

# CATHOLIC CHARITIES

DIOCESE OF HARRISBURG, PA. INC.

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February 18, 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 Harrisburg, Pennsylvania has provided exceptional service to children who need adoptive and foster homes, as well as to adoptive and foster parents, for 81 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



COUNCIL ON  
ACCREDITATION  
FOR CHILDREN  
AND FAMILY  
SERVICES



Catholic Charities of Harrisburg, 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 Diocese of Harrisburg 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 dark ink, appearing to read "Mark A. Totaro", with a stylized, cursive script.

Mark A. Totaro, Ph.D.  
Secretary, Catholic Charities

LAW OFFICES  
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November 27, 2018

Luis E. Perez  
Deputy Director for Conscience and Religious Freedom  
Office for Civil Rights  
U.S. Department of Human Services  
200 Independence Ave., S.W.  
Suite 509 F-2  
Washington, D.C. 20201

Dear Mr. Perez,

On behalf of four Diocesan Catholic Charities agencies within Pennsylvania, I would like to make a formal complaint and refer a matter to your office for review. Several Diocesan Catholic Charities agencies are facing unconstitutional discrimination based upon the agencies' adherence to firmly held tenets of the Roman Catholic faith. Diocesan Catholic Charities agencies are being forced to choose between participating in a state program funded with federal Title IV dollars and exercising and living out their religious beliefs.

As background, in 1992 Pennsylvania created, and continues to fund and maintain, the State Wide Adoption Network (SWAN) to coordinate and facilitate placing at-risk children, who are in legal custody of a county children & youth agency, into healthy foster and adoptive homes. The SWAN program, which is administered through one prime contractor, Diakon, utilizes numerous SWAN affiliate providers to carry out this important work. Several Pennsylvania diocesan Catholic Charities have, for decades, participated as SWAN affiliated providers as a diocesan ministry and a natural exercise of the dioceses' religious faith. Since the beginning, participating Catholic Charities agencies have declined opportunities to place children in homes with same-sex couples because doing so would validate that which violates the church's religious beliefs in marriage as a sacred union between one man and one woman and that every child is entitled to be raised by both a mother and a father.

On July 9, 2018, all SWAN affiliated providers were informed that future participation in the SWAN program was conditioned on signing a new contract requiring nondiscrimination on the basis of sexual orientation and gender identity or expression in the provision of services. The Diocesan Catholic Charities agencies received official notice on August 1, 2018, that the new nondiscrimination language was included in the new contracts and acquiescence was required for participation. A representative letter sent to the Diocese of Greensburg dated August 1, 2018, along with the pertinent portion of the new contract, paragraph 18 on pages 7 and 8, are included as Attachment "A."



On behalf of the affronted Catholic Charities programs, Mr. Eric Failing of the Pennsylvania Catholic Conference (PCC) submitted a Notice of Violation to the Pennsylvania Department of Human Services, as is required under the Pennsylvania Religious Freedom Protection Act, and requested a reasonable accommodation as a way of curing the Department's violation of the Charities' religious liberties. Please see attachment "B."

On November 8, 2018, the Department responded to the Pennsylvania Catholic Conference denying PCC's requested proposed solution and reiterated the requirement that all SWAN affiliate providers commit to nondiscrimination on the basis of sexual orientation and gender identity "regardless of religious convictions or any other objections to the provision." Ironically, the State's official response stated that "[t]he Administration cannot countenance discrimination in whatever form against any group of Pennsylvanians." Please see attachment "C."

Pennsylvania receives substantial federal support for its SWAN program from grants to states for aid and services to needy families with children and for child welfare services under 42 U.S.C.A. § 670, et seq. The authorizing statute does not require the offending language. The relevant portion of 42 U.S.C.A. § 671, State plan for foster care and adoption assistance, effective February 9, 2018, 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 SWAN program is, in large part, funded through Title IV-B and Title IV-E funding, and because neither the authorizing language of 42 U.S.C.A. § 671, or any other federal or state authority grants Pennsylvania the authority to impose this nondiscrimination condition upon SWAN program affiliates, we believe that Pennsylvania's mandate that SWAN providers violate sincerely held religious beliefs in order to participate in the SWAN program intrudes upon the Catholic Charities' religious liberties and violates the Religious Freedom Restoration Act and the Religion Clauses of the First Amendment.

Thank you for your kind attention to this matter. Please feel free to contact me if you need additional information.

