

No. 19-123

In the Supreme Court of the United States

SHARONELL FULTON, ET AL., *Petitioners*,
v.
CITY OF PHILADELPHIA, ET AL., *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX VOL. II

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May 2020

Petition for Writ of Certiorari Filed July 22, 2019
Petition for Writ of Certiorari Granted February 24, 2020

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**Transcript of Hearing on
Temporary Restraining Order**

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United States District Court
Eastern District of Pennsylvania

Sharonell Fulton, et al.

vs.

City of Philadelphia,
et al.

Civil Docket for Case
No. 18-2075

Philadelphia, PA

June 21, 2018

Before Honorable Judge Petrese B. Tucker

TEMPORARY RESTRAINING ORDER

Day 3

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[Page 2]

The Court: Good morning.

All Counsel: Good morning, Your Honor.

The Court: You may be seated. Will the witness take the witness stand. You can state your name.

The Witness: Cynthia Figueroa.

Continued Direct Examination

By Mr. Field:

Q. Good morning, Commissioner Figueroa.

A. Good morning.

Q. Thank you for being back with us today. If you give me a moment, I am just going to prepare my notes and start your questioning again. So Commissioner, starting today, I just want to return to the topic we were talking about when we closed on Wednesday and make sure it is clear what we are talking about as we go forward. Towards the end of your testimony you

talked about being contacted by a reporter. Remind us what you learned from that reporter.

A. So the reporter asked if I was aware of any organizations, specifically Bethany Christian Services And Catholic Social Services, discriminating against - offering support and services to same-sex couples who were interested in becoming foster parents.

[Page 3]

Q. And what did you understand the nature of those two agencies you referenced, Bethany and CSS's, objection to be?

A. I understood their objection to be to not be willing to certify same-sex couples.

Q. What was the nature of that objection? Was it secular, was it religious, was it something else?

A. As indicated by James Amato, it was based on religion.

Q. And approximately when, to the best of your recollection, was this outreach from a reporter?

A. It was on March 9th, and I subsequently spoke to James Amato on the same day.

Q. So shortly after the call from the reporter?

A. Very shortly after the call from the reporter I called James Amato and then we made a number of calls that day.

Q. And is it on that call that James Amato told you what you just related, that it was a religious objection?

A. He made it clear that based on their religious beliefs that they would not do the certification process of the

same-sex couple and they would not do home studies for adoption for same-sex couples.

Q. And on Wednesday you said that after that call [Page 4] you called other faith-based foster care agencies?

A. Yes, that's correct. I called a majority of our providers.

Q. And would you have any reason at that point to believe that a secular agency would have had an objection to serving same-sex couples?

A. I did not, no.

Q. And so upon learning this — did you say March 9th, March 10th?

A. It was March 9th.

Q. March 9th. What was your — what concerns did this information raise for you as commissioner?

A. My concern is that there was a particular community that was being excluded from allowing to become foster parents. And I was concerned that this was possibly in violation of their contract, and so subsequently looked at working with our law department to determine what challenges the position that Catholic Social Services took in regard to their ability to work with same-sex couples.

Q. And why is it concerning to you as commissioner if a particular community is being excluded in some way?

A. I think it's significant in a number of factors. One, as Philadelphia is responsible for serving all citizens, it sends a signal, a very strong signal to [Page 5] that community that their rights are not protected and we

don't care about them. More importantly, when you think about youth that are being served who might identify as LGBTQU, they will become adults at some time. So you are sending a signal to those youth that while we might support you now, we won't support your rights as an adult.

Q. And you testified on Wednesday that you could not take what I understand to be called an intake closure?

A. That is correct.

Q. Tell us again why you did that.

A. So I closed intake and I believe I also shared this on Wednesday is that I have closed intake in other circumstances for other providers as an opportunity to get a better sense of the magnitude of the issue and also to make sure that we stop any further damage that might occur. And for me in this instance it was making sure that we were not providing additional children to be sent to Catholic Social Services or Bethany at the time.

Q. And you said — you just used the word prevent any further damage to occur. How, in your view, could sending additional children create the possibility of further damage?

[Page 6]

A. At the point in which i closed intake, it wasn't clear to me, but it became abundantly clear thereafter, that the ability to comply with the full entirety of their contract was uncertain. And so if you are not able to comply with your contract, certainly it puts — you know, it's a concern for the city, it was a concern for me to not make sure that more children could have

been disrupted if we continued to send kids to Catholic Social Services.

Q. And just so I fully understand, how could more — how could children be disrupted? What are you looking at and thinking about when you say that?

A. So if we — if Catholic Social Services could not comply and they refused to enter into a full contract, we would have to move all of the children who are currently served by Catholic Social Services to another provider. And so certainly a placement disruption is not at all what the city wants to or intends to do, and certainly not a position that we wanted to find ourselves in.

Q. So you closed intake to make sure fewer children — no additional children were added to that mix?

A. That's correct.

Q. You mentioned having closed intake in other instances in the past.

[page 7]

A. Yes.

Q. How has that been handled administratively within DHS? What do you do when you close intake?

A. Generally, information is brought to my attention or I am made aware of directly. And I discuss those matters with my executive team and make a determination that it's in the best interest to shut intake. So we have done that for administrative reasons, and we have done it for programmatic reasons. And the duration of the intake closure is really in place until the issue is remediated or taken care of.

Q. Does DHS permit exceptions when it closes intake?

A. Absolutely. In the case of Catholic Social Services we have made a number of exceptions.

Q. In what context are exceptions considered?

A. So exceptions have been considered as it relates

To keeping siblings together, as well as in cases where A child had recently resided with a foster parent and could return back to a home that the child was familiar with.

Q. And in the past instances of closing intake, have similar exceptions been granted?

A. Absolutely. We just last week had an experience where another organization that has their intake [Page 8] currently closed also for administrative reasons, the CRU made myself and Kimberly Ali aware and asked for us to consider an exception, and we subsequently did so.

Q. And the CRU you talked about yesterday is Central Referral Unit?

A. That is correct.

Q. And the Central Referral Unit is responsible for placements, is that correct?

A. They're responsible for helping determine the level of care and subsequently helping to identify the best placement for the youth that is presented to the CRU.

Q. And in past intake closures, has the Central Referral Unit been involved in making exceptions for, I believe you said, kinship and when there was a relationship with a prior foster parent?

A. Yes. It's very standard practice and I would

just highlight that we are in constant communication with the CRU. So there is — on any given day, there are complicated high profile cases that come to the attention of both deputy commissioner Ali and myself. And so it's pretty standard practice when they are aware that there is a closure that they would bring something to our attention. Sometimes there is an issue of a court order or there's something that comes up that [Page 9] makes them recognize that an exception should be considered, and particularly where that is most significant is kin, because that has been such a cultural norm for our department.

Mr. Rienzi: Objection, move to strike. That's not responsive to the question.

The Court: Overruled.

By Mr. Field:

Q. With respect to CSS, the intake closure you referenced, does that still remain in place?

A. Yes.

Q. Why does that still remain in place?

A. Because we have not resolved the issue, and CSS has indicated that they do not want to enter into a full contract with the City, in which case I don't want to send additional children whose subsequent situation could be disrupted.

Q. As DHS Commissioner, would it — is it — would DHS offer Catholic Social Services the same full contract it is offering the other foster care agencies?

A. Yes.

Mr. Rienzi: Objection, speculation.

The Court: Overruled.

The Witness: Yes, and we have.

By Mr. Field: [Page 10]

Q. And has DHS offered Catholic Social Services an alternative?

A. Yes, we have.

Q. And what is that alternative?

A. We offered a limited contract to ensure that they could continue to search the children who are currently placed in foster care without sending in additional referrals. It was good to hear Mr. Amato state that they would consider entering into a limited Contract.

Mr. Rienzi: Objection, move to strike the narrative.

The Court: Overruled.

By Mr. Field:

Q. Have you been in situations in the past in which providers are closing or for some other reason unable to continue long-term providing services?

A. Yes. Unfortunately in my tenure I have had to experience that a few times.

Q. And in those experiences, what have you done to work with providers to ensure the best interest of the children?

A. So in a number of experiences we have actually negotiated a contract in — understanding that they were going to have to close, but understanding also that we [Page 11] needed the staffing and we needed the ability to assure quality services and the safety of children. And so we negotiated the staffing levels and

the contracted amounts. In one particular case we had an individual, And I know this gets very much into jargon around our contracts, but we pay a lot of the placement services in what we call a per diem. So that's like a set amount of money per child per day. And then we have the ability to do what is called a cost reimbursement contract. In one instance when we knew we were closing the program, we knew it was not financially viable or in the best interest of the kids from a programmatic standpoint, they were not going to be able to keep staff, so we changed it from a per diem contract to a cost reimbursement, and we guaranteed them the ability to have a set amount of staff. In one other instance we actually offered stay bonuses for staff to make sure that we had the exact staffing pattern we needed until closure.

Q. And do you have any reason to think you would not engage in negotiations of this sort with Catholic Social Services?

Mr. Rienzi: Objection, speculation.

The Witness: No.

By Mr. Field: [Page 12]

Q. Would you engage in negotiations of this sort with the Catholic Social Services?

Mr. Rienzi: Objection, speculation.

The court: Overruled.

The Witness: Yes, that's within my purview as the commissioner, and I would negotiate those terms.

By Mr. Field:

Q. Real briefly, you mentioned when you were first contacted by a reporter two agencies, Catholic Social Services and Bethany, I believe?

A. That is correct.

Q. What does Bethany do for DHS?

A. Foster care services.

Q. So it's a similar contract?

A. Yes.

Q. And did you close intake with regard to Bethany?

A. Yes, I did.

Q. Does it remain closed?

A. As of today it remains closed, yes.

Q. And is it your expectation that Bethany will sign a full contract for the coming year?

The witness: Yes.

Mr. Rienzi: Objection, speculation.

The Court: Overruled.

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The Witness: Yes. It's my expectation. In communication it has been indicated that we will likely enter into a full contract with Bethany.

By Mr. Field:

Q. And is it your understanding of the coming fiscal year contract that it includes a clause that providers not discriminate in the recruitment and certification of foster parents?

Mr. Rienzi: Objection, speculation, hearsay and best evidence rule. The document speaks for itself.

The Court: Overruled.

The Witness: Yes.

Mr. Field: May I have a moment, Your Honor?

The Court: Yes.

Mr. Field: Thank you.

(Brief pause in the proceeding.)

Mr. Field: That's all I have at the moment, Your Honor.

The Court: Okay. Cross-examine.

Mr. Field: Thank you.

The Witness: Thank you.

Mr. Rienzi: Your honor, can I take a very short recess so that I can confer with my [Page 14] co-counsel and look at my notes so I can do this as briefly as possible.

The Court: I will give you two minutes.

Mr. Rienzi: That's all I need. Thank You, your honor.

(Brief pause in the proceeding.)

Cross-examination

By Mr. Rienzi:

Q. Good morning, Commissioner Figueroa.

A. Good morning.

Q. You have had a long career doing a variety of different kinds of social justice work?

A. That is correct.

Q. I believe you said yesterday you went to a Jesuit college?

A. I did.

Q. And then you started your career in the Jesuit Volunteer Corps?

A. Yes, that's correct.

Q. What inspired you to do that?

A. Mostly my parents and a history – long tradition. We have believed faith and social justice are good tenets to ensure that those with less have the same opportunities that we have been given.

Q. And those experiences probably gave you a good [Page 15] understanding of what Catholic nonprofit service groups are like?

A. Absolutely.

Q. You know that Catholic loses money doing foster care?

A. No, I am not aware of that.

Q. Do you know that Catholic is a religious organization?

A. I do know that.

Q. And as DHS Commissioner would you say that Catholic has a strong commitment to service?

A. Yes.

Q. And for Catholic that commitment to service is part of how they practice their religious beliefs?

A. I would not provide that expectation.

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Q. Do you think there's a different reason?

A. There could be.

Q. You have no opinion either way as to whether they do it for religious reasons?

A. I don't know that it is for me to say.

Q. I'm asking, do you have an opinion?

A. No.

Mr. Field: Objection, calls for speculation.

The Court: Overruled.

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By Mr. Rienzi:

Q. You have been DHS Commissioner since when?

A. My tenure began in September of 2016.

Q. Do you have that job for a particular term of years?

A. No.

Q. You are an at-will employee?

A. I'm an exempt employee with the City of Philadelphia.

Q. How many foster agencies are there in the City right now?

A. There are 30 agencies in the city of Philadelphia.

Q. Does that include Catholic when you say that?

A. It does.

Q. And Bethany?

A. Yes.

Q. So of those, how many provide home studies for same-sex couples?

A. To my knowledge, all of them should.

Q. How many do?

A. All of them. Except for Catholic Social Services.

Q. So it is your testimony that 28 today provide home studies for same-sex couples?

[Page 17]

A. Well, actually Bethany does because they have certified a number of same-sex couples, so I would just say Catholic.

Q. So today 29 agencies will do home studies for same-sex couples?

A. From my knowledge.

Q. If Catholic closes their program, how many foster agencies in the City will provide home studies to same-sex couples?

A. The same —

Mr. Field: Objection, calls for speculation.

The Court: Overruled.

The Witness: The same number, I presume.

By Mr. Rienzi:

Q. And if Catholic is allowed to resume its past practice, how many agencies in the City will provide home studies for same-sex couples?

Mr. Field: Objection, calls for speculation.

The Court: Overruled.

The Witness: 29.

By Mr. Rienzi:

Q. So no matter happens in this case it is your testimony there will be 29 agencies in the City that [Page 18] provide home studies for same-sex couples, correct?

Mr. Field: Objection, calls for speculation.

The Court: Overruled.

The Witness: Yes.

By Mr. Rienzi:

Q. To your knowledge, DHS has received no complaints against Catholic for operating according to its religious beliefs, correct?

A. That is correct.

Q. To your knowledge, you have received no complaints against Catholic for providing foster care services according to its religious beliefs, correct?

A. None that I am — none that I can recall.

Q. To your knowledge, you have received no complaints against Catholic for failing to perform a home study for someone who wanted it, correct?

A. I can't answer that unequivocally.

Q. But you are not aware of any as you sit here today?

A. I am not aware of any, no.

Q. To your knowledge, not a single prospective LGBT foster parent was unable to become a foster parent because of Catholic's religious exercise, correct?

A. I can't answer that.

[Page 19]

Q. You don't know either way?

A. I can't answer that.

Q. Are you aware of any who are unable to become a foster parent because of Catholic?

A. I can't answer that.

Q. You cannot answer because you are not aware of any, correct?

A. I can't answer that because I don't know if anybody was turned away.

Q. So far as DHS is aware, the number of foster parents turned away by Catholic who wanted a home study for an LGBT couple is zero, correct?

A. I can't answer that.

Mr. Field: she just said she is unaware if anybody was turned away, Your Honor.

The Court: She answered several times.

By Mr. Rienzi:

Q. You said you are responsible for about 1500 employees?

A. That is correct.

Q. To your knowledge, not one of them has told you about any couple rejected by Catholic because of its religious exercise?

A. Not that I can recall.

Q. On your foster care website you tell prospective [Page 20] parents to look for an agency that would be a good fit for them, correct?

A. I don't have it in front of me, so....

Mr. Rienzi: Permission to approach, Your Honor.

The Court: Yes.

By Mr. Rienzi:

Q. I am handing you a document labeled Plaintiff's Exhibit 14. Do you recognize that document?

A. I do.

Q. What is that?

A. It's the Philadelphia website. It's the Philly.gov website.

Q. And you are an employee of the City of Philadelphia?

A. I am.

Q. And DHS is part of the City of Philadelphia Government?

A. That is correct.

Q. I would like you to look at the bottom of the second page, please.

A. Second or third?

Q. Bottom of the second says: choose a foster care agency. Do you see that?

A. Yes.

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Q. And that says: DHS works with many state licensed agencies to provide foster care. Browse the list of foster agencies to find the best fit for you. You want to feel confident and comfortable with the agency you choose. This agency will be a big support to you during your resource parent journey. Once you have found one that you like, call them to find out how to begin the certification process. Did I read that correctly so far?

A. You did, yes.

Q. Is all of that true to the best of your knowledge?

A. Absolutely.

Q. Okay. Why do you want foster parents to find an agency that they will feel confident and comfortable with?

A. Because it's the choice of the family to determine who they want to be served by.

Q. And why would you like them to be confident and comfortable?

A. Because it is their decision.

Q. I am not asking whose decision it is. I'm asking why would you — here it says you would like them to feel confident and comfortable. Why?

