

# **APPENDIX A: HHS Documents**



DEPARTMENT OF HEALTH AND HUMAN SERVICES

Washington, D.C. 20201

**DATE:** January 23, 2019

**TO:** Eric D. Hargan  
Deputy Secretary

**THROUGH:** Jennifer Moughalian  
Acting Assistant Secretary for Financial Resources

Robert P. Charrow  
General Counsel

**FROM:** Steven Wagner  
Principal Deputy Assistant Secretary  
Administration for Children and Families

Roger Severino  
Director, Office for Civil Rights (OCR)

**SUBJECT:** ACF Request for Deviation for South Carolina's Title IV-E Program from  
Select Requirements under 45 CFR Part 75—**DECISION**

**ACTION REQUESTED**

ACF seeks to grant an exception from the religious nondiscrimination requirement in HHS Regulation 45 CFR § 75.300(c) for South Carolina's Title IV-E Foster Care Program, when subrecipients cannot, on the basis of sincere religious belief, assist in certain foster care placements. We recommend that this exception be granted on the condition that exempted subrecipients refer such persons interested in child placements to other subrecipients, or to South Carolina Foster Care Program staff if that staff can refer potential foster parents to other subrecipients.<sup>1</sup>

As required under HHS Grants Policy Administration Manual Part A, Chapter 4 b.(4)(iv), "Deviations from government-wide or HHS regulations must be submitted to OGPOE for approval and, possibly subsequent review by the Office of Management and Budget (OMB)." ACF seeks this exception as a case-by-case exception under 45 CFR § 75.102(b) that does not require OMB approval. That section states that "[e]xceptions on a case-by-case basis for individual non-Federal entities may be authorized by the HHS awarding agency or cognizant agency for indirect costs, except where otherwise required by law or where OMB or other

<sup>1</sup> As discussed below, to the best of our knowledge, South Carolina's religious subrecipients would not object to making referrals to other foster care agencies, and thus the Religious Freedom Restoration Act (RFRA) is not further implicated.

approval is expressly required by this part.”<sup>2</sup> As explained below, this exception is supported by programmatic reasons, by concerns about the statutory authority for § 75.300(c), and by the rights of subrecipients under the Religious Freedom Restoration Act (RFRA), in particular with respect to Miracle Hill Ministries (Miracle Hill), a religious subrecipient of South Carolina’s foster care grant that exclusively recruits foster parents of a particular religion.

## SUMMARY

### **I. Background**

South Carolina’s Department of Social Services (SCDSS) currently holds the Title IV-E Foster Care Grant (Grant Number: 1801SCFOST). The CFDA Number associated with Title IV-E Foster Care is 93.658. In Fiscal Year 2017, SCDSS received \$38,905,680 under the Title IV-E program. According to South Carolina, the State serves over 4,000 children in the foster care system, using a number of secular and faith-based Child Placing Agencies (CPAs) to recruit families for foster care placements. Such CPAs are subrecipients of federal funding under the grant, so according to § 75.300(a), ACF “must manage and administer the [grant] in a manner so as to ensure that Federal funding [received by CPAs] is expended and [the grant program] is implemented in full accordance with [§ 75.300(c) and (d)].”

The first two paragraphs of § 75.300 track OMB’s Uniform Administrative Requirements, 2 CFR § 200.300(a) and (b), and require compliance with applicable statutes. The second two paragraphs, (c) and (d), were added by HHS in a Final Rule that was published on December 12, 2016 (81 FR 89393), and became effective January 11, 2017. Paragraphs (c) and (d) state the following:

*(c) It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation. Recipients must comply with this public policy requirement in the administration of programs supported by HHS awards.*

*(d) In accordance with the Supreme Court decisions in United States v. Windsor and in Obergefell v. Hodges, all recipients must treat as valid the marriages of same-sex couples. This does not apply to registered domestic partnerships, civil unions or similar formal relationships recognized under state law as something other than a marriage.*

HHS relied on 5 U.S.C. § 301 (which relates to internal agency matters and which courts have treated as a housekeeping provision that does not authorize agencies to establish substantive

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<sup>2</sup> The term “cognizant agency for indirect costs” is defined in 45 CFR § 75.2. Section 75.102(b), thus, means that the HHS awarding agency, or the cognizant agency for indirect costs, may grant a case-by-case exception to the requirements of 45 CFR Part 75 (with the exception of the requirements of subpart F, deviations/exceptions can be granted on a case-by-case basis when not prohibited by statute). Thus, the authority for exception does not apply solely with respect to “indirect costs.”

rules that apply to the general public) for authority to promulgate Part 75 and the amendments thereto. In the preamble to the proposed rule, HHS stated that the two provisions “are being proposed for consistency with law and current HHS policy.” Health and Human Services Grants Regulation; Proposed Rule, 81 Fed. Reg. 45270, 45271 (July 13, 2016). Section 75.300(c) was justified as codifying “for all HHS service grants what is already applicable for all HHS service contracts, as required by the HHS Acquisition Regulation.” *Id.* Section 75.300(d) was described as “codifying [HHS’s] implementation of the decisions in *U.S. v. Windsor*, 570 U.S. \_\_\_\_ (2013), 133 S. Ct. 2675 and *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015), 135 S. Ct. 2584.” *Id.* The statutes governing the SC Foster Care Program, however, do not impose many of the nondiscrimination requirements that paragraph (c) imposes as a “public policy requirement,” including nondiscrimination on the basis of religion. The Supreme Court cases cited in paragraph (d) do not require the imposition on non-Federal funding recipients of the requirement contained in paragraph (d).

In January of 2018, SCDSS declined to renew Miracle Hill’s license to provide foster services, because SCDSS asserted that Miracle Hill’s requirement that potential foster parents with which it will work share Miracle Hill’s religious mission and beliefs violates the religious nondiscrimination requirement of 45 CFR § 75.300(c).

On February 27, 2018, Governor Henry McMaster of South Carolina submitted a written request for a “deviation or waiver from current policy to recoup grant funds from SCDSS if the Department determines [45 CFR § 75.300(c) or (d)] are violated by any SCDSS CPA contracts due to religiously held beliefs.” In a subsequent clarifying telephone conversation with Ms. Richele Taylor, the Governor’s Chief Legal Counsel, Ms. Taylor narrowed the exception request to the religious nondiscrimination requirement of 45 CFR § 75.300(c), and agreed that the operational impediments identified therein would be alleviated by permitting SCDSS to require Miracle Hill or a similarly objecting subrecipient to refer people who seek child placements to other CPAs or to South Carolina Foster Care Program staff, when the subrecipient could not, as a matter of sincere religious exercise, provide placements with certain persons because of the persons’ religious beliefs.

On December 18, 2018, Miracle Hill sent a letter to Secretary Azar, with a copy to OCR Director Severino, stating that the application of 45 CFR § 75.300(c) to Miracle Hill substantially burdens Miracle Hill’s religiously motivated conduct in violation of the Religious Freedom Restoration Act; constrains Miracle Hill’s selection of spiritual leaders in violation of *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171 (2012); and exceeds the authority of the nondiscrimination provisions applicable to the SCDSS foster care program. Specifically, while Miracle Hill states that they are committed to serving all program beneficiaries “regardless of his or her race, color, ethnicity, national origin, age, sex, disability, religion, lack of religion, orientation, or identity,” Miracle Hill, as “a Christian ministry, ... believe[s] those who hold certain positions of spiritual influence and leadership—including foster parents—should share [Miracle Hill’s] religious mission and beliefs.” Miracle Hill does not license foster homes or place children in them but, instead, “recruits, qualifies, and encourages families to apply to the State to be licensed as foster families” and “offers ongoing training, encouragement, and administrative, spiritual, and practical support” to foster families.