Sincerely,



William Murch & Connell, LLC

cc: Mr. Eric Failing

# Attachment

“A”



August 1, 2018

471 JPL Work Tower  
P.O. Box 4500  
Greensburg, PA 15601

1-888-795-2512  
phone 717-236-8190  
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[www.diakonswan.org](http://www.diakonswan.org)

In partnership with  
Family Design Resources

Catholic Charities of the Diocese of Greensburg, PA  
Attn: Attn: Raymond E. Riffle  
711 East Pittsburgh Street  
Greensburg, PA 15601

Dear SWAN Affiliate:

Enclosed please find the Statewide Adoption and Permanency Network (SWAN) Purchase of Service Affiliate Agreement packet for the contract period starting October 1, 2018.

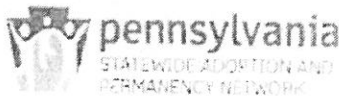
Please review the agreement to be informed of contractual expectations and updates. Several updates have been made to the agreement. Updates include the following:

- **Contract Term** – The contract is updated from a 12-month agreement to a 21-month agreement running from October 1, 2018 to June 30, 2020.
- **Payment for Service** – Service payment rates are no longer referenced as an attachment to the agreement. The Payment of Service language is updated to reference the fee schedule applied based on the referral submission date. See Section 5, paragraphs (a) and (b) to view the updated language.
- **Record Keeping Requirements** – Additional language regarding maintaining records in accordance with DHS regulation is added. See Section 10, paragraph (a) to view the updated language.
- **Nondiscrimination/Sexual Harassment** – As directed by DHS, non discriminatory language relative to beneficiaries of SWAN services is added. See Section 18, paragraph (b) to view the additional language.

To avoid disruption in referrals and payments, please submit the documentation listed below to Diakon-SWAN, LLC (Diakon) no later than **Sunday, September 30, 2018**. A pre-addressed return mail envelope is included for your convenience.

Checklist of materials to be returned to Diakon:

- ☐ **Two signed** copies of the Purchase of Service Affiliate Agreement. (Agreements must be signed by a corporate officer with contractual authority and the signatures must be witnessed by a second party. Please note there are **two** signature pages per agreement.)
- ☐ Confirmed agency legal name and contract address listed on the first page of both agreements. Only if edits are needed, update the agency's legal name and address on the first page of both agreements.
- ☐ Copy of current insurance certificate – public liability and property damage insurance



Prime Contractor for the Statewide Adoption and Permanency Network



(b) The Provider and its officers, employees, agents, or representatives are not employees of Diakon, and are not entitled to any benefits or services provided by Diakon to its employees, including but not limited to workers' compensation insurance, unemployment insurance, group insurance, pension plan, withholding, and the like.

15. Indemnification. Neither party, nor any of its directors, officers, agents, employees, affiliates or subsidiaries or their respective directors, officers, agents or employees shall be responsible to the other for any act or omission of the other party under this Agreement. The parties shall indemnify and hold the other harmless from and against any and all liability, loss, claim, suit, demand, cost, expense and damages, including reasonable attorneys' fees, brought by any person, firm, association, corporation or other legal entity arising from the matters covered under this Agreement.

16. Compliance with Applicable Laws. The Provider shall comply with all applicable federal, state, county and local laws, regulations and policies, with which the Provider must be familiar, in the course of rendering the services contemplated hereunder.

17. Nondiscrimination/Americans with Disabilities Act. The parties to this Agreement and their officers, employees, agents, and representatives agree as follows:

(a) Pursuant to federal regulations promulgated under the authority of The Americans with Disabilities Act, 28 C.F.R. §35.101 et seq., Provider understands and agrees that no individual with a disability shall, on the basis of the disability, be excluded from participation in the services provided in this Agreement or from activities provided for under this Agreement. As a condition to the submission of a proposal for services of accepting and executing this Agreement, Provider agrees to comply with the "General Prohibitions Against Discrimination," 28 C.F.R. §35.130, and all other regulations promulgated under Title II of The Americans with Disabilities Act which are applicable to the benefits, services, programs, and activities provided by the Commonwealth through contracts with outside contractors.

(b) Provider shall be responsible for and agrees to indemnify and hold harmless Diakon and DHS from all losses, damages, expenses, claims, demands, suits, and actions brought by any party against Diakon or DHS as a result of failure to comply with this Paragraph 17.

18. Nondiscrimination/Sexual Harassment. During the term of this Agreement, the Provider agrees as follows:

(a) In the hiring of any employees for the performance of work or any other activity required under this Agreement, the Provider or any person acting on behalf of the Provider shall not by reason of gender, race, creed, or color discriminate against any citizen of this Commonwealth who is qualified and available to perform the work to which the employment relates.

(b) Neither the affiliate agency nor any subcontractor nor any person on their behalf shall in any manner discriminate by reason of race, gender, creed, color, sexual orientation, gender identity or expression, or in violation of the Pennsylvania Human Relations Act and applicable federal laws, against or intimidate any beneficiary of SWAN services,

including children and youth who are or who have been in foster care and prospective or approved qualified families who have applied or have agreed to provide permanency to children in the foster care system under this agreement.

