

# **APPENDIX B:**

## **GAO Analysis**



441 G St. N.W.  
Washington, DC 20548

October 25, 2019

Congressional Requesters

## **Child Welfare: Various HHS Offices Provided Input on Decision to Grant Exception from Religious Nondiscrimination Requirement**

In fiscal year 2017, over 440,000 children were in the foster care system in the United States. Most of these children—77 percent—were in foster family homes. Over the last few years, the number of children entering the child welfare system has generally increased even as many states have struggled to recruit foster families. To help cover the costs of operating foster care programs, including costs associated with foster family recruitment, state child welfare agencies receive federal funding from the Department of Health and Human Services (HHS) under title IV-E of the Social Security Act. The state agencies may, in turn, contract with private child welfare agencies, in some instances faith-based organizations, to help carry out their foster care programs. States participating in title IV-E are required to ensure that their programs comply with various program-specific requirements established by the statute and regulations. In addition, as recipients of HHS funding, these state and private child welfare agencies are also required to comply with HHS’s uniform administrative grant requirements.<sup>1</sup> HHS may authorize certain exceptions from its administrative grant requirements on a case-by-case basis.<sup>2</sup>

In February 2018, on behalf of the private, faith-based child welfare agencies that assist in recruiting foster families for the state, the South Carolina governor requested an exception from an HHS administrative grant requirement that prohibits discrimination on the basis of religion, among other characteristics.<sup>3</sup> Specifically, the governor’s request claimed that this regulatory provision effectively requires faith-based child welfare agencies to abandon their religious beliefs or forego federal funding, which the request claimed violates these agencies’ constitutional rights. According to the governor’s request, one such private faith-based child welfare agency was responsible for recruiting 15 percent of South Carolina’s foster families. This agency recruits foster parents based on their religion. In January 2019, HHS approved South Carolina’s request for an exception from the religious nondiscrimination requirement, allowing the state to apply the exception to this private child welfare agency and any other

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<sup>1</sup>The HHS regulations found at 45 C.F.R. pt. 75 – which implement guidance from the Office of Management and Budget (OMB) – establish uniform administrative requirements, cost principles, and audit requirements for federal awards to non-federal entities, including contracts, grants, and cooperative agreements. These requirements generally apply to recipients and subrecipients of HHS federal awards. Part 75 is divided into several subparts: subpart A (acronyms and definitions), subpart B (general provisions), subpart C (pre-federal award requirements and contents of federal awards), subpart D (post federal award requirements), subpart E (cost principles), and subpart F (audit requirements), along with a number of appendices. For purposes of this report, we focused on subparts A through D, and refer to these collectively as the “administrative grant requirements.”

<sup>2</sup>See 45 C.F.R. § 75.102(b). Section 75.102 also authorizes other modifications of the administrative grant requirements in certain circumstances; however, for purposes of this report, we focused on subsection (b).

<sup>3</sup>See 45 C.F.R. § 75.300(c).

subrecipient of the state's foster care program that uses similar religious criteria in selecting among prospective foster care parents.<sup>4</sup>

You asked us to review HHS's use of regulatory exceptions from nondiscrimination requirements that apply to federally-funded foster care programs. This report describes HHS's process for reviewing and approving requests for exceptions from its administrative grant requirements, including nondiscrimination requirements.

To address our objective, we reviewed documents that HHS officials told us guided their decision-making regarding requests for exceptions. These included HHS and other federal guidance, such as HHS's 2015 Grants Policy Administration Manual and a 2017 Attorney General memorandum on federal law protections for religious liberty, and relevant federal laws and regulations. In addition, we reviewed the letter from South Carolina requesting the exception, and HHS's response letter to South Carolina granting the exception.

We also interviewed HHS officials representing the range of offices involved in reviewing and approving requests for exceptions from administrative requirements. These included the Administration for Children and Families (ACF), the Office of the Assistant Secretary for Financial Resources, the Office for Civil Rights, and the Office of the General Counsel. We requested information about any requests for or approvals of exceptions to HHS's administrative grant requirements under 45 C.F.R. § 75.102(b). In general, these requirements apply to all recipients and subrecipients of HHS federal awards (i.e., they are not limited to participants in title IV-E).<sup>5</sup> We focused this review on any requests for exceptions that would apply to programs operated under the Children's Bureau, the specific office within HHS that oversees title IV-E, from 2014, the year the exception provision took effect, through 2019.<sup>6</sup>

We conducted our work from May 2019 to October 2019 in accordance with all sections of GAO's Quality Assurance Framework that are relevant to our objectives. The framework requires that we plan and perform the engagement to obtain sufficient and appropriate evidence to meet our stated objectives and to discuss any limitations in our work. We believe that the information and data obtained, and the analysis conducted, provide a reasonable basis for any findings and conclusions.