A. Because they are deciding to become a foster [Page 22] parent, so they have to feel comfortable and confident in their decision.

Q. You would like them to have a good fit with the agency?

A. I'd like them to be comfortable with their decision.

Q. You would like them to have a good fit with the agency?

A. I would like them to be comfortable with their decision.

Q. Would you like them to have a good fit with the agency?

Mr. Field: Asked and answered, Your Honor.

Mr. Rienzi: Your Honor, she has not answered.

The court: Overruled. She can answer.

By Mr. Rienzi:

Q. Would you like them to have a good fit with the agency?

A. Yes.

Q. Agencies are allowed to have different requirements for certifying families, correct?

A. No.

Q. Would you read for me the last sentence of that [Page 23] paragraph we were just looking at, please?

A. Oh, different requirements, specialties and training.

Q. It says: each agency has slightly different requirements, specialties and training programs, correct?

A. Correct.

Q. Agencies are allowed to have different requirements, correct?

A. They may only have special requirements as it relates to medical and specialized behavioral health.

Q. It doesn't say that on your website, does it?

JA 297

A. This is meant to provide general information and does not go into individual regs of all of the specializations.

Q. Is there someplace else that tells agencies that those are the only different requirements they are allowed to have?

A. Not that I can recall right now.

Q. I believe you testified yesterday and some this morning that you are familiar with DHS's contracts?

A. I am.

Q. And you are familiar with the contract under which Catholic provides foster care services?

A. I am.

[Page 24]

Q. Is it your responsibility to ensure that that contract is enforced?

A. That is correct.

Q. And that agencies are complying with their contractual obligations?

A. That's correct.

Q. In fact, you signed the agreement?

A. I did sign the agreement.

Q. I believe you testified yesterday and again some this morning about the reason you instituted a referral freeze?

A. An intake closure.

Q. Intake closure. Thank you. An intake closure. Did you do that because you thought Catholic was in violation of its contract?

A. I believe so, yes.

Q. What portion of the contract was Catholic in violation of, in your opinion?

A. After discussing with our law department it was clear the Fair Practices Ordinance as well as the services provision of their contract.

Q. I have got two there. Fair Practices Ordinances?

A. Um-hum.

Q. And the other one you said was –

[Page 25]

A. Is services, the definition of services.

Q. Can you start with services and tell me how, as you understand it, Catholic was in violation of the services provision of the contract?

A. So the totality of the contract under services requires that you train, recruit and certify foster care homes. The inability to deliver a part of that service would not allow you to do the entirety of your contract.

Q. Does the services provision say you must train, recruit and certify all families?

Mr. Field: Objection, your honor. This Is an 80-page contract and he is asking about a particular provision within it.

The Court: Overruled. She can answer.

The Witness: Can you repeat your question.

By Mr. Rienzi:

Q. Sure. Does the services part of the contract require — strike that. Does the services part of the contract tell agencies that they must recruit and certify all families?

A. I don't have it in front of me. I could not without —

Q. Sure. That's understandable. I agree it's [Page 26] long. Give me a second, please.

Mr. Rienzi: Permission to approach, Your Honor.

The court: Yes.

By Mr. Rienzi:

Q. I am handing the witness what has been labeled Plaintiff's Exhibit 15. Can you tell me if you recognize that, please?

A. I do recognize this.

Q. What is that document?

A. This is the conformed standard amendment agreement for Catholic Social Services.

Q. Okay. And this is the agreement under which Catholic provides foster care services?

A. Yes. In this particular contract there's a number of other placement services also in here so....

Q. And you signed this contract, correct?

A. I did. I believe my signature is on one of these pages.

Q. Can you direct —

A. Page 5.

Q. Terrific. Thank you. Can you direct me to the services portion of the contract that you were telling me you believe [Page 27] Catholic has violated?

Mr. Field: Objection, calls for a legal conclusion.

The Witness: I would have to have a moment to be able to go through this entire document to find the sections I am referencing.

The Court: I don't know that you can answer like that.

The Witness: Because services are referenced in multiple parts of the contract. It's not just in one area. So there is the general provisions. There's the scope of services and there's the definitions and terms as it relates to services.

By Mr. Rienzi:

Q. Okay. Is it your view that that contract requires foster agencies to recruit and certify all couples?

A. Yes.

Q. Are agencies allowed to have targeted recruiting?

A. For specialized behavioral health and as well as for medically fragile children.

Q. Beyond those two, is it a violation of the contract that agencies have specialized recruiting?

Mr. Field: Objection, calls for a legal [Page 28] conclusion.

The Court: What do you mean by specialized recruiting?

Mr. Rienzi: Targeted recruiting to particular communities.

Mr. Field: Same objection, your honor.

The Court: Overruled.

The Witness: Could you define what you mean.

By Mr. Rienzi:

Q. Must all agencies recruit everybody all the time or are they allowed to target particular communities to do their recruiting?

A. So they can have a focus on a cultural or particular community, but they require — all foster care agencies are required to serve all members of the City of Philadelphia who present and are interested in becoming a foster parent.

Q. So they are allowed to recruit in a targeted way, is that true?

A. No.

Q. So Concilio targets its recruiting to the Latino community, correct?

A. I would not confuse serving a particular community with only targeting.

[Page 29]

Q. You don't think Concilio's recruiting is targeted to the Hispanic community?

A. I know for a fact that Concilio serves all of Philadelphia.

Q. That was not my question. My question is their recruiting efforts are targeted to the Hispanic community, are they not?

Mr. Field: Objection to the term "targeted," your honor.

The Court: what do you mean by "targeted"?

Mr. Rienzi: I mean do they go out to recruit in particular communities? Do they set out to recruit foster parents in Hispanic communities?

The Court: I believe the answer was they go out, but they are obliged to serve the entire community.

Mr. Rienzi: I don't think she answered the first part as to whether they do the recruiting in a targeted way, which is what I am trying to get at.

The Court: Well, I think you need to rephrase your question.

By Mr. Rienzi:

Q. Concilio focuses its recruiting efforts in the Hispanic community, doesn't it?

[Page 30]

A. I don't think I can answer the question.

Q. You don't know either way?

A. I said earlier that targeted does not exclude the entire community.

Q. You don't know either way whether they target a particular community, correct?

Mr. Field: Objection to the term "targeted," your honor.

The Court: again —

By Mr. Rienzi:

Q. Focus on a particular community.

The Court: She has answered the question as best as she can using her terminology.

By Mr. Rienzi:

Q. You said you also think Catholic violated the Fair Practices Ordinance portion of the contract?

A. Yes, that is correct.

Q. Why do you think that?

A. That — actually I am not an attorney so that was a discussion that we had with our legal counsel in terms of their conclusions as it relates to the representation of not serving same-sex couples.

Mr. Field: Your honor, I just want to object to any inquiry into privileged and confidential attorney/client information.

[Page 31]

The Court: Yes.

By Mr. Rienzi:

Q. Do you think foster care work is a public accommodation?

Mr. Field: Objection, calls for a legal conclusion.

The Court: Yes. Sustained.

By Mr. Rienzi:

Q. Do you think the Fair Practice Ordinance applies to the work of the Department of Human Services doing foster care work?

Mr. Field: Objection, calls for a legal conclusion.

The Court: Ask your question again.

By Mr. Rienzi:

Q. Do you think the Fair Practices Ordinance applies to the work of the Department of Human Services doing foster care work.

The Court: And was there an objection?

Mr. Field: Calls for a legal conclusion, Your Honor.

The Court: Sustained.

Mr. Rienzi: Your honor, the witness has testified that she is in charge for the Department of ensuring that they comply with the law.

[Page 32]

The Court: I understand that, but what she said was she had to have a conversation with her counsel — legal counsel in order to find out exactly what —

Mr. Rienzi: Understood.

By Mr. Rienzi:

Q. Commissioner Figueroa, your discussion with the legal counsel, which I am not going to ask the substance of at all, but your discussion with legal counsel was about whether Catholic had violated the contract and specifically the fair practices ordinance portion of the contract, correct?

Mr. Field: Objection. She's already testified to the fact —

The Court: Overruled.

The Witness: I'm sorry. Can you repeat your question.

By Mr. Rienzi:

Q. All I am trying to do is just be clear about what your discussion with counsel was and I am not asking for the substance of it. That was about whether Catholic had violated the Fair Practice Ordinance portion of the contract, correct?

A. No. My discussion with my law department was, Here are the issues, and I am concerned about their [Page 33] ability to comply with the entirety of their contract.

Q. And for my next question, I want you to leave that discussion aside because I am not asking about that discussion. I am asking you about your job as the person in charge of DHS, and I am asking about your job particularly as somebody who has testified that it is your responsibility to ensure that your agency complies with state, federal and city law.

A. That is correct.

Q. Is it your opinion that DHS is governed by the Fair Practices Ordinance when doing foster care work?

A. Could you restate your question.

Q. Is it your opinion that DHS, the agency you run, is covered by the Fair Practices Ordinance when doing foster care work?

Mr. Field: Objection to the extent it calls for a legal conclusion or information learned from counsel.

The Court: Overruled. If you can answer.

The Witness: I don't feel I have legal training to answer that question.

By Mr. Rienzi:

Q. Have you ever trained your staff on compliance with the Fair Practices Ordinance?

[Page 34]

A. As a Commissioner?

Q. Yes.

A. No, I have not.

Q. In your prior term at DHS have you ever trained your staff on compliance with the Fair Practices Ordinance?

A. As a Deputy Commissioner, no.

Q. In any context at DHS have you ever trained staff on that issue?

Mr. Field: You mean — Your Honor, can we just find out whether he means her personally or her department?

The Court: Her personally.

By Mr. Rienzi:

Q. I will start with you personally.

A. I'm sorry. I am confused. Can you start over again.

Q. Sure. And I will back up. I apologize. What I am trying to get a sense of is whether while you are at DHS you all are acting like you are covered by the Fair Practices Ordinance. So my question is — I will start with now as Commissioner. As Commissioner, have you done anything to make sure that people at DHS follow the Fair Practices Ordinance when doing foster care work?

[Page 35]

A. Not to my recollection.

Q. And in all of your time at DHS, now over the couple of different stints that you have had, do you recall any discussions with anybody about whether DHS was covered by the Fair Practices Ordinance when doing foster care work?

A. I answered that it was with our legal counsel.

Q. Yes. I want you to leave aside that discussion. Other than that, are you aware of any other discussion about whether DHS is covered by the Fair Practices Ordinance when doing foster care work?

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A. I have not had a reason to.

Q. DHS sometimes considers race when making a foster care placement?

A. No.

Q. DHS never considers a request from a parent to foster a child of a particular race when placing children?

A. That would be the parent's choice and perspective to give that request.

Q. And when DHS is meeting that parent's choice, it does consider race when making foster child placements?

A. We can't always offer the ability to provide the consideration that has been presented by the parent.

Q. Understood, but sometimes you do, correct?

[Page 36]

A. No, I can't answer that.

Q. You can't answer it or you don't do it? I will break it apart. Are you saying that DHS never considers the race of a child when making a placement?

A. I am saying that we consider the request of the resource parent and that the other factor that we have to consider is the best interest of the child. Whether the behavior is — coincides with the environment in the household, whether or not there can be no other child in the home, whether or not the child is medically fragile. So there are a lot of considerations and they are all driven by safety.

Q. I am trying to get you to focus on race.

A. Right. And I am telling you the priority of the department —

Q. I understand that. I am asking —

A. — is children's safety.

Q. I understand that. But I am asking you a question about whether the department ever considers race when making a placement.

The Court: When you say "consider," do you mean that's one of the factors or one of many factors?

By Mr. Rienzi:

[Page 37]

Q. Yes, just consider it as one of the factors. So you consider race when making placements sometimes?

A. There's no formalized way for us to do that.

Q. Do you do it?

A. I don't know that I can answer that.

Q. You don't know whether your department ever considers race in making a foster child placement? Is that your testimony?

Mr. Field: Asked and answered, Your Honor.

Mr. Rienzi: Your Honor, with all due respect, it's not actually been answered. I am trying to get to the answer.

The Court: Overruled.

The Witness: Can you repeat it.

By Mr. Rienzi:

Q. Sure. Is it your testimony that the Department of Human Services never considers race when making a child placement?

A. I'm sorry. It sounds like you're using a double negative. Can you ask it more directly.

Q. Sure. Does the Department of Human Services ever consider race when making a foster care placement?

A. I think what I have answered before, as one of the many factors that, yes.

[Page 38]

Q. So yes, it does, but there are other factors also considered?

A. That's correct.

Q. Have you ever had any discussions with anybody as to whether you are violating Fair Practices Ordinance to consider race in a public accommodation?

A. It has not come to my attention.

Mr. Field: Assumes facts not in the record, Your Honor.

By Mr. Rienzi:

Q. Does DHS sometimes consider disability when making child placements in foster care?

A. Absolutely.

Q. Have you ever considered whether you are violating the Fair Practices Ordinance if foster care is a public accommodation?

A. We actually have specialized providers —

Mr. Field: Objection.

The Witness: — that only work with the population you have addressed.

The Court: Overruled.

By Mr. Rienzi:

Q. And that would be a violation of the Fair Practices Ordinance if foster care were a public accommodation, wouldn't it?

[Page 39]

Mr. Field: Objection, calls for a legal conclusion, your honor.

The Court: Sustained.

By Mr. Rienzi:

Q. You know that sometimes foster agencies themselves consider race when making foster care placements?

A. I can't answer that. I don't know.

Q. You don't know whether any agencies consider race when making placements?

A. I have never had that discussion —

Mr. Field: assumes facts not in the record regarding placements, Your Honor.

Mr. Rienzi: It's a question about whether it happens.

Mr. Field: The witness has not testified as to whether foster care agencies provide placements.

The Court: She answered.

By Mr. Rienzi:

Q. Who at DHS would know that?

The Court: Who?

By Mr. Rienzi:

Q. Who in DHS would know whether foster agencies consider race in making placements?

The Court: What does that have to do [Page 40] with this case?

Mr. Rienzi: Plenty, your honor. The claim is that foster care is a public accommodation subject to the fair practices ordinance. The Commissioner has just told me that the department sometimes considers race when making placements.

The Court: As one of many other factors.

Mr. Rienzi: Which would be a violation of the Fair Practices Ordinance if they actually believed it.

The Court: That is your opinion.

Mr. Rienzi: Correct. And it's actually also the Fair Practices Ordinance, Your Honor. I am simply trying to get a sense of how they run their foster care program and whether they allow other considerations that are not consistent with this apparently new view that foster care is a public accommodation. So I am trying to find out how the department handles other things that if their story were actually correct would be violations of the Fair Practices Ordinance.

The Court: Well, that is not — the fact that you consider a public accommodation and what is required by the Fair Practices Act is not what this case is based on, the issue of race.

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Mr. Rienzi: Your honor, she testified that the violation — was violation of the Fair Practices Ordinance because it's their view that foster care is a public accommodation covered by the Fair Practices Ordinance.

The Court: She has not testified to that.

Mr. Rienzi: She has testified that that was one of the two breaches of the Fair Practices Ordinance, is my understanding.

Mr. Field: She testified regarding information providing by her counsel, your honor.

The Court: That is correct. She has not testified to that.

By Mr. Rienzi:

Q. Ms. Figueroa, did you tell other people that Catholic had violated the Fair Practices Ordinances part of that contract?

Mr. Field: Your Honor, I just object to the extent that the question requires —

The Court: Sustained. Sustained.

By Mr. Rienzi:

Q. Commissioner Figueroa, I am not asking you to tell me anything about any conversations you had with your lawyers.

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Mr. Field: Or other City employees, Your Honor.

The Court: I sustained the objection.

By Mr. Rienzi:

Q. Did you talk to anybody who does not work for the City and tell them that you thought Catholic had violated the Fair Practices Ordinance?

A. No.

Q. You didn't tell that to Catholic?

A. In our — actually it was our legal counsel that spoke to their legal counsel in the meeting. The direct question came from Catholic Social Services counsel and our counsel present responded.

Q. Have you ever instructed anybody at DHS to freeze referrals at any agency over a violation of the Fair Practices Ordinance?

