



Miracle Hill
MINISTRIES

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December 18, 2018

Via e-mail and overnight delivery

Hon. Alex M. Azar II
Secretary, U.S. Dept. of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201
Secretary@HHS.gov

RE: HHS regulation infringing on the First Amendment and statutory rights of faith-based community services providers.

Secretary Azar:

Miracle Hill Ministries is a faith-based ministry that serves the homeless, hungry, and needy in upstate South Carolina. Every year, we serve more than 3,000 people in our nine shelters, provide residential recovery centers for men and women seeking to overcome life-dominating addictions, and help hundreds of foster children by facilitating and supporting 220 families who are licensed as foster homes by the State. As has been our practice for 80 years, Miracle Hill gladly serves any adult or child in need, regardless of his or her race, color, ethnicity, national origin, age, sex, disability, religion, lack of religion, orientation, or identity. Likewise, we gladly work with volunteers without regard to such factors.

Notwithstanding the great need for these services and Miracle Hill's decades of widely-acclaimed and award-winning service to anyone in need, Miracle Hill's ability to serve is being threatened by a regulation promulgated by the Department of Health and Human Services ("HHS" or "the Department"). As explained below, the regulation not only poses a grave risk to an already strained foster care system by threatening to close Miracle Hill's foster program, it also violates the First Amendment and civil rights laws, including the Religious Freedom Restoration Act ("RFRA"), by imposing a substantial burden on our religious exercise without demonstrating a compelling governmental interest for doing so and without even attempting to do so in the least restrictive way.

Specifically, in January 2017, the Department amended an existing regulation, 45 C.F.R. § 75.300, which governs federal grants awarded to State governments for use in providing foster care to children in State custody. For decades, such grants—like the corresponding federal statute governing them—had required only that the State recipients not discriminate on the basis of race, color, or national origin. The 2017 amendment added a number of new requirements, including that no person "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." 45 C.F.R. § 75.300(c).

Shortly after this new requirement was finalized, the South Carolina Department of Social Services ("SCDSS") began vetting private foster services providers licensed in South Carolina to

ensure the providers complied with these requirements. Miracle Hill was one of the licensed providers vetted by SCDSS. Miracle Hill does not license the foster homes or place children in them. Rather, SCDSS performs those roles. Instead, Miracle Hill recruits, qualifies, and encourages families to apply to the State to be licensed as foster families. If the State places a foster child in that family, Miracle Hill then offers ongoing training, encouragement, and administrative, spiritual, and practical support to the family.

As noted above, Miracle Hill gladly partners with anyone who wants to serve. Because Miracle Hill is a Christian ministry, however, we believe those who hold certain positions of spiritual influence and leadership—including foster parents—should share our religious mission and beliefs. Dozens of decisions from the Supreme Court and lower courts have held such practices are permissible under the First Amendment and civil rights laws, and Miracle Hill's practice does not deprive anyone of the ability to serve as a foster parent. Indeed, there are no fewer than nine other private foster care providers in our area, several of whom are located mere minutes away, plus SCDSS itself, all of whom work with any foster parents regardless of their religious beliefs or unbelief, orientation, or identity. Nevertheless, in January 2018, as a result of Miracle Hill's practice, SCDSS declined to renew our license to provide foster services, and instead granted us a provisional license that would be revoked if we continued our ministry consistent with our religious beliefs. The reason for SCDSS' decision: 45 C.F.R. § 75.300.¹

The Department's regulation has put Miracle Hill to an impossible choice: either abandon our deeply and sincerely held religious beliefs or abandon children in desperate need. As a matter of religious conviction, we can do neither. Miracle Hill's ministry to abused, orphaned, or neglected children is compelled by our religious beliefs and is itself an exercise of our beliefs. Holy Scripture and Jesus himself command special care and solicitude be shown to children generally and to the needy and orphans particularly. Further, because we view this ministry as religious exercise, and because foster parents are our co-laborers in this religious exercise, we choose, as a matter of religious conviction, to partner only with foster parents who share our religious mission, motivation, and beliefs. Accordingly, a government demand that Miracle Hill either abandon our service to children in need or compromise the way we partner with the parents who serve them imposes a substantial burden on our religious exercise.

