



HOUSE COMMITTEE ON WAYS & MEANS
CHAIRMAN RICHARD E. NEAL

MAJORITY STAFF REPORT

CHILDREN AT RISK

THE TRUMP ADMINISTRATION'S WAIVER OF FOSTER
CARE NONDISCRIMINATION REQUIREMENTS



AUGUST 19, 2020

U.S. HOUSE OF REPRESENTATIVES

In Memory of Congressman John Lewis

This report is being released at a bittersweet time in American history when Americans are coming together to fight injustice but mourning the loss of my dear friend, Congressman John Lewis, who was a humanitarian and a Civil Rights icon. He provided a voice to the voiceless and championed equality for all. I would like to recognize his hard work, patience, and guidance in preparing this report.

This Committee on Ways and Means Majority staff report began with a joint request from me and Congressman John Lewis, who was then the Chairman of the Committee's Subcommittee on Oversight. The question—whether the Administration had followed laws requiring them to put the best interest of the child at the heart of foster care policy—raised issues within the jurisdictions of both Subcommittees. But more importantly, the question weighed heavily on both of our hearts. As Americans who grew up in the segregated South, we understood first-hand the profoundly detrimental effects of discrimination on individuals, families, and communities. Since he was a teen, John fought against oppression and discrimination, helping shape this country so that all could enjoy the opportunities of equality and justice, not just the privileged.

Children in foster care are among the most vulnerable people in our society. They carry the burden of their parents' actions, and often of our failure to help their parents and their families stay together and safe. They are disproportionately Black, brown, Indigenous, and LGBTQ. John recognized that government has a unique responsibility to protect foster youth and to ensure that *each and every* child in foster care finds a loving, affirming family. Not just the white ones. Not just the Christian ones. And not just the straight ones.

My friend John Lewis was the “Conscience of the Congress” and a long-time champion for foster youth. He heard their voices. He loved them. He knew they deserved to be in safe, loving, accepting homes. In his final opinion piece, John shared that he drew hope from the millions of protestors around the globe who set aside divisions based on personal characteristics, background, and nationality to demand respect for human dignity. John has been an inspiration to me for more than 50 years. I deeply regret that he is not here to see the culmination of this work we began together. But I pledge that we will carry this work forward. As he would say, fighting discrimination is the just thing and the right thing to do.



Danny K. Davis
Chairman
Subcommittee on Worker and Family Support

EXECUTIVE SUMMARY

The Committee on Ways and Means (Committee) Majority staff released this report¹ to summarize an investigation into a waiver that the U.S. Department of Health and Human Services (HHS) granted to South Carolina on January 23, 2019. The waiver allowed an exemption from HHS regulations that prohibit discrimination in the state’s child welfare system. The investigation included: a bipartisan request for an independent analysis from the U.S. Government Accountability Office (GAO); requests for information from HHS, state officials in South Carolina and Texas, Miracle Hill Ministries (Miracle Hill), and leading child welfare and nondiscrimination experts; and a review of relevant documents and communications. This report focuses on HHS’s evaluation and approval of the South Carolina waiver application, as well as on the waiver’s consequences for LGBTQ² people and other vulnerable youth in the child welfare system.

The staff investigation found that:

- HHS Granted a Waiver to South Carolina that Was Improper and Unprecedented.
- The Waiver Violates the Statutory Mandate to Act in the Best Interests of the Child.
- Miracle Hill’s Discrimination Threatens to Exacerbate the Foster Parent Shortage.
- Research Shows the Waiver Disproportionately Harms LGBTQ Foster Youth.
- Experts Agree that Protections Against Discrimination Are in the Best Interest of Foster Children.
- HHS Failed to Consider How the Waiver Would Impact Vulnerable Children in Foster Care.
- HHS Recognized the Negative Consequences of South Carolina’s Waiver for LGBTQ Americans.
- HHS Prevented the Committee from Fulfilling its Constitutional Responsibility by Refusing to Disclose Complete Information about the South Carolina Waiver.
- The Waiver Set a Precedent for Discrimination of and Harm to Individuals Outside South Carolina.

¹ Hereinafter, for the duration of this report, the term “staff” will be substituted for “Committee on Ways and Means Majority staff.”

² For the purposes of this report, the use of the term LGBTQ is intended to mean people who are lesbian, gay, bisexual, transgender, queer, questioning, gender non-conforming, two-spirit, and intersex.

In response to the investigation's findings, staff offer the following recommendations:

- HHS Should Immediately Withdraw the South Carolina Waiver to Ensure the Safety and Protection of Children.
- HHS Should Consult with Internal and External Child Welfare Experts and Publish Their Comments before Making Major Policy Changes Not Mandated by Congress.
- HHS Must Provide Congress with Requested Materials for the Purpose of Its Ongoing Review of the Waiver Process and Oversight of Agency Actions.
- HHS Should Ensure that Publicly-Funded Grants Do Not Fund Discrimination Against Individuals Based on Organizational Beliefs.

BACKGROUND

Committee Oversight of Foster Care

As part of its legislative and oversight activities, the Committee must ensure that laws under its jurisdiction are implemented effectively and in accordance with congressional intent. Federal laws that regulate and provide federal funds for foster care, guardianship, and subsidized adoption placements are within the Committee's jurisdiction.

The Committee takes seriously its responsibility to protect already-traumatized youth at every point of their involvement in the child welfare system. The Committee is deeply concerned by the waiver granted to South Carolina on January 23, 2019, for many reasons, including:

- The waiver violates civil rights and the mandate to operate in the best interest of a child by denying appropriate, safe, loving, and affirming foster home placements.
- The waiver allows discrimination within the foster care system based on religion and sexual orientation.
- The waiver intentionally harms LGBTQ children, adults, and families.
- The waiver takes a statute meant to protect people of minority faiths and inappropriately uses it to discriminate against the same religious minorities the law is meant to protect.
- The waiver establishes a troubling precedent to use regulatory authority intended for technical, grant-management purposes to make substantive policy changes without consulting Congress or assessing the impact of the policy change on foster youth.
- The waiver sets a precedent that promotes discrimination of, and harm to, individuals in other states.

The Committee must be especially mindful of ensuring a child welfare system that is safe, affirming, and supportive of all children, regardless of their age, religion, or identity. Effective oversight of the child welfare system depends on HHS's cooperation with Committee oversight efforts and compliance with associated requests for information by the agency.

The Committee Investigation

Prior to changes made by the current administration, HHS regulations barred states from distributing federal funds to child welfare service providers that discriminated against potential foster parents, including discrimination on the basis of sex, sexual orientation, and gender identity. In 2016, HHS codified this long-standing policy, in part, because such discrimination is not in the best interest of the child and puts foster youth at higher risk of inappropriate foster care placement that harms their emotional and social well-being.

On February 27, 2018, South Carolina Governor Henry McMaster requested an exception to, or waiver from, these nondiscrimination regulations. The waiver, requested on behalf of Miracle Hill, would allow South Carolina to distribute federal funds to foster care agencies with discriminatory practices. Miracle Hill recruits foster parents and rejects other prospective foster parents exclusively based on religious status and sexual orientation. On January 23, 2019—citing an authority never before used for such purposes—HHS notified Governor McMaster that it had granted the state’s request for a waiver from those nondiscrimination regulations.

Following HHS’s approval of the South Carolina waiver, the Chairmen of two Ways and Means Subcommittees—Chairman John Lewis (Subcommittee on Oversight) and Chairman Danny K. Davis (Subcommittee on Worker and Family Support)—jointly requested information and documents from state and federal officials, South Carolina child welfare subgrant recipient Miracle Hill, and well-known child welfare and nondiscrimination experts. More specifically, the Subcommittee Chairmen sought analyses and documentation regarding the decision-making process for evaluating foster care nondiscrimination waivers and the associated consequences for foster youth. The Subcommittee Chairmen’s requests included:

- March 21, 2019: Subcommittee Chairmen Lewis and Davis sent a letter to HHS senior officials in the Office of Civil Rights (OCR) and the Administration for Children & Families (ACF).³
- April 15, 2019: Subcommittee Chairmen Lewis and Davis sent a request to GAO,⁴ which the Ranking Minority Members of the Subcommittees subsequently joined.⁵
- May 1, 2019: Subcommittee Chairmen Lewis and Davis sent letters to South Carolina and Texas state officials, as well as to Miracle Hill.⁶

³ Letter from Ways and Means Oversight Subcommittee Chairman John Lewis and Ways and Means Worker and Family Support Subcommittee Chairman Danny K. Davis to HHS ACF Assistant Secretary Lynn Johnson and HHS OCR Director Roger Severino (Mar. 21, 2019).

⁴ Letter from Ways and Means Oversight Subcommittee Chairman John Lewis and Ways and Means Worker and Family Support Subcommittee Chairman Danny K. Davis to Comptroller General Gene L. Dodaro (Apr. 15, 2019).

⁵ Letter from Ways and Means Oversight Subcommittee Ranking Member Mike Kelly and Ways and Means Worker and Family Support Subcommittee Ranking Member Jackie Walorski to Comptroller General Gene L. Dodaro (May 30, 2019).

⁶ Letter from Ways and Means Oversight Subcommittee Chairman John Lewis and Ways and Means Worker and Family Support Subcommittee Chairman Danny K. Davis to South Carolina Governor Henry McMaster and Department of Social Services Director Michael Leach (May 1, 2019); Letter from Ways and Means Oversight

- July 11, 2019: Subcommittee Chairmen Lewis and Davis wrote letters to several organizations with expertise and knowledge regarding the child welfare system and religious nondiscrimination requirements.⁷

Unfortunately, HHS refused to fully respond to the requests from the Subcommittee Chairmen. Such actions hid from congressional leaders and taxpayers many aspects of how, or why, HHS made this policy decision. As a result, this staff report only covers a fraction of the actions federal officials undertook related to the South Carolina waiver and subsequent efforts to undermine nondiscrimination protections for foster youth and other Americans served by HHS grantees.