A. Catholic Social Services.

Q. Other than Catholic Social Services?

A. No.

Q. Have you ever informed the 30 foster care agencies in the City that you believe their provision of foster care is governed by the Fair Practices Ordinance?

A. It's in the contract.

Q. Other than the language in the contract, have you ever informed the agencies in the city that you [Page 43] think they have obligations under the Fair Practices Ordinance when doing foster care work?

A. We always remind individuals to meet the standards in their contracts.

Q. I am saying other than the contract, have you ever told agencies to do that?

A. Based on the nature of the contract discussions, then I would say yes because they all sign their contracts as I did.

Q. I am just asking you, other than the contract, do you ever tell them they must follow the Fair Practices Ordinance?

A. Not that I recall.

Q. You are not aware of any trainings that your agency has done to tell people that?

A. Not that I am aware of.

Q. So in all of your time at DHS the first time you ever heard anybody say foster care was a public accommodation under the Fair Practices Ordinance was in this particular dispute, correct?

A. Again, that was in conversation with my counsel.

Q. And I am asking you since I know you also observed nonprivileged conversations between your counsel and Catholic. So I am not asking you to tell me anything about what your lawyer told you. Prior to [Page 44] March of 2018, you had never taken the position that foster care work was a public accommodation under the Fair Practices Ordinance, correct?

Mr. Field: Objection to the characterization of taking a position, Your Honor.

The Court: Sustained.

By Mr. Rienzi:

Q. You are not aware of DHS ever telling anyone that foster care was a public accommodation prior to 2018, correct?

A. We never needed to prior.

Q. That's not my question. My question is whether you are aware of anyone at DHS ever taking that position prior to 2018?

Mr. Field: Objection to the scope of this, your honor. She has only been the commissioner since the fall of 2016.

The Court: My understanding is it's in the contract.

Mr. Rienzi: I understand that that is their claim, Your Honor, and I'm simply saying if you are running a large system, I am curious to know whether they said it to anybody else.

The Court: When you say "said it to anybody else," I mean the fact that it's laid out in the [Page 45] contract —

Mr. Rienzi: Your Honor, the words "Fair Practices Ordinance" appear in the contract. We have a serious dispute with the City as to whether that makes foster care a public accommodation.

The Court: I can appreciate that. All I am saying is, the fact that it is in the contract, I don't know that it's necessary that it has to be said any other way.

Mr. Rienzi: Your Honor, I think that's a perfectly fair position to take, and maybe Ms. Figueroa is going to say that. But my question is just whether she is aware of anyplace else that they have taken the position that foster care is a public accommodation. She has been there for many years. If the answer is no, then that's fine. I believe the answer was —

By Mr. Rienzi:

Q. Was your answer previously it has not come up before? Was that your answer?

Mr. Field: Again, Your Honor, I just object because he referred again to this characterization of taking the position, which is a legal conclusion.

By Mr. Rienzi:

Q. You have worked at DHS for a total –

[Page 46]

A. Well, in my current capacity?

Q. Total.

A. Almost four years.

Q. Prior to 2018 you had never heard anybody at DHS say that foster care work was a public accommodation, correct?

A. I believe I answered this.

Q. I am asking for a yes or no answer. Prior to 2018, you had never heard anybody call foster care a public accommodation, correct?

Mr. Field: I object to the extent it calls for a privileged communication, Your Honor.

The Court: Overruled. You may answer.

The Witness: I believe I answered that prior to this incident it had not arose.

By Mr. Rienzi:

Q. So no, you had never heard that?

A. No.

Q. Okay. Thank you. I believe you testified on Tuesday that you had heard and agreed with Ms. Ali's testimony, is that correct?

A. That is correct.

Q. And you know that Ms. Ali stated a — what she said was a rule that if a qualified prospective foster [Page 47] family wants a home study performed by a

particular foster agency, that agency must provide the home study. Do you recall that?

Mr. Field: Objection. He is mischaracterizing Ms. Ali's testimony.

The Court: Overruled.

By Mr. Rienzi:

Q. Do you recall Ms. Ali testifying about a rule that if a qualified prospective foster family wants a home study performed by a particular agency, that agency must provide the home study?

A. I have – in terms of rules, is that the – was that the language that Ms. Ali used?

The Court: I think she used policy.

By Mr. Rienzi:

Q. Policy. I'm not — you can call it whatever you like. I'm looking for —

A. I think language is important.

Q. I do too. Thank you. Did you hear Ms. Ali testify about that policy?

A. I was here, yes. I heard her testify on the policy.

Q. Do you agree with her testimony on that policy?

A. Yes, that parents choose which organization they [Page 48] would like to work with.

Q. And that an agency must provide the home study if a family wants the agency to provide the home study, correct?

A. Yes.

Q. You have never done any training for agencies about that policy, have you?

A. In all sincerity, it is a huge department and a lot of the child welfare operations are under Ms. Ali, So I would not be able to answer the question.

Q. You are not aware of any training provided to the agencies about that policy, correct?

A. I just answered that, again, I oversee a very large department, and those duties and responsibilities, I rely on the support of deputy commissioner Ali. So I'm not in a position to be able to answer that.

Q. You certainly never instructed her to make sure agencies are trained on that policy, correct?

A. What policy?

Q. The policy that foster agencies must provide home studies to families who want them. You have not instructed her to make sure that agencies are trained on that policy, correct?

A. That's correct.

Q. And you have done nothing to train your own [Page 49] staff on that policy, correct?

A. Are we referring to the policy of the home study?

Q. The policy that an agency must provide a home study. You have never done anything to train your own staff on that policy, correct?

A. No, because it is reflected in the contract.

Q. Other than your claim that it is in that contract, have you ever seen this policy written down anywhere?

A. I'm sure it exists in a lot of different places. I don't know that I can say — you know, there's reference to

the website, et cetera. So I don't know that I could name other places in which that would appear.

Q. Okay. Do you know that it appears in other places or are you just saying it might and you don't know?

A. It might and I don't know.

Mr. Rienzi: permission to approach, Your Honor.

The Court: yes.

By Mr. Rienzi:

Q. I am handing the witness a copy of a document labeled Plaintiff's Exhibit 16. And I ask you if you [Page 50] have seen that document before?

A. There's a sticker over part of it, so I am assuming that says the Department of Human Services.

Q. I will show you a copy without the exhibit sticker, just so you can see that. Have you seen that before?

A. Yes, this is actually very dated.

Q. It still appears on your website, correct?

A. I don't know.

Q. Dhs.phila.gov is your website?

A. That's correct.

Q. Do you recognize this document?

A. I am familiar with this document.

Q. What is it?

A. It's the foster parent handbook.

Q. And what is the foster parent handbook?

A. It's a guide for prospective parents.

Q. I would like you to turn to the pink sticky note, which is on page 2, the frequently asked questions page. Do you see the section saying: how do I become a foster parent?

A. Yes.

Q. Can you just take a moment and — well, I would like to direct your attention to the second sentence there. It says: there are many foster care agencies in [Page 51]

Q. Nothing in the how I — how do I become a foster parent section says that foster parents have a right to receive a home study from whatever agency they pick, does it?

A. No, but I think it's important to know that this is a general guide to the overall process of foster parenting.

Q. Great. And that general guide does not say you have a right to a home study from any agency you want, does it?

A. Because it's a general guide, it might not include all the detail necessary.

Q. It does not include that statement, correct?

A. What statement?

Q. The statement that you have a right to a home study from whatever agency you pick.

Mr. Field: Your Honor, I just object. The general guide is a —

The Court: Overruled.

Mr. Field: — many-page document and he is asking about the entirety of it.

Mr. Rienzi: I am not.

By Mr. Rienzi:

Q. I am asking about the “how do I become a foster parent” section.

[Page 53]

A. I don’t know what else that — right now off the top of my head in the 74-page document that might be found besides page 2. Can you repeat the statement you are asking me to confirm?

Q. The “how do I become a foster parent” section does not say that you have a right to get a home study from whatever agency you want, does it?

A. In this guide, it does not.

Q. Okay. It says: DHS does not license or approve foster parents. Who does?

A. The Pennsylvania Department of Human Services.

Q. So Pennsylvania DHS is the one who licenses and approves foster parents?

A. That’s correct.

Q. Do agencies play a role in that?

A. Based on the information that they provide is how a parent becomes licensed and approved.

Q. Who do they provide that information to?

A. You are getting into the real technical operational part, so I would have to rely on my Deputy Commissioner to answer that.

Q. They don’t provide it to you, do they?

A. No. They have to go through the state process. Yep.

Q. And you have nothing to do with that process, do [Page 54] you?

A. No.

Q. Your office does not review home studies?

A. I can't answer that.

Q. I'm sorry. You said you can't answer that?

A. I don't know.

Q. When agencies do home studies, they are not acting on behalf of the City, are they?

Mr. Field: Objection, calls for a legal conclusion.

The Court: Overruled.

The Witness: The City pays for the contract for them to deliver the service. The licensing component is held by the State. They can't do the work unless they have a contract with the City of Philadelphia.

By Mr. Rienzi:

Q. When agencies do home studies, they are not acting on behalf of the City, are they?

The Court: She answered that question. When you say on behalf of, it's necessary for them to get a license, but they can't —

Mr. Rienzi: I am simply trying to figure out if this is the city's work that the agencies are doing or if it's somebody else's work.

[Page 55]

Mr. Field: I believe she just answered that question, Your Honor.

The Court: She did answer the question.

Mr. Rienzi: Okay.

By Mr. Rienzi:

Q. Do you still have the contract up there?

A. I do.

Q. Turn to page 86 of the contract, please.

A. I got it.

Q. Do you see section 9.1?

A. I do.

Q. Can you read the first sentence of that section to me, please?

A. Provider is an independent contractor and shall not in any way for any purposes be deemed or intended to be an employee or agent of the City.

Q. And that is correct as your understanding, right?

Mr. Field: Objection to the extent it calls for a legal conclusion, Your Honor.

The Court: Overruled.

The Witness: That's correct under Article 9, the independent contractor indemnification litigation cooperation.

By Mr. Rienzi:

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Q. Thank you.

Mr. Rienzi: Permission to approach, Your Honor.

The Court: Yes.

By Mr. Rienzi:

Q. Handing the witness a document labeled Plaintiff's Exhibit 17. Commissioner Figueroa, actually if I can just turn you back to the foster parent handbook for one more second. It is the previous exhibit. In the second paragraph there you see that the City is referring people to the Pennsylvania State Foster Parent Association?

A. Are we back to the original tab?

Q. I'm sorry. I am back to the foster parent handbook.

A. Yes. What page?

Q. Same page. Page 2, the frequently asked questions. Do you see that DHS is referring people to the Pennsylvania State Foster Parent Association?

A. Here in the middle?

Q. Second paragraph?

A. Yes. Yep.

Q. And DHS says that that entity can also give you more information and assist you as you decide which [Page 57] agency is the best match for you to work with for your home study and license. Do you see that?

A. I'm sorry. Where are you reading from?

Q. The second paragraph on page 2?

A. Yes.

Q. It says that the Pennsylvania State —

A. Got it. Yes.

Q. — Foster Parent Association can also give you more information and assist you as you decide which agency is the best match for you to work with for your home study and license. Do you see that?

A. Yes.

Q. Are you familiar with then the next document I gave you, the resource parent manual?

A. I am actually not familiar with it.

Q. Okay. Are you aware that the Pennsylvania State Foster Parent association changed its name to the Pennsylvania State Resource Family Association?

A. No.

Q. I would like to direct your attention to page 7 of that resource parent manual. It says: pequirements in Pennsylvania to be a resource parent.

A. Yes.

Q. Are you familiar with the regulations that appear on that page?

[Page 58]

A. I am familiar with them. I would not say I could cite them.

Q. Those are the state regulations for an agency approving a foster family, correct?

A. Yes, correct.

Q. And do you see under heading number 1 where it says: note that these are minimum requirements and individual agencies will vary their policies. Do you see that?

A. I do see that.

Q. And that is correct, isn't it?

Mr. Field: Objection to the extent it calls for a legal conclusion, Your Honor.

The Court: Yes, overruled.

The Witness: And clarity — could you clarify the interpretation of “individual agency” for this line of questioning?

By Mr. Rienzi:

Q. I understand them to be talking about foster care agencies. And so the way I am looking at it is in Exhibit 16 the City tells people to go to this foster care agency.

A. I just asked that because we are also considered an agency of the state. So it's not clear to me that this is talking exclusively about foster care agencies.

[Page 59]

Q. Okay. Do you see that it says these are minimum requirements?

A. Yes, I do.

Q. What do you understand that to mean?

A. Less than what is required.

Q. Okay. And to this day, this is a document that the Department of Human Services is sending potential foster parents to, correct?

Mr. Field: Your Honor, this is not a Department of Human Services document.

The Court: I believe she indicated that the resource, the parent resource that you gave to her from the City of Philadelphia was dated.

Mr. Rienzi: I understand that, Your Honor. It appears on their website. And so I am asking a question about it because they are still referring people to this agency. So I am simply trying to find out —

By Mr. Rienzi:

Q. Well, let me ask you. I will ask a different question. Do you disagree with the language you see on page 7 that those requirements for resource parents are minimums?

A. I don't run this agency, so I can't speak – I can't answer that.

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Q. Those are the requirements for certifying a foster family, correct?

Mr. Field: Objection to the extent it calls for a legal conclusion, Your Honor.

The Court: This is not her document.

Mr. Rienzi: I know it's not her document. It's the document that the City sends to foster parents to look at.

The Court: This is not her document. So she cannot tell you whether or not these are the minimum — these are the requirements to certify.

Mr. Rienzi: So fair enough. I am asking her if she agrees with the document. She doesn't have to tell me what they meant. Does she agree?

By Mr. Rienzi:

Q. Do you agree, Commissioner Figueroa, to the statement in the document that you are sending foster parents to?

Mr. Field: I object to this in that the document is printing portions of regulations and the witness has already said she is only generally familiar with those regulations.

The Court: Can you state whether or not these are the minimum requirements?

The Witness: These are not the [Page 61] regulations in their entirety.

By Mr. Rienzi:

Q. And it's your understanding of the way the foster care system works that foster care agencies are allowed to vary their policies for approval of resource parents, isn't it?

Mr. Field: Objection to the ambiguity in "agencies" there, Your Honor.

The Court: Yes. Sustained.

By Mr. Rienzi:

Q. It is your understanding that foster care agencies that work with the city of Philadelphia are permitted by state law to vary their policies for approval of foster families, correct?

Mr. Field: Objection to the extent it calls for a legal conclusion.

The Court: Overruled. Can you answer that question?

The Witness: I am not sure because irregardless we have our existing contract that identifies what they are required to meet.

By Mr. Rienzi:

Q. So is it your position that foster care agencies that work with the city of Philadelphia are not allowed to vary their requirements for becoming a foster parent?

[Page 62]

The Court: What do you mean by “vary their requirements”?

By Mr. Rienzi:

Q. There are requirements listed in state law, correct?

A. Yes.

Q. And I apologize. You are aware that there are requirements in state law for becoming a foster family, correct?

A. I am aware, yes.

Q. And my question to you is, are agencies allowed to vary and to add to those requirements?

A. I believe I have answered that. They are required to follow the contract with the City of Philadelphia irregardless of what this guide might stipulate.

Q. As I matter of state law, is it your understanding that they are allowed to treat these as minimum requirements?

Mr. Field: Objection to the legal conclusion.

The Court: Yes. Sustained. Sustained. I am not quite sure where — what requirements we are talking about.

By Mr. Rienzi:

[Page 63]

Q. No one from your agency has come to you to say we are referring people to a manual that is telling them the wrong thing, have they?

A. Not that has been brought to my level.

Q. And no one has told that you that the City's website says anything wrong about being a foster parent either, correct?

A. We have gotten feedback that the information is dated.

Q. When?

A. We are in the process of redoing our entire website.

Q. When did you get that feedback?

A. We have gotten that from our staff and we have gotten that from providers. And I cannot give you an exact date, but I will tell you in the course of the two years I have been a commissioner, that it's regular feedback that we get regarding our website.

Q. Is any of that feedback related to the language on your website that says agencies can have slightly different requirements?

A. I didn't answer that question.

Q. You did or did not?

A. I did not.

Q. Okay. I am asking you if any of the feedback [Page 64] you have received relates to the sentence on the city's website that says each agency has slightly different requirements.