(c) Neither the Provider nor any person on Provider's behalf shall in any manner discriminate against or intimidate any employee involved in the manufacture of supplies, the performance of work or any other activity required under this Agreement on account of gender, race, creed or color.

(d) The Provider shall establish and maintain a written sexual harassment policy and shall inform their employees of the policy. The policy must contain a notice that sexual harassment will not be tolerated and employees who practice it will be disciplined.

(e) The Provider shall not discriminate by reason of gender, race, creed, or color against any supplier who is qualified to perform the work to which the contract relates.

(f) The Provider shall furnish all necessary employment documents and records to and permit access to its books, records, and accounts by the contracting officer and the Department of General Services' Bureau of Contract Administration and Business Development for purposes of investigation to ascertain compliance with the provisions of this Paragraph 18. If the Provider does not possess documents or records reflecting the necessary information requested, it shall furnish such information on reporting forms supplied by the contracting officer of the Bureau of Contract Administration and Business Development.

19. Limited English Proficiency. Affiliate shall comply with Title VI of the Civil Rights Act of 1964, 43 U.S.C. §2000d. This includes taking action, as required, to assure that all persons with Limited English Proficiency have meaningful access to the services administered to the Prime Contractor. "Limited English Proficiency" means the inability to speak, read, write or understand the English language at a level that permits an individual to interact effectively with social service agencies or health care providers.

20. Severability. The terms and conditions of this Agreement shall be deemed to be severable. Consequently, if any clause, term, or condition hereof shall be held to be illegal or void, such determination shall not affect the validity or legality of the remaining terms and conditions, and notwithstanding any such determination, this Agreement shall continue in full force and effect unless the particular clause, term, or condition held to be illegal or void renders the balance of the Agreement to be impossible to perform.

21. Binding Effect, Assignment, and Delegation. This Agreement shall bind and benefit the successors and assigns of the parties, but either party without the prior consent of the other party shall not assign it.

22. Applicable Law. This Agreement shall be interpreted and enforced under laws of the Commonwealth of Pennsylvania, notwithstanding the law of conflict of laws.

23. Modification. This document and all exhibits and documents which have been incorporated by reference, contains all the terms, provisions, and conditions of this Agreement. No term or provision may be unilaterally modified or amended. Any alteration, variation, modification or waiver of a provision of this Agreement shall be valid only when

# Attachment “B”



PENNSYLVANIA  
CATHOLIC  
CONFERENCE

August 24, 2018

The Honorable Teresa D. Miller  
Secretary, Pennsylvania Department of Human Services  
Room 333, Health & Welfare Building  
Harrisburg PA 17120

Re: SWAN Program Contract Nondiscrimination Provision  
Notice of Violation Under the Pennsylvania Religious Freedom Protection Act

Dear Secretary Miller:

The Pennsylvania Catholic Conference is the public affairs agency that represents the eight Latin Rite and two Eastern Rite Diocese in the Commonwealth of Pennsylvania. On behalf of those dioceses and of the Catholic Charities agencies of the Dioceses of Greensburg, Erie, Harrisburg, Allentown, Scranton and the Archdiocese of Philadelphia, and in fulfillment of the requirements of the Pennsylvania Religious Freedom Protection Act, under 71 P.S. § 2405(b), the Department of Human Services is hereby put on NOTICE that the nondiscrimination clause added by the Department to the 2018-2020 Purchase of Service Affiliate Agreement under the SWAN Program will substantially burden the free exercise of religion of the Catholic Church in the Commonwealth of Pennsylvania, and of its affiliated Catholic Charities agencies and the personnel employed by those agencies in the ways hereinafter described. All of those entities and associated personnel request the Department to provide a cure and to provide appropriate relief from the burden that is imposed by that nondiscrimination clause.

**Background**

SWAN, formally known as the "Statewide Adoption and Permanency Network" was created in 1992 by Governor Casey. SWAN is a "partnership among the Department of Human Services (DHS), the Pennsylvania Adoption Exchange, public and private adoption agencies, organizations, advocates, judges, the legal community, and foster and adoptive parents." The SWAN program is funded and overseen by DHS. The SWAN program serves children who are in the custody of county children and youth agencies and is designed to support the work of county agencies in expediting permanency services for these children.