Staff made repeated efforts to engage with HHS in a timely, respectful, and reasonable manner regarding this investigation, but HHS was largely uncooperative and nonresponsive. In replying to nearly every inquiry, HHS provided duplicate versions of the same documents and otherwise produced numerous documents that were not relevant to the staff investigation. Given HHS's noncompliance, this report simply cannot account for all the actions HHS officials undertook to grant the waiver and undermine nondiscrimination protections.

Subcommittee Chairman John Lewis and Ways and Means Worker and Family Support Subcommittee Chairman Danny K. Davis to Texas Governor Greg Abbott, Attorney General Ken Paxton, and Department of Family and Protective Services Commissioner Henry "Hank" Whitman Jr. (May 1, 2019); Letter from Ways and Means Oversight Subcommittee Chairman John Lewis and Ways and Means Worker and Family Support Subcommittee Chairman Danny K. Davis to Miracle Hill President and CEO Mr. Reid Lehman (May 1, 2019).

⁷ The responses to such letters are provided at Appendix C.

FINDINGS

A. HHS Granted a Waiver to South Carolina that Was Improper and Unprecedented.

The Administration relied on the *Religious Freedom Restoration Act of 1993* (RFRA) to grant the South Carolina waiver. A bipartisan Congress adopted RFRA in response to what it considered to be Supreme Court overreach in an employment dispute,⁸ a decision widely viewed as undermining the rights of religious minorities. The law was intended to reverse the perceived negative effects of that ruling by providing for protection of the exercise of religion by people of minority faiths.⁹ In crafting RFRA, Congress sought to avoid “unintended consequences” and dismissed concerns that the legislation would “unsettle other areas of the law.”¹⁰ It was never intended as a shield for discriminatory practices that violate the civil rights of others. Consequently, HHS’s reliance on RFRA as a justification was improper and set a harmful precedent.

HHS regulations outline administrative grant requirements that apply to funds being awarded by the agency.¹¹ South Carolina sought a waiver from HHS’s religious nondiscrimination requirements, which provide 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.*”¹²

In seeking to remove nondiscrimination requirements applicable to Miracle Hill, the agency relied on a broad regulatory exception that had never been used for a foster care rules waiver. In fact, neither staff nor GAO could find any example of HHS using the authority to waive grant requirements in this selective manner for *any* federal grant awarded. Specifically, HHS explained that its decision was allowable as a case-by-case exception under a general grant management regulation that allows HHS to place a higher value on Miracle Hill’s rights as an organization under RFRA than the civil rights of individuals.¹³

⁸ House Report No. 103-88, Committee on the Judiciary, Religious Freedom Restoration Act of 1993, <https://www.justice.gov/sites/default/files/jmd/legacy/2014/03/26/house rept103-88-1993.pdf>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ As GAO explained in their analysis: “The HHS regulations found at 45 C.F.R. pt. 75 – which implement guidance from the Office of Management and Budget (OMB) – establish uniform administrative requirements, cost principles, and audit requirements for federal awards to non-federal entities, including contracts, grants, and cooperative agreements. These requirements generally apply to recipients and subrecipients of HHS federal awards. Part 75 is divided into several subparts: subpart A (acronyms and definitions), subpart B (general provisions), subpart C (pre-federal award requirements and contents of federal awards), subpart D (post federal award requirements), subpart E (cost principles), and subpart F (audit requirements), along with a number of appendices.” GAO, Various HHS Offices Provided Input on Decision to Grant Exception from Religious Nondiscrimination Requirement (Oct. 25, 2019), <https://www.gao.gov/products/GAO-20-69R>. Full version of GAO’s analysis is available at Appendix B.

¹² 45 C.F.R. § 75.300(c) (emphasis added).

¹³ The text of 45 C.F.R. § 75.102(b) provides: “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.”

RFRA should not be used as a mechanism that enables HHS to allow child welfare agencies to use federal funds for discriminatory purposes. The federal government must fulfill its responsibility to serve all Americans regardless of faith, who they are, or who they love.

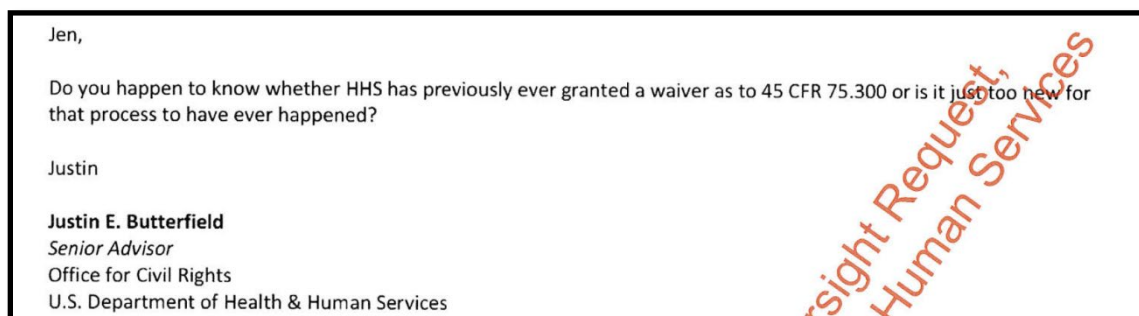
Independent watchdog concluded the waiver was unprecedented.

In April 2019, the Subcommittee Chairmen requested that GAO conduct an independent and non-partisan review of the process HHS used to grant the South Carolina waiver. They asked that GAO interview key HHS officials and review any prior uses of its regulatory authority to approve waivers from the nondiscrimination requirements in child welfare programs. The request to GAO became bipartisan, and the Committee Majority and Minority staff participated in joint bipartisan follow-up conversations with GAO concerning the scope of their review and their interim findings.

On November 25, 2019, GAO publicly released a report summarizing its work in response to the bipartisan request.¹⁴ As part of its work, GAO reviewed HHS documents, reviewed the discrimination waiver request letter from South Carolina Governor McMaster, and interviewed officials across a range of HHS staff divisions and operating divisions. Although HHS’s federal child welfare regulatory authority established in 2014 provides for a case-by-case exception or waiver, GAO’s review concluded that the waiver granted by HHS to South Carolina in January 2019 was the first and “*only exception to its administrative grant requirements that has been approved.*”¹⁵

Internal HHS documents reinforce GAO’s conclusion about the extraordinary nature of the waiver.

In agency documents provided to the Committee, HHS also recognized the unprecedented nature of granting the South Carolina waiver. The investigation found that, prior to granting the waiver, HHS staff understood that no entity had ever received such a waiver from nondiscrimination rules. For example, in late April 2018, OCR staff inquired with the office of the HHS Assistant Secretary for Financial Resources (ASFR) about any past waiver grants:¹⁶

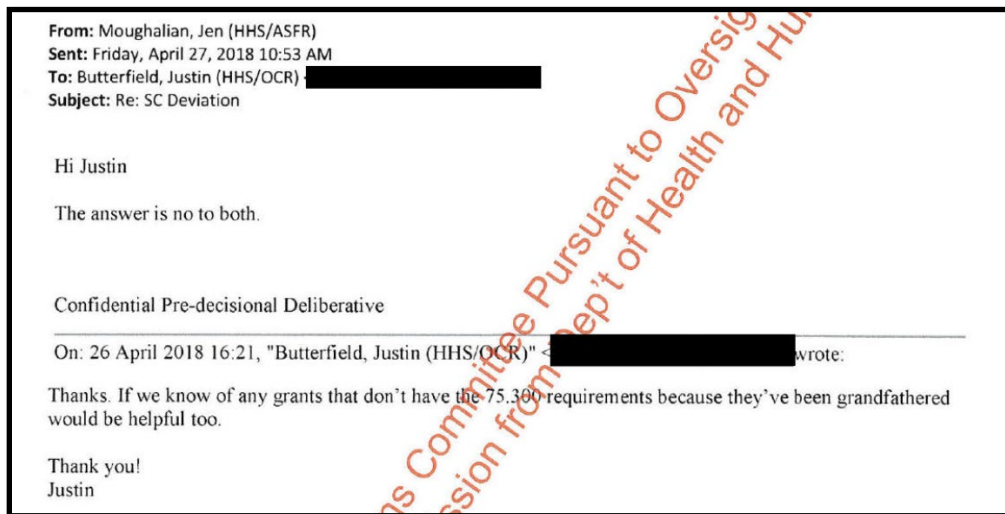


¹⁴ GAO, Various HHS Offices Provided Input on Decision to Grant Exception from Religious Nondiscrimination Requirement.

¹⁵ *Id.* (emphasis added).

¹⁶ HHS Document Production, Bates NealRFMH_0001399-1400.

Subsequently, the Acting Assistant Secretary for Financial Resources directly confirmed for OCR that no such waivers had been granted and that no existing grants were exempt from the nondiscrimination requirements.¹⁷



B. The Waiver Violates the Statutory Mandate to Act in the Best Interests of the Child.

State child welfare systems make decisions that affect abused and neglected children, including decisions about placement, custody, safety, and permanency planning. Both federal¹⁸ and state¹⁹ statutes require that, whenever such decisions are made, the decision must be made in the “best interests” of the child. A decision made in a child’s best interests requires a suite of considerations, including: the extent to which a child has loving relationships with the parents, siblings, and other people who may impact the child’s best interests; the child’s comfort at home, school, and community; and the child’s mental and physical health.