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<sup>4</sup>For the letter from HHS granting the exception, see <https://governor.sc.gov/news/2019-01/statement-us-department-and-health-and-human-granting-religious-freedom-waiver-request>. GAO did not assess the legal determinations underlying HHS's decision to grant the South Carolina request. Federal litigation challenging this decision is currently pending. See *Rogers v. United States Department of Health and Human Services*, No. 19-1567 (D. S.C. filed May 30, 2019) (in which a same-sex Unitarian Universalist couple whose application to become foster parents was denied by the large faith-based child welfare agency filed suit against the state and HHS, alleging in part that HHS's decision to grant the exception was unconstitutional) and *Maddonna v. United States Department of Health and Human Services*, No. 19-448 (D. S.C. filed Feb. 15, 2019) (in which a Catholic woman whose request to volunteer with foster children was denied by the same agency brought suit against the state and HHS, alleging in part that HHS's decision to grant the exception violated the Administrative Procedure Act and was unconstitutional). Motions to dismiss in both cases are currently pending. In the *Maddonna* case, one of the defendants filed a supplemental motion on July 17, 2019, noting that the child welfare agency has since changed its policies to now allow Catholics who affirm the agency's doctrinal statement to serve as foster parents and employees.

<sup>5</sup>The request from South Carolina describes these faith-based private child welfare agencies as contractors, and HHS's response letter refers to them as subgrantees. In this report we use the term "subrecipients," which is the term used in HHS regulations. See 45 C.F.R. § 75.2.

<sup>6</sup>45 C.F.R. § 75.102(b) became effective December 26, 2014. See 45 C.F.R. § 75.110.

## Background

### Foster Care Placements

Children may be placed in foster care when their families can no longer care for them for reasons such as abuse or neglect. When children are removed from their homes, state or local child welfare agencies are typically responsible for coordinating their placement and the provision of services. These agencies recruit and work with foster families or the staff of residential facilities or group homes to provide shelter and daily care to children.<sup>7</sup> Child welfare agencies often rely on community partners, including contracted private organizations, to help recruit and retain families that can provide foster care. In some instances, private child welfare agencies target their recruitment to certain types of families they believe will best meet the needs of children in state care, such as those that are faith-based, military, Native-American, or African-American.

### Federal Requirements and Oversight

Although states are primarily responsible for their foster care programs, title IV-E of the Social Security Act authorizes federal funding to state child welfare agencies to help cover the costs of operating these programs. As a condition of receiving federal funds under title IV-E, state recipients must comply with various program requirements.<sup>8</sup> For example, they must have a state plan approved by the Secretary of HHS for providing foster care and adoption assistance.<sup>9</sup> In addition, title IV-E recipients—and any subrecipients to which they provide title IV-E funds—must also comply with HHS’s administrative grant requirements.<sup>10</sup> One of these requirements prohibits discrimination against otherwise eligible individuals on the basis of religion, among other characteristics.<sup>11</sup> As mentioned above, the administrative grant regulations also provide that HHS awarding agencies may authorize exceptions from their requirements on a case-by-case basis.<sup>12</sup>

Various entities within HHS may be involved in reviewing and approving requests for exceptions from its administrative grant requirements, including the nondiscrimination requirements. HHS’s Office of the Assistant Secretary for Financial Resources, through its Office of Grants, oversees implementation of the regulations governing HHS grants, including any requests for exceptions from these regulations. Within ACF, the Children’s Bureau administers the title IV-E grant program and is responsible for ensuring that states comply with title IV-E requirements. If an exception request implicates nondiscrimination or other civil rights obligations, the Office for

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<sup>7</sup>These caregivers generally undergo an assessment and licensing or certification process to ensure their suitability as caregivers.

<sup>8</sup>See generally 42 U.S.C. § 670 *et seq.*; 45 C.F.R. pts. 1355 and 1356.

<sup>9</sup>42 U.S.C. § 671(a).

<sup>10</sup>See 45 C.F.R. pt. 75.

<sup>11</sup>Specifically, this provision provides that “[i]t 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.” 45 C.F.R. § 75.300(c).

<sup>12</sup>Specifically, this provision provides 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 approval is expressly required by this part.” 45 C.F. R. § 75.102(b).

Civil Rights may be involved. This office works to ensure that individuals receiving services from HHS-funded programs are not subject to unlawful discrimination, and that individuals and entities can exercise their conscience and religious freedom rights.<sup>13</sup> The Office of the General Counsel provides program officials with legal advice for agency policymaking and policy-based decisions.

### **Various HHS Offices Provided Input on the Only Exception to its Administrative Grant Requirements that Has Been Approved**

Two state title IV-E grantees—South Carolina and Texas—have requested exceptions from HHS’s administrative grant requirements, according to HHS officials we interviewed, and both requests were for exceptions from the nondiscrimination requirements.<sup>14</sup> South Carolina’s request was approved and Texas’s request is pending.