On July 9, 2018, the DHS Office of Children, Youth and Families (OCYF) held a meeting with Diakon and the SWAN affiliates (including Catholic Charities agencies) to discuss the new contract period beginning in October 2018. The new contract is to begin October 1,

The Public Affairs Agency of the Catholic Bishops of Pennsylvania, 1990  
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www.penncc.org

2018 and continue until June 30, 2020. Affiliate providers received the new Purchase of Service Affiliate Agreements on or around August 6, 2018, and are required to sign the new agreement, with the religiously objectionable clause, in order to participate in SWAN. The nondiscrimination clause found in ¶18(b) of the Agreement states:

*Neither the affiliate agency nor any subcontractor nor any person on their behalf shall in any manner discriminate by reason of race, gender, creed, color, **sexual orientation, gender identity or expression**, or in violation of the Pennsylvania Human relations Act and applicable federal laws, against or intimidate any beneficiary of SWAN services, including children and youth who are or who have been in foster care and prospective or approved qualified families who have applied or have agreed to provide permanency to children in the foster care system under this agreement.*

Any affiliate agency that is not going to sign the new contract must inform SWAN by August 31, 2018. If an affiliate agency is going to sign the new contract, it must be sent to SWAN by September 30, 2018.

**Issues raised:**

The new non-discrimination clause proposed for every SWAN contract presents religiously troubling concerns for the Catholic Charities and Catholic Social Services agencies in the several Roman Catholic Dioceses which have for many years served Pennsylvania families and children as SWAN participants.

If forced to sign the new SWAN contract, these agencies, which have provided valuable loving care to Pennsylvania's at-risk youth for decades, would be prohibited from adhering to firmly held beliefs in longstanding Catholic doctrinal and moral teachings regarding the sacredness of marriage as between one man and one woman, which is currently given expression by those agencies when declining to collaborate with same sex couples when the agencies are providing services related to adoption and foster care. Alternatively, if the agencies do not sign the new contract, they will not be able to provide adoption and foster care services through the SWAN program, which will substantially burden their ability to continue their religious ministry of providing adoption and foster care programs in a manner which does not force them to violate their religious beliefs.

**Religious Basis for the Objection:**

The Catholic Church has a long history of serving and ministering to children and families. Scripture itself describes that from the beginning of the Church, ministering to the widows and orphans has been an integral aspect of the exercise of the Catholic faith. **"Religion that is pure and undefiled before God, the Father, is this: to visit orphans and widows in their affliction, and to keep oneself unstained from the world."** James 1:27. It is in the

service of charity to others that the Catholic meets God. Saint Augustine wrote: "If you see Charity, you see the Trinity." *De Trinitate*, VIII, 8, 12: CCL 50, 287.

The history of the Catholic Church both in Europe and in America is replete with examples of Catholic institutions whose primary purpose was to care for parentless children. The first orphanage in the American continent was an orphanage for girls, which was established in 1548 in Mexico by a Spanish order and was called La Caridad. The first orphanage in what is now the United States was founded by the Ursulines Order in New Orleans in 1727 under the auspices of Louis XV.

In his September 13, 1987, address to Catholic Charities, USA, in San Antonio, Pope John Paul II reminded the national association of Catholic Charities agencies that:

*Works of mercy, justice and compassion are basic to the history of the Church in the United States.* The two American women who have been numbered among the saints, Frances Xavier Cabrini and Elizabeth Ann Seton, have been thus honoured principally because of their work for their poorer brothers and sisters. The initiatives of Catholic charities in the United States go back to before the Declaration of Independence. Countless institutions and structures have been established to assist the orphan, the immigrant, the ethnic groups, all persons in need - of every race and creed. Countless Americans of all extractions have made the compassionate service of their fellow human beings the whole purpose and method of their lives. In particular, generations of religious, women and men, have consumed themselves in selfless service, under the sign of love.

In addition, excerpts from the Encyclical Letter of the Supreme Pontiff, Benedict XVI, *Deus Caritas Est*, demonstrate that the Catholic Church's religious faith is lived out and is exercised through love of and care for others. "The Church's charitable activity is a manifestation of Trinitarian Love." Pope Benedict further spoke of charity (love of other) as a responsibility of the entire Church:

Love of neighbour, grounded in the love of God, is first and foremost a responsibility for each individual member of the faithful, but it is also a responsibility for the entire ecclesial community at every level: from the local community to the particular Church and to the Church universal in its entirety. As a community, the Church must practice love.

*Deus Caritas Est*, ¶ 20.

The requirement to love others as a part of the Catholic's worship of God drives the Catholic Charities organizations to provide the services it does. This religious principle then manifests itself today in the Charities' adoption and foster programs which are central to the exercise of the Catholic faith – never ancillary. Those individuals who direct and provide those services on behalf of the Church do so as a personal witness to their own religious principles and beliefs and in the exercise of their religious obligations to aid those in need.