Children enter foster care after a formal process, usually involving the courts, which determines that they cannot currently be kept safe from abuse or neglect while living at home. The goal of the foster care system is to provide safe, supportive, and affirming care for those children while the child welfare agency works to help them safely return home, or, if that is not possible, to move toward permanency outcomes including guardianship and adoption.

Over the years, the Committee has consulted with current and former foster youth about how to improve the child welfare system and learned that it can be particularly challenging for older foster youth to find a “good match” with foster or adoptive parents. Prospective parents often request infants and younger children. Many older youth have had multiple placements and experienced trauma in foster care, making them even harder to place. LGBTQ youth are

¹⁷ *Id.*

¹⁸ Sec. 472(a) of the Social Security Act [42 U.S.C. § 672].

¹⁹ HHS ACF Children’s Bureau, Child Welfare Information Gateway (2016), https://www.childwelfare.gov/pubPDFs/best_interest.pdf.

disproportionately represented in the foster care system.²⁰ Older foster youth also are more likely than their younger peers to “come out” and identify as LGBTQ, and many of these youth entered the foster care system partially because of conflict with their birth families about gender identity and/or sexual orientation.

A diverse array of supportive and safe foster homes is critical to ensuring every child finds the right placement match, including LGBTQ youth and other children who have faced difficulty finding acceptance. When foster care agencies deny qualified and willing adults the opportunity to serve as foster parents, this action greatly exacerbates existing foster home shortages for—and undermines the well-being of—abused and neglected children who desperately need a safe and affirming environment to mitigate the trauma and instability they have experienced.

Data show that LGBTQ adults are more likely than their peers to become foster parents, and they also are more likely to foster older youth who are less likely to have willing, qualified foster homes available to them.²¹ In fact, same-sex parents are over seven times more likely to be raising foster children than different-sex parents.²² Categorically excluding any caring, qualified adult who matches the needs of the foster youth, and denying them based on the adult’s religion, gender identity, or sexual orientation, harms foster youth and violates the multiple statutory mandates that protect the best interest of the child in the child welfare system.

After HHS approved the South Carolina waiver, the South Carolina chapter of the National Association of Social Workers (NASW-SC) sent a letter to Committee Chairman Richard E. Neal. The letter expressed concern that the new policy goes against the best interest of children by denying children appropriate placement, exacerbating shortages of caring foster homes in a state already experiencing a foster home shortage, and undermining the well-being of foster youth. The letter states that: “[S]ome foster children are being denied the right to live in a home appropriate for them. This makes little sense given our current shortage of foster homes. Foster children who identify as LGBTQ are especially vulnerable as a result of this ruling [to approve the state’s waiver request]; they are at risk of placement in a home that stigmatizes or condemns them, affecting their self-esteem, self-worth, and mental health.”²³

²⁰ The Williams Institute, UCLA School of Law, Los Angeles Foster Youth Study, *Sexual and Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles* (Aug. 27, 2014), https://www.acf.hhs.gov/sites/default/files/cb/pii_rise_lafys_report.pdf.

²¹ About 20 percent of youth ages 14–17 have been in care for four or more years, compared to children ages 7–13 (12%). For youth aged 18–20 years, that rate jumps to 51 percent. Source: Staff analysis of HHS ACF Children’s Bureau Adoption and Foster Care Analysis and Reporting System (AFCARS) data for FY 2018.

²² The Williams Institute, UCLA School of Law, *How many same-sex couples in the U.S. are raising children?* (July 2018), <https://williamsinstitute.law.ucla.edu/research/parenting/how-many-same-sex-parents-in-us/>. Among couples with children, almost three percent of same-sex couples were raising foster children compared to about one-half of one percent of different-sex couples. Also, more than 20 percent of same-sex couples were raising adopted children compared to about three percent of different-sex couples.

²³ Full letter is available at Appendix C (emphasis added).

C. Miracle Hill's Discrimination Threatens to Exacerbate the Foster Parent Shortage.

Nearly every jurisdiction in the country is experiencing a shortage of qualified, willing foster parents as the opioid epidemic and other factors increase the number of children in care. Foster parent recruitment advertisements appear on billboards, in magazines, on bulletin boards, in schools, and in places of worship in nearly every state and locality across the nation. In Georgia, as of December 2019, there were nearly 12,900 children in foster care, but only about 4,800 certified foster homes in the state.²⁴ That same month, in Illinois, there were nearly 17,000 children involved with the state child welfare system, about 1,400 of whom were in institutions or group homes rather than with relatives or in a family-like setting with foster parents.²⁵ Reports of foster children sleeping on the floor of their social worker's office are widespread across the country.²⁶

In 2018, the year Governor McMaster requested the waiver, there were approximately 4,600 children in South Carolina's foster care system, compared with roughly 2,700 available foster homes.²⁷ Given the consistent shortage of foster families, HHS's decision to grant the South Carolina waiver raised concerns about the long-term impact on recruiting and retaining available foster families, particularly those willing and able to care for older youth, religious minority youth, and LGBTQ youth.

In conducting its investigation, staff learned about Miracle Hill's discrimination against potential foster parents based on their religion or sexual orientation. Miracle Hill supervises a full 15 percent of foster parents in South Carolina.²⁸ Miracle Hill required all applicants to accept the organization's doctrinal statement that not only requires a belief in a Christian Trinitarian God but that also defines marriage as between a man and a woman.²⁹ This waiver represents the first time that a state has used federal funds to deny children the opportunity to live with safe, supportive, and qualified foster parents based on religious beliefs.

The Committee recognizes that this sanctioned discrimination is reminiscent of the all-too-recent history of the rampant religious discrimination against Catholics, Jews, Muslims, and other

²⁴ WCJL, *Georgia calling for more foster parents amidst shortage* (Dec. 9, 2019),

<https://www.wjcl.com/article/georgia-calling-for-more-foster-parents-amidst-shortage/30174874#>.

²⁵ Illinois Department of Children & Family Services, *Children Placed in Foster Care, Relative Care, Group Homes, or Institutions By Placement County* (Data as of December 31, 2019).

²⁶ See, e.g., The Austin American-Statesman, *Foster children are still sleeping in state offices amid shortage of homes* (Jan. 18, 2020), <https://www.statesman.com/news/20200118/foster-children-are-still-sleeping-in-state-offices-amid-shortage-of-homes>; InvestigateWest, *The \$600-A-Night Foster Care Bed* (Oct. 11, 2017), <https://www.invw.org/2017/10/11/the-600-a-night-foster-care-bed/>; Tampa Bay Times, *Foster children still sleep in offices, but Eckerd Connects says foster-care fix is working* (Aug. 22, 2018),

https://www.tampabay.com/news/Foster-children-still-sleep-in-offices-but-Eckerd-Connects-says-foster-care-fix-is-working_171117482/; The Wichita Eagle, *Some Kansas children sleep in offices while waiting for foster homes* (Sept. 19, 2017), <https://www.kansas.com/news/politics-government/article174173731.html>.

²⁷ The Post and Courier, *Report: Number of SC children in state custody increased by 1,500 since 2012* (Oct. 15, 2018), https://www.postandcourier.com/health/report-number-of-sc-children-in-state-custody-increased-by/article_d75d60fa-cd67-11e8-bf6e-d7483a354dde.html.

²⁸ HHS Document Production, Bates NealRFMH_0000019.

²⁹ Miracle Hill, *Our Doctrinal Statement*, <https://miraclehill.org/who-we-are/#beliefs> (last accessed Aug. 11, 2020).

religious minorities, as well as overt racial discrimination against Black, American Indian, and immigrant groups that was publicly validated and invigorated in the 20th century by the Ku Klux Klan and the Dillingham Commission on Immigration.³⁰ The following anecdotal examples demonstrate how Miracle Hill discriminated against potential foster parents and volunteer adult mentors:

- Lydia Currie wrote that her desire to serve as a foster parent was “*inspired by the core Jewish value of ‘tikkun olam’, repairing the world.*”³¹ However, Lydia learned that she and her husband could not proceed with their application to be foster parents with Miracle Hill solely based on their religion.
- Similarly, Beth Lesser and her husband faced the same obstacle in seeking to mentor children who were receiving foster care services through Miracle Hill. They were rejected because, as Jews, they did not share the organization’s Protestant Christian beliefs. They were told to find another agency that would accept them.³² As Lesser said, “*To say we can go somewhere else is like saying you can’t use this state-funded hospital, but you can go to the one down the street.*”³³
- In May 2019, Eden Rogers and Brandy Welch, a married couple who are members of South Carolina’s Greenville Unitarian Universalist Church, were denied the opportunity to become foster parents through Miracle Hill on the basis of their religion *and* their sexual orientation.³⁴
- Aimee Maddonna, a Catholic mother in South Carolina, was also turned away from volunteering as a mentor at Miracle Hill because of her religious affiliation. As she explained, “*I had to tell my kids that, because we’re Catholic, we can’t take these kids out for ice cream and cheer them on at their games. I was devastated. . . If you don’t protect the rights of everybody, it sets a precedent that will eventually touch on you.*”³⁵ She filed suit against HHS and South Carolina on February 15, 2019.
- In response to Aimee Maddonna’s lawsuit and related public outcry³⁶ about religiously-motivated discrimination against a married Catholic mother, Miracle Hill announced on

³⁰ Politico Magazine, *When America Hated Catholics* (Sept. 23, 2015),

<https://www.politico.com/magazine/story/2015/09/when-america-hated-catholics-213177>.