If a recipient of HHS funding wants an exception from an administrative grant requirement, it will generally submit the request to the office that oversees the program for which the request is being made, in accordance with the requirements of the grant award. According to HHS officials, depending on the exception requested, the program office may consult with other HHS offices before making a decision and responding to the request.<sup>15</sup> The request from South Carolina was addressed to the Acting Assistant Secretary for ACF.

Upon receiving the South Carolina request, ACF officials determined which HHS offices should be involved in considering whether to grant it. Officials said that the Children’s Bureau was involved in reviewing the request because of its role in providing support and guidance to state child welfare programs. They also explained that ACF forwarded the request to the Office of the Assistant Secretary for Financial Resources because of its role in overseeing the grant regulations from which South Carolina sought an exception. Finally, according to officials, ACF sent the request to the Office for Civil Rights because the request alleged that the regulation from which South Carolina was seeking an exception infringed upon the free exercise of religion by faith-based private child welfare agencies. HHS’s Office of the General Counsel provided legal counsel throughout the review and approval process, according to officials from that office. In addition to forwarding the request to the other offices, officials said that ACF also gathered additional information from South Carolina by phone regarding the scope of the services

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<sup>13</sup>One of the responsibilities of the Office for Civil Rights is ensuring HHS’s compliance with the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.* This act prohibits the government from substantially burdening a person’s free exercise of religion, unless the government demonstrates that application of such burden to the person is the least restrictive means of furthering a compelling governmental interest.

<sup>14</sup>Officials from the Office of the Assistant Secretary for Financial Resources told us they also received two other requests for exceptions from HHS grant regulations that were outside the scope of our review. Specifically, the requests were for exceptions to appendix IX of the regulations, entitled “Principles for Determining Costs Applicable to Research and Development Under Grants and Contracts with Hospitals.” As previously noted, our focus in this review was on the requirements in subparts A through D of 45 C.F.R. pt. 75. In addition, in March 2019 several members of the Pennsylvania House of Representatives sent a letter requesting an exception from the nondiscrimination provision of the administrative grant requirements for the state’s faith-based adoption and foster care agencies. According to an HHS official, HHS did not consider this exception request because the requester was not a recipient of federal HHS funding.

<sup>15</sup>According to HHS’s grants policy administration manual, program offices must obtain approval from the Office of Grants Policy, Oversight and Evaluation for certain types of modifications to HHS grant requirements.

provided by the large faith-based child welfare agency in the state.<sup>16</sup> According to HHS, ACF did not conduct independent analysis to corroborate the information from South Carolina.

Specifically, the roles carried out by these offices in this process included:

- **Children’s Bureau.** Officials said their review determined that the request posed no issues from a programmatic perspective. Moreover, Children’s Bureau officials said they determined that the Children’s Bureau did not have authority over the regulations from which South Carolina was requesting an exception. According to officials, a Children’s Bureau official attended one meeting on the topic with representatives from other divisions, and Children’s Bureau staff received the draft response letter HHS ultimately sent to South Carolina. However, they were not involved in the process to approve the request and reported that they did not comment on the letter granting the exception.
- **Office of the Assistant Secretary for Financial Resources.** Officials said they received the request, along with background information and a rationale for approving it, from ACF. They said they analyzed the request in the context of the relevant statutes and considered the policy implications of approving the request from the perspective of HHS grants oversight. Specifically, officials said they sought to determine if the request was in direct conflict with policies and regulations, and whether approving it might create long-term implications. They determined that approving the request was not in direct conflict with policies and regulations and that it would not have long-term implications.
- **Office for Civil Rights.** According to one official, ACF asked this office to analyze how the Religious Freedom Restoration Act would bear on the request. To perform this analysis, the official said they relied on the information South Carolina and the large faith-based private child welfare agency provided via ACF. As part of their legal analysis, the official said they compared this information against the statute, as well as an October 2017 memorandum from the U.S. Attorney General on religious liberty protections in federal law.<sup>17</sup> They concluded that requiring the large faith-based private child welfare agency to comply with the religious nondiscrimination requirement would violate the Religious Freedom Restoration Act, and therefore recommended approval of the exception with respect to that agency and other similarly situated organizations.
- **Office of the General Counsel.** Attorneys in the Office of the General Counsel worked with other HHS entities involved in reviewing the South Carolina request in a manner consistent with the role of the Office of the General Counsel as described in a 1973 *Federal Register* notice, according to officials from that office.<sup>18</sup> They also confirmed that the Office of the General Counsel participated in at least one meeting to discuss the memo, and said that as part of the Office of the General Counsel’s role of providing legal advice to relevant HHS component offices, officials also likely participated in considering the request through email and informal conversations. According to HHS, attorneys from the Office of the General Counsel also provided input on the Office for Civil Rights’ legal

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<sup>16</sup>Through these conversations, South Carolina narrowed the scope of its request from 45 C.F.R. § 75.300(c) and (d) to 45 C.F.R. § 75.300(c). 45 C.F.R. § 75.300(d) provides that “[i]n 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.”