The Pennsylvania Religious Freedom Protection Act, 71 P.S. §2403, describes the meaning of the imposition of a "substantial burden" on the religious liberty of a religious entity or an individual as follows:

**"Substantially burden."** An agency action which does any of the following:

- (1) Significantly constrains or inhibits conduct or expression mandated by a person's sincerely held religious beliefs.
- (2) Significantly curtails a person's ability to express adherence to the person's religious faith.
- (3) Denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion.
- (4) Compels conduct or expression which violates a specific tenet of a person's religious faith.

By inclusion of a mandatory contractual provision (the proposed nondiscrimination clause) in the SWAN affiliates agreement, without including any possibility of the accommodation of the sincerely-held religious beliefs of the persons and religiously-affiliated agencies which have heretofore faithfully and successfully provided services under the SWAN Program, the Department will substantially burden the religious liberties and the free exercise of the religious beliefs and practices of those religiously-affiliated agencies and their personnel who cannot agree to abide by the newly-added strictures in that clause.

Specifically, governmentally compelled adherence to the proposed clause, with the price of non-acceptance of that clause being foreclosure from continued participation in the SWAN Program, will substantially burden the religious beliefs and practices of Catholic agencies and their personnel in all four of the circumstances which are stated in the disjunctive in the above-quoted statutory definition:

- (1) Catholic Charities agencies and their personnel, if forced to abandon their beliefs or else be precluded from participation in the SWAN Program, will be constrained or inhibited in the expression of essential tenets of their faith.
- (2) Catholic Charities agencies and their personnel, if precluded from participation in the SWAN Program by reason of their adherence to their religious beliefs, will be subject to a significant curtailment of their ability to express adherence to essential tenets of their faith.
- (3) Catholic Charities agencies and their personnel, if denied an opportunity to participate in the SWAN Program solely because they cannot accept the imposition of a religiously-objectionable condition on that participation, will be denied a reasonable opportunity to engage in ministerial activities that are fundamental to the practice of their religious faith.
- (4) Catholic Charities agencies and their personnel, if compelled by force of the coercive power of government to provide services that they believe to be religiously objectionable in order to participate in the SWAN Program, will have been obliged to engage in conduct that is contrary to their sincerely-held religious beliefs.



**Authority to Act:**

During a recent presentation and webinar for SWAN affiliate providers, the Department and Diakon personnel gave a PowerPoint presentation informing the affiliate providers of the new nondiscrimination language. Neither the PowerPoint information provided by the Department nor the 2018-2020 Purchase of Service Affiliate Agreement itself explicitly identify the legal authority upon which the Department is relying in order to advance this revised contract clause requirement.

The Pennsylvania Human Relations Act (PHRA) does not identify sexual orientation and gender identity as having legally protected status, so the Department's authority does not lie in the PHRA or any other Pennsylvania statute. Possibly the Department is relying upon the Governor's April 7, 2016, Executive Order No. 2016-05 – Contract Compliance, as authority for this recent directive. That Executive Order required all agencies under the Governor's authority to cooperate with the Department of General Services (DGS) to ensure that "contractors and grantees agree. . . not to discriminate in the award of subcontract or supply contracts . . . on the basis of race gender creed, color, sexual orientation or gender identity or expression." However, that Executive Order specifically exempted from its scope those federally funded programs which have contract compliance requirements imposed by the federal agency:

For those programs where an agency's receipt and use of federal funds are subject to approval and oversight by a federal funding agency, Agency Heads under the Governor's jurisdiction will comply with those contract compliance requirements imposed by that federal agency as a condition of eligibility for the funds rather than program requirements established by DGS.

E.O. 2016-05 §3(c).

To the extent that SWAN contracts through Diakon are funded by federal programs, "subject to approval and oversight by a federal agency," with federal compliance requirements, it is arguable that Executive Order 2016-05 does not authorize this new contract requirement. Nevertheless, to the extent that any State funds are appropriated for the SWAN Program, the Governor's Executive Order could still arguably apply to the use of those funds. However, the validity of that Order itself may be called into question under the recent decision of the PA Supreme Court in the case of *Markham v. Wolf*, Docket Nos. 109, 110 MAP 2016 (Pa. 2018).

Nevertheless, the Governor's Executive Order is not supported by any statutory warrant found in Pennsylvania law, and that Order, and any legal authority that may possibly be asserted to support it, must be "construed so as to avoid the imposition of substantial burdens upon the free exercise of religion without compelling justification." 71 P.S. §2402(2).

