DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

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

November 3, 2020

Robert Gordon
Director
Michigan Department of Health and Human Services
333 South Grand Avenue
P.O. Box 30195
Lansing, Michigan 48909-7695

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

Dear Director Gordon,

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 *Buck v. Gordon*, 1:19-cv-00286 (W.D. Mich. Apr. 15, 2019). The complaint, brought by St. Vincent's Catholic Charities (St. Vincent), alleges that the application of 45 C.F.R. § 75.300(c) 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, for St. Vincent's to remain in the program, it effectively requires St. Vincent's to provide services to couples in same-sex marriages against St. Vincent's sincere religious beliefs. The federal district court for the Western District of Michigan agreed with the plaintiffs and issued a preliminary injunction against HHS on RFRA grounds. *Buck v. Gordon*, 429 F. Supp. 3d 447, 465 (W.D. Mich. 2019). The court explained that the combination of state and federal rules concerning the program "put St. Vincent in the position of either giving up its belief or giving up its contract with the State," and concluded that "St. Vincent has shown that it is likely to prevail on its [Free Exercise Clause] and RFRA claims." *Id.* at 465, 469.

OCR has reviewed the court's order and given this matter serious consideration. As you likely know, HHS is not currently enforcing, among other provisions, 45 C.F.R. § 75.300(c). *See* Notification of Nonenforcement of Health and Human Services Grants Regulation, 84 Fed. Reg. 6380963,809, 63,811 (Nov. 19, 2020).2019). There is no basis, therefore, for Michigan to rely on that provision as a reason to prevent St. Vincent from participating in the State's Title IV-E program. Moreover, even if HHS were currently enforcing section 75.300(c) against state grantees generally, it would not be able to enforce that section with respect to the State of Michigan in this particular instance. RFRA prohibits HHS from applying 45 C.F.R. § 75.300(c) against Michigan with respect to St. Vincent's 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, 83 Fed. Reg. 2,804 (Jan. 19, 2018).[1]

OCR has analyzed the plaintiffs' complaint under RFRA. Based on that analysis, OCR has concluded that HHS cannot enforce the sexual-orientation or gender-identity nondiscrimination requirements of section 75.300(c) against Michigan with respect to St. Vincent's 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 St. Vincent's religious exercise is burdened by section 75.300(c).

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. City of Hialeah*, 508 U.S. 520, 546 (1993).

OCR understands that St. Vincent has participated in and desires to continue to participate in Michigan's 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 St. Vincent shares Michigan's goal of working to fill the shortage of safe foster homes for vulnerable children. In the pending litigation, St. Vincent has pointed out that, as a Catholic organization, it considers marriage to be the exclusive union between one biological man and one biological woman, and that sexual relations are properly reserved to such a marriage. Consistent with such beliefs, St. Vincent maintains that it cannot provide a written recommendation to the State evaluating and endorsing family situations, including those of unmarried or LGBTQ couples, that would conflict with its religious beliefs. If St. Vincent is unable to work with a couple due to St. Vincent's religious beliefs, it provides the couple with a list of other area agencies who do not share St. Vincent's religious beliefs and could assist them in becoming foster or adoptive parents.

Michigan's contracts with child placing agencies ("CPAs") have required nondiscrimination on the basis of gender identity and sexual orientation since before 45 C.F.R. § 75.300(c) went into effect in 2017. The State's contracts also incorporate state statutory protections for faith-based CPAs (as interpreted by the State).[2] Under those statutes, Mich. Comp. Laws §§ 722.124e(2), 722.124f(1), CPAs may decline to work with prospective foster

[1] https://www.federalregister.gov/documents/2018/01/19/2018-00816/office-for-civil-rights-statement-of-delegation.
[2] Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction, Ex. 9, ¶ 8, *Buck v. Gordon*, 1:19-cv-00286 (W.D. Mich. Apr. 15, 2019).

parents if it "will result in a conflict with the CPA's sincerely held religious beliefs contained in a written policy, statement of faith, or other document adhered to by the CPA."[3] The statutes provide that any CPA that declines to provide services for religious reasons must promptly refer the applicant to another CPA that is willing and able to provide the declined services, and to Michigan's website that identifies other CPAs. *Id.* § 722.124e(4). St. Vincent states that it complies with those referral requirements,[4] and it is OCR's understanding, based on statements made in the pending litigation, that St. Vincent has no objection to referring persons with whom they cannot work because of their religious beliefs to other CPAs in Michigan.