A. What are you referencing now.

Q. Now I am back at the original website that we looked at. It says: birth, marriage and life events on the first page. And then it has this box?

A. Yes, thank you.

Q. And you said you have received feedback that the information on your website is dated. And I am simply trying to find out whether any of that feedback relates to the sentence on the web page that says each agency has slightly different requirements, specialties, and training programs.

A. It has been general feedback.

Q. No one has specifically told you that that sentence on your website was wrong?

A. Not that particular sentence.

Q. And as you sit here today, you don't have any intention of changing that, do you?

A. I'm certainly going to —

Mr. Field: Objection, calls for speculation.

The Court: Sustained.

Mr. Rienzi: Permission to approach, your [Page 65] honor.

The Court: Yes.

By Mr. Rienzi:

Q. Handing you a document labeled Plaintiff's Exhibit 18. And it's the website from an organization called the second chance.

A. A Second Chance.

Q. A Second Chance. Are you familiar with a Second Chance?

A. I am.

Q. What are they?

A. They're a foster care provider agency and they also do family group decision-making.

Q. What is family group decision-making?

A. It's basically a teaming process to help determination of the progress on a case.

Q. I would like to direct your attention to the second sentence in the box at the top of the page under kinship cares. And it reads: as the only agency in the country that exclusively delivers services to the entire kinship triad, child, caregiver, and birth parents, its approach is pure kinship. Do you see that?

A. I do.

Mr. Field: Your honor, I would object to [Page 66] the question both on relevance and hearsay. This is not a DHS document.

The Court: Well, overruled. I am not quite sure where we are going but —

Mr. Rienzi: I will get there quickly, Your honor.

The Court: Okay.

By Mr. Rienzi:

Q. A second chance says on its website that it exclusively does kin care, correct?

A. That's their terminology, yes.

Q. Do you believe it would violate the public accommodations law for second chance to exclusively do kinship care?

Mr. Field: Objection, calls for a legal conclusion.

The Court: Sustained.

By Mr. Rienzi:

Q. Have you ever investigated a second chance for the fact that it says it exclusively does kin care?

Mr. Field: Objection to the extent that it assumes DHS investigates on such subjects.

The Court: Overruled. She can answer.

The Witness: Can you repeat?

By Mr. Rienzi:

[Page 67]

Q. Have you ever investigated a second chance for the claim on its website that it exclusively does kin care?

A. No, because they serve everybody we send to them.

Q. You didn't cut off referrals to a Second Chance?

A. They accept everybody we send to them.

Q. You did not cut off referrals to a Second Chance?

A. No.

Q. For Second Chance you decided that what they actually do is what matters, correct?

The Court: Sustained.

Mr. Field: Objection, Your Honor.

By Mr. Rienzi:

Q. For Second Chance you did not think that you should cut off referrals simply based on their statement on the website, correct?

A. Correct. As a marketing document, not a direct response to a question asked.

Q. Is it your testimony that Second Chance currently does nonkinship foster care?

Mr. Field: Can you repeat the question, please, counsel?

By Mr. Rienzi:

[Page 68]

Q. Is it your testimony that a Second Chance currently does nonkinship foster care?

A. That's not the words I use.

Q. Is that true?

A. Those are not the words I use.

Q. Is — does a Second Chance currently do nonkinship foster care?

A. Yes.

Q. When did you find that out?

A. I don't have — I don't know that I can tell you a date.

Q. Was it within the last month or further ago than that?

A. Probably as long as I have known Second Chance.

Q. Which is how long?

A. In my capacity as Commissioner, two years.

Q. Was there a time when Second Chance only did kinship care?

A. I don't know.

Q. You never did any investigation to find that out?

The Court: Well, she never did any investigation of kinship care.

By Mr. Rienzi:

Q. To find out whether Second Chance only focused [Page 69] on kinship care?

Mr. Field: It has been answered, Your Honor.

The Court: It was. Sustained.

By Mr. Rienzi:

Q. Other than your claim that it is in the contract, is the policy that a foster care agency must provide a home study to any couple that wants it written down anyplace else?

Mr. Field: Objection, Your Honor. That is not the witness's testimony regarding the contract.

The Court: Overruled.

The Witness: The contract — by the nature of a contract is you're bound to the services that you have agreed to do on behalf of the City of Philadelphia. It clearly indicates that services include training, recruitment and certification of foster home.

By Mr. Rienzi:

Q. And the contract does not say to do it for all families, does it?

A. I think we have already answered that, that it's — in this very long document I cannot speak to that specific.

Q. We will let the contract speak for itself on [Page 70] that point. Other than the contract, have you ever seen this policy written anyplace else?

A. Just clarify, what do you mean policy as a specific policy of who?

Q. Your claimed policy that a foster agency must provide the home study for any prospective family that wants it?

A. Only as it is required through the contract.

Q. So no, you have not seen it written anyplace but the contract, correct?

A. I don't know.

Q. There is no place that you can name for me today that that is written other than the contract, correct?

A. I can't answer so I would have to say I don't know.

Q. Okay. You don't doubt the sincerity of Catholic's religious beliefs, do you?

A. No, I do not.

Q. And I believe you said earlier you don't doubt that they are in fact religious, do you?

A. No, I don't doubt that at all.

Q. And you understand, I believe you testified yesterday, that Catholic's position about home studies is a religious decision, correct?

[Page 71]

A. Yes, in their view, yes.

Q. And you told Catholic that you would not make an exception to allow Catholic to choose not to do certain home studies, correct?

A. My position was that if you remove that individual community and inserted African American or Latino, it would not be even a question. So to me it was clearly discriminatory in nature.

Q. Because to you it's akin to racism?

A. It's discriminating against a particular community.

Q. I believe you said before that you have no evidence that any actual gay couple ever asked Catholic to perform the service, is that correct?

A. Could you rephrase that.

Q. You are not aware of any actual gay couple that ever asked Catholic to perform a home study, correct?

A. I am not aware.

Mr. Field: Your Honor, I believe that mischaracterizes the witness's testimony.

The Court: No, I believe she testified to that already.

By Mr. Rienzi:

Q. But you still won't make any exception for Catholic?

[Page 72]

A. That they can discriminate against one particular community?

Q. That they can allow the other 28 or 29 agencies in the City to do that home study. You will not allow them an exception, correct?

A. I believe I have answered that. I would not allow one organization to discriminate in the way that I would not allow the other 28 to choose then to discriminate against other communities. It's certainly a very dangerous place for the City to enter into to allow discrimination of any community.

Q. You agree that transferring foster kids from their homes is not in their best interest, correct?

A. I do agree with that.

Q. You agree it would be traumatic to transfer kids from their foster homes?

Mr. Field: Objection, calls for speculation, Your Honor.

The Court: Overruled. You may answer.

The Witness: That's not always the case. So it's not a yes or no answer.

By Mr. Rienzi:

Q. Your reason — strike that. You have already testified earlier today and I believe on Tuesday that you shut down intake at [Page 73] Catholic to protect the best interest of children, correct?

A. That's correct.

Q. And the reason — your reason for doing that was that you didn't want to place children at Catholic who might later have to be moved, correct?

A. That is correct, or add additional children that would have to possibly be moved.

Q. Because moving children from Catholic could be traumatic for them, correct?

A. As I stated earlier, it's not a yes or no answer.

Q. Well then, I don't understand your reason. I thought your argument was I don't want to put more kids there, right? You said you didn't want to put more kids at Catholic, correct?

A. I think what I didn't have a chance to say is that each case is an individual situation. In generalization, moving kids is not something that the city wants to have to do as it relates to a disruption for a child.

Q. And the general reason for that general view that you don't want to move kids is what?

A. Is that we want to make sure that we maintain the best interest of the child.

[Page 74]

Q. And for some children it won't be in their best interest to be transferred from home to home, correct?

A. Well, we hope in the best interest that we actually don't have to move home to home. We believe very strongly since 50 percent of the Catholic Social Services are with kin, that kin would want to continue to take care of their own kin and that they would transfer to another agency. That's certainly the conversation we would have with the other foster parents who are amazing and also expressed that their general care — and everybody knows that foster parents do this because they love the children, and that would be a very difficult position to have to put a foster parent, Because ultimately it will be the foster parents who will have to decide whether or not they want to move to another foster agency or if they are willing to no longer have a child in their home.

Q. You heard some of them testify on Monday that they may not choose to transfer to another agency, correct?

Mr. Field: Objection, mischaracterizes prior testimony.

The Court: Sustained.

By Mr. Rienzi:

Q. Were you in the room when the foster mothers [Page 75] testified on Monday?

A. I was.

Q. You heard them say that they do not want to

transfer away from Catholic, correct?

A. I heard they were not sure.

Q. You didn't hear them say that they don't want to do it?

A. They all said that they were not sure. They could not state at this time.

Q. They all stated that they did not want to, correct?

Mr. Field: Asked and answered, Your Honor.

The Court: Sustained.

By Mr. Rienzi:

Q. They said they were not sure what they would do if Catholic was shut down, but you agree that they all expressed a preference to remain with Catholic, correct?

Mr. Field: Objection, Your Honor.

The Court: Sustained.

By Mr. Rienzi:

Q. You said this morning that your reason for closing intake was to protect the best interest of the children, correct?

A. Yes, correct.

[Page 76]

Q. That was not your explanation for the freeze at the time you instituted it, was it?

A. I don't understand the question.

Q. That explanation as the reason for your freeze was not the reason you gave at the time, was it?

Mr. Field: Objection, gave to whom?

Mr. Rienzi: Anybody.

The Witness: I don't know. That's not true. I had plenty of conversations internally regarding that matter.

By Mr. Rienzi:

Q. Who did you tell that it was in the best interest of the children and that's why you were doing the freeze?

A. My executive team.

Q. And who is on that team?

A. You want me to name all of them?

Q. How big is it?

A. It's all of the deputies as well as the operational directors. My team is about 15 people.

Q. For both of our good, I will say no thank you.

A. Okay.

Q. You authorized Commissioner Ali to send the e-mail to CUA leadership on March 26 telling them about the shutdown, correct?

[Page 77]

A. I did.

Q. And that e-mail did not tell CUA leadership that the reason for the shutdown was the best interest of the child, correct?

A. We never provide for the purposes of the providers the reasons why we are closing intake for any provider. It's not fair to that provider to put out their

personal business in regards to what is happening to them.

Q. You didn't tell Catholic that the reason for the shutdown was the best interest of the children, did you?

A. No. We explained that we had to investigate this further.

Q. And you told them the reason for the shutdown was the possibility that they would not do a home study for same-sex couples, correct?

A. Violation of the Fair Practices Ordinance, yes.

Q. Do you understand that some foster mothers and foster children would be harmed if Catholic is formed to close — forced to close?

The Court: What do you mean by "harmed"?

Mr. Field: Objection to speculation, Your honor.

The Court: Sustained.

By Mr. Rienzi:

[Page 78]

Q. Did you hear Ms. Simms-Busch testify about how her children would lose the social worker they have bonded with if catholic is forced to chose?

Mr. Field: Objection, Your Honor, mischaracterizes the witness's testimony. She represented she would not — she did not know what she would do if Catholic was forced to close.

By Mr. Rienzi:

Q. Did you hear Ms. Simms-Busch testify that her children would lose the social worker who has a bond

with her kids if Catholic is forced to close? Did you hear that?

The Court: Overruled. You may answer.

The Witness: Just to clarify, you're talking about the social worker versus the foster parent?

By Mr. Rienzi:

Q. Yes. For that question I am talking about the social worker who Ms. Simms-Busch testified about, the Catholic social worker.

A. So could you repeat? I just wanted to clarify you were talking about the social worker.

Q. Sure. You heard Ms. Simms-Busch testify that her children would lose the Catholic social worker who has a bond with them if Catholic is forced to close?

[Page 79]

A. I did hear that, yes.

Q. You hear Ms. Paul testify about how she would lose the ability to rely on the social workers she has trusted for decades, correct?

A. That is correct.

Q. You heard Ms. Paul testify about how her home is available right now, correct?

A. I did hear that, yes.

Q. And you heard Ms. Fulton testify about her — how her children may be transferred away from her if Catholic closes, correct?

A. Only if she chooses to not transfer to another agency.

Q. Which she said she might choose to do, correct?

A. And she said she was not sure.

Q. But you heard her testify about how her children might be transferred away from her if Catholic closes, correct?

A. I heard that they might.

Q. And you heard how DHS in the past has been unable to find a home for one of those children, correct?

A. No.

Q. You didn't hear that?

A. I don't recall that.

[Page 80]

Q. Okay.

A. I mean, if you have it and you would like me to see the transcript.

Q. That's fine. At a minimum, all of these foster mothers would be forced to go to an agency that is not their first choice if Catholic is closed, correct?

A. That is correct.

Q. Don't these women have a right to be at the foster agency that is their first choice?

A. They have the right to be at the foster care agency they choose.

Q. But if the City forces Catholic to shut down, these women will not be allowed to be at the agency that they testified is their first choice, correct?

A. If Catholic chooses not to enter into a full contract, then yes, they're going to have to find new homes.

Q. And to your knowledge, the only reason that Catholic would refuse to do that is because the City is insisting on its policy about doing home studies for anyone who asks, correct?

A. The City is insisting that Catholic Social Services comply with their contract.

Q. And the only piece of your view of the contract [Page 81] that you understand to be any problem for catholic is your insistence that Catholic must provide a home study for any couple who asks, correct?

A. Can you clarify my insistence?

Q. Sure. So what I am trying to get at is there is a dispute between you and Catholic about what the contract means, right?

A. I think there's a dispute that is beyond just me as an individual person.

Q. Just to be clear, between DHS and Catholic. I don't at all mean to personalize it and say it's just you. Other than the issue of doing home studies for every single couple who asks, you are not aware of any other reason that Catholic would not enter into a new contract with you, are you?

Mr. Field: Objection, Your Honor. He is asking about Catholic's reasons for doing something, Which the Commissioner would not know.

The Court: Sustained.

By Mr. Rienzi:

Q. Has Catholic stated any reason to you that it would be unable to enter into a new contract other than DHS's insistence that it must do home studies for everyone who asks?

A. They have indicated they would not comply [Page 82] because they would not certify same-sex couples, which is a portion of the service that is required to deliver.

Q. I understand that's your understanding of the contract. And I am asking, has Catholic told you there is anything else that would stop them from entering into a new contract?

A. Other than complying? No.

Q. Other than that one issue?

A. Other than complying, no.

Q. No. I want — I don't want the broad word "comply." I am asking you a specific question. Have they —

A. Well, if you can't deliver an element of your contract then —

Q. I understand your argument. I am asking you — you have identified one specific problem Catholic has, the home studies for same-sex couples?

A. It's a pretty big problem.

Q. I am asking you to tell me if there are any other problems that Catholic has stated that would stop them from entering into the contract with you?

Mr. Field: Your Honor, he is asking about whether or not things would stop Catholic from entering into a contract.

Mr. Rienzi: Your Honor, I am asking [Page 83] about negotiations that they have had, and I simply want to narrow the field and be clear. I think her testimony is that the only issue that Catholic has raised is this one issue. And I would just like confirmation that it is not

anything else, that — it's a reasonable question about discussions she has had.

The Court: Overruled.

The Witness: That was up until yesterday. There has been testimony provided that was new information to us that has certainly caused some concern.

By Mr. Rienzi:

Q. I am asking you about Catholic's negotiations with you. Has Catholic told you there is anything else that would stop them from entering into that contract other than —

A. And I am answering yes, because yesterday they indicated a new requirement that they have with a foster parent that we were completely unaware of until it was provided in testimony by James Amato yesterday.

Q. You were unaware that Catholic — strike that.

Mr. Rienzi: Permission to approach, Your Honor.

The Court: Yes.

By Mr. Rienzi:

[Page 84]

Q. I am going to hand you a document labeled Exhibit 2, which is — it was an attachment to a brief the city filed, which is a copy of your declaration. I just ask you to look at that and tell me if you have seen it before.

A. I have.

Q. And that's your declaration?

A. It is.

Q. And you signed it?

A. I did.

Q. Can you turn to page 6, please. In paragraph 28 you say that you decided to suspend referrals and you say: I did this because CSS told us it could not comply with its contract. Do you see that?