³¹ Jewish Telegraphic Agency (Opinion), *I was barred from becoming a foster parent because I am Jewish* (Feb. 5, 2019). <https://www.jta.org/2019/02/05/opinion/i-was-barrd-from-becoming-a-foster-parent-because-i-am-jewish> (emphasis added).

³² The Greenville News, *Miracle Hill faces new level of scrutiny* (Mar. 2, 2018),

<https://www.greenvilleonline.com/story/news/2018/03/01/miracle-hill-foster-care/362560002/>.

³³ *Id.* (emphasis added).

³⁴ The Greenville News, *Greenville couple sues Trump administration and SC governor over foster-care practice* (May 30, 2019), <https://www.greenvilleonline.com/story/news/2019/05/30/greenville-sc-couple-sue-trump-administration-governor-over-miracle-hill-foster-care/1284405001/>.

³⁵ Associated Press, *Lawsuit claims discrimination by foster agency* (Feb. 15, 2019), <https://apnews.com/ed3ae578ebdb4218a2ed042a90b091c1> (emphasis added).

³⁶ WYFF, *Upstate woman says being ‘wrong kind of Christian’ prevented foster parenting; lawsuit filed* (Feb. 15, 2019), <https://www.wyff4.com/article/upstate-woman-says-being-wrong-kind-of-christian-prevented-foster-parenting-lawsuit-filed/26361011>.

July 5, 2019, that it would permit Catholics and Orthodox Christians who affirm the organization’s doctrinal statement to serve as foster parents and mentors for foster youth.³⁷ Their doctrinal statement reflects Miracle Hill’s evangelical beliefs, including some that may not be shared by Catholics and Orthodox Christians, and explicitly rejects same-sex marriages and LGBTQ individuals.³⁸ Maddonna has publicly stated that this policy change does not resolve the inherent religious discrimination, because affirming the doctrinal statement would dishonor her Catholic beliefs. “If I agreed, I’d be lying as any Catholic would know,” she told *The Greenville News*.³⁹

As of the writing of this staff report, Miracle Hill has not responded similarly to other lawsuits from prospective foster parents who were discriminated against based on their status as a religious minority or sexual minority. This inconsistency suggests a hierarchy and religious preference, where Miracle Hill is willing to exhibit religious tolerance of Catholics and Orthodox Christians but not a willingness to work with non-Christian religious minorities. The clear result of the South Carolina waiver is to exclude willing and qualified foster parents in South Carolina based on the religious doctrine of Miracle Hill, which exacerbates the shortage of foster parents in the state and consequently undermines the best interest of foster youth by delaying placement in safe and loving homes.

D. Research Shows the Waiver Disproportionately Harms LGBTQ Foster Youth.

HHS is well-aware that LGBTQ children are over-represented in the foster care system.⁴⁰ While comprehensive statistics for the foster care system are not available, recent studies suggest that more than 20 percent of foster youth identify as LGBTQ, over twice their representation in the general youth population.⁴¹ These youth report twice the rate of mistreatment while in care than do their non-LGBTQ counterparts.⁴² Further, LGBTQ youth have greater rates of placement in group homes, multiple foster placements, hospitalization for emotional reasons, involvement in the criminal justice system, and homelessness.⁴³ In the words of foster youth.⁴⁴

³⁷ Miracle Hill, Miracle Hill Ministries Strengthens Christian Identity by Opening Foster Program to Catholic Foster Parents (July 5, 2019), <https://miraclehill.org/wp-content/uploads/2019/08/Miracle-Hill-Ministries-Strengthens-Christian-Identity-by-Opening-Foster-Program-to-Catholic-Foster-Parents.pdf>.

³⁸ Miracle Hill, Our Doctrinal Statement, <https://miraclehill.org/who-we-are/#beliefs> (last accessed Aug. 10, 2020).

³⁹ The Greenville News, *Miracle Hill changes foster care policy, will recruit Catholic, Orthodox Christian parents* (July 11, 2019), <https://www.greenvilleonline.com/story/news/2019/07/11/protestant-evangelical-sc-foster-care-miracle-hill-ministries-changes-policy-catholic-parents/1687602001/>.

⁴⁰ HHS LGBT Policy Coordinating Committee, *Advancing LGBT Health & Well-Being* (2016), <https://www.hhs.gov/sites/default/files/2016-report-with-cover.pdf>.

⁴¹ Baams L, Wilson BDM, Russell ST. LGBTQ Youth in Unstable Housing and Foster Care. *Pediatrics*. 2019;143(3):

e20174211, <https://pediatrics.aappublications.org/content/pediatrics/early/2019/02/07/peds.2017-4211.full.pdf>.

⁴² The Williams Institute, UCLA School of Law, Los Angeles Foster Youth Study, *Sexual and Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles* (Aug. 27, 2014), https://www.acf.hhs.gov/sites/default/files/cb/pii_rise_lafys_report.pdf.

⁴³ The Williams Institute, UCLA School of Law, Los Angeles Foster Youth Study, *Sexual and Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles* (Aug. 27, 2014), https://www.acf.hhs.gov/sites/default/files/cb/pii_rise_lafys_report.pdf.

⁴⁴ Letter from Family Equality to Ways and Means Oversight Subcommittee Chairman John Lewis and Ways and Means Worker and Family Support Subcommittee Chairman Danny K. Davis (Aug. 30, 2019); Letter from Foster

“I was told after I was removed from my second foster family placement that unless I manned up, I’d likely never find a forever family. People just don’t want gay kids. My caseworker told me that as she was driving me to the first facility I would be placed in.”

– Kristopher, Texas

“I was placed in a foster home with my older sister. It was supposed to be a temporary placement. It was also supposed to be a safe place that provided care and love for me. My foster parents did not know how to be supportive, caring, and understanding. When they found out I was gay, they were angry. My foster dad said that I couldn’t be gay in his house. They did not speak to me.”

– Mark, California

“I lived in a home where I feel my foster parents had great intentions but didn’t know how to handle my situation. They didn’t know how to approach me and tell me that I was safe, that it was okay to be who I was, and in that sense, I didn’t feel safe. I didn’t feel comfortable to talk about who I was or even come out. I was afraid that if I came out, I would be sent to a home where they sent other gay kids, with kids who had special needs, who had mental and emotional issues, that actually needed the help. That’s where they sent gay kids that they didn’t know what to do with, and I didn’t want to end up there. It’d be monumental if we could start educating the country, these parents, these agencies, on how to talk to young adults, how to talk to youth, how to talk to kids, and make them feel safe in their home.”

– Ernesto, Texas

When in foster care, LGBTQ youth are often inappropriately subjected to efforts to change their sexual orientation or gender identity, including conversion therapy.⁴⁵ Just as LGBTQ youth are disproportionately represented in foster care, LGBTQ youth and foster youth are over-represented in the runaway and homeless youth population. More than one-half (56 percent) of LGBTQ youth in foster care were forced into homelessness at least once during their child welfare experience rather than remain in a foster care placement that was a poor fit. Those youth say they felt safer on the street than with non-affirming foster parents.⁴⁶

Club to Ways and Means Oversight Subcommittee Chairman John Lewis and Ways and Means Worker and Family Support Subcommittee Chairman Danny K. Davis (Aug. 30, 2019). Full letters available at Appendix C.

⁴⁵ HHS Substance Abuse and Mental Health Services Administration, Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth (Oct. 2015), <https://store.samhsa.gov/product/Ending-Conversion-Therapy-Supporting-and-Affirming-LGBTQ-Youth/SMA15-4928>.

⁴⁶ Children’s Rights, LGBTQ (last accessed Aug. 11, 2020), <https://www.childrensrights.org/lgbtq-2/>.

Additionally, LGBTQ youth are overrepresented in the juvenile justice system, and LGBTQ youth in the juvenile justice system are twice as likely as other children to have experienced child abuse, group or foster care placement, and homelessness.⁴⁷

“It is humanity’s obligation to protect and nurture the divine spark in every child, enabling them to reach their fullest potential. At both the state and federal level, the government must act in the best interest of the child, focusing on providing foster youth with safe and loving homes, not on turning away qualified and loving parents in order to prioritize a narrow set of religious beliefs.”

– Religious Action Center of Reform Judaism

All children in the child welfare system are experiencing a family crisis or trauma. LGBTQ youth, who are disproportionately represented in foster care, are an especially vulnerable subgroup of this population with a high risk of *continuing* to experience trauma while in foster care. Excluding LGBTQ foster parents from serving as caretakers only forces LGBTQ foster youth into homes with adults selected specifically because they do not share the youth’s identity. There are many incredible anecdotal examples of non-LGBTQ foster parents forming a loving, supportive, and affirming family environment for LGBTQ foster youth. Federal technical assistance offered by career civil servants at the HHS ACF Children’s Bureau⁴⁸—supported by child welfare experts at advocacy organizations across the country—have made considerable efforts in recent years to provide the training and support for non-LGBTQ foster parents to succeed in creating affirming environments for their LGBTQ foster youth.

However, placing a foster youth with an adult who does *not* affirm the youth’s identity puts the youth at risk of being told that their identity is somehow wrong, their fault, or the reason they are in foster care; none of which is true. HHS approved the South Carolina waiver knowing that Governor McMaster had submitted it with the intent of providing federal funds to Miracle Hill, which is an organization that proactively screens out prospective foster parents because they do not share Miracle Hill’s evangelical Christian faith nor their *misguided beliefs that LGBTQ parents are unfit parents*. It is without question that Miracle Hill’s discrimination intentionally harms LGBTQ foster youth and violates the statutory obligation to act in the best interest of the child.

