, and have access to resources to help them understand who they are. Adequate training should also provide staff with the tools to create an affirming and supportive environment for questioning youth to be able to explore their identity free from bullying.

Recommendation 5: § 410.1305(a)
Standard programs, restrictive placements, and post-release service providers shall provide training to all staff, contractors, and volunteers, to ensure that they understand their obligations

⁴² National Institutes of Health, *Sex, Gender, and Sexuality*, NIH, <https://www.nih.gov/nih-style-guide/sex-gender-sexuality#gender-identity> (last updated Nov. 14, 2023).

⁴³ *Id.*

under ORR regulations in this part and policies and are responsive to the challenges faced by staff and unaccompanied children at the facility. All trainings should be tailored to the unique needs, attributes, and gender, **gender identity and sexual orientation** of the unaccompanied children in care at the individual care provider facility. Standard programs and restrictive placements must document the completion of all trainings in personnel files. All staff, contractors, and volunteers must have completed all required background checks and vetting for their respective roles prior to service provision and care provider facilities must provide documentation to ORR of compliance;

- Recommendation #6: Post-Release Services (PRS) under § 410.1210(b)(12) Should be Expanded to Include Gender-Affirming Healthcare Resources and LGBTQI+ Services.

We applaud the inclusion of LGBTQI+ children as “unaccompanied children requiring additional consideration” for PRS under § 410.1210(c)(3). We believe all LGBTQI+ youth should be provided PRS if they wish to access these services. We also support the requirement under § 410.1210(b) that PRS “shall be provided in a manner that is sensitive to the individual needs of the unaccompanied child and in a way, they effectively understand regardless of spoken language, reading comprehension, or disability to ensure meaningful access for all eligible children.”

However, to help ensure “meaningful access” for LGBTQI+ youth, we recommend that the service areas listed in paragraphs (b)(1) through (12) of § 410.1210 be expanded to include gender-affirming healthcare resources and LGBTQI+-specific post-release services. Newly released LGBTQI+ youth may not be aware of the many resources in various communities that are available to them if they wish to learn more about LGBTQI+-friendly spaces or healthcare resources. At the same time, access to comprehensive post-release services is critical to advancing the health and safety of LGBTQI+ youth who are released from ORR custody, given research that shows that LGBTQI+ youth who lack adequate social supports face a higher risk of homelessness and exploitation.⁴⁴

Information about where youth may access gender-affirming care in the community should be provided within PRS materials and resources. Post-release access to resources on gender-affirming care is vital, as many transgender and gender non-conforming youth experience severe mental health issues due to their bodies not reflecting their gender identity.⁴⁵ These resources are helpful in a variety of ways, as they connect LGBTQI+ youth to their local LGBTQI+ community and can curtail potential risk LGBTQI+ youth may face upon release.

⁴⁴ Lonnie James Bean, *LGBTQ Youth at High Risk of Becoming Human Trafficking Victims*, ADMINISTRATION FOR CHILDREN & FAMILIES (June 26, 2013), <https://www.acf.hhs.gov/archive/blog/2013/06/lgbtq-youth-high-risk-becoming-human-trafficking-victims>.

⁴⁵ Claire McCarthy, *The care that transgender youth need and deserve*, HARVARD HEALTH (Mar. 14, 2022), <https://www.health.harvard.edu/blog/the-care-that-transgender-youth-need-and-deserve-202203142704>.

In addition to expanding PRS to include gender-affirming healthcare resources and LGBTQI+-specific post-release services, ORR must also ensure that these services and supports are provided in a manner that protects LGBTQI+ youth’s right to privacy and requires a youth’s consent before disclosure to their sponsor. Unless a youth consents to disclosure, PRS providers should share information regarding LGBTQI+ support services such as local youth organizations, LGBTQI+-specific health clinics, and community groups directly with the youth, rather than through their sponsor, to avoid improperly disclosing their identity to their sponsor. If the youth requires assistance in accessing specific services, they should be provided with support to ensure that they are able to access those services.

For some youth who are unwilling or unable to disclose their LGBTQI+ identities to their sponsors, ensuring “meaningful access” to PRS may require providers to work directly and confidentially with youth before their release from ORR custody. Providing services to the youth before release may be necessary to prevent improper disclosure of the child’s LGBTQI+ identity to the child’s sponsor. At the same time, ORR should ensure that arranging for such services does not delay release.