Additionally, Miracle Hill, in its letter, argues that the religious nondiscrimination requirement of 45 CFR § 75.300(c) (and other requirements of paragraphs (c) and (d)) are *ultra vires* to the extent they exceed the mandate of the statutes applicable to the foster care program,<sup>3</sup> or “impose requirements contrary to the Constitution and RFRA.” Similarly, South Carolina argues that, because § 75.300(c) implements a religious nondiscrimination requirement that goes beyond those in the Title IV-E nondiscrimination statute or other applicable statutes, it is unlawful. For reference, 42 U.S.C. § 671(a)(18), which is applicable to the Title IV-E foster care and adoption program, provides:

*(a) Requisite features of State plan. In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which—*

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*(18) not later than January 1, 1997, provides that neither the State nor any other entity in the State that receives funds from the Federal Government and is involved in adoption or foster care placements may—*

*(A) deny to any person the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the person, or of the child, involved; or*

*(B) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved[.]*

## **II. Justification for Deviation Request**

### **A. HHS Grants Regulations**

Title IV-E of the Social Security Act (the Act) provides Title IV-E agencies with significant latitude to determine how and under what conditions an agency will license or approve prospective foster or adoptive parents. The Act requires each state or tribe operating a Title IV-E program to designate or establish a licensing authority that establishes and maintains standards for foster homes and child care institutions that are reasonably in accord with nationally recommended standards. The Act does not apply the foster family home licensing standards to adoptive family homes; rather, an agency must place a child for adoption in accordance with applicable state, tribal, and local law. The Act does not prohibit Title IV-E agencies from establishing additional criteria otherwise allowed by law for licensing foster family homes or approving adoptive families. As such, a Title IV-E agency has substantial flexibility in establishing licensing criteria for foster families and approval requirements for adoptive families.

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<sup>3</sup> The referenced statute is the nondiscrimination provision applicable to the Title IV-E foster care and adoption program. See 42 U.S.C. § 671(a)(18).

South Carolina's exception request is allowed by the laws and regulations governing ACF's grant-making authority. South Carolina seeks an exception from an HHS-promulgated regulation, and HHS may grant case-by-case exceptions under 45 CFR § 75.102(b). South Carolina's letter asks for an exception from the entirety of 45 CFR § 75.300(c) and (d), although (as noted below) the request was subsequently limited to the religious nondiscrimination provision in 45 CFR § 75.300(c). In its letter, Miracle Hill specifically objects to 45 CFR § 75.300(c).

Neither South Carolina nor Miracle Hill sought an exception from 45 CFR § 75.300(a) and (b). Under § 75.300(a), South Carolina would still be required to ensure that "[f]ederal funding is expended and associated programs are implemented in full accordance with U.S. statutory and public policy requirements." These requirements include the nondiscrimination requirements of 42 U.S.C. § 671(a)(18), as well as any other applicable statutory nondiscrimination requirements.

In general, ACF's interest is in expanding access to foster care services by, *inter alia*, increasing the number of participating foster care families. ACF has not conducted an independent analysis to determine the impact of the proposed exception on access to foster care settings in South Carolina. However, South Carolina states it has more than 4,000 children in foster care, that it needs more child placing agencies, and that faith-based organizations "are essential" to recruiting more families for child placement. South Carolina specifically cites Miracle Hill, a faith-based organization that recruits 15 percent of the foster care families, and states that, without the participation of such faith-based organizations, South Carolina would have difficulty continuing to place all children in need of foster care. South Carolina's letter argues that, if it is not provided an exception from section 75.300(c) and (d), certain faith-based organizations operating under the grant would have to abandon their religious beliefs or forego licensure and funding and that this would cause hardship to faith-based organizations and the state's foster care program.<sup>4</sup> Similarly, Miracle Hill's letter states that this has already happened to Miracle Hill because of its commitment to its religious principles.

We infer from South Carolina's failure to cite objections from other specific entities, and from the fact that Miracle Hill only accounts for 15 percent of foster care families in the program, that there are other entities in the program that do not use similar religious criteria in selecting among prospective foster care parents. Miracle Hill itself states that there are at least nine other private foster care providers in Miracle Hill's area, and SCDSS itself, that work with any foster parents, regardless of, among other things, their religious beliefs.

Given this set of facts, ACF believes a limited exception should be granted so that Miracle Hill, or any other subrecipient in the South Carolina Foster Care Program with the same objection to facilitating placements with certain persons because of such persons' religious beliefs, should be

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<sup>4</sup> In its letter, South Carolina did not specify the aspects of 45 CFR § 75.300(c) and (d) that Miracle Hill and/or other faith-based organizations find objectionable. ACF reached out to the Governor's office for clarification. The Governor's chief legal counsel clarified that the exception request is only for the religious nondiscrimination requirement of section 75.300(c), and that South Carolina is unaware of any subrecipient that would object to referring people to other child placement agencies or to South Carolina Foster Care Program staff when the subrecipient cannot, as a matter of sincere religious exercise, provide placements with certain persons because of the persons' religious beliefs.

conditionally excepted from the religious nondiscrimination requirement of 45 CFR § 75.300(c). We recommend granting the exception on the condition that Miracle Hill, or any other subrecipient making use of this exception, will be required to refer foster parent candidates to which the subrecipient cannot make a placement to other subrecipients in the South Carolina Foster Care Program that are willing to accept such referrals, or to the South Carolina Foster Care Program staff themselves, if the South Carolina Foster Care Program is equipped to refer those persons to other willing subrecipients. This condition is recommended on the understanding that Miracle Hill, and any other subrecipient making use of this exception, does not object on religious grounds to making such referrals and, therefore, the condition does not implicate additional RFRA concerns.

The purpose of the proposed exception is to facilitate the participation of faith-motivated entities in the recruitment of families for South Carolina's foster care program. If approved, the State of South Carolina will be informed by means of a letter. Additionally, ACF may make this specific approval known through the issuance of an Information Memorandum to state, tribal, and territorial agencies administering or supervising the administration of Title IV-E of the Social Security Act. The effective date will be immediately upon approval.

#### **B. Religious Liberty Analysis**

The Secretary delegated to HHS's Office for Civil Rights (OCR) the Department's responsibility and authority to implement and ensure compliance with RFRA, including the ability to investigate complaints, offer technical assistance, or conduct compliance reviews concerning programs or activities funded, conducted, or administered by the Department. OCR has reviewed the letters from South Carolina and Miracle Hill, and has prepared the following religious liberty analysis.

RFRA provides that the federal government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless "it demonstrates that the application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. The "exercise of religion" "includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4) and 2000cc-5(7)(A).

A substantial burden is any burden that is not illusory or *de minimis*. The Supreme Court has held that even a five dollar fine can be a substantial burden. *Wisconsin v. Yoder*, 406 U.S. 205, 208 (1972). Furthermore, for purposes of this analysis, whether the financial consequences are a fine or the withholding of a benefit, such as a grant or a license, is irrelevant. See *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."). RFRA was specifically designed to enshrine the analyses of *Yoder* and *Sherbert* into federal statutory law. 42 USC § 2000bb(b)(1) ("The purposes of this chapter are (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free

exercise of religion is substantially burdened.”). Notably, in 2017, the Supreme Court recognized that religious institutions applying for government grants have “a right to participate in a government benefit program without having to disavow [their] religious character” under the standard set forth in *Sherbert. Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

It is our understanding that certain religious organizations in South Carolina cannot, as a matter of sincere religious exercise, provide child placements with certain persons because of the persons’ religious beliefs. For example, as described in Miracle Hill’s letter to the Secretary, Miracle Hill serves children in need of foster care as a matter of its religious exercise. As part of that exercise, it will only partner with potential foster parents whose religious beliefs match Miracle Hill’s religious mission and beliefs. SCDSS determined that this religious exercise would violate provisions of 45 CFR § 75.300(c) that go beyond the requirements of 42 U.S.C. § 671(a)(18). This threatens Miracle Hill’s ability to continue to participate in the Title IV-E foster care program. As Miracle Hill describes the situation:

The Department’s regulation has put Miracle Hill to an impossible choice: either abandon our deeply and sincerely held religious beliefs or abandon children in desperate need. As a matter of religious conviction, we can do neither. Miracle Hill’s ministry to abused, orphaned, or neglected children is compelled by our religious beliefs and is itself an exercise of our beliefs. . . . Further, because we view this ministry as religious exercise, and because foster parents are our co-laborers in this religious exercise, we choose, as a matter of religious conviction, to partner only with foster parents who share our religious mission, motivation, and beliefs. Accordingly, a government demand that Miracle Hill either abandon our service to children in need or compromise the way we partner with the parents who serve them imposes a substantial burden on our religious exercise.