That principle of statutory construction is likewise in keeping with principles of avoidance of constitutional violation in the construction of statutory authority set forth by the U.S. Supreme Court in the case of *NLRB v. Catholic Bishop of Chicago*, 99 S.Ct. 1313, 1319 (1979):

"The values enshrined in the First Amendment plainly rank high 'in the scale of our national values.' In keeping with the Court's prudential policy it is incumbent on us to determine whether the Board's exercise of its jurisdiction here would give rise to serious constitutional questions. If so, we must first identify 'the affirmative intention of the Congress clearly expressed' before concluding that the Act grants jurisdiction."

Consequently, absent any clearly expressed *statutory* authority that would affirmatively require the Department to apply its revised nondiscrimination clause to religiously-affiliated agencies, any attempt to coerce those entities and their personnel to adhere to such a clause would offend not only the Religious Freedom Protection Act, but also the Free Exercise Clause of the First Amendment to the U.S. Constitution.

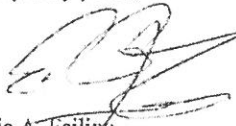
#### **Proposed Solution**

The Diocesan Catholic Charities Agencies of Pennsylvania and their personnel formally request the Department to accommodate their religious convictions and practices by providing an adequate and effective exemption for conscientiously-objecting faith-based organizations from the newly-added proscriptions on discrimination on the basis of sexual orientation or gender identity or expression.

#### **Conclusion**

Without the requested appropriate relief, the Catholic Charities of Pennsylvania will, by necessity to protect their religious liberties, be compelled to consider the filing of an action in the Commonwealth Court against the Department to assert a claim under the Pennsylvania Religious Freedom Protection Act, 71 P.S. §§2401, et seq. Thank you for your kind attention to this matter.

Very truly yours,



Eric A. Failing  
Executive Director

cc: Doris M. Leisch  
Chief Counsel  
Office of General Counsel  
Pennsylvania Department of Human Services  
3<sup>rd</sup> Floor West  
Health & Welfare Building  
Harrisburg PA 17120

# Attachment

## “C”



COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF HUMAN SERVICES

NOV 08 2018

Mr. Eric Failing  
Executive Director  
Pennsylvania Catholic Conference  
223 North Street, Box 2835  
Harrisburg, Pennsylvania 17105

Dear Mr. Failing:

Thank you for your August 24, 2018 correspondence regarding the Statewide Adoption and Permanency Network (SWAN) Program.

The Wolf Administration is committed to providing services to all citizens of the Commonwealth, on an equal and non-discriminatory basis. As part of this commitment, the Administration has prioritized the review of its contractual and other arrangements with social service providers throughout the Commonwealth to ensure consistent and unbiased service delivery. The Administration believes that everyone, including foster children and the families that serve them, must receive high-quality services, regardless of the children's or families' race, gender, creed, color, sexual orientation, or gender identity or expression. The new SWAN affiliate contracts reflect that belief by requiring all SWAN affiliates to commit to providing critical permanency services in a non-discriminatory manner to children in foster care and those families who are willing to provide the desired permanency.

The SWAN program began in 1992 as an initiative to help all children in foster care achieve timely permanency. Since its inception, more than 44,500 children have been adopted from the Pennsylvania foster care system. Since the beginning of the SWAN program, the Department of Human Services has required that the SWAN prime contractor ensure that services are provided to children in foster care regardless of their geographic location, gender, culture or race, and that families not be denied the opportunity to adopt based on age, race, ethnicity, gender, religion, income, marital status, education, employment status, citizenship, or geography. The non-discrimination clause included in the new SWAN affiliate contracts builds upon those requirements and is based upon the belief that all Pennsylvania children and families deserve equal treatment and services.

The Administration cannot countenance discrimination in whatever form against any group of Pennsylvanians, regardless of how well intentioned the basis on which such discrimination is grounded. For that reason, the Administration will require all affiliate agencies to adhere to the new non-discrimination provision in the SWAN affiliate contracts, regardless of religious convictions or any other objections to the provision. I

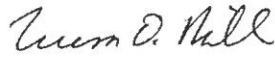
Mr. Eric Failing

-2-

am therefore unable to grant your request to be exempt from the provision preventing discrimination on the basis of sexual orientation or gender identity or expression.

If you have any questions or would like to discuss this further, please contact Ms. Cathy Utz, Director, Office of Children, Youth, and Families, at (717) 705-8098.

Sincerely,

A handwritten signature in cursive script, appearing to read "Teresa D. Miller".

Teresa D. Miller  
Secretary

cc: Ms. Utz



DEPARTMENT OF HEALTH AND HUMAN SERVICES  
OFFICE FOR CIVIL RIGHTS (OCR)  
**Civil Rights Discrimination Complaint**

Form Approved: OMB No. 0945-0002  
Expiration Date: 04/30/2019



YOUR FIRST NAME David R. Dye, Esq,		YOUR LAST NAME	
HOME PHONE (Please include area code)		WORK PHONE (Please include area code) (717) 232-8731	
STREET ADDRESS 2303 Market Street		CITY Camp Hill	
STATE PA	ZIP 17011	E-MAIL ADDRESS (If available) DYE@BMC-LAW.NET	

Are you filing this complaint for someone else? ☒ Yes ☐ No

If Yes, whose civil rights do you believe were violated?

