September 30, 2005

Lyn Gates, Director
Office of Licensing
Department of Human Services
P.O. Box 707
Trenton, New Jersey 08625

RE: Proposed Repeal and New Rules, N.J.A.C. 10:122C, Proposal Number PRN 2005-282 (Manual of Requirements for Resource Family Parents) -- <u>Comments On Rule Provisions Affecting Basic Health Care, Health Education And Related Rights Of Children In Out-Of-Home Care</u>

Dear Director Gates:

The following comments are submitted by the Hyacinth AIDS Foundation and the Center for HIV Law and Policy.[1] Our comments are limited to those provisions that we believe implicate the rights of youth in state care and custody to 1) the full array of basic medical services, including sexual health and HIV education, prevention and care; 2) autonomy and privacy in decision-making with respect to sexual health care; and 3) physical and emotional safety and accommodation of basic needs that includes consideration of all of the factors related to individual identity, including race, ethnic background and sexual orientation.

By the end of 2004, 32,746 people were reported living with HIV or AIDS in New Jersey, with the proportion of cases exposed through sexual contact on the rise.[2] Perinatal transmission, while substantially reduced from even five years ago, still produces more than 150 new pediatric exposures a year, and 86% of pediatric cases living with HIV/AIDS are among people of color in New Jersey. Some cities in New

[1] The Hyacinth AIDS Foundation, headquartered in New Brunswick and with offices across the state, is New Jersey's oldest and largest HIV/AIDS service organization. The Center for HIV Law and Policy, based in New York, is the first and only national legal resource and strategy center expanding and supporting the response to the unaddressed legal needs of individuals living with or at risk of HIV.

[2] *See* Division of HIV/AIDS Services (DHAS), New Jersey HIV/AIDS Semi-annual Newsletter (December, 2004), *available at* http://www.state.nj.us/health/aids/aidsqtr.htm.

Jersey are hit particularly hard. In Newark, for example, one in every 31 African Americans is known to be living with HIV or AIDS; in fact, 1 in every 4 African Americans living with HIV/AIDS in New Jersey lives in Newark.[3] None of these statistics include the many thousands more who are undiagnosed or at serious risk of HIV. The proposed rules provide an important opportunity – and responsibility – to address the continuing HIV epidemic among some of the neediest of New Jersey's children, and those who are disproportionately at risk.

The failure to address the sexual health needs of youth, and discriminatory or insensitive treatment of lesbian, gay, bisexual, transgender and questioning youth, both play a role in the intolerably high rate of HIV among young people, including those living in many urban areas of New Jersey. As many as half of all youth with HIV pass through the child welfare system, and youth in state care, particularly lesbian, gay, bisexual and transgender (LGBT) youth, are at an alarmingly high risk of becoming HIV infected. Yet the proposed rules fail to address the provision of sound, comprehensive HIV/AIDS education for children in care and the need to ensure that resource family parents are culturally sensitive and supportive in all areas affecting a child's health, safety, and well-being, including sexual orientation and gender identity. Moreover, ensuring the equal treatment of LGBT children in placement.is consistent with the requirements of New Jersey's Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.*, which prohibits discrimination on the basis of sexual orientation.

These comments are not meant to be a comprehensive discussion of these children's basic needs; rather, they identify several areas of the rule proposal that need to be amended to ensure that basic needs related to HIV and sexual health are addressed met.[4]

10:122C-3.1 Rights of children in placement

Adolescents have a recognized right of access to reproductive and sexual health care and education, including services related to sexually transmitted diseases.[5] The rule provisions on the rights of children in placement should explicitly recognize their right of access to reproductive and sexual health care and education, and should ensure the provision of services related to sexually transmitted diseases, pregnancy and HIV. Further, a minor's right of autonomy and privacy in accessing sexual health services – i.e., the ability to secure sexual health care without prior parental/guardian notice or consent, and to keep the records of such care private – is directly related to their willingness to avail themselves of these services and consequently also should be recognized in the new rules.[6] Finally, the regulations should assure all children in

[3] Division of HIV/AIDS Services (DHAS), New Jersey HIV/AIDS Semi-annual Newsletter (December, 2004), pp.3, 10-15.

