

## SECRETARIAT FOR CATHOLIC HUMAN SERVICES

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ARCHDIOCESE OF PHILADELPHIA

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OFFICE OF THE SECRETARY

February 28, 2019

The Honorable Lynn Johnson  
Assistant Secretary  
Administration for Children and Families  
U.S. Department of Health and Human Services  
330 C Street, SW  
Washington, D.C. 20201

Re: Exemption Request Under 45 CFR § 75.102(b)

Dear Ms. Johnson:

The Diocesan Catholic Charities Agency in the Archdiocese of Philadelphia, Pennsylvania has provided exceptional service to children who need adoptive and foster homes, as well as to adoptive and foster parents, for a 100 years. Our service is deeply rooted in the faith and traditions of the Catholic Church and is a clear manifestation of the Catholic theological principle that "faith without works is dead." James 2:17. Since 1992 this service to needy children and families has been lived out through participation in Pennsylvania's SWAN program.

The Statewide Adoption and Permanency Network (SWAN) is a public/private partnership created by the Commonwealth of Pennsylvania for the purpose of facilitating the adoption and placement in quality settings of hard to place children who are in the care of the numerous County Children and Youth Agencies throughout Pennsylvania. SWAN's "partners" include the Pennsylvania Department of Human Services, the Pennsylvania Adoption Exchange, courts, public and private adoption agencies, organizations, and foster and adoptive parents.

The Pennsylvania Department of Human Services (DHS) oversees the administration of the SWAN program with federal HHS funds. In the 2017-18 Pennsylvania State Budget, \$323,812,000 of federal funds received under Title IV-E of the Social Security Act were used to administer the SWAN program through the numerous County Children & Youth Agencies. The 2018-19 Pennsylvania State Budget reflects that \$340,635,000 of federal Title IV-E funds are dedicated to the SWAN program.

Recently, without citing any state or federal authority, Pennsylvania's DHS has notified all SWAN affiliates, including religious affiliates such as Catholic Charities of Archdiocese of Philadelphia, that participation in the SWAN program requires all affiliates to either sign a new contract with new and expanded nondiscrimination language or withdraw from the adoption and foster ministry. The new contract language mandates that no SWAN affiliate may discriminate in any way in the administration of the service provider agreement on the basis of religion or sexual orientation and gender identity. No accommodation for conscientious religious objection to this provision was granted, even though one was sought.

Presumably, DHS rests its heavy handed decision on a 2017 Federal regulatory amendment which is not supported by Congressional authority. That regulatory change added two new paragraphs requiring nondiscrimination on, among other grounds, sexual orientation and gender identity and also required the recognition of the validity of same-sex marriages. See 45 CFR §75.300 (c), (d). Neither of those conditions is required by the regulation's enabling statute and both conditions offend the Catholic Charities' firmly held religious beliefs and seek to compel the Catholic Charities to violate their firmly held religious beliefs in violation of the Religious Freedom Restoration Act (RFRA).

The newly added regulation reads, in pertinent part:

(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.

45 CFR§75.300 (c),(d). Section 671 of the Social Security Act (42 U.S.C. § 671) already statutorily identifies the criteria with which a State's plan must comply to receive Title IV-E funds. Subparagraph 18 of that section is the only provision in the law that identifies the bases upon which a participating entity may not deny any person the opportunity to become an adoptive or foster

parent. The only enumerated bases identified in 42 U.S.C. § 671 include race, color and national origin. The pertinent paragraph reads:

(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;

Because the Supreme Court has previously, and consistently, ruled that an agency is not free to add conditions into regulations which were not intended by Congress, these new regulations are invalid. See for instance, *Utility Air Regulatory Group v. Environmental Protection Agency*, 573 U.S. 302, 328 (2014) “We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.

Additionally, more recently, in *Trinity Lutheran Church of Columbia, Inc., v. Comer*, the Supreme Court held that “[t]he State has pursued its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character. Under our precedents, that goes too far. The Department’s policy violates the Free Exercise Clause.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024, 198 L.Ed.2d 551 (2017).

Even more pertinently, the Supreme Court has ruled that regulatory burdens that pose substantial threats to religious liberty may not be considered to be statutorily authorized absent the “affirmative intention of the Congress clearly expressed.” *NLRB v. Catholic Bishop of Chicago*, 99 S.Ct. 1313, 1322 (1979). No such clear expression of Congressional intent is here present.

HHS’s new regulatory additions, albeit presumably unintentionally, forces us, as Catholic providers, to choose between exercising our firmly held religious beliefs and participating in an otherwise generally available governmental program. We further believe that this Hobson’s choice violates our constitutional rights as well as the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. (RFRA). RFRA prohibits the government from substantially burdening the free exercise of religion unless the government employs the least restrictive burden needed to accomplish a compelling governmental interest. We would suggest that a regulation which effectively

expels religious adoption and foster care providers out of the provider marketplace is not the least restrictive means to accomplish Congress' intent for Title IV-E of the Social Security Act.

Fortunately, HHS has the authority to stop these unconstitutional violations. 45 CFR § 75.102(b) states: "(b) Exceptions 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." This provision of the regulations allows HHS to recognize and fix unintended consequences.

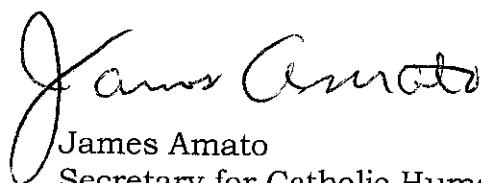
On our behalf, and on behalf of the other dioceses in Pennsylvania which participated in the SWAN program last year, Counsel for the Pennsylvania Catholic Conference filed the attached formal Complaint with Mr. Luis Perez, Deputy Director for Conscience and Religious Freedom within the Department's Office for Civil Rights. It is our understanding that our Complaint has been received and an investigation is ongoing and being handled as expeditiously as possible.

Unfortunately, our ministry, in addition to the children we serve, continues to suffer. While rooted in faith and driven by love, the Catholic Church has reaped spiritual rewards for its ministry to homeless children and childless couples in the SWAN program. However, the Church and its faithful have not been the only beneficiary of the Church's ancient ministry. The State has also benefited enormously from the longstanding symbiotic relationship, which has developed between the state, and the Church's various ministries such as relief services, caring for the homeless, operating food banks and shelters, counseling services as well as the adoption and foster services which are in jeopardy today. Numerous examples demonstrate how, for so many years the secular state has appreciated and benefited from the partnership and the Church's inner drive to serve the "least of these." Mt. 25:40. The unlawful imposition of the new non-discrimination contract provisions is a very real and substantial burden on the Catholic Charities' religious exercise and places in greater danger the at-risk children whom the SWAN program intends to help.

For the foregoing reasons, under the authority of 45 CFR § 75.102(b), the Catholic Charities of the Archdiocese of Philadelphia hereby formally request an individual exemption from the nondiscrimination requirements imposed upon them by the requirements of 45 CFR § 75.300(c) and (d).

We anxiously await your favorable reply. Thank you.

Sincerely,

A handwritten signature in cursive script that reads "James Amato". The signature is written in black ink and is positioned above the printed name and title.

James Amato  
Secretary for Catholic Human Services