FIRST NAME Pennsylvania Catholic Dioceses	LAST NAME
--	-----------

I believe that I have been (or someone else has been) discriminated against on the basis of:

- ☐ Race / Color / National Origin ☐ Age ☒ Religion / Conscience ☐ Sex  
☐ Disability ☐ Other (specify):

Who or what agency or organization do you believe discriminated against you (or someone else)?

PERSON / AGENCY / ORGANIZATION

The Honorable Teresa D. Miller, Secretary, Pennsylvania Department of Human Services

STREET ADDRESS Room 333 Health & Welfare Building		CITY Harrisburg
STATE PA	ZIP 17120	PHONE (Please include area code) (717) 787-2600

When do you believe that the occurred?

LIST DATE(S)

SEPTEMBER 1, 2018 and continuing

Describe briefly what happened. How and why do you believe you have been discriminated against? Please be as specific as possible.

(Attach additional pages as needed)

Religious discrimination. The State is forcing contract providers to violate religious beliefs. See attached docu

Please sign and date this complaint. You do not need to sign if submitting this form by email because submission by email represents your signature.

SIGNATURE

*David R. Dye, Esq.*

DATE 11/26/2018

Filing a complaint with OCR is voluntary. However, without the information requested above, OCR may be unable to proceed with your complaint. We collect this information under authority of Sections 1553 and 1557 of the Affordable Care Act, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, the Church Amendments, the Coats-Snowe Amendment, the Weldon Amendment, and other civil rights statutes. We will use the information you provide to determine if we have jurisdiction and, if so, how we will process your complaint. Information submitted on this form is treated confidentially and is protected under the provisions of the Privacy Act of 1974. Names or other identifying information about individuals are disclosed when it is necessary for investigation of possible discrimination, for internal systems operations, or for routine uses, which include disclosure of information outside the Department of Health and Human Services (HHS) for purposes associated with civil rights compliance and as permitted by law. It is illegal for a recipient of Federal financial assistance from HHS to intimidate, threaten, coerce, or discriminate or retaliate against you for filing this complaint or for taking any other action to enforce your rights under Federal civil rights laws. You are not required to use this form. You also may write a letter or submit a complaint electronically with the same information. To submit an electronic complaint, go to OCR's web site at:

[www.hhs.gov/ocr/civilrights/complaints/index.html](http://www.hhs.gov/ocr/civilrights/complaints/index.html). To submit a complaint using alternative methods, see reverse page (page 2 of the complaint form).

The remaining information on this form is optional. Failure to answer these voluntary questions will not affect OCR's decision to process your complaint.

Do you need special accommodations for OCR to communicate with you about this complaint? (Check all that apply)

☐ Braille ☐ Large Print ☐ Cassette tape ☐ Computer diskette ☐ Electronic mail ☐ TDD

☐ Sign language interpreter (specify language): \_\_\_\_\_

☐ Foreign language interpreter (specify language): \_\_\_\_\_ ☐ Other: \_\_\_\_\_

If we cannot reach you directly, is there someone we can contact to help us reach you?

FIRST NAME: Philip Murren LAST NAME: \_\_\_\_\_

HOME PHONE (Please include area code): \_\_\_\_\_ WORK PHONE (Please include area code): (717) 232-8731

STREET ADDRESS: 2303 Market Street CITY: Harrisburg

STATE: PA ZIP: 17011 E-MAIL ADDRESS (If available): bmc-law2@msn.com

Have you filed your complaint anywhere else? If so, please provide the following. (Attach additional pages as needed)

PERSON / AGENCY / ORGANIZATION / COURT NAME(S): \_\_\_\_\_

DATE(S) FILED: \_\_\_\_\_ CASE NUMBER(S) (If known): \_\_\_\_\_

To help us better serve the public, please provide the following information for the person you believe was discriminated against (you or the person on whose behalf you are filing).

ETHNICITY (select one) RACE (select one or more)

☐ Hispanic or Latino ☐ American Indian or Alaska Native ☐ Asian ☐ Native Hawaiian or Other Pacific Islander

☐ Not Hispanic or Latino ☐ Black or African American ☐ White ☐ Other (specify): \_\_\_\_\_

PRIMARY LANGUAGE SPOKEN (if other than English): \_\_\_\_\_

How did you learn about the Office for Civil Rights?