A. I do.

Q. CSS never used the words “could not comply with its contract,” did it?

A. This is my declaration, so my interpretation of —

Q. That’s what I wanted to be clear on. When you say could not comply with its contract, that’s your interpretation, correct?

A. That in consultation with our legal counsel.

Q. That’s fine. But you are not telling the Court that CSS said it can’t comply with its contract, [Page 85] correct?

A. Well, they said they won’t deliver a service, so if you can’t deliver part of your contract, I don’t know how else to define that.

Mr. Field: Your Honor, I object to this line of questioning. This affidavit paragraph does not contradict any of her prior testimony.

Mr. Rienzi: Your Honor, I am not asking her if it does. I am simply trying to figure out what she meant and get clarity that when she said CSS told us it could not comply with its contract, that in fact that’s an interpretation. That is not what CSS actually said.

The Court: It’s not the words that they used.

Mr. Rienzi: Yes. That’s what I am just trying to get clarity on.

Mr. Field: It was asked and answered, Your Honor.

The Court: I think she has answered.

Mr. Rienzi: Yes.

By Mr. Rienzi:

Q. Right now, intakes are frozen?

Mr. Field: Objection to the characterization of “frozen.”

[Page 86]

By Mr. Rienzi:

Q. I’m sorry. What is the right phrase?

A. Intake is closed.

Q. Intake is closed right now, correct?

A. That’s correct.

Q. Which is easier for the Central Referral Unit, making a placement to one of Catholic’s homes when intake is closed or when intake is not closed?

A. It has not had an impact.

Q. I’m sorry?

A. It has not had an impact.

Q. Are you sure of that? It has had no impact?

A. It has not impacted our congregate care or the use of our child care room. So yes, I am sure of that.

Q. How do you know that?

A. Well, availability of — well, I know that through data.

Q. How do you know that? What data tells you that?

A. I look at weekly data.

Q. And that weekly data tells that you the closure of intake has had no effect on congregate care?

A. That's correct.

Q. What do you look at in the data to know that?

A. Look at the number of youth that are in congregate care and where they are located.

[Page 87]

Q. How do you know that there has been no impact from the closure of intake?

A. Because the number has remained the same or reduced.

Q. There's a lot of variables that go into that number, aren't there?

A. Yes. And I have a pretty amazing performance and technology team that actually have really great detailed data on this.

Q. Terrific. How many kids are in congregate care right now?

A. I don't want to — so we have dependent and delinquent. And so we are talking about just dependency. We have somewhere around 715, 17.

Q. Okay. And about how many of those in congregate care could be living with foster families?

A. I could not say because not all children that are in congregate care are appropriate for foster care placement.

Q. But some of them are, correct?

A. It could be.

Q. You've stated publicly that about 250 of them could be in family homes, haven't you?

A. I stated that we would want to work to increase the amount.

[Page 88]

Mr. Rienzi: Permission to approach, Your Honor.

The Court: Yes.

By Mr. Rienzi:

Q. I am handing the witness a document labeled Exhibit 19. Ms. Figueroa, I would ask you if you are familiar with that document.

A. I am familiar with that document.

Q. You read it around the time it came out?

A. I am sure I read it closely.

Q. What is it?

A. It's a story in regard to our foster care recruitment effort, which I believe initiated this whole process.

Mr. Field: Your Honor, I just object to this Exhibit. It's a newspaper article. It's not authored by the document and published by — looks like Philly.com.

Mr. Rienzi: Your Honor, newspaper articles are self-authenticating under Rule 902. And I am simply looking to ask the witness a question about a quote that she gave in the article.

Mr. Field: The quotes from the article would still be hearsay, Your Honor.

[Page 89]

The Court: Overruled.

By Mr. Rienzi:

Q. Ms. Figueroa, if you would turn to page 3 of that printout. Do you see a box around some language in the article?

A. Mm-hmm.

Q. Can you read that language aloud, please?

Mr. Field: Counsel, can I just ask whether the box is in the original publication.

Mr. Rienzi: The box is something I put to indicate —

Mr. Field: Thank you. Sorry about that.

Mr. Rienzi: I put the box on it to indicate the language I wanted to direct the witness to. The box is essentially — consider it highlighting, please.

Mr. Field: So this is not the original article.

The Court: To the extent he placed the box around —

Mr. Rienzi: The box was placed on the original article.

The Court: — The sentence.

By Mr. Rienzi:

Q. Commissioner Figueroa, can you read the language [Page 90] in the box.

A. In Philadelphia about 700 children are in group home placements. Of those Figueroa said about 250 could be living with families while 450 more need to stay in staffed facilities due to physical or emotional needs.

Q. Do you recall talking to that reporter?

A. I do.

Q. And you didn't have any reason to be untruthful to that reporter, did you?

A. No.

Q. Is that an accurate discussion — description of what you said to the reporter?

A. Correct, yeah.

Q. So you would say that of the approximately 700 children in group homes approximately 250 could be living with families, correct?

A. I think that the operative is "could," as it requires a court process.

Q. I believe you said you have done some recruiting recently, is that right?

A. Yes, we have.

Q. And you've got about 75 new families sign up?

A. Actually, I just ran the data and it's well over 200.

Q. Terrific. And are some of those families [Page 91] already taking care of kids?

A. No.

Q. Why not?

A. Because they are new recruits, they've just been newly certified.

Q. So none of those families are taking care of kids, correct?

A. I don't know exactly right now that number, but those are — as of today we had well over 200 new recruited families.

Q. Terrific. But they are new. And so it takes a little while before they can start taking care of kids?

A. No. Once they are certified and they've completed the process and have been licensed, they are prepared to take home.

Q. Do you know how many of them have been licensed?

A. I don't know. I can't answer that right now, and I would highlight though, availability does not necessarily mean appropriate placement.

Q. How many of those 250 kids have moved out of congregate care?

A. I don't understand your question.

Q. You said you told the reporter that about 250 could be living with families, correct?

A. That is correct.

[Page 92]

Q. I am asking how many of them are still in congregate care?

A. I also explained that it's a court process.

Q. I heard that part. I'm asking how many are still living in congregate care?

A. I said I don't have the exact number off the top of my head today.

Q. Do you have a rough number?

A. I believe I gave it to you.

Q. What is the number you gave?

A. I said somewhere around 700, 715.

Q. That's the same number actually that you told the journalist in March, isn't it?

A. That is correct.

Q. So the number has not changed?

A. The numbers have not changed.

Q. And you are aware that there are at least a couple of dozen places available with families through Catholic social services right now?

A. According to their testimony, yes.

Q. Do you have any reason to think that number is wrong?

A. I mean, I have not verified the numbers, so I would hope that what they are saying is accurate.

Q. So if intake was not closed, some of those 250 [Page 93] kids could have been placed at Catholic, correct?

Mr. Field: Objection, calls for speculation, your honor.

The Court: Sustained.

By Mr. Rienzi:

Q. The reason you recruited more foster families is that you wanted to reduce the number of kids in congregate care, correct?

A. I stated that to reduce the older population of — older youth population as well as youth who identify as LGBTQ who wanted to be in affirming homes. So we were targeting particular areas.

Q. One of the particular areas you targeted is reducing the number of kids in congregate homes, isn't it?

A. That's older youth, yes.

Q. I just want a clear answer if I can.

The Court: She said yes.

Mr. Rienzi: Yes. Okay. Thank you.

By Mr. Rienzi:

Q. But the number of kids in congregate care actually has not changed since March, correct?

A. I would just highlight that we run a very complicated system, and so it's not widgets. It's not one for one. Kids are abused every day. They are [Page 94] neglected every day. They end up in our placement, in our care, because their families can't care for them. We are incredibly fortunate that we have foster care agencies, but it's not a one to one. So to assume that because there is availability will reduce the congregate care is an overexaggeration of the complication of our work.

Q. I understand that it's complicated, and I very much understand that those kids have been abused and been through terrible times. I am trying to get clarity on your previous statements that you want to reduce the number of kids in congregate care, your previous statement that 250 could be living with families, and your statement that there is no impact at all from not sending any kids to the, say, 25 or so families that are available in Catholic Social Services. Can you explain to me how we can connect those dots and make it make sense?

A. The only dot I could connect is that if we come back here in three months I'm hoping that all these certified homes, that we will greatly reduce that number. But the numbers that I am presenting are the numbers that the system is dealing with today.

Q. And those numbers again are the same as they were in March?

[Page 95]

A. They have not increased since the closure. So our need for Catholic Social Services availability certainly has not impacted the congregate care number.

Q. There are real kids who could be in those homes right now, aren't there?

A. I can't say that without a judicial decision.

Q. You can't say either way whether there are real kids who are in congregate homes who could be at Catholic right now?

Mr. Field: Calls for speculation, Your Honor.

The Court: Sustained.

By Mr. Rienzi:

Q. The reason for your drive was to get families who could take kids, some of whom are in congregate care, correct?

Mr. Field: Asked and answered, Your Honor.

The Court: Sustained.

By Mr. Rienzi:

Q. You don't know either way whether the availability of those beds in homes with Catholic would help children?

Mr. Field: Calls for speculation, Your Honor.

[Page 96]

The Court: Sustained.

Mr. Rienzi: Your Honor, the entire case is about her prediction of the best interests of children.

Mr. Field: Mischaracterizes the entire case, Your Honor.

The Court: Sustained. Sustained.

By Mr. Rienzi:

Q. When there are not enough foster home for kids, children suffer?

Mr. Field: Objection, Your Honor.

The Court: Sustained.

By Mr. Rienzi:

Q. Too few foster homes can result in children being moved around?

Mr. Field: Can you repeat the question, counselor?

By Mr. Rienzi:

Q. Too few foster homes can result in children being moved around?

Mr. Field: Calls for speculation, Your Honor.

The Court: Sustained.

Mr. Rienzi: Your Honor, she runs this system, and I am trying to figure out the relationship [Page 97] between the number of homes and the impact on children. I am simply trying to get her to tell me what the impact is of too few foster homes. I will try again.

By Mr. Rienzi:

Q. Do you know anything about the impact of not having enough foster homes?

A. No. I mean, I don't understand the question.

Q. You don't understand anything about the relationship between the number of foster homes available and the well-being of the children in your care? You don't know about a relationship between those two things?

The Court: That wasn't your question.

By Mr. Rienzi:

Q. Do you know anything about the relationship between the number of foster homes and the well-being of the children in your care?

A. Yes.

Q. And what is that relationship?

A. That we would like to have homes available for children who are in our care.

Q. More foster homes is better for the kids in your care, correct?

A. More appropriate foster homes are available for kids in our care that is in our best interest, yes.

[Page 98]

Q. And you don't have any reason to think that the homes certified through Catholic are inappropriate, do You?

A. No.

Q. Between 2016 and 2017 the State actually put DHS on a provisional license, didn't it?

A. It was prior to my arrival. So we — I believe June of 2017, I am not sure of the exact date, so it was under a — within less than a year of my tenure that we received a full license.

Q. So when you came in, that was something that needed your attention, wasn't it?

A. Yes. I actually took the job having worked in a nonprofit predominantly because I felt I could make a significant difference, and the agency was going through a difficult time.

Q. And one of the reasons it was on a provisional license was that the state found multiple failures to apply with applicable state regulations, correct?

Mr. Field: Objection, Your Honor. The witness said she was not with the agency at that time.

The Court: Sustained.

By Mr. Rienzi:

Q. Part of the reason you took the job was to fix this problem, wasn't it, Ms. Figueroa?

[Page 99]

A. It was.

Q. So are you familiar with the scope of the problem that led to the provisional license?

A. I am familiar with the issues that the state presented, yes.

Q. And one of those issues was the State saying that there were multiple failures to comply with applicable state regulations, correct?

A. I believe that mischaracterizes the licensing process.

Q. The State told you when it gave you a provisional license that DHS had failed to comply with State regulations, didn't it?

A. It cites specific regulations, yes.

Q. And one of the failures was allowing children to sleep overnight too long in the DHS facility without adequate and timely placement, correct?

A. That is correct.

Q. Having more foster homes would help you deal with that problem, wouldn't it?

A. We got our license back because we reduced the utilization of the child care room.

Q. You still use it sometimes though, huh?

A. In the event of an emergency when a child arrives at 2 o'clock in the morning.

[Page 100]

Q. You also use it sometimes when a child doesn't arrive in the middle of the night, don't you?

A. We — the unfortunate times is there is a tremendous complexity. There's usually a lot of intellectual disability or significant violent behaviors where the child can't be in a home, and most foster parents won't accept children at that hour who have significant sexual acting out, fire starters, cutters or have violent tendencies. Those are children that generally do not end up in a foster home. So just to be clear, the children who are generally spending overnight are not kids who end up going into a general foster care placement.

Q. You keep saying generally. Some of those children do end up in foster care placement, correct?

A. Some do, yes.

Q. And having more homes would make it less likely that you would have to have children sleeping in the DHS office, wouldn't it?

Mr. Field: Objection, calls for speculation.

The Witness: Not necessarily.

By Mr. Rienzi:

Q. But it might, correct?

Mr. Field: Objection, calls for [Page 101] speculation.

The Court: Sustained.

By Mr. Rienzi:

Q. It's priority for DHS to recruit LGBTQ foster parents, correct?

A. Affirming homes.

Q. So one of them is to recruit LGBTQ affirming homes, correct?

A. Correct.

Q. You also have a priority of recruiting more LGBTQ foster parents, correct?

A. Correct.

Q. You have worked with the Mayor's Office of LGBT Affairs on some of that recruitment?

A. Along with other providers, yes.

Q. And so recruiting events can be aimed at particular segments of the population?

A. At all segments, yes.

Q. They can also be aimed at particular segments, correct?

A. Yes.

Q. Agencies are not obligated to recruit everyone all the time, are they?

Mr. Field: Objection, Your Honor. That testimony is not regarding agencies at the moment.

[Page 102]

The Court: Sustained. I think we have been through this already.

By Mr. Rienzi:

Q. Are you familiar with the Mayor's Office of LGBT Affairs?

A. I am.

Q. You follow that office on Twitter?

A. I do.

Q. It's an office of the City government?

A. It is.

Q. That office exists to help people of particular sexual orientations?

Mr. Field: Objection, Your Honor, to the extent the witness is aware of the office's purpose.

Mr. Rienzi: Yes. I am asking the question.

The Court: If you know.

The Witness: I don't have the definition of their mission statement on there, but that sounds about right.

By Mr. Rienzi:

Q. I believe you said when you did your investigation — and I'm moving back up so I can situate you. This morning you started your testimony by talking about your investigation after hearing from the Philly [Page 103] Inquirer reporter. Do you remember that?

A. I do.

Q. When you did that investigation, you only contacted faith-based foster care agencies, correct?

A. That's correct.

Q. You did not contact any nonreligious foster care agencies, correct?

A. Actually, I did speak with one other nonfaith based foster care agency.

Q. Which one was that?

A. Northeast Treatment Center.

Q. Why did you contact Northeast Treatment Center?

A. I have a good relationship with the CEO and wanted to ask about their practices.

Q. Did you talk about Catholic's practices?

A. No.

Q. As to all of the other nonreligious foster care agencies in the city, you did not call them to ask them their policy about LGBT couple applicants, correct?

A. No.

Q. Have you ever called nonreligious agencies to ask them whether they perform home studies for everyone who asked them?

A. Aside from Northeast Treatment Center, no.

Q. Have you ever called nonreligious agencies to [Page 104] tell them they must important perform home studies for everyone who asks them?

A. No.

Q. Have you ever called nonreligious agencies to ask if they ever refer home studies to another agency?

A. No.

Q. You had a meeting with James Amato in or around March 15th, correct?

A. That's correct.

Q. Where did that meeting take place?

A. In Deputy Commissioner Ali's conference room.

Q. That's a government office?

A. It is.

Q. And who attended for the City at that meeting?

A. It was myself, Deputy Commissioner Ali, our attorney was present, and Jim Black, James Amato, as well as counsel for the Archdiocese attended.

Q. Did you take notes?

A. I don't recall.

Q. Do you recall if anyone else did?

A. I believe our legal counsel did.

Q. At that meeting you told Catholic that times have changed, didn't you?

A. I did.

Q. And you told them that it's not 100 years ago [Page 105] anymore, didn't you?

A. Catholic Social Services indicated that they had been doing this service for 100 years. And I explained that women didn't have the rights and African Americans didn't have the rights, and I probably would not be sitting in the room if it was 100 years ago.