Forcing a faith-based organization, such as Miracle Hill, to choose between its religious beliefs and closing its foster care operations through application of 45 CFR § 75.300 would be a government-imposed substantial burden on religious exercise. The disqualification or exclusion of such an organization as a subrecipient in the grant activities of a willing grantee, such as South Carolina, on the basis of the subrecipient’s religiously based inability to comply with the religious nondiscrimination requirement in 45 CFR § 75.300(c) would, thus, establish a *prima facie* violation of RFRA. See Department of Justice, “Federal Law Protections for Religious Liberty,” 82 FR 49668, 49669 (Oct. 26, 2017) (“RFRA applies to all actions by federal administrative agencies, including . . . grant or contract distribution and administration”); see also OLC Opinion, “Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act,” 31 Op. O.L.C. 162 (2007) (stating that RFRA requires the Office of Justice Programs to exempt a religious organization that is a grantee under the Juvenile Justice and Delinquency Prevention Act from a religious nondiscrimination requirement of that grant).

According to the Supreme Court, “RFRA operates by mandating consideration, under the compelling interest test, of exceptions to ‘rule[s] of general applicability’” to prevent substantial

burdens on religious exercise. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 434 (2006). Thus, where government action or policy imposes a requirement that would constitute a *prima facie* violation of RFRA, the government is prohibited from engaging in that action, or must grant a religious exception to that policy, unless it can show that the action or policy furthers a compelling governmental interest through means that are the least restrictive on religious exercise.

To prove that it has a compelling interest, the government must show more than a generalized interest behind the imposition of a burden; rather, it must show that it has a compelling interest in burdening the specific person or entity whose religious beliefs are impacted. As the Supreme Court noted,

RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than [a] categorical approach. RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law “to the person”—the particular claimant whose sincere exercise of religion is being substantially burdened. . . . [In *Sherbert and Yoder*], this Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants. In *Yoder*, for example, we permitted an exemption for Amish children from a compulsory school attendance law. We recognized that the State had a “paramount” interest in education, but held that “despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote . . . and the impediment to those objectives that would flow from recognizing *the claimed Amish exemption*.” The Court explained that the State needed “to show with more particularity how its admittedly strong interest . . . would be adversely affected by granting an exemption *to the Amish*.”

*Gonzales*, 546 U.S. at 430–31 (emphasis in original, internal cites omitted).

Under this analysis, for HHS to deny a grant, or to prohibit a grantee from working with a subrecipient, such as Miracle Hill, because of its sincere religious objection to complying with certain regulatory conditions, HHS would have to show not only that it has an interest of the highest order in the policies furthered by the regulations, but also that it has an interest of the highest order in forcing the *particular objecting entity* to comply with the regulations.

HHS regulations explicitly allow for HHS to provide exceptions on a case-by-case basis, 45 CFR § 75.102(b), or on a program-wide basis with the concurrence of OMB, 45 CFR § 75.102(a). See *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 884 (1990) (“where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.”). Courts have struck down laws or policies that granted secular entities exceptions or allowed other reasons for sidestepping rules, if similar exceptions for religious entities or for persons seeking exceptions for religious reasons were not also granted. See, e.g., *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 366 (3rd Cir. 1999) (Alito, J.) (“when the government makes a value

judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny"). As the Supreme Court noted in striking down a law prohibiting animal sacrifice as part of a religious observance, while permitting killing animals for other reasons, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547 (1993); see also *Holt v. Hobbs*, 135 S. Ct. 853, 865 (2015). Although OCR is not aware of other exceptions HHS has provided with respect to 45 CFR § 75.300(c), the requirements are very new, and HHS did not impose them in any grant prior to January 2017. The recent vintage of section 75.300(c) leaves HHS open to the argument that it would not have waited until 2017 to act to protect its interests as applied to religious organizations if they were indeed compelling.

That an interest is compelling can also be undermined by comparing the program with other, analogous programs. For example, in *Holt v. Hobbs*, the Supreme Court questioned whether a policy requiring prison inmates to shave their beards was compelling in light of the fact that other prisons did not have the same requirement. *Holt*, 135 S. Ct. at 866. In the grant context, then, if the requirements that constitute a substantial burden are not found in other grants or in similar grants from other agencies, it is difficult to establish that the interests sought to be furthered are actually compelling. In this case, OMB's Uniform Administrative Requirements do not contain the same broad requirements that HHS recently enacted at 45 CFR § 75.300(c). See 2 CFR § 200.300.

Finally, even if the government can show that it has a compelling interest in furthering the regulation's objectives with respect to the particular religious objector, it must also show that the requirements of the regulation are the least religiously burdensome means of accomplishing that compelling interest — RFRA's "least-restrictive-means" test. *Hobby Lobby v. Burwell*, 134 S. Ct. 2751 (2014) ("The least-restrictive-means standard is exceptionally demanding."). If HHS can identify any other method of furthering the goals of 45 CFR § 75.300(c) that is less burdensome to the religious objector, then it cannot require the religious objector to abide by the regulation.

OCR also does not believe that HHS has a compelling interest in imposing such burdens on religious organizations, pursuant to regulations, because the regulatory requirements exceed the nondiscrimination requirements of the applicable statutes. As noted above, 45 CFR § 75.300 adds several novel factors to those that are addressed by 42 U.S.C. § 671(a)(18). While the statute, which is applicable to the SC Foster Care Program, only prohibits discrimination on the basis of "race, color, or national origin," the new regulations add additional protected classes that are not imposed on the Title IV-E foster care and adoption program by section 671(a)(18) or by any other statute. Of additional relevance, the regulation provides no exceptions for religious organizations as are found in statutes that prohibit religious discrimination explicitly. See e.g., 42 U.S.C. § 2000e-1(a) (Title VII); 42 U.S.C. § 3607(a) (Fair Housing Act).

South Carolina does not seek exemption from the nondiscrimination statute applicable to its foster care program (42 U.S.C. § 671(a)(18)), other applicable nondiscrimination statutes, such as the Age Act or Section 504 of the Rehabilitation Act, or other provisions of the regulation in

question, such as 45 CFR § 75.300(a) and (b). While South Carolina's letter sought an exception from 45 CFR § 75.300(c) and (d) in their entirety, the Governor's chief legal counsel subsequently narrowed the exception request to the religious nondiscrimination requirement of 45 CFR § 75.300(c), and agreed that any operational impediments would be alleviated by permitting an objecting subrecipient to refer people to other child placement agencies or to South Carolina Foster Care Program staff when the subrecipient cannot, as a matter of sincere religious exercise, provide placements with certain persons because of those persons' religious beliefs.<sup>5</sup>

In its letter, Miracle Hill similarly complains about, and seeks relief from, the requirements found in the new regulations that impose a substantial burden on its religious exercise based on its belief that "those who hold certain positions of spiritual influence and leadership – including foster parents – should share [its] religious mission and beliefs." It notes that the requirements in the new provisions exceed the requirements in the nondiscrimination provision applicable to the foster care and adoption program. Miracle Hill also notes that other entities can provide the services to which it objects: Its letter notes that "there are no fewer than nine other private foster care providers in [Miracle Hill's] area, several of whom are located mere minutes away, plus [SCDSS] itself, all of whom work with any foster parents regardless of their religious beliefs or unbelief, orientation, or identity."