After analyzing St. Vincent's complaint under RFRA, OCR has concluded that, if HHS were to apply section 75.300(c) to require Michigan to exclude St. Vincent from Michigan's foster care and adoption programs, such exclusion would constitute a "substantial burden" on St. Vincent's religious exercise. St. Vincent states that conducting personalized family-specific home study assessments and certifications for "unmarried or LGBTQ" couples would violate its sincerely held religious beliefs.[5] The government has no reason to doubt the sincerity of St. Vincent's asserted religious beliefs. *Cf. Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 715 (1981) (noting that courts should be reluctant to "undertake to dissect religious beliefs"). Moreover, the ability to participate in the Title IV-E grant program provides funding to CPAs for their activities and enables CPAs like St. Vincent to fulfill their mission of placing needy children in homes.[6] To force St. Vincent and similarly situated faith-based agencies to choose between participating in a federal program and following their faith is a substantial burden under RFRA. *See Sherbert v. Verner*, 374 U.S. 398, 405-06 (1963) (recognizing that conditioning the receipt of a government benefit on the violation of one's religious tenets imposes a substantial burden on a person's exercise of religion); 42 U.S.C.A. section 2000bb-1(a) (applying the *Sherbert* standard of prohibiting the government from substantially burdening a person's exercise of religion unless the burden falls within two specified exceptions); *Trinity Lutheran*, 137 S. Ct. 2012, 2021 (2017) (subjecting a law that excluded religious organizations from participation in a government grant program to strict scrutiny).

In addition, HHS lacks a compelling interest in applying section 75.300(c) with respect to entities such as St. Vincent, since such an application 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). Rather, HHS has a compelling interest in increasing the number of providers, including faith-based providers, who are willing to participate in the Title IV-E program. The overall need for foster care placements in Michigan is high, and any HHS action to enforce the provision would likely prevent placements if St. Vincent or similarly situated entities were excluded from Michigan's program as a result. In addition, according to its pleadings, because of its religious character and mission, St. Vincent is equipped to recruit additional prospective families who would not otherwise feel able to foster or adopt children,[7] thus increasing the number of foster

[3] *Id.* at 6.
[4] Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction, Ex. 1, ¶ 16, *Buck v. Gordon*, 1:19-cv-00286 (W.D. Mich. Apr. 15, 2019).
[5] *Id.* ¶ 8.
[6] *Id.* ¶¶ 3, 5 (describing St. Vincent's mission "to share the love of Christ by performing the corporal and spiritual works of mercy" and its operation as "one of the oldest and most effective adoption agencies in Michigan").
[7] Complaint, ¶ 64, *Buck v. Gordon*, 1:19-cv-00286 (W.D. Mich. Apr. 15, 2019).

care placements available to serve in the state. HHS therefore believes 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, potential foster or adoptive parents with whom providers such as St. Vincent cannot partner will still have opportunities to participate in the Title IV-E program through alternative providers. Indeed, Michigan has represented that it offers a total of 57 CPA locations,[8] and HHS is aware of only two agencies that have been challenged in Michigan for declining to work with same-sex couples.