⁴⁷ Children’s Rights, LGBTQ (last accessed Aug. 11, 2020), <https://www.childrensrights.org/lgbtq-2/>.

⁴⁸ HHS Capacity Building Center for States and Children’s Bureau, *Toolkit to Support Child Welfare Agencies in Serving LGBTQ Children, Youth, and Families*, <https://library.childwelfare.gov/cwig/ws/library/docs/capacity/Blob/107660.pdf?r=1&rpp=10&upp=0&w=+NATIVE%28%27recno%3D107660%27%29&m=1>.

E. Experts Agree that Protections Against Discrimination Are in the Best Interest of Foster Children.

Subcommittee Chairman Lewis and Subcommittee Chairman Davis sought out leading child welfare and nondiscrimination experts, as well as youth who have been in the child welfare system, to provide input on the needs of foster children.

On July 11, 2019, the Subcommittee Chairmen requested input from outside groups including: the American Civil Liberties Union, the American Academy of Pediatrics, Americans United for Separation of Church & State, Center on the Study of Social Policy, Child Welfare League of America, Children’s Defense Fund, Foster Club, Family Equality, Religious Action Center of Reform Judaism, Voice for Adoption, and The Williams Institute at the UCLA School of Law.⁴⁹

Many of these organizations routinely consult with HHS on child welfare policy issues, but were not asked to consult on this waiver decision. They identified several issues that HHS did not consider. HHS should have consulted these experts before granting the waiver, in keeping with normal custom. Following are the conclusions upon which experts agree:

Diversity and inclusion are a best practice in recruiting qualified foster and adoptive parents.

Diversity and inclusion do not stop at recruiting racially and ethnically diverse adults; it also means broadening recruitment efforts to provide open and affirming recruitment and retention for people who are religious, sexual, and gender minorities. Doing so allows states to make good matches between parents and children in need of homes, which reduces the trauma associated with being removed from one’s birth parents and foster care.

The Children’s Defense Fund explained:

*It is crucial that states focus on recruiting not only more foster and adoptive families (or “resource families”), but the right families to meet the diverse needs of youth in their care. . . . Recruiting a pool of foster parents of only one faith, background and attitude will make it impossible to meet the needs and affirm the identities of the diverse group of youth who need families.*⁵⁰

The American Academy of Pediatrics (AAP) explained:

*Adolescents are especially sensitive to unsupportive environments and the behaviors of adults around them, and the experience of discrimination based on race, gender identity, sexual orientation, and other categories can lead to immediate and long lasting behavioral health harms. LGBTQ youth who report high rates of acceptance by family and caregivers, however, have greater behavioral health outcomes.*⁵¹

⁴⁹ Their responses are available in full at Appendix C.

⁵⁰ Full letter available at Appendix C (emphasis added).

⁵¹ *Id.* (emphasis added).

LGBTQ adults are a valuable and needed source of affirming foster parents for all youth, and especially for LGBTQ youth.

All children look to adults in their lives to provide the mentorship, support, affirmation, and inspiration to live happy and healthy lives. Recruiting LGBTQ adults into foster parent roles increases the supply of qualified foster parents and also provides an opportunity for foster youth to have an open and affirming home-like setting that also provides foster youth with a diversity of role models, which is inarguably in the best interest of the child. LGBTQ foster parents provide all children, regardless of their gender identity or sexual orientation, with examples of strong relationships between and/or with adults who do not hold heteronormative identities. Not only do LGBTQ adult figures help children embrace and understand a diversity of perspectives from an early age, but they also provide the sense of safety and security a foster youth needs as they grow into their own understanding of family, personal identity, and interpersonal relationships.

The Williams Institute at the UCLA School of Law explained:

*Almost forty years of research has overwhelmingly concluded that children raised by same-sex couples are just as healthy, socially adjusted, and psychologically fit as children with different-sex parents . . . Recruitment of LGBTQ families could provide a plentiful source of affirming and supportive homes for not only LGBTQ foster youth but all foster youth.*⁵²

Given the direct connection between discrimination and the supply of suitable foster families, the Child Welfare League of America concluded:

*In addressing the needs of youth who identify as LGBTQ, the system and agencies supporting this population needs to develop guidelines and policies that are appropriate and affirming of their sexual orientation, gender identity, and expression.*⁵³

Allowing faith-based foster care agencies to discriminate against prospective foster parents on the basis of the parents' religion or sexual orientation reduces the likelihood of a "good match" when placing a child in a foster home.

Not only does discrimination based on religion and sexual orientation reduce the diversity of the pool of qualified, safe, and affirming foster homes, but it poses a risk that neglected and abused children will not find a good match during a time of crisis. As a result, youth in the care of such agencies have fewer protections and opportunities to be placed in a safe, stable, loving home when prospective parents are referred elsewhere or denied.

The Center for the Study of Social Policy (CSSP) explained:

When a placement is a poor fit and the foster parent is unable to meet a child's needs, it can cause further harm to the child. For LGBTQ+ children and youth, there is a risk that placement in a non-affirming home will undermine their healthy

⁵² *Id.* (emphasis added).

⁵³ *Id.* (emphasis added).

*development at a critical point in time and replicate the very harm, rejection, and trauma that may have precipitated their entry into care.*⁵⁴

The American Civil Liberties Union explained:

*The main problem with [sending prospective parents to another agency] is that it overlooks the people the child welfare system was created to serve—the children. In Michigan, an agency did not place a child with his siblings because they were in the care of a same-sex couple and the agency was unwilling to place children in same-sex parent families.*⁵⁵

There is a direct connection between discrimination and the supply of suitable and available foster families.

There is already a shortage of available foster parents. We know this from the data, and we know this from the heartbreaking stories that foster youth share from their time in the foster care system. Screening out qualified and loving prospective foster parents based on the religious preference of a foster care agency, and thereby denying parents of religious minority and sexual and gender minority status, is not only blatant discrimination but it further exacerbates the foster parent shortage.

Voice for Adoption explained:

*Reducing or eliminating the pool of capable, caring, and willing LGBT families from adoption or foster care would have an enormously negative impact on individual children as well as the foster system as a whole. It would increase the number of children in our nations' over-burdened foster care system. It would increase the number of youth that age out of foster care and face additional barriers to health, safety, well-being and success. It would create unnecessary trauma, suffering, and grief in children.*⁵⁶

HHS easily could have sought all of the above expert opinions in advance of the harmful and discriminatory waiver; failure to do so contravened HHS's moral obligation to protect children involved in the child welfare system.

F. HHS Failed to Consider How the Waiver Would Impact Vulnerable Children in Foster Care.

The staff investigation confirmed that, in approving the waiver, HHS failed to sufficiently consult on the potential effects the waiver would have on foster youth; HHS also failed to fully consult with both internal and external experts, including not only their own career civil servants who administer federal child welfare programs, but also the outside experts on foster care and civil rights policies. The failure to analyze how the waiver would impact vulnerable children in foster care flies in the face of the stated mission of ACF, which is to “*promote the economic and social*

⁵⁴ *Id.* (emphasis added).

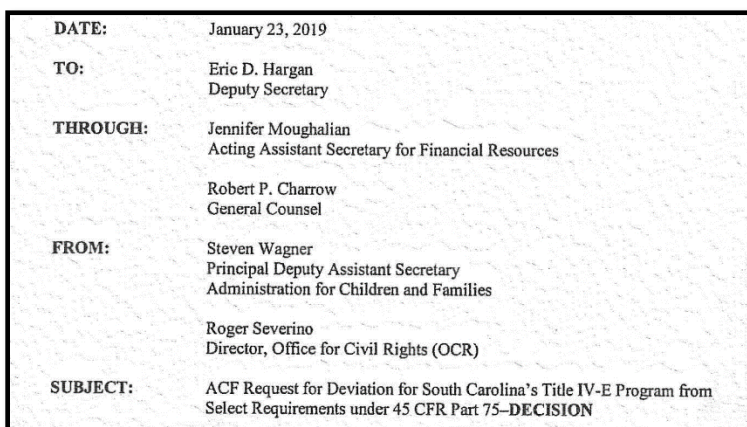
⁵⁵ *Id.* (emphasis added).

⁵⁶ *Id.* (emphasis added).

well-being of children, families, individuals and communities with leadership and resources for compassionate, effective delivery of human services.”⁵⁷

Internal memo contains no analysis of consequences for foster youth.

Internal documents provided to the Committee included a decision memo from HHS political appointees to HHS Deputy Secretary Eric Hargan, who ultimately approved and signed the memo. The memo recommended that the waiver be granted to South Carolina to ensure that Miracle Hill could continue contracting with the state and using their federal funds, while implementing discriminatory policies.⁵⁸ The memo reported little to no consultation with foster care experts, either internal or external to HHS, or others involved in the foster care system, and included no analysis of the consequences foster youth would suffer upon implementation of the waiver in South Carolina.⁵⁹



The memo acknowledged that ACF’s interest is to expand the pool of qualified foster parents and to address the reported hardship of organizations rather than the best interest of foster youth. But as shown below, the memo takes at face value South Carolina’s assertion that faith-based organizations are critical to expanding that pool.

The staff investigation found that HHS did not conduct its own evaluation or due diligence of this claim. Had HHS followed standard consultation and rulemaking procedures, the findings would have shown that, while not all religious organizations are discriminatory, there do exist faith-based organizations that promote discriminatory practices; Miracle Hill is one such organization whose discrimination against prospective foster parents acts to constrict, rather than expand, the pool of qualified foster parents.