OCR is conducting an ongoing investigation related to the complaint received from Miracle Hill. While OCR may make additional findings and determinations as a result of that investigation, after consulting with the HHS Office of the General Counsel, and based on the information provided by South Carolina and Miracle Hill, OCR concludes that denying South Carolina an exception from the religious nondiscrimination requirement in 45 CFR §75.300(c) would impose a substantial burden on the religious exercise of certain of its subrecipients – such as Miracle Hill – by forcing them to choose between receipt of a government contract (and participating as a subrecipient in South Carolina's Foster Care Program) and following their sincere religious beliefs. For the reasons set forth above, OCR also questions whether HHS has a compelling interest in applying the substantive prohibition at issue to a religious organization, given its recent vintage, lack of statutory basis, and non-uniform application to other HHS programs.<sup>6</sup> Furthermore, to the extent that maximizing access to the Title IV-E foster care program is a compelling governmental interest, forcing South Carolina to exclude faith-based organizations from its Foster Care Program – such as Miracle Hill, which provides significant foster care capacity in South Carolina – would contravene that interest, particularly considering that multiple other providers in the same area are available to partner with foster parents that Miracle Hill cannot partner with in a manner consistent with its religious beliefs. The State of South

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<sup>5</sup> While South Carolina's request letter only identified Miracle Hill as such a faith-based organization, it has indicated that other entities in the program are also religious in nature; the RFRA analysis would apply to such entities, to the extent they hold similar religious beliefs as Miracle Hill. The State represented to HHS that it knows of no subrecipient that would take advantage of the requested exception but would, as a matter of religious exercise, object to making referrals to willing subrecipients in the South Carolina Foster Care Program.

<sup>6</sup> This is particularly true where, as here, the substantial burden comes solely from requirements not found in OMB's uniform grant requirements and which are not based on the statute underlying the grant. See *Holt*, 135 S. Ct. at 866 (noting that the policies of "other well-run institutions" is relevant in determining whether the proposed restrictions are compelling interests imposed using the least-restrictive means (quoting *Procurier v. Martinez*, 416 U.S. 393, 414 n.14 (1974))).

Carolina has, previously, expressed to HHS that excluding Miracle Hill from South Carolina's foster care program will negatively impact the State's ability to make foster care placements. ACF has also stated that reducing the number of CPAs would frustrate the purposes of the HHS/ACF grant program at issue.

Presuming that HHS has a generalized compelling interest in the prohibition at issue, OCR doubts it has a compelling interest in applying it to the particular religiously objecting grant subrecipients in South Carolina when, as both South Carolina and Miracle Hill agree, there are child placement agencies in South Carolina funded by the HHS grant that are willing to work with prospective foster parents of different faiths or no faith in compliance with the religious nondiscrimination requirement in 45 CFR § 75.300(c). For similar reasons, OCR doubts HHS could satisfy the least restrictive means test.

Excluding subrecipients from South Carolina's Foster Care Program will likely reduce the number of faith-based CPAs and, according to South Carolina, would negatively impact the State's ability to make foster care placements. ACF believes that reducing the number of CPAs would frustrate the purposes of the HHS/ACF grant program at issue. At the same time, it is OCR's understanding that other subrecipients in South Carolina, either individually or collectively, would be willing to make foster care placements in compliance with the religious nondiscrimination requirement in 45 CFR § 75.300(c) and that objecting subrecipients are willing to make referrals to such CPAs, or to the South Carolina Foster Care Program staff. Therefore, HHS can achieve the goal of maximizing the number of foster care placements with legally qualified persons without forcing a subset of faith-based subrecipients in the South Carolina Foster Care Program to comply with the religious nondiscrimination requirement in 45 CFR § 75.300(c) in conflict with their sincere religious beliefs.

### C. Statutory Authority

Granting the exception is legally supported because the legal justification for the non-statutory nondiscrimination requirements of § 75.300(c) and (d) are suspect. Paragraphs (a) and (b) of § 75.300, which are uniform across all agencies, prohibit discrimination among federal funding recipients on grounds set forth by Congress in statute. HHS added paragraphs (c) and (d) to require, as a "public policy" matter, nondiscrimination on the basis of religion, sexual orientation, gender identity, and same-sex marriage status among HHS grantees and subrecipients.

OGC has advised HHS that it may not impose substantive grant conditions, such as nondiscrimination requirements, without clear statutory authority. *See also Pharmaceutical Research and Manufacturers of America v. United States Department of Health and Human Services*, 43 F. Supp. 3d 28 (D.D.C. 2014). When HHS added § 75.300(c) and (d), OGC advised that any requirement imposed on grantees prohibiting discrimination on grounds not clearly specified by statute would be at risk of a challenge under the Administrative Procedure Act (APA). An APA claim could contend that HHS lacks underlying statutory authority to impose such a requirement, and that the requirement is inconsistent with Congress's intention in establishing the program. Congress has been selective in imposing specific nondiscrimination

criteria in certain statutes, and in not imposing the same criteria in others. For example, Title VI of the Civil Rights Act prohibits discrimination on the basis of race, color, and national origin, but not religion or sex. Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex, but not religion, and only in certain programs. Congress does not prohibit discrimination on the basis of religion in many of its statutes, including those applicable to the SCDSS foster care program, and does not prohibit discrimination on the basis of sexual orientation, gender identity, or same-sex marriage status in any statute applicable to HHS grants. In the preamble to the Federal Register notices by which 45 CFR 75.300(d) was promulgated, HHS suggests that, under the Supreme Court's cases in *United States v. Windsor* and in *Obergefell v. Hodges*, federal funding recipients may not discriminate on the basis of same-sex marriage status. Those cases do not reach that holding, however, but simply require federal and state governments to treat same-sex and opposite-sex couples the same in defining marriage. It is unlikely the Supreme Court would extend *Windsor* and *Obergefell* to prohibit all entities receiving federal grant funds from discriminating on the basis of same-sex marriage status. In this case, the SCDSS program at large works with potential foster care parents of all religions, orientations, or marriage status; the exception requested by SCDSS would simply allow some subrecipients to offer placements to a narrower range of potential foster parents based on religious belief, and would ensure that they refer others to the State itself or to agencies that will work with them.

### III. Conclusion

The exception should be granted for several reasons. Rejecting the exception, and instead continuing to require SCDSS to require Miracle Hill and similar subrecipients to comply with the religious nondiscrimination requirement of 45 CFR § 75.300(c) would impose a substantial burden on Miracle Hill by forcing it to choose between, on the one hand, following its religious convictions and being denied its license to provide foster services, or on the other hand, abiding by the additional requirements of 45 CFR § 75.300(c), in violation of its religious beliefs. HHS grants regulations provide authority in 45 CFR §75.102(b) to grant case-by-case exceptions. OMB's Uniform Administrative Requirements lack parallel "public policy" requirements of religious nondiscrimination as found in 45 CFR § 75.300(c). HHS likely lacks statutory authority to impose the objected-to requirements through 45 CFR § 75.300(c). Excluding Miracle Hill from the SCDSS Title IV-E foster care program would harm the program and potentially reduce foster care placements. There are multiple other providers in the program and in the area where Miracle Hill operates that do not hold Miracle Hill's religious beliefs, and to whom potential foster parents seeking to work with Miracle Hill could be referred. OCR is conducting an investigation; while it may make additional findings and determinations, it has concluded that, at a minimum, enforcing the religious nondiscrimination provision of 45 CFR § 75.300(c) against Miracle Hill would constitute a violation of RFRA, and that a deviation or exception for South Carolina with respect to Miracle Hill (and other, similarly situated organizations) should be granted. It is also OCR's understanding that Miracle Hill, and any other subrecipient making use of this exception, does not object on religious grounds to making referrals and, therefore, a referral requirement does not implicate additional RFRA concerns.