The burden HHS has placed on Miracle Hill is not only substantial—it is impermissible. By imposing this burden, HHS has violated the First Amendment by restricting Miracle Hill's ability to consider an individual's beliefs and behaviors when making decisions related to individuals whose role and functions include spiritual influence, guidance, and formation. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012); *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 801 (4th Cir. 2000); *Shaliehsabou v. Hebrew Home of Greater Washington*, 363 F.3d 299, 308 (4th Cir. 2004); *Conlon v. InterVarsity Christian Fellowship*, 777

¹ SCDSS also relied on 45 C.F.R. § 87.3(d), which states an organization participating in programs involving HHS funding shall not “discriminate against a program *beneficiary* or prospective program *beneficiary* on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.” Even assuming this requirement applies to the SCDSS program in which Miracle Hill participates by supporting foster parents, SCDSS' reliance on it is misplaced. SCDSS seems to mistakenly believe foster parents are the beneficiaries of the program. They are not. The foster children are. Miracle Hill has never discriminated against foster children on any basis, including their religion, lack thereof, or refusal to hold a belief or participate in a practice.

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F.3d 829 (6th Cir. 2015). Further, to the extent the regulation restricts or penalizes Miracle Hill's right to make screening, training, or supervision decisions related to the foster homes with whom we will partner, the regulation violates Miracle Hill's freedom of association. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000); *Roberts v. United States Jaycees*, 468 U.S. 609, 622–23 (1984).

In addition, the regulation violates RFRA, imposing a substantial burden on Miracle Hill's free exercise by applying governmental pressure to abandon our religious convictions or comply with the government's demands. *See Wisconsin v. Yoder*, 406 U.S. 205, 217–18 (1972); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Thomas v. Review Bd. of Ind. Empl. Sec. Div.*, 450 U.S. 707, 717–18 (1981). HHS has not identified a compelling interest to justify this burden, much less one "of the highest order" applicable specifically to Miracle Hill or even to other faith-based providers. *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, *2024 (June 26, 2017); *Gonzales v. O Centro Espirita Beneficente*, 546 U.S. 418, 430–31 (2006); *Atty. Gen. v. Desilets*, 636 N.E.2d 233, 238 (Mass. 1994).

Furthermore, the regulation is *ultra vires* by exceeding the statute's non-discrimination mandate and by imposing requirements contrary to the Constitution and RFRA. In addition, it is arbitrary and capricious because it "entirely failed to consider an important aspect of the problem," namely the free exercise and associational rights of faith-based providers. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Previous regulations have always left religious providers the freedom to select foster homes that share their faith. If HHS meant to alter this long-standing accommodation, the administrative record would surely contain some basis justifying the burden, explaining the compelling interest, and narrowly tailoring the restriction. It does not.

The numerous legal deficiencies of the amended regulation not only violate Miracle Hill's constitutional and statutory rights, they also bring about a perverse and unintended result, driving faith-based providers out of the arena and thus *shrinking* the pool of homes and services available to foster children at a time when the need is great and growing. The intent of the Department's amended regulation—that any qualified person should be able to foster and adopt—has already been realized in South Carolina and every other State. Accommodating Miracle Hill's ministry and alleviating the substantial burden HHS has placed upon it will not alter this fact. It will only ensure maximum participation and an increase in loving homes for children in need.

In conclusion, we ask you to issue guidance to explain 45 C.F.R. § 75.300 does not infringe on Miracle Hill's constitutional and statutory rights and to take steps to amend the regulation to make clear that it accommodates Miracle Hill's sincerely held religious beliefs. As we await resolution of this situation, we continue to suffer operational, financial, and lost opportunity costs. Our temporary license expires in a matter of weeks, and in the absence of such guidance, SCDSS will not license Miracle Hill. Thank you for your consideration and prompt attention to this matter.

Sincerely,



Reid Lehman

President/CEO, Miracle Hill Ministries

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