HHS offered no explanation—other than relying on the claims of South Carolina and Miracle Hill—for how abandoning the goal of expanding the number of qualified foster parents by allowing certain parents to be turned away by Miracle Hill would help children in care. Indeed,

⁵⁷ HHS ACF, What is the Administration for Children & Families (last accessed Aug 11, 2020), <https://www.acf.hhs.gov/> (emphasis added).

⁵⁸ HHS Document Production, Bates NealRFMH_0000004-17.

⁵⁹ *Id.*

the HHS memo admits that “ACF has not conducted an independent analysis to determine the impact of the proposed exception on access to foster care settings in South Carolina.”⁶⁰

In general, ACF’s interest is in expanding access to foster care services by, *inter alia*, increasing the number of participating foster care families. ACF has not conducted an independent analysis to determine the impact of the proposed exception on access to foster care settings in South Carolina. However, South Carolina states it has more than 4,000 children in foster care, that it needs more child placing agencies, and that faith-based organizations “are essential” to recruiting more families for child placement. South Carolina specifically cites Miracle Hill, a faith-based organization that recruits 15 percent of the foster care families, and states that, without the participation of such faith-based organizations, South Carolina would have difficulty continuing to place all children in need of foster care. South Carolina’s letter argues that, if it is not provided an exception from section 75.300(c) and (d), certain faith-based organizations operating under the grant would have to abandon their religious beliefs or forego licensure and funding and that this would cause hardship to faith-based organizations and the state’s foster care program.⁴ Similarly, Miracle Hill’s letter states that this has already happened to Miracle Hill because of its commitment to its religious principles.

Rather than consult any experts on child welfare, HHS political appointees came to their own conclusions about whether the waiver approval would impact neglected and abused children’s “access to foster care settings.” These conclusions were based solely on representations made by the waiver applicants—South Carolina and Miracle Hill.⁶¹ HHS conducted no independent analysis or modeling on the impact of the waiver and made no effort to verify claims in the application.

We infer from South Carolina’s failure to cite objections from other specific entities, and from the fact that Miracle Hill only accounts for 15 percent of foster care families in the program, that there are other entities in the program that do not use similar religious criteria in selecting among prospective foster care parents. Miracle Hill itself states that there are at least nine other private foster care providers in Miracle Hill’s area, and SCDSS itself, that work with any foster parents, regardless of, among other things, their religious beliefs.

Agency documents show that internal policy experts were excluded from decision-making process.

The HHS Children’s Bureau (CB) at ACF administers the Federal Foster Care Program, and non-partisan CB career civil servants have a wealth of experience administering foster care and child welfare programs. Given CB’s mission and responsibility for administering child welfare policy, internal experts there should have had a central role in deciding whether to approve such an unprecedented waiver. However, internal documents, as well as GAO’s independent analysis, confirm that CB staff played no direct role in the decision-making process. Despite the sweeping impact the waiver would have on children in foster care, political appointees at OCR—not the career civil servants at CB who are experts on child welfare—drove the waiver decision.

⁶⁰ *Id.* at NealRFMH_0000008 (emphasis added).

⁶¹ *Id.*

Documents show that, in late May 2018, political appointees sought to identify which ACF staff (either at CB or the Office of Grants Management) had previously raised legal concerns about Miracle Hill’s practices.⁶²

From: Wynne, Maggie (HHS/IOS)
Sent: Wednesday, May 30, 2018 2:21 PM
To: Severino, Roger (HHS/OCR); Wagner, Steven (ACF); Moughalian, Jen (HHS/ASFR)
Cc: Bowman, Matthew (HHS/OGC)
Subject: RE: Deviation Request Memo

Steve, Do you know if the communication from HHS came from CB or Grants Management?

“Miracle Hill Ministries CEO Reid Lehman told WSPA that DSS’ new interpretation of law is a result of “communication from the Department of Health and Human Services in Washington saying that it was illegal and they wanted to be sure no one in South Carolina was doing this.”

While recognizing that CB staff may have previously played a role in assessing nondiscrimination requirements, HHS did not substantively consult or involve such staff in deciding whether to grant the South Carolina waiver. In an April 2019 email, ACF civil servant staff admitted to each other that “CB has not had a direct role in this issue with respect to [the] South Carolina waiver. I believe the Office [of] Civil Rights had the lead.”⁶³

Message

From: Collins, Gail (ACF) [REDACTED]
Sent: 4/2/2019 6:08:56 PM
To: Bock, Joe (ACF) [REDACTED]; Milner, Jerry (ACF) [REDACTED]
CC: Pearson, Lisa (ACF) [REDACTED]; Wolovoy, Jesse (ACF) [REDACTED]; Naugles, Tina (ACF) [REDACTED]
Subject: FW: PA request for religious exemption -
Attachments: Bernstine Letter of HHS 4-1-19.pdf

Hi Lisa,

As far as I understand, CB has not had a direct role in this issue with respect to South Carolina waiver. I believe the Office Civil Rights had the lead.

I am forwarding the PA letter to Joe and Jerry for any insight they may have as to process and staying informed about what response this letter receives from the Department.

Thanks.

Gail

GAO’s report also explained that CB staff “were not involved in the process to approve the request and reported that they did not comment on the letter granting the exception.”⁶⁴ In fact, CB staff only attended a single meeting on the topic with representatives from other HHS divisions.

⁶² HHS Document Production, Bates NealRFMH_0001176.

⁶³ HHS Document Production, Bates NealRFMH_0001577 (emphasis added).

⁶⁴ GAO, Various HHS Offices Provided Input on Decision to Grant Exception from Religious Nondiscrimination Requirement (emphasis added).

In bipartisan discussions with Committee staff, GAO also noted their own difficulty in obtaining information from HHS’s internal child welfare experts. For example, no CB staff were present at GAO’s initial meeting with HHS. In fact, HHS only involved internal child welfare experts after bipartisan Committee staff jointly asked that GAO explicitly request consultation with CB staff at subsequent meetings between GAO and HHS.

HHS ignored opposition from diverse experts and stakeholders.

In addition to HHS’s failure to consult its own internal child welfare experts about the effects of the waiver on vulnerable foster youth, HHS also failed to consult meaningfully, or to heed concerns raised by, various external stakeholders and outside experts, including organizations representing current and former foster youth.

Opposition to discrimination is not a partisan issue. Prior to the agency granting the waiver, at least 75 national and state civil rights, child welfare, and faith organizations urged HHS to reject South Carolina’s request.⁶⁵

Even organizations focused on economic growth and business development sought to warn HHS about the harmful consequences of the South Carolina waiver. In July 2018, the National Association of Manufacturers (NAM) President and CEO, Jay Timmons, wrote to HHS Secretary Azar about the waiver, explaining that “*manufacturers reject discrimination in all of its ugly forms. . . Put simply, those organizations that are taking dollars from the federal treasury should not be permitted to discriminate.*”⁶⁶

Speaking on behalf of the 14,000 manufacturers who are members of the NAM, Timmons further wrote that: “*A policy allowing for discrimination means fewer children will be given the opportunity to be a part of a welcoming foster home or ultimately get adopted into a loving forever home.*”⁶⁷

As you know from your previous career and our work together, manufacturers reject discrimination in all of its ugly forms. At issue is whether Child Placing Agencies that benefit from federal dollars should be permitted to discriminate, whether on the basis of race, religion, national origin, marital status or sexual orientation. There are certainly organizations that are faith-based that choose to discriminate for one reason or another – perhaps based on the religious affiliation of the applying parent(s), or perhaps based on an objection to a legally recognized marriage between a couple of the same gender. Although rejection of qualified and loving families is repugnant to most Americans, it is certainly within the rights of the organization to do so – as long as the organization is not benefitting from federal tax dollars.

Put simply, those organizations that are taking dollars from the federal treasury should not be permitted to discriminate. A policy allowing for discrimination means fewer children will be given the opportunity to be a part of a welcoming foster home or ultimately get adopted into a loving forever home.

⁶⁵ See Letter from Lambda Legal et al., to HHS Secretary Alex M. Azar II (Jan. 9, 2019), <https://www.lambdalegal.org/letter-hhs-secretary-azar-opposition-to-sc-waiver-request>. Such correspondence was also included in productions from HHS to the Committee.

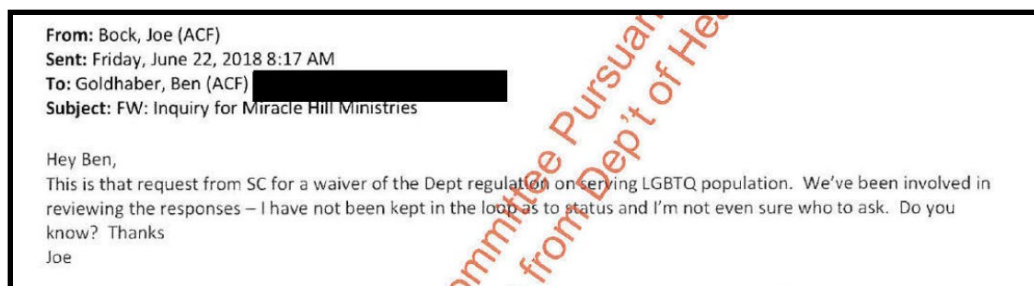
⁶⁶ HHS Document Production, Bates NealRFMH_0000095 (emphasis added).

⁶⁷ *Id.* (emphasis added).