Consequently, ACF recommends that a conditional exception from the religious nondiscrimination requirement of 45 CFR § 75.300(c) be provided for the South Carolina Title IV-E Foster Care Grant (Grant Number: 1801SCFOST), as requested by the State of South Carolina, on the condition that Miracle Hill, or any other subrecipient making use of this exception, will be required to refer foster parent candidates to whom the subrecipient cannot make a placement to other subrecipients in the South Carolina Foster Care Program that are willing to accept such referrals, or to the South Carolina Foster Care Program staff themselves if the staff are equipped to refer those persons to other willing subrecipients. The exception would not relieve the South Carolina Foster Care Program of its obligation to comply with the nondiscrimination requirements of 42 U.S.C. § 671(a)(18), all other parts of 45 CFR § 75.300(c), § 75.300(d), or § 75.300(a) and (b) (for which South Carolina has not requested an exception), and with any provisions of civil rights statutes, including Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, and section 504 of the Rehabilitation Act of 1973 that may apply.<sup>7</sup>

The proposed relief and the condition of that relief, described above, have been discussed with the Governor's Chief Legal Counsel, Ms. Richele Taylor, who agrees that the proposed relief will satisfy the State's objective and that the condition is practicable – and indeed is already being done.

### **RECOMMENDATION**

ACF seeks approval to except SCDSS from the religious nondiscrimination provision of 45 CFR § 75.300(c), to the extent it substantially burdens the religious exercise of subrecipients such as Miracle Hill and on the condition that such subrecipients refer potential foster parents with whom they cannot work, on the basis of religious belief, to other subrecipients or to SCDSS. This relief may take the form of ACF granting the recipient an exception to the objected-to requirement of 45 CFR § 75.300(c) as applied to all subrecipients objecting on religious grounds, if the referral condition is satisfied, or by ACF requiring the recipient to specifically exempt Miracle Hill from such requirements. To avoid recurring issues with other potential religious objectors, we recommend granting the exception to apply to all subrecipients similarly situated to Miracle Hill.

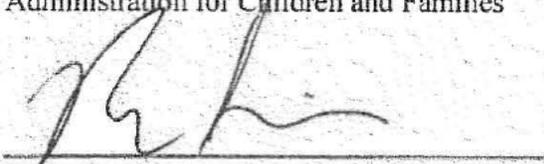
---

<sup>7</sup> 42 U.S.C. § 2000d *et seq.*, 20 U.S.C. § 1681 *et seq.*, 42 U.S.C. § 6101 *et seq.*, and 29 U.S.C. § 794, respectively.

For all the religious liberty and programmatic reasons discussed above, we recommend that you approve the exception from the religious nondiscrimination requirement in 45 CFR § 75.300(c) for South Carolina's Title IV-E Foster Care Program, on condition that subrecipients whose religious exercise would be impermissibly burdened by such provision refer persons interested in child placements to other subrecipients, or to the South Carolina Foster Care Program staff themselves if that staff are equipped to refer those persons to other willing subrecipients.



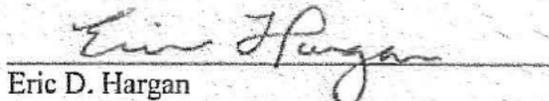
Steven Wagner  
Principal Deputy Assistant Secretary  
Administration for Children and Families



Roger Severino  
Director, Office for Civil Rights

**DECISION**

Approved  Disapproved  Need More Information

  
Eric D. Hargan

1/29/2019  
Date

**Attachments**

- TAB A: Letter from Governor McMaster, dated February 27, 2018
- TAB B: Letter from Reid Lehman, President/CEO of Miracle Hill Ministries, dated December 18, 2018
- TAB C: Draft Response to Governor McMaster





SEP 19 2018

Jay Timmons  
President and CEO

July 25, 2018

The Hon. Alex M. Azar II  
Secretary of Health and Human Services  
U.S. Department of Health and Human Services  
330 C Street NW  
Washington, D.C. 20416

Dear Secretary Azar:

A few weeks ago, I requested to speak with you about an issue of critical importance and I write today to provide you with background. I hope to schedule a call or an in-person meeting to discuss this matter further.

The Health and Human Services Department has encouraged states to seek a waiver that would exempt them from non-discrimination policies relating to child placement services. The most recent instance has come from South Carolina, as Governor Henry McMaster has requested a waiver to permit his state's Child Placing Agencies to discriminate based on a religious objection.

Governor McMaster specifically cites the Miracle Hill agency. While that agency's record of placement is generally positive, their record of discrimination is not. As you are likely aware, a Jewish couple, who moved from Florida and who had fostered 13 children there, were denied the ability to even apply to become foster parents through the Miracle Hill agency, which is a Christian faith-based group.

As you know from your previous career and our work together, manufacturers reject discrimination in all of its ugly forms. At issue is whether Child Placing Agencies that benefit from federal dollars should be permitted to discriminate, whether on the basis of race, religion, national origin, marital status or sexual orientation. There are certainly organizations that are faith-based that choose to discriminate for one reason or another – perhaps based on the religious affiliation of the applying parent(s), or perhaps based on an objection to a legally recognized marriage between a couple of the same gender. Although rejection of qualified and loving families is repugnant to most Americans, it is certainly within the rights of the organization to do so – as long as the organization is not benefitting from federal tax dollars.

Put simply, those organizations that are taking dollars from the federal treasury should not be permitted to discriminate. A policy allowing for discrimination means fewer children will be given the opportunity to be a part of a welcoming foster home or ultimately get adopted into a loving forever home.

The South Carolina request is likely not the only request for a waiver your department has received.

*Leading Innovation. Creating Opportunity. Pursuing Progress.*

733 10<sup>th</sup> Street, NW • Suite 700 • Washington, DC 20001 • P [REDACTED] • F [REDACTED] • www.nam.org

NealRFMH\_0000095



As recently as May 23 of this year, one of your staff members at HHS, Shannon Royce, at a public event encouraged organizations to request waivers to HHS's non-discrimination policy that would result in fewer foster placements and adoptions of children in need. In her advocacy, Ms. Royce said: "I talked with OGC yesterday and I wanted to address this really carefully and wisely with you. Those of you who are faith-based foster and adoption agencies, if you are engaged in foster and adoption care, and there is something you believe substantially burdens your religious expression, we would encourage you to file a request for religious accommodation under the Religious Freedom Restoration Act, with both ACF – Children and Families – and with OCR – Civil Rights....and if you would like to file that kind of religious accommodation, we would encourage you to do so. By filing that religious accommodation, the burden then shifts to the government, and the government then has to show a compelling interest in maintaining the rule that they have, and then they have to show that they are operating in the least restrictive means."

No doubt, Ms. Royce was, indeed, addressing this issue "carefully" because she did not want to raise any warning flags about her previous advocacy against same sex marriage, and her association with organizations that support conversion therapy for gay Americans. However careful she was attempting to be, Ms. Royce was still using her position in government to advocate for discrimination in foster care and adoption – and that should be completely counter to the objective of a department which exists to "enhance the health and well-being of all Americans." That objective is not achieved through discrimination.

While I can speak for manufacturers across the country in stating unequivocally that we believe discrimination is unacceptable, I can also speak from very personal experience. You may be aware of the battle my husband and I experienced in obtaining permanent parental rights over our son, Jacob, after he was born via surrogacy in Wisconsin.

While our family was successful after being vindicated through an arduous legal battle, other prospective parents should not have to fight against federally funded discrimination in order to help more children make it out of the foster system and into loving homes.

Again, I urge you to reject Governor McMaster's waiver request and any like it. Further, I would appreciate your personal attention to the matter of how the issue of discrimination on the basis of race, religion, national origin, marital status and/or sexual orientation is being handled internally in order to help and protect more children through foster and adoption opportunities.

Respectfully,



Jay Timmons



**To:** Grove, Matthew R. (HHS/OS) [REDACTED]; Wright, Natasha (OS/IOS) [REDACTED]  
**Cc:** Hitt, Linda (ACF) [REDACTED]; Logan, Scott (ACF) [REDACTED]  
**From:** Cottingham, Kenneth (ACF)  
**Sent:** Tue 6/26/2018 4:25:07 PM (UTC)  
**Subject:** RE: SPS00396426

Matt,

Is there a reason the OGC and Maggie's comments didn't come back as a revised task so we can track in system?

