



Director  
Office for Civil Rights  
Washington, D.C. 20201

March 5, 2020

The Honorable Ken Paxton  
Attorney General of Texas  
P.O. Box 12548  
Austin, TX 78711-2548

Re: Application of 45 C.F.R. § 75.300(c) & (d) in Light of the Religious Freedom Restoration Act

Dear Attorney General Paxton,

The Office for Civil Rights (“OCR”) of the U.S. Department of Health and Human Services (“HHS” or the “Department”) has received the complaint filed in *Texas, et al. v. Azar*, No. 3:19-cv-00365 (S.D. Tex. Oct. 31, 2019). The complaint, brought by the State of Texas and the Archdiocese of Galveston-Houston (“the Plaintiffs”), alleges that the application of 45 C.F.R. § 75.300(c) and (d) to the State’s Title IV-E Foster Care and Adoption Assistance program violates the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. § 2000bb, *et seq.*, because it requires current or potential program participants, including the Archdiocese, to refrain from discriminating on the basis of sexual orientation, gender identity, and same-sex-marriage status as a condition of participation in the program. OCR has considered the matter and concludes that RFRA prohibits HHS from applying 45 C.F.R. § 75.300(c) and (d) against Texas with respect to the Archdiocese and other similarly situated entities for the reasons described below.

The Secretary of HHS has charged OCR with investigating complaints “alleging a failure by any departmental component to comply with RFRA,” to conduct compliance reviews, provide technical assistance regarding compliance, and initiate any other action “as may be necessary to facilitate and ensure compliance with RFRA.” Office for Civil Rights; Statement of Delegation, 84 Fed. Reg. 2,804 (Jan. 19, 2018).<sup>1</sup>

Prior to receiving the Plaintiffs’ complaint, HHS had received several letters from Texas concerning this and related matters. On October 29, 2018, the Texas Attorney General’s office wrote a letter informing HHS that it considers the gender-identity and sexual-orientation nondiscrimination requirements of § 75.300(c), as well as the same-sex-marriage requirements of § 75.300(d), to be contrary to law and that Texas did not intend to comply with § 75.300(c) and (d) in the operation of programs funded with HHS grants.

<sup>1</sup> <https://www.federalregister.gov/documents/2018/01/19/2018-00816/office-for-civil-rights-statement-of-delegation>.

On December 17, 2018, Texas again wrote to HHS. Texas stated that § 75.300(c) and (d) suffer from various legal flaws, asked HHS to repeal them, and, in the alternative, requested that HHS's Administration for Children and Families grant an exception from the application of § 75.300(c) and (d) for any faith-based, child-welfare service providers in Texas's Title IV-E program. The letter, however, did not identify any faith-based, child-welfare service providers who sought such an exception or who claimed that their religious exercise was being burdened in violation of RFRA.

Finally, on August 29, 2019, the Texas Attorney General's office again wrote to HHS, this time attaching the October 29 and December 17, 2018 letters, and reiterated Texas's positions and requests contained in those letters. Again, Texas did not identify any specific providers who complained of, or who Texas believed were being subjected to, a RFRA violation.

It should be noted that in no case, even after receiving Texas's October 29, 2018, letter stating it would not comply with parts of § 75.300(c) and (d), did HHS take steps to enforce § 75.300(c) and (d) with respect to Texas or its subrecipients. It should also be noted that at no point did the Archdiocese of Galveston-Houston contact HHS to raise any concerns regarding § 75.300(c) or (d) or, prior to the filing of its lawsuit, allege that its religious exercise was being burdened in violation of RFRA.

Notwithstanding the foregoing, OCR has analyzed the plaintiffs' complaint and Texas's previous correspondence under RFRA. Based on that analysis, OCR has concluded that HHS cannot enforce the sexual-orientation or gender-identity nondiscrimination requirements of § 75.300(c) or the same-sex-marriage requirements of § 75.300(d) against Texas with respect to the Archdiocese of Galveston-Houston or other similarly situated entities—namely, entities that seek to participate in the Title IV-E program and whose sincere religious exercise would be substantially burdened in the same way that the Archdiocese of Galveston-Houston's religious exercise is burdened by § 75.300(c) and (d).

RFRA states 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. Under RFRA, the government must show that it has a compelling interest in burdening the “particular claimant” whose religious beliefs are burdened. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006). A compelling interest is an interest “of the highest order.” *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993).