G. HHS Recognized the Negative Consequences of South Carolina’s Waiver for LGBTQ Americans.

Upon granting the South Carolina waiver, ACF Assistant Secretary Lynn Johnson announced that “the government should not be in the business of forcing foster-care providers to close their doors because of their faith. Religious freedom is a fundamental human right.”⁶⁸ Yet, alarmingly, HHS documents show that the waiver decision was not solely connected to state foster care policy or advancing “religious freedom.” Rather, HHS recognized that the waiver would advance efforts to reduce child welfare protections for LGBTQ youth and exclude LGBTQ parents from foster care and adoption.

Internal documents indicate that some HHS staff considered the waiver application an LGBTQ issue, not a religious freedom issue. For example, in a staff email exchange between the most senior career civil servant at the ACF Children’s Bureau and the senior career staff serving as ACF Deputy Assistant Secretary of Administration, the staff refer to the waiver as addressing an issue concerning “*servicing* [the] *LGBTQ population*.”⁶⁹



That senior civil servants understood that the South Carolina waiver application was related to serving the LGBTQ population is a clear indication that HHS recognized that this had broader consequences than simply protecting sincerely-held religious beliefs. As such, the investigation’s findings—based on internal HHS documents and the full set of circumstances surrounding the South Carolina waiver—rebut HHS’s claim that the waiver process was about serving youth in foster care. Rather, it was understood that the policy decision by HHS would have the effect of expanding discrimination against LGBTQ Americans, including foster youth.⁷⁰

⁶⁸ Washington Post, *Trump administration grants waiver to agency that works only with Christian families* (Jan. 23, 2019), https://www.washingtonpost.com/local/education/trump-administration-grants-waiver-to-agency-that-works-only-with-christian-families/2019/01/23/5beafed0-1f30-11e9-8b59-0a28f2191131_story.html.

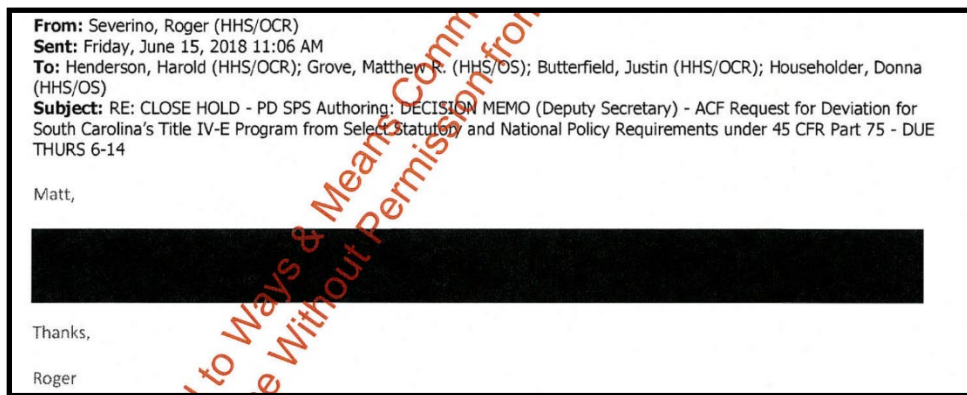
⁶⁹ HHS Document Production, Bates NealRFMH_0001338 (emphasis added).

⁷⁰ As discussed later in this report, HHS would soon move to issue Notices of Proposed Rulemaking that would formally codify religiously motivated discrimination across most HHS grant programs.

H. HHS Prevented the Committee from Fulfilling its Constitutional Responsibility by Refusing to Disclose Complete Information about the South Carolina Waiver.

Given the Committee's compelling legislative and oversight interests, HHS should have been forthcoming with the Committee. The Committee is entitled to documents and information that relate to major policy changes that will impact thousands of children in foster care. However, HHS chose to redact material and to withhold key documents from the Committee, impeding the Committee's review of the waiver approval process. The following examples illustrate HHS's willful refusal to provide responsive material and to cooperate with the staff investigation:

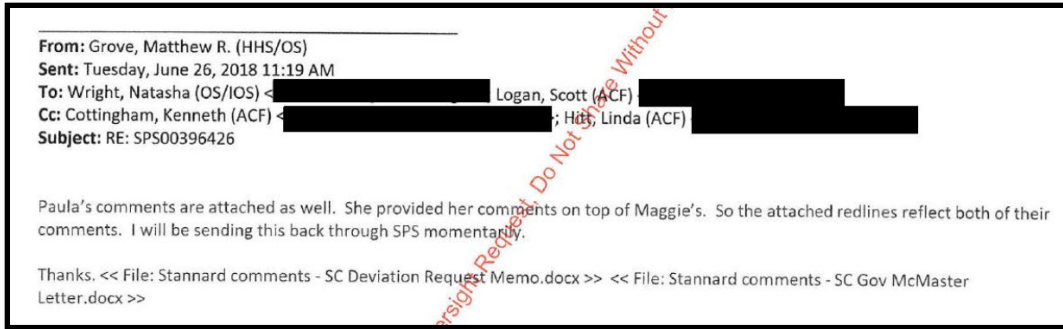
- In some email threads provided to the Committee, the agency redacted all of the content of emails sent by OCR Director Roger Severino, who played a leading role in approving the waiver.⁷¹



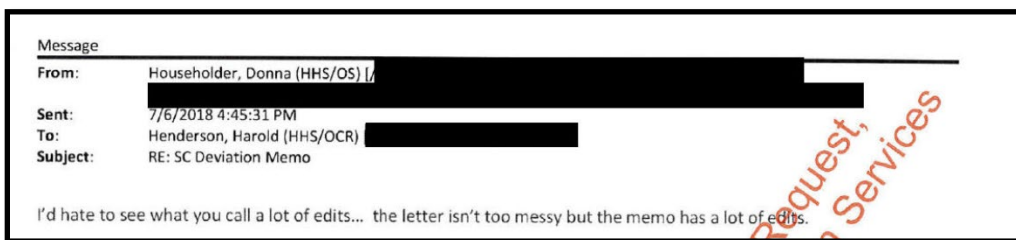
- Some documents allude to attachments containing comments or edits from senior HHS officials, but the agency never produced such attachments. For example, Paula Stannard and Maggie Wynne were senior political appointees in the Office of the Secretary at the time the South Carolina waiver was considered and approved. As shown below, they helped shape the waiver. However, HHS refused to provide the attachments with their comments and edits, despite repeated staff requests during the investigation of this report.⁷²

⁷¹ HHS Document Production, Bates NealRFMH_0002371.

⁷² HHS Document Production, Bates NealRFMH_0000887.



- Another email acknowledged that the memo associated with the waiver “has a lot of edits” from OCR staff, yet HHS refused to provide this version of the memo that showed the edits.⁷³ Ways and Means staff repeatedly asked for copies of missing attachments, as well as evidence of any deliberations that happened over email. HHS political staff in the office of the Assistant Secretary for Legislation responded to these requests very slowly, and with evasive replies and materials that did not directly address such requests.



- The agency also decided to withhold several documents based on alleged privileges without providing adequate support for the legitimacy of such privilege claims. Staff were provided numerous blank documents stamped as “Withheld for Privilege.”⁷⁴



⁷³ HHS Document Production, Bates NealRFMH_0001999 (emphasis added).

⁷⁴ HHS Document Production, Bates NealRFMH_0002480 (emphasis added).

I. The Waiver Set a Precedent for Discrimination of and Harm to Individuals Outside South Carolina.

By considering and then granting the nondiscrimination waiver to South Carolina, HHS promoted discrimination of—and harm to—individuals in the nation broadly. Before HHS issued the waiver in January 2019, organizations and states understood that HHS was near approval of South Carolina’s request. Just prior to formal approval of the South Carolina waiver, at least one other state requested that HHS revise nondiscrimination regulations for child welfare providers.

After approving the South Carolina waiver, HHS’s subsequent actions confirm that the waiver set a dangerous precedent for discrimination in other health and human services programs. Fewer than ten months later, and without any analysis of the effect the waiver has had on the foster care system, HHS released a proposed regulation and associated nonenforcement notice promoting widespread discrimination in almost all HHS grant programs. The below table describes a range of actions the Trump Administration pursued following its decision to grant the South Carolina waiver that serve to weaken nondiscrimination protections for LGBTQ Americans:

<u>ACTION</u>	<u>CONSEQUENCES</u>
November 2019 HHS Notice of Proposed Rulemaking (NPRM)	This NPRM would allow HHS grantees to use federal funds to discriminate in a wide range of health and human services programs—beyond federally-funded adoption and foster care services. Like the South Carolina waiver, the NPRM explicitly enables discrimination on the basis of sex, sexual orientation, and gender identity, as well as religion. ⁷⁵
November 2019 HHS Non-enforcement Notice	Published on the same day of the NPRM described above, this Non-enforcement notice disregarded the typical public comment period and immediately implemented the NPRM, allowing discrimination to begin immediately. ⁷⁶
January 2020 HHS NPRM	This NPRM would further weaken nondiscrimination protections by removing the requirement that religious organizations use an alternative provider notice and referral in the event they are denying services. ⁷⁷ This requirement was one of the ostensible protections for prospective LGBTQ, religious minority, and single parents cited by Miracle Hill Ministries and other agencies seeking to discriminate.

⁷⁵ Congressional Research Service, *Nondiscrimination Requirements in Health and Human Services Grants* (Dec. 4, 2019).

⁷⁶ HHS, Office of the Assistant Secretary for Financial Resources; Health and Human Services Grants Regulation, 84 Fed. Reg. 63831 (Nov. 19, 2019); HHS, Notification of Nonenforcement of Health and Human Services Grants Regulation, 84 Fed. Reg. 63809 (Nov. 19, 2019).