[4] In those portions of the comments recommending amendment with specific language, *terms in italics* represent new language, and [brackets] represent deletion of terms in the current DYFS proposal.

[5] *See, e.g.*, N.J.S.A. 9:17A-4.

[6] *E.g.*, Ford, C., Millstein, S. Halpern-Felsherk, B., Irwin, C., *Influence of physician confidentiality assurance on adolescents' willingness to disclose information and seek future health care: A randomized controlled trial*, 278 J.A.M.A. 1029-34 (1997); Council on Scientific Affairs, American Medical Association, *Confidential health services for adolescents*, 269 J.A.M.A.1420-24 (1993).

placement of freedom from discriminatory treatment on the basis of gender, gender identity and sexual orientation in addition to race, ethnicity, national origin, religion, gender identity, and disability.

10:122C-3.2 Records kept by a resource family parent

Adolescents often have their right to medical confidentiality violated. While parents and legal guardians generally have a right of access to medical records and information concerning their children, New Jersey as well as many other states recognize the right of adolescents to confidentiality and autonomy in specific medical situations related to mental health and addiction services, and services related to reproductive health and to the diagnosis and treatment of sexually transmitted diseases. Accommodation of adolescents' right to control access to information and records about these types of services has long been recognized as essential to ensuring their willingness to seek health and life-preserving care.[7]

As the Society for Adolescent Medicine stated in part in its recent publication of positions with respect to confidentiality in the delivery of adolescent health services:

- Confidentiality protection is an essential component of health care for adolescents because it is consistent with their development of maturity and autonomy and without it, some adolescents will forgo care.
- Confidential health care should be available, especially to encourage adolescents to seek health care for sensitive concerns and to ensure that they provide complete and candid information to their health care providers.
- Laws that allow minors to give their own consent for all or some types of health care and that protect the confidentiality of adolescents' health care information are fundamentally necessary to allow health care professionals to provide appropriate health care to adolescents and should be maintained.[8]

Consequently, section 10:122C-3.2 should be amended to accommodate minors' recognized rights to control access to information related to confidential health care services, including reproductive/sexual health care.

10:122C-5.1 General personal requirements.

In delineating the general personal requirements of resource family parents, the proposed rules fail to distinguish between serious contagious diseases that are transmitted through casual contact and those that pose no risk to children in placement through routine family activity. Failure to make this distinction clear risks violation of the proposed rules' provision on discrimination, which prohibits exclusion of prospective resource family

[7] Ford, C.A. and English, A., *Limiting confidentiality of adolescent health services: What are the risks?*, 288 J.A.M.A. 752-753 (Aug. 14, 2002).

[8] Ford, C.A., English, A., Sigman, G., Society of Adolescent Medicine Position Statement, *Confidential Health Care for Adolescents: Position Paper of the Society for Adolescent Medicine*, 35 J. OF ADOLESCENT HEALTH 1-8 (2004).

parents on the basis of disability, and state and federal antidiscrimination law recognizing HIV as a protected disability.[9] Section 10:122C-5.1(a)2.i. should be amended as follows:

> "The resource family parent shall be free of serious contagious diseases that may put a child in placement at risk *through routine or casual contact.*"

10:122C-5.2 References

While the proposed rules identify a number of characteristics related to the responsible care of children in placement for which personal references must vouch, the rules are silent with respect to key qualities of cultural competence that are fundamental to the child's health and welfare. While references are queried with respect to the resource family parent applicant's possible problems ranging from cult membership to drug and alcohol abuse, references are not queried on the applicant's abilities to care for a child regardless of sexual orientation, race or other issues that may affect appropriate parenting. We recommend that the rule be amended to include a new subsection, 10:122C-5.2(c)5.ix, as follows:

> "The personal references shall provide information needed to assist the Department or contract agency in evaluating:
>
> *…ix. The extent to which the applicant's experience, organizational or religious affiliation, attitudes or beliefs may be incompatible with supportive and responsible parenting of any child because of that child's race, national origin, disability, gender and gender identity, sexual orientation or religion."*

10:122C-5.6 Training

Because much mistreatment of LGBT children in placement is a result of ignorance on the part of the caretaker, and an absence of written standards and expectations for their treatment of these children, the Department must affirmatively ensure in its training that the NJ Law Against Discrimination is understood and followed. In recognition to the right of every child in placement to safe and supportive care, 10:122C-5.6(a)1 should be amended to require that:

> "Prior to the issuance of a license, each applicant shall complete pre-service training, provided or approved by the Department, that will adequately prepare the applicant with the appropriate knowledge and skills to provide for the needs of the children who are or may be placed in the home, including but not limited to cultural competence with respect to *a child's race, national origin, disability, gender and gender identity, sexual orientation and religion*."

[9] *See* N.J.S.A. 10:5-5; *Bragdon v. Abbott*, 524 U.S. 624 (1998).

10:122C-6.5 Religion

The proposed regulations should recognize, and address, the potential for the religious beliefs of resource family parents to interfere not only with the child's right to general medical care but to other essential services related to mental, sexual and reproductive health, as well as to accommodation and respect for the child's sexual orientation and gender identity. Accordingly, section 10:122C-6.5(d) of the regulations should be amended as follows:

> "The resource family parent's religious practices shall not interfere with a child in placement receiving medical care, *including but not limited to mental health, sexual health, or reproductive health services and information, or interfere with the child's expression or questioning of his or her sexual orientation or gender identity, regardless of the child's age."*

N..J.A.C. 10:122c-6.10 (a) Clothing

We are aware that on occasion gay or transgender children in foster care have been unfairly prohibited from wearing clothing of their choice on the basis that the clothing was not gender-appropriate. We believe that the failure to recognize the existence of questioning and transgender youth in the foster care system, and the use of terms such as "community standards" in this context can lead to judgmental, and potentially discriminatory, treatment of non-heterosexual children. The unsupportive and judgmental treatment of lesbian, gay, bisexual, transgender and questioning youth has a demonstrated connection to their engagement in high-risk behavior. We believe it is important to address this issue as part of our larger concern with the HIV care and prevention needs of these youth.

This oversight in the rules proposal could be corrected by the following amendment to 10:122c-6.10 (a)1:

> "The resource family parent shall ensure that each child in placement has a personal supply of adequate, clean, well-fitting, and attractive clothing appropriate to the child's age, gender, individual needs *including those related to gender identity and expression,* [community standards] and season."

N.J.A.C. 10:122C-7.1 Health care and medical treatment

The regulations must address the pressing need for comprehensive sexual health care and education to address the significant incidence and risk of HIV among children in placement. The new rules could address this need through the addition of a new subparagraph (a)10:

> *"The resource family parent shall ensure that comprehensive, scientifically-sound sexual health services and information, including but not limited to STD screening, treatment and information, HIV prevention education and diagnosis,*

reproductive health and contraceptive services and information, is available to each child in placement who otherwise possesses capacity to understand such services. Such services and information shall be provided by trained, qualified professionals and shall equally accommodate the needs of all youth in care without regard to gender, sexual orientation, gender identity and expression, or religion.

Conclusion

The proposed new Manual of Requirements for Resource Family Parents contain many provisions important to ensuring the overall safety of children in out-of-home placement. However, the failure to address the sexual health and HIV prevention needs of these children, and the related right of lesbian, gay, bisexual, transgender and questioning youth to supportive care and freedom from discrimination, is a serious omission. We appreciate the opportunity to submit these comments, and hope that they are of assistance in remedying this oversight. We would welcome the opportunity to meet with you to address any questions you may have and to provide further assistance in crafting provisions that satisfy these medical and legal imperatives.

Respectfully submitted,

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