Recommendation 6: § 410.1210(c)(3)

LGBTQI+ status unaccompanied children. **PRS shall be provided to all LGBTQI+ youth who consent to those services. PRS providers shall directly provide LGBTQI+ youth information on where to access gender-affirming healthcare and local LGBTQI+ support services and aid youth in accessing those services when the youth requests assistance.**

- Recommendation #7: Care Provider Facilities Should be Required to Report Data on LGBTQI+ Youth to ORR.

Proposed § 410.1501 delineates the type of data about unaccompanied children that care provider facilities are required to report to ORR. § 410.1501(a) specifies the types of biographical information about each child that providers must report. It does not include information regarding children’s sexual orientation and gender identity. We recommend that ORR amend the regulation to require reporting of data regarding children who identify as LGBTQI+. This data should be limited to children who voluntarily disclose that they identify as LGBTQI+, as ORR staff should not pressure youth to disclose information about their sexual orientation or gender identity.

It is important for ORR to track how many youth who identify as LGBTQI+⁴⁶ are in care in order to better meet their needs and placement preferences. By tracking this type of data, ORR will better understand where LGBTQI+ youth are being placed and assess if those programs are adequately providing affirming and supportive care to youth. It is also important for ORR to identify which states LGBTQI+ youth are being placed in, as there are a number of states that limit the rights of LGBTQI+ individuals.⁴⁷ Placement in states with restrictions on LGBTQI+ rights and resources may cause issues for LGBTQI+ youth who request LGBTQI+-specific resources while under ORR’s care or as part of post-release services.

Recommendation 7: § 410.1501(a)

Biographical information, such as an unaccompanied child’s name, gender, date of birth, **information regarding sexual orientation and gender identity which a child has voluntarily disclosed to ORR**, country of birth, whether of indigenous origin, and country of habitual residence;

III. General Policy Recommendations for LGBTQI+ Youth in ORR Custody.

A. ORR Should Refer All LGBTQI+ Youth for Appointment of a Child Advocate

Given the vulnerability of LGBTQI+ unaccompanied youth, we recommend that ORR refer all LGBTQI+ youth who identify as LGBTQI+ for the appointment of a Child Advocate. Youth who openly identify as LGBTQI+ may benefit from working with Child Advocates to help amplify their wishes and promote their best interests while in ORR custody. Child Advocates may also provide supplemental support for LGBTQI+ youth in the transitional months following release from ORR custody.

B. ORR Should Provide Youth with Comprehensive Sex Education (CSE) with Specific LGBTQI+ Learning Modules.

Comprehensive Sex Education (CSE) programs are indispensable in providing youth with the building blocks to understand their bodies, reproductive health, and how to have healthy relationships. According to the World Health Organization, CSE “equips children and young people with the knowledge, skills, attitudes and values that help them to protect their health, develop respectful social and sexual relationships, make responsible choices and understand and

⁴⁶ As mentioned above, some children may not be ready to express their sexual orientation and gender identity or identify as LGBTQI+, while they are in ORR custody. We also recognize that these identities are fluid. Therefore, we expect that data on the number of LGBTQ+ youth who voluntarily disclose that they identify as LGBTQI+ will underreport the actual number of LGBTQI+ youth in custody. Nevertheless, we believe that it is critical for ORR to track the number of youth who voluntarily disclose that they are LGBTQI+ so that ORR can better assess whether it is meeting the needs of these youth.

⁴⁷ Human Rights Campaign, *State Equality Index*, LAWS & LEGISLATION STATE SCORECARDS STATE SCORECARDS STATE SCORECARDS, <https://www.hrc.org/resources/state-scorecards> (last visited Nov. 17, 2023).

protect the rights of others."⁴⁸ Decades of research shows CSE has overwhelming positive lifelong outcomes for youth in their health and future relationships.⁴⁹ Furthermore, "research demonstrates that curricula that are inclusive of all sexual orientations, gender identities, and expressions, across areas of study, and most strongly within CSE, reduce homophobic bullying and harassment, and increase safety for LGBTQI+ students."⁵⁰ LGBTQI+-inclusive CSE also results in better health and relationship outcomes for LGBTQI+ youth, while also curtailing risk factors for LGBTQI+ youth.⁵¹ ORR should consider implementing CSE across its various programs and ensure that all CSE provided by ORR to youth includes LGBTQI+ learning modules.