☐ HHS Website /Internet Search ☐ Family / Friend /Associate ☐ Religious /Community Org ☒ Lawyer /Legal Org ☐ Phone Directory ☐ Employer

☐ Fed /State/Local Gov ☐ Healthcare Provider /Health Plan ☐ Conference /OCR Brochure ☐ Other(specify): \_\_\_\_\_

To submit a complaint, please type or print, sign, and return completed complaint form package (including consent form) to the OCR Headquarters address below.

## U.S. Department of Health and Human Services

Office for Civil Rights  
Centralized Case Management Operations  
200 Independence Ave., S.W.  
Suite 515F, HHH Building  
Washington, D.C. 20201  
Customer Response Center: (800) 368-1019  
Fax: (202) 619-3818  
TDD: (800) 537-7697  
Email: [ocrmail@hhs.gov](mailto:ocrmail@hhs.gov)

### Burden Statement

Public reporting burden for the collection of information on this complaint form is estimated to average 45 minutes per response, including the time for reviewing instructions, gathering the data needed and entering and reviewing the information on the completed complaint form. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: HHS/OS Reports Clearance Officer, Office of Information Resources Management, 200 Independence Ave. S.W., Room 531H, Washington, D.C. 20201. Please do not mail this complaint form to this address.



HHS-700 (10/17) (BACK)





## COMPLAINANT CONSENT FORM

The Department of Health and Human Services' (HHS) Office for Civil Rights (OCR) has the authority to collect and receive material and information about you, including personnel and medical records, which are relevant to its investigation of your complaint.

To investigate your complaint, OCR may need to reveal your identity or identifying information about you to persons at the entity or agency under investigation or to other persons, agencies, or entities.

The Privacy Act of 1974 protects certain federal records that contain personally identifiable information about you and, with your consent, allows OCR to use your name or other personal information, if necessary, to investigate your complaint.

Consent is voluntary, and it is not always needed in order to investigate your complaint; however, failure to give consent is likely to impede the investigation of your complaint and may result in the closure of your case.

Additionally, OCR may disclose information, including medical records and other personal information, which it has gathered during the course of its investigation in order to comply with a request under the Freedom of Information Act (FOIA) and may refer your complaint to another appropriate agency.

Under FOIA, OCR may be required to release information regarding the investigation of your complaint; however, we will make every effort, as permitted by law, to protect information that identifies individuals or that, if released, could constitute a clearly unwarranted invasion of personal privacy.

Please read and review the documents entitled, Notice to Complainants and Other Individuals Asked to Supply Information to the Office for Civil Rights and Protecting Personal Information in Complaint Investigations for further information regarding how OCR may obtain, use, and disclose your information while investigating your complaint.

**In order to expedite the investigation of your complaint if it is accepted by OCR, please read, sign, and return one copy of this consent form to OCR with your complaint. Please make one copy for your records.**

- As a complainant, I understand that in the course of the investigation of my complaint it may become necessary for OCR to reveal my identity or identifying information about me to persons at the entity or agency under investigation or to other persons, agencies, or entities.
- I am also aware of the obligations of OCR to honor requests under the Freedom of Information Act (FOIA). I understand that it may be necessary for OCR to disclose information, including personally identifying information, which it has gathered as part of its investigation of my complaint.



- In addition, I understand that as a complainant I am covered by the Department of Health and Human Services' (HHS) regulations which protect any individual from being intimidated, threatened, coerced, retaliated against, or discriminated against because he/she has made a complaint, testified, assisted, or participated in any manner in any mediation, investigation, hearing, proceeding, or other part of HHS' investigation, conciliation, or enforcement process.

**After reading the above information, please check ONLY ONE of the following boxes:**

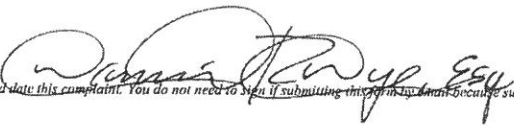
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**CONSENT:** I have read, understand, and agree to the above and give permission to OCR to reveal my identity or identifying information about me in my case file to persons at the entity or agency under investigation or to other relevant persons, agencies, or entities during any part of HHS' investigation, conciliation, or enforcement process.

☐

**CONSENT DENIED:** I have read and I understand the above and do not give permission to OCR to reveal my identity or identifying information about me. I understand that this denial of consent is likely to impede the investigation of my complaint and may result in closure of the investigation.

Signature:



Date: 11/26/2018

\*Please sign and date this complaint. You do not need to sign if submitting this complaint because submission by email represents your signature.

Name (Please print): David R. Dye

Address: 2303 Market Street, Camp Hill, PA 17011

Telephone Number: (717) 232-8731