Q. You explained to them that it was not 100 years ago anymore, correct?

Mr. Field: Asked and answered.

The Witness: I indicated, yes, things have changed since 100 years ago.

By Mr. Rienzi:

Q. You told Catholic that they should listen to Pope Francis, did you not?

A. I said it would be great if we followed the teachings of Pope Francis, the voice of the Catholic Church.

Q. You told Catholic that they should not listen to Archbishop Chaput on this issue, correct?

A. I don't believe those were my words.

Q. So on one hand you said it would be great if we would listen to Pope Francis, correct?

A. Um-hum.

Q. Was there anyone on the other side you were saying they should listen to Pope Francis instead of?

[Page 106]

A. I stated the first part of that, that, you know, it would be great if we listened to the teachings and the words of our current Pope Francis.

Q. And you said that they should not listen to the Archdiocese on this issue, correct?

A. I answered this. I don't recall what I said specifically.

Q. Okay. So you know you said we should listen to Pope Francis, but you don't recall saying anything about who would be listening to Pope Francis —

Mr. Field: Asked and answered.

The Witness: I don't recall saying the Archbishop.

By Mr. Rienzi:

Q. Do you recall saying the Archdiocese?

The Court: Overruled.

The Witness: No.

By Mr. Rienzi:

Q. Do you recall saying anyone else in distinction with Pope Francis?

A. No.

Q. You told them that the home study issue was getting attention at the highest levels of City government, didn't you?

A. I did.

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Q. Okay. And you were referring in part to the Mayor when you said that, correct?

A. And my chain of command, yes.

Q. So when you said that, you were referring to yourself as the highest levels of City government?

A. Certainly the Managing Director's Office. So in the City Charter I report in to the Managing Director's Office and subsequently the Mayor.

Q. You had discussed this issue with the Mayor before your meeting with Catholic, correct?

A. Briefly.

Q. What did you say?

A. I said that I am working to address the issues. There is a number of children, and that we will brief him once we have made decisions about moving forward.

Q. What did the Mayor say?

Mr. Field: Objection, assumes facts not in the record.

The Court: Sustained.

By Mr. Rienzi:

Q. Did the Mayor answer you?

Mr. Field: Objection, assumes facts not in record.

Mr. Rienzi: It's simply a question, Your Honor. She said what she told the Mayor. I am asking [Page 108] what the Mayor said back.

Mr. Field: Objection, hearsay.

The Court: Sustained.

Mr. Rienzi: The City is a defendant,

Your Honor. The Mayor is the Mayor of the City. It's an admission, Your Honor.

The Court: Sustained.

Mr. Field: Objection as well to the extent there was counsel present.

By Mr. Rienzi:

Q. Did you know the Mayor's views by the time you sat down to meet with Catholic?

A. No.

Mr. Field: Objection, calls for speculation.

The Court: She has answered.

By Mr. Rienzi:

Q. Did you discuss cutting off intake with the Mayor's Office?

A. No.

Q. The Mayor is your boss?

A. He is the head of the City. My direct boss is Eva Gladstein.

Q. Who is Eva Gladstein's boss?

A. Mike Diberadinis.

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Q. Who is his boss?

A. The Mayor.

Q. Who appointed you?

A. The Mayor.

Q. Do you consider yourself part of the Mayor's administration?

A. I do.

Q. You know the Mayor's views about the Archdiocese?

A. I do now.

Q. When did you learn the Mayor's views about the Archdiocese?

A. Through this litigation.

Q. You know that he does not like the Archdiocese very much, correct?

A. I understand what has been presented, yes.

Q. Do you doubt the truthfulness of what has been presented?

The Court: In regard to —

Mr. Rienzi: The Mayor's views on the Archdiocese.

The Witness: I'm sorry. Can you repeat what you are asking me.

By Mr. Rienzi:

Q. When you said you know what has been presented.

[Page 110] And I guess I am asking, do you doubt the truthfulness of what has been presented? It's a little difficult because you're saying you know what's been presented — I will ask you this. When you say I know what's been presented, what are you referring to?

A. I'm referring to the exhibits that you guys provided in this submission.

Q. Okay.

Mr. Rienzi: Permission to approach, Your Honor.

The Court: Yes.

The Witness: The date of my wedding anniversary.

Mr. Field: Multiple points, but I would like to start with an offer of proof on this.

Mr. Rienzi: Sure. She's appointed by the Mayor. She is a member of the Mayor's administration. I think her boss's views on the religious entity that is at issue here

are highly relevant to the religious discrimination claim.

Mr. Field: Your Honor —

Mr. Rienzi: I'd like to finish, please.

Mr. Field: Yes.

Mr. Rienzi: She follows Mayor Kenney on Twitter and I am showing some of his public statements [Page 111] on twitter about the Archdiocese and about the Pope, who she told the Archdiocese in a government building who they should listen to. It's highly relevant, Your Honor.

Mr. Field: Your Honor, this statement is from 14th of November 2014. The witness testified she learned about this material through plaintiff's filing in this litigation. I am not clear how it's relevant to the timeline of the questions that counsel is asking her.

The Court: I'm going to sustain the objection.

By Mr. Rienzi:

Q. Ms. Figueroa, what do you know about the Mayor's views about the Archdiocese, other than what you have learned in this case?

A. None.

Q. Nothing. So until this case you had no idea of the Mayor's views about the Catholic Church?

A. That's correct.

Q. You follow Mayor Kenney on Twitter?

A. I follow a lot of people on Twitter, yes.

Q. And you follow Mayor Kenney on Twitter?

A. I do.

Q. When you see at the top of that document it says [Page 112] Jim Kenney, at Jim S. Kenney—

Mr. Field: Your Honor, this document is not in the record. I've already objected to it.

The Court: And I sustained the objection.

Mr. Rienzi: And I'm just asking her to tell me if she recognizes the Twitter handle as one that she follows.

The Witness: I've followed the mayor since he became mayor, so I would not have been privy to this one.

By Mr. Rienzi:

Q. When did you get on Twitter?

Mr. Field: Objection to the relevance of this entire line of questioning, Your Honor.

The Court: Sustained.

Mr. Rienzi: Your Honor, I would like to make an offer of proof about the documents from the mayor's Twitter account. I understand that you rejected that. I would just like to make an offer so that it is in the record. May I do that?

The Court: Yes.

Mr. Rienzi: My offer of proof is as follows, Your Honor. I would like to question the witness about several statements her boss, the mayor, [Page 113] has made about the Archdiocese and the Catholic Church. And there are just several tweets that I propose to ask the witness about. The first one is from November 14th, 2014 saying: The Arch don't care about people. It's about image and money. Pope Francis needs to kick some a-s-s here.

The second one is a tweet from the mayor from June 25th, 2012 that says: I could care less about the people at the Archdiocese.

The next one is a tweet from July 6th, 2016 saying that: Archbishop Chaput's, quote, actions are not Christian.

And our argument about the relevance of those documents, Your Honor, is simply that this is a case about religious discrimination. These are statements from the witness's boss. And several cases quite recently, actually, including some that may get cited by the Supreme Court this morning, have taken judicial notice of and allowed introduction of tweets from executives, Office of the President of the United States. And I would just point the Court to International Refugee Assistance Project versus Trump, in the 4th Circuit, 883 F.3rd 233; *Commonwealth v. Bradsheer* in Pennsylvania Superior Court 2016 WL 7495120; and *Hawaii v. Trump*, which for all I know has [Page 114] been decided by the Supreme Court this morning. Our argument is that in a religious discrimination case about religious discrimination by the city against the Archdiocese, that the witness's boss's views on the Archdiocese are highly relevant.

Mr. Field: Your Honor, I renew my objection of these documents that were addressed at sidebar yesterday. I would like to try to introduce them and the periodization of my prior objection does not change. These all predate the decision at issue and the witness has already testified that she was not aware of this information at that time.

The Court: So the objection is sustained.

By Mr. Rienzi:

Q. You testified yesterday that part of your job is complying with state mandates, correct?

A. That is correct.

Q. And one of those state mandates is Pennsylvania's Religious Freedom Protection Act, correct?

A. That is correct.

Q. And you know you have obligations under that law, correct?

A. I do.

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Q. What are your obligations under that law?

A. I don't know that off the top of my head so....

Q. Okay. What does the department do to ensure that it complies with that law?

A. I am not sure. I don't know.

Q. Do you understand that under state law you can only burden someone's religious exercise if you have a compellingly important reason?

Mr. Field: Objection, Your Honor. She already said she was not aware of her obligations under that law.

Mr. Rienzi: I don't believe that's what she said.

The Court: Overruled.

Mr. Rienzi: I believe she said she is aware.

The Court: Overruled.

By Mr. Rienzi:

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Q. Are you aware that under the Religious Freedom Protection Act DHS can only burden someone's religious exercise if they have a compellingly important reason?

A. Do I understand is the question?

Q. Do you understand that that's your obligation?

A. I understand that, yes.

Q. Have you done anything to ensure your compliance [Page 116] with that obligation?

A. I am not sure that I understand the question.

Q. As you run your department, do you do anything to make sure that you don't burden people's religious exercise?

A. Yeah, I am not sure I know how to answer that question.

Q. Can you name anything that your department does to ensure that it doesn't burden people's religious exercise?

A. Sure. We don't pray before our meetings.

Q. Okay. What else?

A. We don't have any religious artifacts in our offices. We don't require our staff to sign a pastoral reference to work at the department. I think those are some general examples of what the city would not do as a city employee.

Q. You know that your boss, the mayor, has taken a public position that he does not like religious freedom laws, like the Religious Freedom Protection Act?

A. I don't know that personally.

Q. You don't know anything about his views on religious liberty laws?

A. I have answered that based on what you have presented here, but not what you are asking.

[Page 117]

Q. The mayor never told you that enforcing the Religious Freedom Protection Act is a priority of his administration?

Mr. Field: Objection, Your Honor. What is the relevance of this line of questioning?

The Court: Sustained.

Mr. Field: Move to strike.

The Court: Well, she has not answered.

By Mr. Rienzi:

Q. You have asserted that you have an interest in complying with the city's Fair Practices Ordinance, correct?

A. Yes.

Q. And you testified yesterday that you are responsible for meeting federal mandates related to child welfare work, correct?

A. That's correct.

Q. You received federal TANF funding—that's temporary aid to needy families funding—for your foster care program, correct?

A. That is correct.

Q. DHS has to make statements to the federal government about its compliance with TANF regulations to receive that money, correct?

A. That is correct.

[Page 118]

Q. When was the last one you filed?

A. I have no idea. My finance team does that.

Q. Do you know who signs that?

Mr. Field: Objection to relevance, Your Honor.

Mr. Rienzi: I will get to that in a second, Your Honor.

The Court: Overruled.

The Witness: They are prepared by the finance department, and I sign the TANF document that gets submitted.

By Mr. Rienzi:

Q. And you don't know when the last one you signed was?

A. I don't recall the date.

Q. Do you remember roughly?

A. No.

Q. Do you remember if it was before or after closing intake at Catholic?

A. That I definitely don't know.

Q. Okay. Are you aware that under federal funding requirements you have an obligation not to interfere with a religious organization's definition, practice or expression of its religious beliefs?

Mr. Field: Objection to the extent it [Page 119] calls for a legal conclusion.

The Court: Overruled. She can answer.

The Witness: To the extent the Department of Human Services—so we are a state licensed county administered so the county administration can indicate its delivered child welfare services, so while there's federal funding and state funding, it is a county run system.

By Mr. Rienzi:

Q. You make certifications to the federal government about your compliance with TANF regulations, correct?

A. That's correct.

Q. That includes certifying that you follow federal law associated with those funds, correct?

A. Yes.

Q. And are you aware that one of the federal laws associated with receiving those funds, which you certify that you follow, requires you to allow religious groups to retain independence in the definition, practice and expression of their religious beliefs?

A. Yes.

Q. But you don't know whether you have made that certification since the intake closure at Catholic?

A. I don't. They happen quarterly, so I don't [Page 120] recall when the last—and it's not on a regular standing schedule.

Q. When you signed the last one, did you do any analysis of whether you had violated it by closing intake at Catholic?

Mr. Field: Objection, assumes facts not in record.

The Court: Yes, sustained.

By Mr. Rienzi:

Q. Have you thought about whether you violated your TANF funding requirements to the federal government by closing intake at Catholic?

A. Have I had a thought about it?

Q. Have you ever thought about that?

A. I can't say that I have thought about that.

Q. Okay. And I suppose you have not figured out what you are going to say the next time you have to make that certification?

A. Well, certainly—

Mr. Field: Objection, calls for speculation.

The Court: Sustained.

By Mr. Rienzi:

Q. Do you know what the consequences are of making false statements to the federal government in the [Page 121] context of federal funding?

A. Not off the top of my head.

Q. Do you know that your agency could lose its federal funding if it makes false statements to the federal government about its compliance with TANF regulations?

A. That sounds probably about right.

Q. You understand you do have an obligation to obey federal law?

A. I do.

Q. Would you agree with me that it's a compellingly important interest of yours to obey federal law?

The Court: Compelling?

Mr. Rienzi: Compelling.

By Mr. Rienzi:

Q. How about, would you agree with me you have a really important—

Mr. Field: Objection, calls for a legal conclusion, Your Honor.

By Mr. Rienzi:

Q. Would you agree with me that you have a really important interest—

Mr. Field: Asking for an offer of proof of this line of questioning, Your Honor.

The Court: She says she has an interest.

[Page 122]

Mr. Rienzi: In following federal law? Did I get that answer? I apologize.

The Court: She did.

The Witness: I did.

Mr. Rienzi: Terrific. Thank you.

By Mr. Rienzi:

Q. Has DHS informed the federal government about its intake freeze at Catholic?

A. No. We informed the state.

Q. But you have not informed the federal Department of Health and Human Services who administers your TANF funding?

A. The state actually works with the feds in regards to our TANF funding.

Q. Do you know if the state has informed the federal government about—

A. I don't.

Q.—your intake closure?

A. I don't.

Mr. Rienzi: If I can just have a brief minute, Your Honor.

The Court: Yes.

(Pause.)

The Court: Counsel, how long will you be? We need to take a break.

[Page 123]

Mr. Rienzi: Your Honor, can we take a very short break however long you want, and I will be ready by the time you say we should go.

The Court: We will take a five minute recess.

Mr. Rienzi: Thank you, Your Honor.

The Clerk: All rise.

(Break taken.)

The Court: You may be seated. Good afternoon, Counsel. You can continue.

Mr. Rienzi: Thank you, Your Honor.

By Mr. Rienzi:

Q. Ms. Figueroa, earlier you said that you thought Catholic violated the contract and you referred to the

Fair Practices Ordinance portion of the contract. Do you recall that?

A. They didn't comply with the contract.

Q. Yes. And you said one of the portions you believe they did not comply with is the Fair Practices Ordinance part of the contract, is that correct?

A. Yes, that's right.

Q. Can I direct your attention—

Mr. Rienzi: May I approach, Your Honor?

The Court: Yes.

By Mr. Rienzi:

[Page 124]

Q. I just don't know what exhibit number the contract is. So page 97 of Exhibit 15, please. I would particularly like to direct your attention to Paragraph 15.1.

A. Yes.

Q. And just ask, is that the provision you had in mind when you testified earlier?

Mr. Field: Objection to the extent it calls for a legal conclusion.

The Court: Overruled.

The Witness: I'm sorry.

By Mr. Rienzi:

Q. Is 15.1 the provision you had in mind earlier when you said Catholic had violated the Fair Practices portion of the contract?

Mr. Field: Objection. It mischaracterizes the witness's testimony. I don't believe she said she had a specific provision in mind, Your Honor.

The Court: Well, the question is, is that the provision?

The Witness: 15.1 references the Fair Practices ordinance.

By Mr. Rienzi:

Q. Is that the provision you had in mind when you [Page 125] said that you thought they violated the Fair Practices portion of the contract?

A. This is one reference to the nondiscrimination fair practice.

Q. You don't know either way whether this is the provision you had in mind?

A. I think we visited the fact that this is a very long document and so without going into every single page where else it's referenced I cannot cite right now.

Q. But you don't know any other one that you were thinking of before?

A. That's not what I said.

Q. I'm sorry. I am just trying to get a sense of what you were thinking of when you told me that they violated the Fair Practices portion of the contract.