Thanks

Ken

## Kenneth B. Cottingham

Director, Executive Secretariat  
Immediate Office of the Assistant Secretary  
Administration for Children and Families (ACF)  
U.S. Department of Health and Human Services

Office: [REDACTED]

---

**From:** Grove, Matthew R. (HHS/OS)

**Sent:** Tuesday, June 26, 2018 11:19 AM

**To:** Wright, Natasha (OS/IOS) <[REDACTED]>; Logan, Scott (ACF) [REDACTED]

**Cc:** Cottingham, Kenneth (ACF) <[REDACTED]>; Hitt, Linda (ACF) [REDACTED]

**Subject:** RE: SPS00396426

Paula's comments are attached as well. She provided her comments on top of Maggie's. So the attached redlines reflect both of their comments. I will be sending this back through SPS momentarily.

Thanks. << File: Stannard comments - SC Deviation Request Memo.docx >> << File: Stannard comments - SC Gov McMaster Letter.docx >>

---

**From:** Grove, Matthew R. (HHS/OS)

**Sent:** Tuesday, June 26, 2018 10:43 AM

**To:** Wright, Natasha (OS/IOS); Logan, Scott (ACF)

**Cc:** Cottingham, Kenneth (ACF); Hitt, Linda (ACF)

**Subject:** RE: SPS00396426

<< File: Wynne comments - SC Deviation Request Memo.docx >> << File: Wynne comments - SC Gov McMaster letter.docx >>

Attaching Maggie's comments. Will share Paula's comments when I receive them.

Thanks.

---

**From:** Wright, Natasha (OS/IOS)

**Sent:** Tuesday, June 26, 2018 7:08 AM

**To:** Logan, Scott (ACF)

**Cc:** Cottingham, Kenneth (ACF); Hitt, Linda (ACF); Grove, Matthew R. (HHS/OS)

**Subject:** RE: SPS00396426

Maggie submitted comments. Paula Stannard is still reviewing. Matt is handling this one. Please feel free to direct your inquiries to him instead. -thanks, Natasha

---

**From:** Logan, Scott (ACF)  
**Sent:** Monday, June 25, 2018 10:56 PM  
**To:** Wright, Natasha (OS/IOS) [REDACTED]  
**Cc:** Cottingham, Kenneth (ACF) [REDACTED]; Hitt, Linda (ACF) [REDACTED]  
**Subject:** FW: SPS00396426

Hi Natasha,

Any update on this letter?

Thank you,  
Scott

Scott Logan  
Director  
Division of Legislative and Regulatory Affairs  
Office of Legislative Affairs and Budget  
Administration for Children and Families  
U.S. Department of Health and Human Services  
330 C ST, SW Suite 5020D  
Washington, D.C. 20201  
[REDACTED]

---

**From:** Cottingham, Kenneth (ACF)  
**Sent:** Friday, June 22, 2018 12:58 PM  
**To:** Logan, Scott (ACF) [REDACTED]  
**Cc:** Hitt, Linda (ACF) [REDACTED]  
**Subject:** FW: SPS00396426

Scott,

Per e-mail from Natasha, this is in OS clearance with a due date of Monday, June 25, 2018.

Thanks

Ken

**Kenneth B. Cottingham**  
Director, Executive Secretariat  
Immediate Office of the Assistant Secretary  
Administration for Children and Families (ACF)  
U.S. Department of Health and Human Services  
[REDACTED]  
Office: [REDACTED]

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Message

**From:** Wagner, Steven (ACF) [REDACTED]  
**Sent:** 5/30/2018 6:29:55 PM  
**To:** Wynne, Maggie (HHS/IOS) [REDACTED]; Severino, Roger (HHS/OCR) [REDACTED]  
Moughalian, Jen (HHS/ASFR) [REDACTED]  
**CC:** Bowman, Matthew (HHS/OGC) [REDACTED]  
**Subject:** RE: Deviation Request Memo

I don't know.

---

**From:** Wynne, Maggie (HHS/IOS)  
**Sent:** Wednesday, May 30, 2018 2:21 PM  
**To:** Severino, Roger (HHS/OCR); Wagner, Steven (ACF); Moughalian, Jen (HHS/ASFR)  
**Cc:** Bowman, Matthew (HHS/OGC)  
**Subject:** RE: Deviation Request Memo

Steve, Do you know if the communication from HHS came from CB or Grants Management?

"Miracle Hill Ministries CEO Reid Lehman told WSPA that DSS' new interpretation of law is a result of "communication from the Department of Health and Human Services in Washington saying that it was illegal and they wanted to be sure no one in South Carolina was doing this."

---

**From:** Severino, Roger (HHS/OCR)  
**Sent:** Wednesday, May 30, 2018 2:15 PM  
**To:** Wagner, Steven (ACF) [REDACTED]; Moughalian, Jen (HHS/ASFR) [REDACTED]  
**Cc:** Wynne, Maggie (HHS/IOS) [REDACTED]; Bowman, Matthew (HHS/OGC)  
**Subject:** RE: Deviation Request Memo

Did you all know the SC deviation request was public knowledge? We got an inquiry about it from WSJ today, and are not confirming or denying anything.

From a March 1 Greenville Post [article](#):

In recent letters to Miracle Hill and the U.S. Department of Health and Human Services, and as part of his reelection campaign, McMaster has said Miracle Hill should receive a waiver so it can continue to receive state and federal money for its foster care services.

"As governor, I am protecting religious freedom for all South Carolinians, and I'm working tirelessly to keep Miracle Hill operating at full force," McMaster's letter to U.S. Department of Health and Human Services says.

The March 14 Greenville News [article](#) also mentions the Feb 27 letter to HHS:

McMaster has stood in support of Miracle Hill in a letter to the U.S. Department of Health and Human Services and as part of his reelection campaign. He previously said Miracle Hill should receive a waiver so it can continue to receive state and federal money for its foster care services.

The Christian Post [article](#) makes mention of an earlier communication with HHS, however, it doesn't reference the Feb 27 letter to HHS from McMaster because the article was published on Feb 23:

Miracle Hill Ministries CEO Reid Lehman told WSPA that DSS' new interpretation of law is a result of "communication from the Department of Health and Human Services in Washington saying that it was illegal and they wanted to be sure no one in South Carolina was doing this."

...

Lehman told The Greenville News that he believes McMaster will ask federal officials for clarification.

"I think he'll get clarification from Washington that our practice is not illegal," Lehman said. "And then we just ask that the state recognize that as well."

The Trump administration has been very vocal about its desire to protect and support religious liberty in all areas of federal government. In January, HHS launched the new Conscience and Religious Freedom Division within its Office of Civil Rights.

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...

Lehman told The Greenville News that he believes McMaster will ask federal officials for clarification.

"I think he'll get clarification from Washington that our practice is not illegal," Lehman said. "And then we just ask that the state recognize that as well."

The Trump administration has been very vocal about its desire to protect and support religious liberty in all areas of federal government. In January, HHS launched the new Conscience and Religious Freedom Division within its Office of Civil Rights.

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Message

**From:** Bock, Joe (ACF) [REDACTED]  
**Sent:** 6/22/2018 12:21:04 PM  
**To:** Goldhaber, Ben (ACF) [REDACTED]  
**Subject:** RE: Inquiry for Miracle Hill Ministries

Thanks

**From:** Goldhaber, Ben (ACF)  
**Sent:** Friday, June 22, 2018 8:20 AM  
**To:** Bock, Joe (ACF) [REDACTED]  
**Subject:** RE: Inquiry for Miracle Hill Ministries

Pretty sure that went thru Exec Sec several weeks ago for final signature. Not sure if it got sent. Suspect Ken C would know...

**From:** Bock, Joe (ACF)  
**Sent:** Friday, June 22, 2018 8:17 AM  
**To:** Goldhaber, Ben (ACF) [REDACTED]  
**Subject:** FW: Inquiry for Miracle Hill Ministries

Hey Ben,

This is that request from SC for a waiver of the Dept regulation on serving LGBTQ population. We've been involved in reviewing the responses – I have not been kept in the loop as to status and I'm not even sure who to ask. Do you know? Thanks

Joe

**From:** Logan, Scott (ACF)  
**Sent:** Thursday, June 21, 2018 11:49 PM  
**To:** Bock, Joe (ACF) [REDACTED]; Milner, Jerry (ACF) [REDACTED]  
**Cc:** Casterline, Rebecca (ACF) [REDACTED]  
**Subject:** FW: Inquiry for Miracle Hill Ministries

Please see attached from Rep. Gowdy's staff. Would you please let me know how to respond? I thought Jerry had told me SC was approved for a waiver from the regulation. If so, what does that mean for this organization?