<sup>17</sup>Department of Justice, Office of the Attorney General, *Federal Law Protections for Religious Liberty*, Memorandum for All Executive Departments and Agencies (Washington, D.C.: October 6, 2017).

<sup>18</sup>Statement of Organization, Functions, and Delegations of Authority, 38 Fed. Reg. 17,032 (June 28, 1973).

analysis of the Religious Freedom Restoration Act. However, one official from the Office of the General Counsel said that the decision on whether to grant the request for an exception was ultimately the responsibility of HHS's Deputy Secretary.

According to an ACF official, in deciding whether to recommend approving the request, they took into consideration the input provided by officials from across the agency and the impact on children in foster care in South Carolina. After these offices reviewed the request, ACF officials sent a memo explaining a rationale for approval to HHS's Deputy Secretary. The memo expressed views shared with GAO by HHS officials and in documents we reviewed. The Deputy Secretary approved the request, and the Principal Deputy Assistant Secretary sent a letter to South Carolina's governor informing him that the request for an exception from the religious nondiscrimination provision was conditionally granted.<sup>19</sup> The letter explained that HHS approved the request because it determined that requiring the large faith-based private child welfare agency in South Carolina to comply with the regulation's religious nondiscrimination provision "would cause a burden to religious beliefs that is unacceptable" under the Religious Freedom Restoration Act.<sup>20</sup> The letter specified that the exception to the religious nondiscrimination requirement applies with respect to the large private, faith-based child welfare agency and any other subrecipient in the South Carolina foster care program that uses similar religious criteria in selecting among prospective foster families. The letter also stated that this exception does not relieve the South Carolina foster care program of its obligation to comply with any other requirements of the nondiscrimination provisions, the title IV-E statute, and any other applicable civil rights statutes.

In addition to South Carolina, the Texas Attorney General sent a letter to the Assistant Secretary of ACF in December 2018 requesting an exception from the nondiscrimination provisions of the administrative grant requirements for its foster care program. Specifically, the letter requested that HHS commence rulemaking to repeal 45 C.F.R. § 75.300(c) and (d) or, in the alternative or until a decision is made, requested an exception from those provisions of the regulations on behalf of the state and its faith-based child welfare providers. As of September 2019, HHS had made no determination about Texas's request.

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<sup>19</sup>The exception applies on the condition that any subrecipient making use of the exception be required to refer potential foster parents that do not adhere to the subrecipient's religious beliefs to other subrecipients in the South Carolina foster care program, or to refer them to the South Carolina foster care program staff, if the staff is equipped to refer those persons to other willing subrecipients. According to the letter from HHS, this condition was added on the understanding that the subrecipients making use of the exception do not object on religious grounds to making such referrals and therefore the condition does not implicate additional Religious Freedom Restoration Act concerns.

<sup>20</sup>See letter from Steven Wagner, Principal Deputy Assistant Secretary, Administration for Children and Families, to Governor Henry McMaster (Jan. 23, 2019). The letter discussed the legal analysis conducted by the Office for Civil Rights, which concluded that the large faith-based child welfare agency's "sincere religious exercise would be substantially burdened by application of the religious nondiscrimination requirement of § 75.300(c), and that subjecting [the agency] to that requirement, by denying South Carolina's exception request, is not the least restrictive means of advancing a compelling government interest on the part of HHS." According to the letter, "[r]elevant to this determination is the fact that the religious nondiscrimination provision in § 75.300(c) exceeds the scope of the nondiscrimination provisions found in the federal statutes applicable to the [South Carolina] Foster Care Program, and provides no exceptions for religious organizations as are found in other statutes prohibiting religious discrimination." The letter refers to the nondiscrimination provision of the title IV-E program statute, which requires state plans to provide 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." 42 U.S.C. § 671(a)(18).

## Agency Comments

We provided a draft of this report to HHS for review and comment. HHS provided technical comments, which we incorporated as appropriate.

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As agreed with your offices, unless you publicly announce its contents earlier, we plan no further distribution until 30 days from its issue date. At that time, we will send copies of this report to the appropriate congressional committees, the Secretary of Health and Human Services, and other interested parties. In addition, the report will be available at no charge on the GAO website at <http://www.gao.gov>.

If you and your staff have any questions, please contact Kathryn A. Larin at (202) 512-7215 or [larink@gao.gov](mailto:larink@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. Major contributors to this report were Sara Schibanoff Kelly, Ramona L. Burton, Sara Pelton, Sarah Cornetto, and Sara Ford.



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