A. That's the Fair Practice Ordinance itself, and I also referenced to the services portion of their contract and the definition of services.

Q. Nothing else that you can think of?

A. As it relates to what?

Q. As it relates to your claim that Catholic violated the contract.

A. I don't think that's actually what I said. I said that—if we are talking about intake closure or in terms of the making of this decision. Could you be [Page 126] more clear?

Q. We are talking about your claim earlier that Catholic violated the contract.

A. I didn't use the term. I said that they were—inability to comply, and I said that it was clear that they could be violating.

Q. So you are not sure whether you think Catholic has violated this contract yet?

A. Well, they have issued statements clearly their position.

Q. But it's possible they have not violated the contract yet?

Mr. Field: Objection to the extent it calls for a legal conclusion, Your Honor.

The Court: Sustained.

By Mr. Rienzi:

Q. Is your testimony that they have violated it or that they might violate the contract?

A. Are you asking my opinion as of right now or are you asking you me my opinion as it relates to closing intake?

Q. As it relates to closing intake. Was your opinion that they had violated the contract or might violate the contract?

A. When I closed intake it was that they may have [Page 127] violated their contract.

Q. And have you come to the view or have you come to a view as to whether the failure to do home studies for same-sex couples that you cited earlier is a violation of the contract?

Mr. Field: Objection, to the extent it calls for a legal conclusion, Your Honor.

The Court: Sustained.

By Mr. Rienzi:

Q. Do you have a view today as to whether Catholic's position on not doing home studies for same-sex couples is a violation—

Mr. Field: Objection, to the extent it calls for a legal conclusion, Your Honor.

The Court: Sustained.

Mr. Rienzi: Your Honor, she signed this contract. I am just asking her whether she thinks it has been violated or might be violated. Those are two very different things, and she is the signer of the contract.

Mr. Field: Your Honor, he can ask her about her view of home studies and Catholic's obligation, but he's asking for a legal determination under the contract, which speaks for itself.

The Court: Sustained.

[Page 128]

By Mr. Rienzi:

Q. Does DHS have a position about whether Catholic has violated this contract in regards to home studies for same-sex parents?

Mr. Field: Same objection, Your Honor.

The Court: Sustained.

By Mr. Rienzi:

Q. Do you understand under this contract that the Fair Practices Ordinance only applies if foster care is a public accommodation?

Mr. Field: Objection, to the extent it calls for a legal conclusion, Your Honor.

The Court: Yes, sustained.

By Mr. Rienzi:

Q. Do you understand that the direct prohibition of discrimination, 15.1, only applies to race, color, religion and national origin?

Mr. Field: Objection, calls for a legal conclusion, Your Honor.

The Court: Sustained.

Mr. Rienzi: Your Honor, if I may argue the point for a moment.

The Court: No.

By Mr. Rienzi:

Q. Ms. Figueroa, you testified earlier that the CRU [Page 129] referral process—strike that. You testified earlier, I believe, that there has been no impact on the CRU referral process from the closure of intake, is that correct?

Mr. Field: Objection, mischaracterizes the witness's testimony.

The Court: Overruled. She can answer.

The Witness: I don't believe that's what I said.

By Mr. Rienzi:

Q. Has the intake closure made it more difficult for CRU to place children with families through Catholic?

A. No.

Q. And your reason for saying no is that you have set up a process by which people can ask DHS to make exceptions, is that correct?

Mr. Field: Objection, Your Honor. If I can just ask for a clarification if counsel is talking about Catholic CUA or Catholic Social Services.

Mr. Rienzi: Catholic Social Services.

The Court: Okay. You may answer.

The Witness: Can you repeat the question.

By Mr. Rienzi:

[Page 130]

Q. Sure. You have closed intake at Catholic Social Services, correct?

A. Foster care.

Q. Foster care intake at Catholic Social Services, correct?

A. That's correct.

Q. And I believe your testimony is that there has been no impact on the ability of the CRU to place children in families working with Catholic, is that correct?

A. No. I don't understand the last part of your question.

Q. The closure of intake makes it harder to place children in families through Catholic, correct?

A. The closure of intake makes it harder for CRU?

Q. Yes.

A. No.

Q. Why do you say no?

A. Because we have not seen an impact in our number of availability or the impact it's had on congregate care or the use of the child care room.

Q. When you've placed children at Catholic during the closure of intake, that has not been through the normal CRU referral process, has it?

Mr. Field: Objection to the [Page 131] characterization of the normal process, Your Honor.

The Court: Overruled.

The Witness: Repeat the question.

By Mr. Rienzi:

Q. When you have placed children in families through Catholic during the intake closure, that has not occurred through the usual CRU referral process, correct?

A. Do you mean in terms of having a waiver or an exception related to special cases?

Q. I would like you to compare what it was like before the intake closure to what it is like now.

A. I am not sure what you are asking me to compare.

Q. Before the intake closure did you or Ms. Ali need to be consulted every time a child would be placed with Catholic?

A. We're consulted every time there is a congregate care placement, yes.

Q. Did you and Ms. Ali need to be consulted every time there was a placement with Catholic before intake closure?

A. Not every time.

Q. After the intake closure you or Ms. Ali must be contacted every time there is a placement with Catholic, correct?

[Page 132]

A. That's correct, along with other providers that have their intake closed.

Q. Who else has their intake closed?

A. Can we publicly say that, since there's – I mean, that's not something we—I am just asking.

Q. I don't know the answer to that. I am happy to –

Mr. Field: Your Honor, can we have a minute?

Mr. Rienzi: Let me ask a more general question to see if I can—

By Mr. Rienzi:

Q. You have already mentioned Bethany as having an intake closure, which I believe is a publicly known fact, correct?

A. That's correct, and there is, I believe, at least two to three other organizations right now that have their intake closed.

Q. Thank you. You spoke before about a waiver or exceptions policy, correct?

A. Practice, yes.

Q. Okay. Is there any written policy that governs how that practice works?

A. No.

[Page 133]

Q. How does that process work?

A. Practice or process—practice?

Q. How does your waiver or exceptions practice work?

A. We right now are generally notified directly by the—either the on-call director if it's during the day. If it's a staff member the CRU elevates it through—to my e-mail as well as to Commissioner Ali.

Q. But you don't have any written policy that governs how you decide whether to make an exception?

A. There are a number of things that we do in practice that we don't have a specific policy for.

Q. And this is one of them. You do not have a written policy on this.

A. That's correct, yes.

Q. You just make individualized assessments of what is the right thing to do in a particular circumstance. Is that fair?

A. It's fair to say that we treat each child individually, yes.

Q. And for this exceptions process you make individualized assessments, correct?

A. That's correct.

Q. You have never communicated your waiver policy to—strike that.

[Page 134]

You have never communicated your waiver policy in writing to the various CUA's, correct?

A. There was an e-mail sent by Ms. Ali informing them regarding the insurance that CRU had to do all of the placements.

Q. And—I'm sorry. Is your testimony that that e-mail informed them—and I don't mean to make you guess. Would you like me to get the e-mail?

A. No. You guys entered it into evidence yesterday with the e-mail that was sent from Stacy Boyd for the direction of Ms. Ali to the CUA leadership.

Q. Right. We are talking about the same e-mail. At a certain point if you need to see it, let me know. I don't want to—it's not quizzing your memory.

A. Sure.

Q. That e-mail said nothing about an exceptions policy, correct?

A. I think—actually, if we are going to talk specifically about the e-mail, I would like a copy.

Q. Sure. This has been previously marked as an exhibit. I don't know the number.

Mr. Field: It's Exhibit 3.

By Mr. Rienzi:

Q. And Ms. Figueroa, is this the e-mail that you and I were talking about a moment ago?

[Page 135]

A. This is, yes.

Q. This e-mail does not inform CUA leadership about the availability of exceptions, correct?

A. It says if you have questions about a case, please contact me by phone or e-mail.

Q. It doesn't say any exceptions will be granted, correct?

A. It says if you have a question—

Q. I agree.

A.—about a case.

Q. It does not say exceptions will be granted, correct?

A. No, it does not say that.

Q. It does not inform them on what basis you might make an exception, correct?

A. No, it does not.

Q. And you have no way of knowing whether your office is actually being notified of all the situations in which, for example, there could be a sibling placement, correct?

A. I am not sure if that's accurate. There's a lot of communication that happens verbally with our CUA's through both the director and supervisory meetings. So we talk about placement disruptions pretty significantly with our CUA's.

[Page 136]

Q. As you sit here under oath, you don't know either way whether your office gets told about all of the possible sibling placements, correct? You just don't know?

A. True.

Q. And you don't know if you find out about all of the situations where there is a prior foster care parent as with Doe Child Number 1, correct?

Mr. Field: Objection, to the extent that it characterizes Doe Child Number 1 placement.

The Court: I am going to sustain the objection.

By Mr. Rienzi:

Q. You said earlier that you had offered Catholic the ability to enter into the same full contract. Is that what you said?

A. I said we offer them opportunity to enter into a full contract.

Q. It's not the same full contract that they have previously entered into?

A. For the same services?

Q. Yes. In other words, you would be changing—

A. It is for the same services.

Q. I am going to hand you a document which has previously been marked as Plaintiff's Exhibit 13. And [Page 137] that's a letter from the law department, who are your lawyers in this case, correct?

A. Yes. This is the letter prior to sending the Award letter. So this is dated in regards to the line of questions you are asking me.

Q. I would like to turn to page 2 of that document, please. In the third full paragraph from the top, the last sentence of that paragraph reads: we believe our current contract with CSS is quite clear that this is all right.

A. Did you say second or third paragraph?

Q. Third paragraph from the top, second page, third paragraph from the top. The paragraph begins “please also note.”

A. Sorry, that’s page 3.

Q. I apologize. Sorry about that.

A. Go ahead. Sorry.

Q. The last sentence of the third paragraph reads: We believe our current contract with CSS is quite clear that this is all right, but please be advised that any further contracts with CSS will be explicit in this regard. Do you see that?

A. I do.

Q. And any future contract that you enter into with CSS you have told CSS you plan to have a more explicit [Page 138] discrimination policy in that contract, correct?

A. The clarity regarding the policy will be made available to all contracted providers, not just CSS.

Q. And when you said Bethany is going to enter into a new contract, that new contract is not the same as their old contract, is it?

A. It is the same contract with explicit language defining the expectations.

Q. So it’s the same, but with different language on the key issue, correct?

Mr. Field: Objection to the reference “key issue,” Your Honor.

The Court: Sustained.

By Mr. Rienzi:

Q. It's the same with different language that is being changed in order to more directly address the question of home studies for same-sex foster couples, correct?

A. Can you repeat that?

Q. Sure. I am trying to figure out the contract that you were saying before that DHS would give Catholic is the same full contract they had before or is a changed contract on the nondiscrimination issue?

A. I don't have the contract in front of me, but just to repeat what was shared with Catholic Social [Page 139] Services, it would be explicit in regard, in terms to what is required.

Q. The current contract is not explicit, correct?

A. I believe right, it means providing further clarity.

Q. In the past you have frequently let agencies continue for months after the expiration of a contract, is that correct?

A. When there is a renewal expected and it's been cleared by both the provider and the city that the expectation is to move forward in compliance with that contract, yes.

Q. And in those situations sometimes you operate for months under the old contract?

A. That is correct.

Mr. Field: That calls for a legal conclusion, Your Honor.

The Court: Overruled.

By Mr. Rienzi:

Q. You talked earlier about possibly changing contract terms to shift from per diem to cost reimbursement. Do you recall that testimony?

A. That was an example what we did with a provider that was closing, yes.

Q. In that circumstance you are not doing any new [Page 140] referrals, is that correct?

A. That's correct.

Mr. Rienzi: My last question and I want to make one proffer, one last document, Your Honor.

By Mr. Rienzi:

Q. My last question, though, is, I believe we talked before about whether you spoke with the mayor. And I just want to be clear. Have you had any conversations with anyone in the mayor's office about whether this conflict with the archdiocese is politically useful?

Mr. Field: Objection to the scope of the question, Your Honor.

The Court: Yes, sustained.

Mr. Rienzi: Your Honor, my one proffer. There is one additional Mayor Kenney tweet that I just want to make the proffer on. I understand that it will almost certainly be covered by your prior ruling. May I just make the offer out loud?

The Court: Yes.

Mr. Rienzi: It's a April 9, 2015 tweet by Mayor Kenney at Jim F. Kenney. It says: love this, hashtag Philadelphia council, invite all affected by RFRA laws

to city of brotherly love, ranked the number one hashtag LGBT friendly by HRC.

[Page 141]

And my argument would simply be this, is Ms. Figueroa's boss demonstrating that he does not like religious freedom laws very much.

The Court: Okay, if that's your argument.

Mr. Rienzi: I have put it in the record, and I am done. Thank you very much, Ms. Figueroa.

The Court: Okay. Any redirect?

Mr. Field: Just a few questions, Your Honor.

Redirect examination by Mr. Field:

Q. Commissioner Figueroa, I will try and be brief. When you started your testimony two days ago now, you talked about the Jesuit—you worked for the Jesuit volunteer corps in your faith. Just to clarify for the record, if you are comfortable, would you mind specifying your religious faith?

A. Sure. I am Catholic. I have been born and raised Catholic and I practice as a Catholic and Jesuits are an order, a denomination of priesthood.

Q. Thank you.

If you could turn for a moment to the exhibit that has been entered as P 13. Counsel was just [Page 142] showing it to you. This is the letter –

A. This one, yes. It was not marked. I'm sorry, this one?

Q. Yes.

Mr. Field: And I believe, counsel, this was entered as P 13 from yesterday?

Mr. Rienzi: I believe so.

Mr. Field: Thank you.

By Mr. Field:

Q. I will represent it is Exhibit P 13. It's a letter dated May 7th to Mark Rienzi, counsel here, from Valerie Robinson, chair of corporate and tax group. Is Ms. Robinson one of your counsel with the city?

A. Yes.

Q. And were you consulted in and involved in this letter?

A. Yes. The law department prepared this letter.

Q. Yes. Thank you. If you can turn back to the second page that Mr. Rienzi had you reading from.

A. The second or the third?

Q. Third page, excuse me.

A. Just making sure.

Q. There are no numbers on this one. And the paragraph that is from the—the fourth from the bottom that starts: family equality is both a legal [Page 143] requirement and an important city policy and value that must be embodied in our contractual relationships.

A. Um-hum.

Q. Can you read me what it says, the last portion of that paragraph that starts “on a related note.”

A. On a related note, contrary to the discussion in your letter regarding DHS's practices concerning siblings,

because the best interests of the children in our care are paramount, we did recently grant an exception to cessation of CSS's referrals in that instance to assure that siblings were placed together, and we expect the best interest of children will remain paramount throughout any transition.

Q. As DHS Commissioner in all of the communications you are involved in and responsible for, do you have any reason to think there has ever been any lack of clarity about your department's granting exceptions in the cases of kinship and siblings?

A. No. I think we have been pretty clear.

Q. Thank you. Just one last issue. Earlier in your cross-exam testimony you mentioned hearing new testimony on Tuesday for the—about an issue for the first time that caused you some concern. What was that testimony?

A. The testimony was by James Amato, who indicated [Page 144] that there has to be a pastoral reference provided in order to become a foster parent with Catholic Social Services.

Q. And what concern did that cause you?

A. It's a very specific church practice that has to come from a pastor or a religious leader and clearly creates another barrier that is not a requirement to become a foster parent.

Q. And did you hear Mr. Amato testify that it didn't—it was not required to only be a Catholic church, but could be any of a variety of forms of religious leader?

A. I did, but I also heard that what I interpreted as easiest would probably have a significant challenge being able to become a foster parent through CSS,

since there would be no opportunity to gain a pastoral reference.

Q. And did that cause you concern about the city's contracting with Catholic Social Services?

A. It does.

Mr. Field: Thank you. No further questions, Your Honor.

The Court: Okay. Any other questions?

Mr. Rienzi: Very briefly.

Recross Examination

[Page 145]

By Mr. Rienzi:

Q. Ms. Figueroa, as Commissioner of DHS you are not aware of a single actual person who has said they were unable to be certified by Catholic because of a pastoral letter requirement, is that correct?

A. No, I have not. I didn't know until yesterday.

Q. Did you discuss the matter with others? Did you discuss the matter with others at DHS?

A. No. I was not allowed to talk to them. I was under oath.

Q. You have got good lawyers.

A. I do.

Mr. Rienzi: Nothing further, Your Honor.