Thank you,  
Scott

Scott Logan  
Director  
Division of Legislative and Regulatory Affairs  
Office of Legislative Affairs and Budget  
Administration for Children and Families  
U.S. Department of Health and Human Services  
330 C ST, SW suite 5020D  
Washington, D.C. 20201  
[REDACTED]

**From:** [REDACTED]@mail.house.gov>  
**Sent:** Thursday, June 21, 2018 3:34 PM

To: Logan, Scott (ACF) [REDACTED]  
Subject: Inquiry for Miracle Hill Ministries

Mr. Logan,

I enjoyed talking with you this morning. You are always welcome in Greenville, SC. We enjoy having visitors.

I have attached an inquiry from Rep. Gowdy regarding Miracle Hill Ministries and an email from Mr. Reid Lehman, CEO of Miracle Hill. Please let me know if you need additional information.

Thank you for your help!

[REDACTED]  
Constituent Service Representative/  
Legislative Correspondent  
Congressman Trey Gowdy, SC-04

[REDACTED] FAX

[REDACTED]@mail.house.gov



[Sign up to receive updates from Rep. Gowdy](#)

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Message

**From:** Butterfield, Justin (HHS/OCR) [REDACTED]  
**Sent:** 4/27/2018 2:54:05 PM  
**To:** Moughalian, Jen (HHS/ASFR) [REDACTED]  
**Subject:** RE: SC Deviation

Thanks, Jen.

Justin

**From:** Moughalian, Jen (HHS/ASFR)  
**Sent:** Friday, April 27, 2018 10:53 AM  
**To:** Butterfield, Justin (HHS/OCR) [REDACTED]  
**Subject:** Re: SC Deviation

Hi Justin

The answer is no to both.

Confidential Pre-decisional Deliberative

---

On: 26 April 2018 16:21, "Butterfield, Justin (HHS/OCR)" <[REDACTED]> wrote:

Thanks. If we know of any grants that don't have the 75,300 requirements because they've been grandfathered would be helpful too.

Thank you!  
Justin

On: 26 April 2018 15:01, "Moughalian, Jen (HHS/ASFR)" <[REDACTED]> wrote:

I believe it was implemented in January 2017 and this is the first request for deviation. I will confirm.

Jen Moughalian  
US Department of Health and Human Services  
[REDACTED] Office)  
[REDACTED] Cell)

*Deliberative and pre-decisional communication*

---

**From:** Butterfield, Justin (HHS/OCR)  
**Sent:** Thursday, April 26, 2018 2:59 PM  
**To:** Moughalian, Jen (HHS/ASFR) [REDACTED]  
**Subject:** SC Deviation

PRE-DECISIONAL & DELIBERATIVE PROCESS PRIVILEGED

Jen,

Do you happen to know whether HHS has previously ever granted a waiver as to 45 CFR 75.300 or is it just too new for that process to have ever happened?

Justin

**Justin E. Butterfield**

*Senior Advisor*

Office for Civil Rights

U.S. Department of Health & Human Services

Office: [REDACTED]

Mobile: [REDACTED]

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Message

**From:** Collins, Gail (ACF) [REDACTED]  
**Sent:** 4/2/2019 6:08:56 PM  
**To:** Bock, Joe (ACF) [REDACTED]; Milner, Jerry (ACF) [REDACTED]  
**CC:** Pearson, Lisa (ACF) [REDACTED]; Wolovoy, Jesse (ACF) [REDACTED]; Naugler, Tina (ACF) [REDACTED]  
**Subject:** FW: PA request for religious exemption -  
**Attachments:** Bernstine Letter of HHS 4-1-19.pdf

Hi Lisa,

As far as I understand, CB has not had a direct role in this issue with respect to South Carolina waiver. I believe the Office Civil Rights had the lead.

I am forwarding the PA letter to Joe and Jerry for any insight they may have as to process and staying informed about what response this letter receives from the Department.

Thanks.

Gail

**From:** Pearson, Lisa (ACF)  
**Sent:** Tuesday, April 2, 2019 1:58 PM  
**To:** Collins, Gail (ACF) <[REDACTED]>; Naugler, Tina (ACF) [REDACTED]  
**Cc:** Wolovoy, Jesse (ACF) [REDACTED]  
**Subject:** PA request for religious exemption -

Hi Gail --

Attached is correspondence from the PA House of Representatives to assistant secretary Lynn Johnson requesting religious exemption for FHs, citing SC.

While we (regional office) have no role in this, do we know how this will be decided/next steps in HHS?

Thanks --

-----  
Lisa J. Pearson  
Regional Program Manager  
U.S. Department of Health and Human Services  
Administration for Children and Families  
Children's Bureau/Region 3  
801 Market St, Suite 8300  
Philadelphia, Pennsylvania 19107-3134  
Phone: [REDACTED]  
Fax: [REDACTED]  
[REDACTED]





Message

**From:** Householder, Donna (HHS/OS) [redacted]  
**Sent:** 7/6/2018 4:45:31 PM  
**To:** Henderson, Harold (HHS/OCR) [redacted]  
**Subject:** RE: SC Deviation Memo

I'd hate to see what you call a lot of edits... the letter isn't too messy but the memo has a lot of edits.

**From:** Henderson, Harold (HHS/OCR)  
**Sent:** Friday, July 06, 2018 12:07 PM  
**To:** Grove, Matthew R. (HHS/OS) [redacted]  
**Cc:** Householder, Donna (HHS/OS) [redacted]  
**Subject:** RE: SC Deviation Memo

Matt. It was just uploaded with a few OCR edits.

We did not except the edits to provide you a clean copy because there were numerous edits from Paula and we did not want to be presumptive of her edits and accept them..

**From:** Grove, Matthew R. (HHS/OS)  
**Sent:** Friday, July 6, 2018 11:02 AM  
**To:** Henderson, Harold (HHS/OCR) [redacted]  
**Cc:** Householder, Donna (HHS/OS) [redacted]  
**Subject:** SC Deviation Memo

Harold,

Any update on the OCR rewrite of this memo?

Thanks.  
Matt

Matthew R. Grove  
Senior Policy Coordinator/Services Policy Team Lead  
Immediate Office of the Secretary, Executive Secretariat  
U.S. Department of Health and Human Services  
200 Independence Ave SW - Room 607H  
Washington, DC 20201  
Phone: [redacted] Fax: [redacted]

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Message

**From:** Severino, Roger (HHS/OCR) [REDACTED]  
**Sent:** 6/15/2018 4:08:06 PM  
**To:** Grove, Matthew R. (HHS/OS) [REDACTED]; Henderson, Harold (HHS/OCR) [REDACTED]; Butterfield, Justin (HHS/OCR) [REDACTED]; Householder, Donna (HHS/OS) [REDACTED]  
**Subject:** RE: CLOSE HOLD - PD SPS Authoring: DECISION MEMO (Deputy Secretary) - ACF Request for Deviation for South Carolina's Title IV-E Program from Select Statutory and National Policy Requirements under 45 CFR Part 75 - DUE THURS 6-14

Matt,

Paula can probably give you the history if you need it.