For parallel reasons, OCR has also concluded that imposing the sexual-orientation and gender-identity nondiscrimination requirements of section 75.300(c) on Michigan's program is not the least restrictive means of achieving a compelling interest. As noted above, the most significant interest HHS has identified is in ensuring that qualified prospective foster care parents and providers can participate in Title IV-E programs. HHS has deemed this interest satisfied without having to require state grantees to exclude entities such as St. Vincent. Michigan law requires its CPAs to refer individuals, with whom the objecting entities decline to work, to other CPAs in the Title IV-E program, and St. Vincent has represented that it complies, and appears not to object to complying, with that law. OCR's approach of not applying the sexual orientation and gender identity nondiscrimination requirements of section 75.300(c) to prohibit a State from working with entities like St. Vincent is, at minimum, a less restrictive means of advancing HHS's interest than applying section 75.300(c) to prohibit working with such entities. *Cf. Burwell v. Hobby Lobby*, 573 U.S.682, 730–31 (2014) (refraining from deciding a potential RFRA conflict where an available less restrictive means resolves the question presented). Accordingly, OCR cannot conclude that applying the sexual-orientation and gender-identity nondiscrimination requirements of section 75.300(c) to Michigan with respect to St. Vincent's or other similarly situated entities is the least restrictive means of advancing a compelling governmental interest.[9]

OCR's conclusion here is consistent with the position HHS has taken in similar matters in other jurisdictions. Using the exceptions process available under 45 C.F.R. Part 75, HHS provided an exception to the State of South Carolina to enable the participation of certain faith-based providers in South Carolina's foster care program to the extent their religious exercise is substantially burdened by the religious nondiscrimination requirement of section 75.300(c).[10]

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[8] State Defendants' Response to Motion for Preliminary Injunction, Ex. A, ¶ 6, *Buck v. Gordon*, 1:19-cv-00286 (W.D. Mich. Apr. 15, 2019).

[9] In addition, the OMB Uniform Administrative Requirements, located at 2 C.F.R. § 200.300, do not contain provisions analogous to the relevant requirements in 45 C.F.R. § 75.300 (c). 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 C.F.R. Part 75 provides a mechanism for granting an exception from requirements of that part, including section 75.300(c): namely, case-by-case exceptions available under 45 C.F.R. § 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.

[10] HHS regulations explicitly allow for HHS to provide exceptions on a case-by-case basis, 45 C.F.R. § 75.102(b), or on a program-wide basis with the concurrence of OMB, 45 C.F.R. § 75.102(a). The case-by-case exceptions regulation at § 75.102(b) does not specify criteria for HHS to apply in considering whether to grant an exception. And, as the Supreme Court noted in striking down a law that prohibited animal sacrifice as part of a religious

Similarly, OCR recently concluded that RFRA prohibits HHS from applying the sexual orientation, gender identity, and same-sex marriage status provisions of section 75.300(c) and (d) to the State of Texas with respect to faith-based CPAs in its Title IV-E program whose religious beliefs concerning marriage and sexual relations prevent them from engaging in activities that condone or could be seen as condoning behavior inconsistent with those beliefs. In both cases HHS relied, as it does here, on its interest in broadening the number of child placing agencies and of prospective parents, and concluded that its interest counseled against imposing the HHS regulation in a way that would drive faith-based, child-placing agencies out of Title IV-E programs because of their religious objections to certain requirements of section 75.300.

For all these reasons, RFRA prohibits HHS from applying section 75.300(c) to the State of Michigan with respect to St. Vincent's Catholic Charities or other similarly situated entities as discussed above. The above analysis and conclusions have been provided to the Assistant Secretary for the HHS Administration for Children and Families (ACF) which administers Michigan's Title IV-E program.

We are aware of statements made by Michigan that suggests it may believe that HHS regulations require Michigan to apply sexual orientation and gender identity nondiscrimination provisions to St. Vincent or similarly situated religious providers of foster care and adoption services. In light of the definitive conclusions reached by HHS on this question, we ask that you refrain from representing to subrecipients or the public at large anything with respect to the application of any HHS authority that is inconsistent with such conclusions.

Sincerely,

Roger T. Severino
Director
Office for Civil Rights

Cc: Lynn Johnson, Assistant Secretary, Administration for Children and Families
Cc: Elizabeth Darling, Commissioner, Administration on Children, Youth, and Families
Cc: Lori Windham, Senior Counsel, Becket Fund for Religious Liberty

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." *Hialeah Church of the Lukumi Babalu Aye*, 508 U.S. at 547; (cleaned up); *see also Holt v. Hobbs*, 135 S. Ct. 853, 865–66 (2015); *cf. 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.").