OCR understands that the Archdiocese desires to participate in the Title IV-E program as part of its religious mission to care for needy children and to show concern for the well-being of its neighbors. OCR also understands that the Archdiocese, consistent with its sincere religious beliefs, considers marriage to be the exclusive union between one biological man and one biological woman, that sexual relations are properly reserved to such a marriage, and that it cannot engage in activities that condone or could be seen as condoning behavior inconsistent

with those beliefs. Accordingly, OCR has concluded that if HHS were to apply the sexual-orientation or gender-identity nondiscrimination requirements of § 75.300(c) or the same-sex-marriage requirements of § 75.300(d) to require Texas to exclude the Archdiocese, or other similarly situated entities, from Texas's foster care and adoption programs, such exclusion would constitute a "substantial burden" on the Archdiocese's religious exercise. Specifically, such an application of these requirements would compel entities such as the Archdiocese to choose between religious exercise and participation in an otherwise available public program. See *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 716-18 (1981); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); see also *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 719-26 (2014) (finding a substantial burden under RFRA).

OCR has also concluded that applying § 75.300(c) and (d) against Texas with respect to the Archdiocese of Galveston-Houston or other similarly situated entities is not the least restrictive means of advancing a compelling governmental interest. Applying § 75.300(c) and (d) with respect to entities such as the Archdiocese will likely reduce the effectiveness of the Title IV-E Foster Care and Adoption Assistance program. See 84 Fed. Reg. 63,681 (Nov. 19, 2019). To do so is not in the Department's interest. Rather, the Department has a compelling interest in doing the opposite, *viz.*, increasing the number of providers, including faith-based providers, who are willing to participate in the Title IV-E program. In HHS's experience, the program is best served by allowing States room to develop a robust and diverse network of providers to accomplish their foster care mission. Furthermore, to the extent that § 75.300(c) and (d) advance a governmental interest in ensuring that potential foster or adoptive parents whom certain providers such as the Archdiocese cannot partner with still have opportunities to participate in the Title IV-E program, that goal can be accomplished through other means, such as promoting the availability of alternative providers. Indeed, Texas has represented that it has a diverse network of program participants, meaning that potential foster or adoptive parents with whom certain faith-based providers cannot partner should nevertheless be able to participate in the program. Accordingly, OCR cannot conclude that applying § 75.300(c) and (d) to Texas with respect to the Archdiocese or other similarly situated entities is the least restrictive means of advancing a compelling governmental interest.<sup>2</sup>

Indeed, OCR reached a similar conclusion under RFRA concerning the Title IV-E program of the State of South Carolina, its religious subrecipient Miracle Hill Ministries, and similarly situated entities to the extent their religious exercise is substantially burdened by the religious nondiscrimination requirement of § 75.300(c). OCR further explained that HHS's interest in broadening the number of child placing agencies and prospective parents counseled against imposing that HHS regulation in a way that would drive faith-based, child-placing

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<sup>2</sup> In addition, the OMB Uniform Administrative Requirements, located at 2 CFR § 200.300, do not contain provisions analogous to the relevant requirements in 45 CFR § 75.300(c) and (d). As the Supreme Court recognized in *Holt v. Hobbs*, 135 S. Ct. 853, 866 (2015), consideration of analogous programs operated by other governmental entities is relevant in determining whether the government has a compelling interest "of the highest order" in imposing a substantial burden on religious exercise. Moreover, 45 CFR Part 75 provides a mechanism for granting an exception from requirements of that part, including § 75.300(c) and (d): namely, case-by-case exceptions available under 45 CFR § 75.102(b). The Supreme Court has emphasized that, where other exceptions are available, the government has a difficult burden to meet before refusing an exception under RFRA. See, e.g., *O Centro*, 546 U.S. at 434.

agencies out of Title IV-E programs because of their religious objections to the religious non-discrimination requirement of § 75.300.

Consequently, OCR has concluded that RFRA prohibits HHS from applying § 75.300(c) and (d) to the State of Texas with respect to the Archdiocese or other similarly situated entities as discussed above.

Sincerely,

A handwritten signature in cursive script that reads "Severino for RTS". The signature is written in dark ink and is positioned below the word "Sincerely,".

Roger T. Severino  
Director  
Office for Civil Rights