**From:** Grove, Matthew R. (HHS/OS)  
**Sent:** Friday, June 15, 2018 11:42 AM  
**To:** Severino, Roger (HHS/OCR) [REDACTED]; Henderson, Harold (HHS/OCR) [REDACTED]; Butterfield, Justin (HHS/OCR) <[REDACTED]>; Householder, Donna (HHS/OS) [REDACTED]  
**Subject:** RE: CLOSE HOLD - PD SPS Authoring: DECISION MEMO (Deputy Secretary) - ACF Request for Deviation for South Carolina's Title IV-E Program from Select Statutory and National Policy Requirements under 45 CFR Part 75 - DUE THURS 6-14

Thanks. [REDACTED]

**From:** Severino, Roger (HHS/OCR)  
**Sent:** Friday, June 15, 2018 11:06 AM  
**To:** Henderson, Harold (HHS/OCR); Grove, Matthew R. (HHS/OS); Butterfield, Justin (HHS/OCR); Householder, Donna (HHS/OS)  
**Subject:** RE: CLOSE HOLD - PD SPS Authoring: DECISION MEMO (Deputy Secretary) - ACF Request for Deviation for South Carolina's Title IV-E Program from Select Statutory and National Policy Requirements under 45 CFR Part 75 - DUE THURS 6-14

Matt,

Thanks,

Roger

**From:** Butterfield, Justin (HHS/OCR)  
**Sent:** Friday, June 15, 2018 9:16 AM  
**To:** Grove, Matthew R. (HHS/OS) <[REDACTED]>; Householder, Donna (HHS/OS) [REDACTED]  
**Cc:** Henderson, Harold (HHS/OCR) <[REDACTED]>  
**Subject:** RE: CLOSE HOLD - PD SPS Authoring: DECISION MEMO (Deputy Secretary) - ACF Request for Deviation for South

Carolina's Title IV-E Program from Select Statutory and National Policy Requirements under 45 CFR Part 75 - DUE THURS 6-14

[REDACTED]

Justin

**From:** Grove, Matthew R. (HHS/OS)

**Sent:** Friday, June 15, 2018 9:12 AM

**To:** Butterfield, Justin (HHS/OCR) <[REDACTED]>; Householder, Donna (HHS/OS)

**Cc:** Henderson, Harold (HHS/OCR) <[REDACTED]>

**Subject:** RE: CLOSE HOLD - PD SPS Authoring: DECISION MEMO (Deputy Secretary) - ACF Request for Deviation for South Carolina's Title IV-E Program from Select Statutory and National Policy Requirements under 45 CFR Part 75 - DUE THURS 6-14

[REDACTED]

[REDACTED]

[REDACTED]

Thanks.

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**From:** Grove, Matthew R. (HHS/OS)

**Sent:** Friday, June 15, 2018 8:36 AM

**To:** Butterfield, Justin (HHS/OCR); Householder, Donna (HHS/OS)

**Cc:** Henderson, Harold (HHS/OCR)

**Subject:** RE: CLOSE HOLD - PD SPS Authoring: DECISION MEMO (Deputy Secretary) - ACF Request for Deviation for South Carolina's Title IV-E Program from Select Statutory and National Policy Requirements under 45 CFR Part 75 - DUE THURS 6-14

[REDACTED]

Thanks.

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**From:** Butterfield, Justin (HHS/OCR)

**Sent:** Thursday, June 14, 2018 5:31 PM

**To:** Householder, Donna (HHS/OS); Grove, Matthew R. (HHS/OS)

**Cc:** Henderson, Harold (HHS/OCR)

**Subject:** RE: CLOSE HOLD - PD SPS Authoring: DECISION MEMO (Deputy Secretary) - ACF Request for Deviation for

South Carolina's Title IV-E Program from Select Statutory and National Policy Requirements under 45 CFR Part 75 - DUE THURS 6-14

I am fine with the IEA typo edit. [REDACTED]

Justin

**From:** Householder, Donna (HHS/OS)

**Sent:** Thursday, June 14, 2018 4:46 PM

**To:** Butterfield, Justin (HHS/OCR) <[REDACTED]>

**Cc:** Henderson, Harold (HHS/OCR) <[REDACTED]>

**Subject:** FW: CLOSE HOLD - PD SPS Authoring: DECISION MEMO (Deputy Secretary) - ACF Request for Deviation for South Carolina's Title IV-E Program from Select Statutory and National Policy Requirements under 45 CFR Part 75 - DUE THURS 6-14

Justin,

Please see Matt's comments below, and let us know if you are okay with him making the edit from IEA (bottom of page 5). [REDACTED]

Thank you,

Donna

**From:** Grove, Matthew R. (HHS/OS)

**Sent:** Thursday, June 14, 2018 4:27 PM

**To:** Householder, Donna (HHS/OS) <[REDACTED]>

**Cc:** Henderson, Harold (HHS/OCR) <[REDACTED]>

**Subject:** RE: CLOSE HOLD - PD SPS Authoring: DECISION MEMO (Deputy Secretary) - ACF Request for Deviation for South Carolina's Title IV-E Program from Select Statutory and National Policy Requirements under 45 CFR Part 75 - DUE THURS 6-14

Hi Donna,

There was a very small typo type of edit from IEA on the memo. I'm assuming OCR is comfortable with me accepting that comment and making the change? [REDACTED]

[REDACTED] The IEA and ACF comments are attached.

Thanks

Matt

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**From:** Householder, Donna (HHS/OS)

**Sent:** Thursday, June 14, 2018 3:52 PM

**To:** Grove, Matthew R. (HHS/OS)

**Cc:** Henderson, Harold (HHS/OCR)

**Subject:** FW: CLOSE HOLD - PD SPS Authoring: DECISION MEMO (Deputy Secretary) - ACF Request for Deviation for South Carolina's Title IV-E Program from Select Statutory and National Policy Requirements under 45 CFR Part 75 - DUE THURS 6-14

Hi Matt, I just submitted OCR revision with markups and a clean copy through SPS. Have also attached them to this email.

Thank you,

Donna

**From:** Butterfield, Justin (HHS/OCR)  
**Sent:** Thursday, June 14, 2018 2:30 PM  
**To:** Householder, Donna (HHS/OS) <[REDACTED]>  
**Subject:** RE: CLOSE HOLD - PD SPS Authoring: DECISION MEMO (Deputy Secretary) - ACF Request for Deviation for South Carolina's Title IV-E Program from Select Statutory and National Policy Requirements under 45 CFR Part 75 - DUE THURS 6-14

Attached is the response. March has cleared. Matt Grove is waiting for this one.

Justin

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**From:** Householder, Donna (HHS/OS)  
**Sent:** Monday, June 11, 2018 2:16 PM  
**To:** Butterfield, Justin (HHS/OCR) <[REDACTED]>; Bell, March (HHS/OCR) <[REDACTED]>  
Frohboese, Robinsue (HHS/OCR) <[REDACTED]>  
**Cc:** Hudson, Dawn (OS/OCR) <[REDACTED]> Henderson, Harold (HHS/OCR) <[REDACTED]>  
**Subject:** CLOSE HOLD - PD SPS Authoring: DECISION MEMO (Deputy Secretary) - ACF Request for Deviation for South Carolina's Title IV-E Program from Select Statutory and National Policy Requirements under 45 CFR Part 75 - DUE THURS 6-14

Good Afternoon,

Please see the attached SPS authoring (rewrite) assignment; OS Exec Sec asks us to "please address attached comments from IEA, ACF, and OGC. Thanks. Matt." Our rewrite is due in SPS by **5 PM Thursday, 6/14/18**.

<< File: \$ ACF Comments - Response to Gov. McMaster (ACF - Exec Sec).docx >> << File: IEA\_00396426\_AS-793020\_06052018 Deviation Request Memo .docx >> << File: 00396426 OGC SIGNED NOTE 20180607 18-15010.pdf >> << File: TAB B - Response to Gov. McMaster OGC MARK-UP 20180607 18-15010.docx >>

The original incoming document and what we submitted to OS is provided below for your reference.

<< File: Letter to Wagner DHHS.PDF >> << File: Response Letter to Governor McMaster - 5-31-18.docx >>

Sincerely,  
Donna  
HHS/OCR  
[REDACTED]

Produced to Ways & Means Committee Pursuant to Oversight Request, Do Not Disclose Without Permission from Dep't of Health and Human Services



**Withheld for Privilege**

*Produced to Ways & Means Committee Pursuant to Oversight Request, Do Not Disclose Without Permission from Dep't of Health and Human Services*