⁷⁷ HHS, Ensuring Equal Treatment of Faith-Based Organizations, 85 Fed. Reg. 2974 (Jan. 17, 2020).

<u>ACTION</u>	<u>CONSEQUENCES</u>
May 2020 HHS Adoption and Foster Care Analysis and Reporting System (AFCARS) Final Rule	This final regulation eliminates data collection related to LGBTQ foster and adoptive families in the child welfare system; data that are essential to gauge recruitment and retention of diverse foster and adoptive families, and also to determine whether LGBTQ youth are being placed in affirming and non-traumatizing homes.
June 2020 Supreme Court Brief Filed by Department of Justice	The Trump Administration filed a brief with the Supreme Court in a pending case arguing that organizations receiving taxpayer funding, such as Miracle Hill, should be permitted to refuse to work with LGBTQ couples and others based on the organization’s religious beliefs. ⁷⁸
June 2020 HHS Affordable Care Act Section 1557 Final Regulation	This final regulation weakens nondiscrimination protections for patients, affecting LGBTQ individuals, women, people with limited English proficiency, immigrants, people of color, people with disabilities, and patients from other marginalized communities.

Viewed together, these actions are part of the Trump Administration’s sweeping efforts to weaken rights and protections for LGBTQ Americans and other marginalized communities. The effects of the above actions extend far beyond the child welfare system and remove nondiscrimination protections that are applied to a wide array of HHS-administered grants and health programs throughout the nation. These efforts will result in discrimination against children, adults, and families, and will have an especially devastating impact on those who are aging, living with disabilities, immigrants, LGBTQ, religious minorities, and other groups.

Just as HHS did not consult internal and external experts before approving the South Carolina waiver, HHS did not consult experts before making these significant policy changes. This, again, is an affront to HHS’s long-standing relationship with the expert community and to HHS’s duty to seek expert advice and the input of the public, and to give program beneficiaries the opportunity to engage in the policymaking process before making sweeping changes that affect all Americans.

The additional regulatory actions and willingness to approve the South Carolina waiver demonstrate that **HHS considers certain religious preferences of organizations more important than the civil rights of individuals**—children, seniors, and vulnerable adults—that HHS is charged with helping.

⁷⁸ NBC News, *Adoption agency should be able to reject gay couples, Trump administration argues* (June 4, 2020), <https://www.nbcnews.com/feature/nbc-out/adoption-agency-should-be-able-reject-gay-couples-trump-administration-n1224911>; Brief for the United States as Amicus Curiae Supporting Petitioners, *Fulton, et al. v. City of Philadelphia, et al.*, https://www.supremecourt.gov/DocketPDF/19/19-123/144793/20200603145511974_19-123tsacUnitedStates.pdf.

RECOMMENDATIONS

In light of these findings, staff issue the following recommendations:

HHS Should Immediately Withdraw the South Carolina Waiver to Ensure the Safety and Protection of Children.

HHS should immediately reverse its decision to waive nondiscrimination rules. The investigation made clear that the waiver undermines the foster care system, and HHS should have denied the waiver request at the outset.

HHS's failure to consult internal or external experts on child welfare about the effects of the waiver, its dismissal of the letter of opposition to the waiver by dozens of national foster youth experts and stakeholders, and its focus on organizational preferences over the needs of vulnerable youth with histories of trauma further document that HHS acted against the best interest of the child to prioritize organizational discrimination.

HHS Should Consult with Internal and External Child Welfare Experts and Publish Their Comments before Making Major Policy Changes Not Mandated by Congress.

Significant policy shifts that affect vulnerable youth in the child welfare system should be made in close consultation with policy experts and stakeholders. Not only should HHS have consulted experts, but it also should have done so prior to making a child welfare policy decision. Further, before taking such action, HHS should have provided an opportunity for public comment and review. If HHS had consulted child welfare and nondiscrimination policy experts, the agency could have received the proper analyses and guidance necessary to avoid making this detrimental and harmful decision.

HHS Must Provide Congress with Requested Materials for the Purpose of Its Ongoing Review of the Waiver Process and Oversight of Agency Actions.

The refusal of HHS to comply with the requests from the Subcommittee Chairmen concerning the South Carolina waiver obstructed the staff investigation and undermined the Committee's constitutional authority. Congressional leaders and taxpayers deserve an in-depth understanding of the way HHS approved the distribution of federal funds to support foster care agencies that use discriminatory practices.

HHS should swiftly produce *all* remaining outstanding documents to the Committee without redactions. Such materials are necessary for staff to complete its comprehensive evaluation of HHS actions related to the South Carolina waiver.

HHS Should Ensure that Publicly-Funded Grants Do Not Fund Discrimination Against Individuals Based on Organizational Beliefs.

HHS should immediately: (1) rescind the South Carolina waiver; (2) withdraw all other initiatives that weaken nondiscrimination protections; (3) resume enforcement of all nondiscrimination laws; and (4) serve all Americans, regardless of who they are or what they believe.

HHS is moving in the wrong direction. The South Carolina waiver permits Miracle Hill to use federally-provided funds to reject Jews, Catholics, persons of other faiths, non-religious persons, and LGBTQ individuals from serving as safe and affirming caretakers and role models to foster youth. In addition, the South Carolina waiver permits Miracle Hill to use federally-provided funds to force foster youth who are Jews, Catholics, persons of other faiths, non-religious, and LGBTQ to be placed in the care of adults who oppose their identity as a gender, religious, or sexual minority.

It is apparent that the South Carolina waiver and other subsequent Trump Administration actions described above reflect a concerted intent to allow all grantees to use federal funds to discriminate against individuals on the basis of religion, sexual orientation, sex, and gender identity. HHS—the agency charged with protecting the well-being of children experiencing abuse and neglect—should not be complicit in allowing states to discriminate against vulnerable populations.

National policies must ensure that all Americans are treated equitably, especially in federally-funded programs. As the Supreme Court recently affirmed, protections against sex discrimination apply to sexual orientation and gender identity.⁷⁹ In light of this decision, existing federal civil rights laws must be vigorously enforced to protect LGBTQ individuals. Otherwise, the federal government increases the likelihood that these individuals will experience discrimination that affects their personal, social, and economic well-being. The failure to protect these rights at the federal level forces individuals to rely on state and local nondiscrimination provisions. Unfortunately, in many states, people lack basic legal protections against discrimination and harassment on the basis of gender identity, gender expression, and sexual orientation.

Very little information exists about how states use their dollars to ensure that LGBTQ, religious, and unmarried people are treated fairly within the child welfare system. As a result, governments at all levels are often unable to ensure that policies equitably provide services to all children and families. More data are needed to fully understand the extent and impact of discrimination and to ensure accountability.

As stated in numerous letters to Secretary Azar, the Committee vigorously condemns the Administration's recent regulatory actions that weaken nondiscrimination protections and urges

⁷⁹ *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731 (2020).

the withdrawal of such regulations. HHS should resume enforcement of all nondiscrimination laws and serve all Americans regardless of who they are or what they believe.⁸⁰

⁸⁰ Letter from Ways and Means Committee Chairman Richard E. Neal, Education & Labor Committee Chairman Robert C. “Bobby” Scott, Energy & Commerce Committee Chairman Frank Pallone, Jr., and Oversight & Reform Committee Chairwoman Carolyn B. Maloney to HHS Secretary Alex M. Azar II (July 8, 2020); Letter from Ways and Means Committee Chairman Richard E. Neal, Education & Labor Committee Chairman Robert C. “Bobby” Scott, Energy & Commerce Committee Chairman Frank Pallone, Jr., and Oversight & Reform Committee Chairwoman Carolyn B. Maloney to HHS Secretary Alex M. Azar II (May 1, 2020); Letter from Ways and Means Committee Chairman Richard E. Neal, Education & Labor Committee Chairman Robert C. “Bobby” Scott, Energy & Commerce Committee Chairman Frank Pallone, Jr., and Oversight & Reform Committee Chairwoman Carolyn B. Maloney to HHS Secretary Alex M. Azar II (Dec. 20, 2019); Letter from Ways and Means Committee Democrats to HHS Secretary Alex M. Azar II (Dec. 9, 2019); Letter from Subcommittee Chairmen Lewis & Davis to HHS Secretary Alex M. Azar II (Dec. 6, 2019).

CONCLUSION

Congress entrusted HHS with the core responsibility to protect children who have experienced abuse, neglect, and trauma to ensure these youth live in safe, affirming families. Based on the staff investigation and the information HHS provided to this Committee and to GAO, HHS is failing its congressional mandate. As subsequent Trump Administration actions confirm, HHS is using the South Carolina waiver as a harmful precedent beyond child welfare, essentially using vulnerable foster youth as test cases for its discriminatory policies across all HHS services.

Sweeping policy changes should be made with care, analysis, consultation with experts, and due consideration for their impact. HHS acted negligently by not meaningfully consulting internal or external child welfare policy experts to understand how this waiver would affect children and families in South Carolina, and by not investigating assertions made by the waiver applicants. Instead, HHS inappropriately empowered staff who lack child welfare expertise to apply never-before-used administrative grant regulations and to enact a policy that would harm vulnerable children. These actions represent a stark departure from longstanding HHS policy and practice to consult experts and families to ensure that agency decisions promote the best interests of vulnerable children.

The release of this staff report does not reflect an end to efforts to ensure that the child welfare system advances the interests of *all* children and families across the nation. Continued oversight is needed to ensure that every child touched by the foster care system is part of a safe, loving, and stable family.

APPENDICES

A. HHS Documents

B. GAO Analysis

C. Letters from Child Welfare / Nondiscrimination Experts