C. ORR Should Create a Working Group Focused on Improving Care for LGBTQI+ Youth in ORR Custody.

To better inform ORR's policies and practices to affirm and support LGBTQI+ youth, we recommend that ORR convene a working group focused on better meeting the needs of LGBTQI+ youth in ORR custody. The task force would be a space for ORR staff to meet with experts and advocates who work directly with LGBTQI+ youth in ORR custody to address systemic issues and advance long-term policies and practices to improve the care of LGBTQI+ youth. This working group would be able to make policy recommendations and provide support to ORR in the development and implementation of policies.

IV. Conclusion

LGBTQI+ youth deserve to be supported and protected from discrimination and mistreatment while in ORR custody. We urge ORR to adopt our recommendations and improve protections for LGBTQI+ youth in the final rule. We thank ORR for the opportunity to comment on the proposed rule.

For any questions or concerns about this comment, please contact Abena Hutchful at ahutchful@theyoungcenter.org and Alexis Bay at abay@theyoungcenter.org.

Sincerely,

⁴⁸ World Health Organization, *Comprehensive sexuality education*, WORLD HEALTH ORGANIZATION (May 18, 2023), <https://www.who.int/news-room/questions-and-answers/item/comprehensive-sexuality-education>.

⁴⁹ Eva S. Goldfarb, Lisa D. Lieberman, *Three Decades of Research: The Case for Comprehensive Sex Education*, JOURNAL OF ADOLESCENT HEALTH Volume 68 Issue 1 24, 27 (2021), <https://www.sciencedirect.com/science/article/pii/S1054139X20304560>.

⁵⁰ *Id.*

⁵¹ SIECUS: Sex Ed for Social Change, URGE: Unite for Reproductive & Gender Equity Advocates for Youth, Answer, Black & Pink, the Equality Federation, GLSEN, the Human Rights Campaign, the National LGBTQ Task Force, and Planned Parenthood Federation of America, *A Call to Action: LGBTQ+ Youth Need Inclusive Sex Ed Education*, REPORT: LGBTQ+ INCLUSIVE SEX ED (May 2021), <https://urge.org/lgbtq-inclusive-sexed-report/>.

Acacia Center for Justice
Advocates for Basic Legal Equality, Inc (ABLE)
American Immigration Council
Americans for Immigrant Justice
Capital Area Immigrants' Rights (CAIR) Coalition
Catholic Charities Baltimore, Esperanza Center
Central American Resource Center - CARECEN- of California Child and Adolescent Psychiatrist
Church World Service
Community Legal Services in East Palo Alto
Cornell Asylum & Convention Against Torture Appellate Clinic
Dignidad, The Right to Immigration Institute
Empowering Pacific Islander Communities
Florence Immigrant & Refugee Rights Project
Florida Legal Services, Inc.
Freedom Network USA
Galveston-Houston Immigrant Representation Project
HIAS Pennsylvania
Houston Immigration Legal Services Collaborative
Human Rights Initiative of North Texas
Immigrant Defenders Law Center (ImmDef)
Immigrant Justice Task Force, Wellington United Church of Christ Immigration Center for Women and Children
Immigration Equality
InReach
Just Neighbors
Justice Action Center
Justice in Motion

Juvenile Law Center

La Raza Centro Legal

Law Office of Daniela Hernandez Chong Cuy

Lawyers for Good Government

Legal Services for Children

Los Angeles Center for Law and Justice

Lutheran Social Services of the National Capital Area (LSSNCA) Migration Matters

National Immigrant Justice Center

National Immigration Law Center (NILC)

National LGBTQ Task Force Action Fund

OneAmerica

Physicians for Human Rights - Student Advisory Board

LSN Legal, LLC

Rocky Mountain Immigrant Advocacy Network

Safe Passage Project

South Asian Public Health Association

Sunita Jain Anti-Trafficking Initiative

Texas Civil Rights Project

The Immigration Project

UC Davis Immigration Law Clinic

United We Dream

University of Maryland Support, Advocacy, Freedom, and Empowerment (SAFE)

Center VECINA

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