The Court: Okay. Any other questions?

Mr. Field: Not for this witness, Your Honor.

The Court: Thank you.

The Witness: Thank you, judge.

The Court: Your next witness.

Ms. Cortes: Your Honor, could we ask for lunch briefly.

The Court: You can't eat.

Ms. Cortes: At this time, Your Honor. Also to be perfectly honest, Your Honor, our next proposed witness is not currently right here. I think [Page 146] we assumed that there was going to be a lunch break at this time. So I would just ask. I did alert Mr. Rienzi of our next witness. I understand that he has an objection. I don't know if Your Honor wants to address that now or after lunch or whatever Your Honor's preference is.

Mr. Rienzi: Your Honor, can I just briefly state. I think there's actually a good reason to have a brief discussion now, if you are willing.

The Court: Okay.

Mr. Rienzi: My understanding from counsel is that the next witness will be a Mr. Frank Cervone, who is not a witness for whom they submitted a declaration in any of their moving papers and whom I am told is somebody that wishes to qualify as an expert, somebody who is not disclosed to us previously, who is supposed to be an expert who we don't have any of the expert materials on. I think it's frankly improper to go forward with the witness in that circumstance. And so I would ask Your Honor if you are willing to rule now, I just don't think they should be introducing new witnesses who have not been part of the pleadings previously.

Ms. Cortes: Your Honor, Mr. Cervone was to be an affiant in the proposed—in the intervenor's [Page 147]

papers. He is being represented by Ms. Mary Catherine Roper for the ACLU. So he did have notice. He is part of that—of those papers, Your Honor. I did provide counsel with Mr. Cervone's resume. There is no requirement under the federal rules that require us to provide them with such notice. We also did not have a notice of all of their witnesses for today, Your Honor. If counsel would like to interview Mr. Cervone ahead of time with Ms. Roper present there is no issue for our side or for Ms. Roper.

His proposed testimony would be very relevant to these proceedings. He has been a child advocate in—specifically for the city and county of Philadelphia for the past 40 years. We have heard a lot of testimony—or at least opposing counsel has tried to elicit a lot of testimony that it's only one side that is going to be harmed by Your Honor not granting this TRO. Mr. Cervone would provide Your Honor with the testimony, the very relevant testimony from his experience as a child advocate, as to what would occur if Your Honor does grant the TRO and to the devastating effect on the children and specifically the LGBTQ children and also the LGBTQ same-sex couples and his experience within the foster system as a child advocate.

And even if Your Honor does not qualify [Page 148] him as an expert, I would propose to Your Honor that he would still be allowed to provide opinion testimony on that front. And again, we would allow Mr. Rienzi and his entire team to question him ahead of time and even to continue the voir dire in open court before Your Honor until Your Honor is satisfied that he is an actual expert in this field.

Mr. Rienzi: Your Honor, I simply say that the time for introducing Mr. Cervone's testimony would have been when they presented their arguments, their legal arguments in their briefs. And introducing the idea of an expert testifying in the middle of the day today and proposing that I take his deposition over lunch seems like an unfair practice and exceedingly difficult for anybody to do. You will have a chance to hear from Mr. Cervone once you decide whether or not he should be able to intervene. He is one of the council of intervenors, apparently. So that motion is before Your Honor. Our opposition is due next week. You have accepted their brief—his brief and his writings as an amicus already. I really do not think it's fair to go down this path.

Ms. Cortes: Your Honor, Mr. Rienzi can address that part as to—it's my understanding Mr. [Page 149] Cervone can clarify for Your Honor that he will actually withdraw as counsel, given that he would be allowed to testify today as a witness. So he would withdraw as counsel and Ms. Roper would continue along with the representation. Is that correct, Ms. Roper?

Ms. Roper: That is correct, Your Honor. And obviously as we have been participating as intervenors, we might well have called him or someone similar to testify. But since we are not here to do that, I think the city wanted to do that. Again, this is not our fight. I just am here to clear up any questions about his relationship with respect to the intervenors.

Ms. Cortes: And Your Honor, to Mr. Rienzi's point as not being able to depose him, we are on Your Honor's TRO schedule. They are the ones that have filed the TRO/preliminary injunction. So we are all on an

expedited schedule. We would have all loved to have had the time to depose all of their witnesses, but we are all under this schedule. So none of us were able to do that.

The Court: Okay. I am going to permit the witness to testify. I am going to recess until 1:30. And if you call him and have him report back, so [Page 150] that he could be made available to counsel so that we can proceed at 1:30.

Ms. Cortes: Your Honor, he had a meeting with his staff starting at 12:30. He believed it would last a half hour. I have asked him to return to court as quickly as he possibly can so he will be available to counsel for the plaintiffs.

The Court: Very well. Okay. We will recess until 1:30.

All counsel: Thank you, Your Honor.

(All rise.)

(Lunch break taken.)

The Court: Good afternoon. You may be seated. Are we ready to proceed?

Ms. Cortes: Yes, Your Honor.

Mr. Rienzi: Yes, Your Honor.

The Court: Call your witness.

Ms. Cortes: Defendants call Frank Cervone to the stand.

The Clerk: Please remain standing and raise your right hand.

(Witness sworn.)

The Clerk: Can you state and spell your name for the record, please?

The Witness: Frank Cervone, C-E-R-V as [Page 151] in Victor, O-N-E.

The Court: Good afternoon.

The Witness: Good afternoon.

Ms. Cortes: May I proceed, Your Honor?

The Court: Yes.

Direct examination—qualifications

By Ms. Cortes:

Q. Good afternoon, Mr. Cervone. Can you please tell her honor where you went to school?

A. College?

Q. You can start with college and you can work your way up.

A. University of Pennsylvania for undergrad, Villanova Law School, and LaSalle University for a master's degree in theology.

Q. Can you tell her honor what is it that you did immediately after law school?

A. Career-wise?

Q. Yes.

A. So I served for a year as a staff attorney at Delaware County Legal Assistance Association, a legal aid program, working with law students as an adjunct clinical professor from Villanova. I then moved on to Saint Gabriel's system, which is a residential – a program for residential treatment and day treatment [Page 152] programs for delinquent boys run by the

Catholic Social Services, the Archdiocese of Philadelphia, where I was a teacher and a lawyer and a Christian brother, a member of the religious community.

Q. And then just going back to your experience as an adjunct professor at Villanova, can you tell her honor exactly what it is you did as an adjunct professor there?

A. So we ran a—the Delaware County Legal Assistance essentially had a contract of some sort with Villanova Law School. These are in somewhat the early days of clinical education and so the law school outsourced the administration of their clinical program to this legal aid office. And so my job was to supervise law students in domestic violence cases and child support cases in state court in Delaware County in media.

Q. And then you mentioned working at Saint Gabriel's?

A. Correct.

Q. What is it that you did after your time at Saint Gabriel's career-wise?

A. So I did—in 1989 I left Saint Gabe's and went back to Delaware County—Delaware County Legal Assistance in essentially the same role as a clinical [Page 153] instructor for a year. And then was hired as general counsel of the support center for child advocates in April of 1990.

Q. And are you still there today?

A. I am. In November of 1992 I was elected – I was elected. I was selected by the board of directors to be the executive director of child advocates. And I have

continued in the role of executive director since November of '92.

Q. And this might seem like an obvious question, but can you tell her honor what it is—what does it mean to be a child advocate?

A. So child advocate is a term of art used almost exclusively in our work in Philadelphia County. Most jurisdictions use the phrase guardian ad litem, and it is essentially to serve as a lawyer for a child, court-appointed lawyer for a child in a child protection proceeding, which in Pennsylvania is known as a dependency court case in the juvenile courts. Our office represents children in child welfare proceedings and related proceedings in Philadelphia's Court of Common Pleas.

Q. And before we go into the specifics as to what you would do as a child advocate, can you tell her honor sort of who are the players in the dependency court [Page 154] system in Philadelphia?

A. A classic, we think of a triad of child, parent and state as the three parties to a proceeding. And so the child or sibling group is a party of interest in that proceeding. Those proceedings are typically initiated by a county children and youth agency. Here in Philadelphia it's the Department of Human Services and the Department of Human Services is represented by lawyers from the city law department. And then there are one or two parents in the proceeding. They typically have separate counsel, and thus we have child, parent, state as the three kind of main actors or parties. There are a variety of provider agencies who come before the court typically not as party, but in

either a witness role or otherwise come to the attention of the court.

Q. And when you mentioned parents, can you break that down, do you mean biological parents, foster parents, can you just please clarify for her honor what you meant by parents?

A. So the nature of a dependency proceeding is to intervene with regard to the parent/child relationship, the legal relationship. So mostly we are talking about birth parents, mothers and fathers. On occasion there is some other adult caregiver who has a legal [Page 155] relationship with the child and thus they get standing in that dependency proceeding, so that could be a grandparent, it could be a stranger who has been providing care for the child or maybe who has been recognized by some other court as having custody. Those are all the folks that have a legal relationship with the child. Well, of course, we also interact with caregivers who are interposed by some provider agency such as we have been discussing here from a foster care agency or the like. And those folks might be strangers to the child before they come to know the child or they might be a relative of the child, what we call kinship relationship.

Q. And just for clarity, how long have you been a child advocate?

A. One might say since I have been working at the support center for child advocates since 1990, in this formal sense of guardian ad litem in court cases. I feel like my other answer to that question often is my whole life. This is what I feel like I—I am about. It is become my personal mission, my sense of self-identity is to be an advocate for children.

Q. And in your preparing to go to court and in your role as a child advocate, can you explain to her honor what is it that you have to do to prepare and make sure [Page 156] that you fulfill those duties?

A. So the model that I use in my own cases is the model of our office, what we think of as a service model. And we think of our task as to represent the whole child. A child is referred to me and my – I don't have an individual law practice outside of the office. So when I use "we," I'm talking about both my own practice and that of my colleagues who are in our office. So our practice involves responding to the presenting problem that brought a child to the attention of our office and to the attention of the courts. That presenting problem might, for example, be an incident of child sexual abuse or physical abuse or severe neglect, which incident was then brought to the court, for example, by the Department of Human Services in a petition. That case is essentially petitioned to court and we are appointed by the court to serve as counsel and guardian ad litem for the child.

We work hard to understand the events, background related to the presenting problem. And then as well to understand the—all of the collateral issues that might be involved in a child's life. One might think, for example, in a child sex abuse case that that child needs therapy and needs access to therapy, needs transportation to the therapist, needs a report [Page 157] from the therapist. We need to know whether she is making progress. She needs to be in school. She needs to be in the right school. And so we are going to engage her school community, counselors mostly.

In the main we are going to interact with the case managers on the case. Here in Philadelphia they work

for CUA's, Community Umbrella Agencies, we interact with the CUA worker on the case. We might work with some of the parts of Philadelphia DHS that we have heard about over the past few days, like the Central Referral Unit, contract administration, the commissioner's office or otherwise to deal with problems that emerge with regard to that child.

Q. Can you tell her honor how—this might be difficult, but can you estimate for her honor about how many children you have served as a child advocate for in your—as your time—during your tenure?

A. So I don't have an individual practice—I'm sorry, caseload these days. For many years of my service as director I actually had a subset of kids who were assigned to me in the main. Now I serve as one of the rotating staff attorneys that cover cases. Any time you are in court on behalf of a child, you are representing that child. Our office is appointed to represent the child, not individual attorneys. So I am [Page 158] not personally appointed to represent very many kids. You know, it happens, in discrete moments.

The agency represents these days about 1,100 kids a year. So in one sense I feel responsible and as representative I represent all 1,100 of those kids. I certainly don't know them all. I was in court yesterday and had three kids who I represented, two who were adopted and one who is in foster care. On Friday I had seven kids who I represented in four proceedings. So I would say that I have personally engaged probably several thousand children, either individual representation over my career, and certainly half of the agency I believe our number is somewhere in the order of 8,000 kids during my time. Very rough estimate.

Q. And I guess in both your personal and as representative of your—of this support center for child advocates, can you tell her honor about how many of these children have self-identified as LGBTQ youth?

A. For the last about ten years we have maintained a specialty practice in which we assign designated staff to work with youth who have self-identified. And so along the way we have had occasion to keep count at least of those who have identified—self-identified. And that number we think is somewhere between 25 and 50 children a year who have explicitly self-identified. [Page 159] Certainly there are some number of additional youth—pardon me—who have not yet come out to themselves or to us or to others. And, you know, one might imagine there may be another several dozen children on our caseload at any one moment who are questioning their identity.

Mr. Rienzi: Objection, move to strike as speculation.

The Court: Overruled.

By Ms. Cortes:

Q. And Mr. Cervone, you said you designate staff specifically for these youths. Why is that?

A. Our service model includes assignment of each child to a staff member as responsible for that case. And our service model we have not mentioned includes working with volunteer lawyers from the legal community. We think of ourselves as the volunteer legal service for abused and neglected children. So that when a lawyer from the community wants to do their pro bono work for abused kids, they come to us. So in part in order to facilitate that volunteer model, each child is assigned to a child advocate social

worker, probably 90 percent or more of our kids are assigned to a child advocate social worker. Eight to ten percent are assigned to a staff attorney for primary responsibility. And, you [Page 160] know, the purpose of those several assignments is so that there is a discrete case manager who knows about the case and who has—is essentially the collector of knowledge and documents and the protagonist for purposes of advocacy.

Q. Now, I just want to go back to your general experience in child advocacy. Have you written or published any articles regarding child advocacy?

A. I've published probably dozen of pieces, law review articles, op-eds, newsletter pieces, articles in professional publications, the ABA Litigation magazine—I'm sorry, whatever their professional journal is, the section on litigation of the ABA. So I do a lot of writing, probably publish three or four or five pieces a year for, in a sense, general circulation.

Q. And besides your regular support testimony, have you been asked to testify regarding matters of child advocacy?

Mr. Rienzi: Objection, just get clarity if you are talking about this case or—

Ms. Cortes: I will rephrase, Your Honor.

The Court: Yes.

By Ms. Cortes:

Q. Mr. Cervone, have you been asked to testify regarding child advocacy besides in this particular [Page 161] case?

A. Yes. So Tuesday morning I testified before the general assembly—Pennsylvania General Assembly House, Child and Youth Committee in support of the creation of the office of the children's advocate, essentially an ombudsman function. That's the third time I have testified on that subject in the last 15 years. In July of last year, July of '17, I testified before the Interbranch Commission. I previously thought it was the interrelations commission but it was the Pennsylvania Interbranch Commission on Gender and Racial Bias on the subject of the experience of LGBT youth in the child welfare system.

Q. And let me just stop you right there. Can you tell her honor what you testified to? Can you tell us more about the subject of that testimony?

A. The subject of that testimony?

Q. Yes.

A. Of that event?

Q. Yes.

A. Yeah. So our office was invited to speak to the Interbranch Commission on this question of the experience of gay and lesbian youth in the child welfare system and how the systems might serve those children better, and so –

Q. I'm sorry to interrupt. When you say the systems, can you please explain to her honor what exactly is meant by that?

A. Yes. So the Interbranch Commission, as I understand it, is a kind of jointly-created, essentially research arm to make recommendations to the several branches of state government. And so it is somehow commissioned by both resolution of the General

Assembly, the legislature, and appointment from the Pennsylvania Supreme Court. To be honest, I don't know if the executive branch has any appointments in the Interbranch, you know, structure.

Q. And can you tell before—I'm sorry, before I interrupted you to explain what the systems were, could you tell her honor what is it—more specifically what it is you testified regarding that—

Mr. Rienzi: Objection, hearsay.

The Court: Overruled.

The Witness: The members invited us to speak about it and what we spoke about. I went with a colleague, a specialist, a woman who—a master social worker who had responsibility for this particular caseload for the last five years. And we shared – in part we shared the stories and experience of essentially discrimination, abuse, oppression and bullying that many [Page 163] of our clients have experienced during their time either in foster care or in residential programs or with their birth families. So we talk about, in a sense, the experience of their problems. As well we talk about in a sense, solutions.

So we spend some time actually teaching about, in a sense, language that might be more appropriately used to address issues of transgender identity. You know, the kind of respect that has come to emerge in the public arena these days around selected or preferred pronouns, persons of transgender or bi-racial identity—I'm sorry, bi-sexual identity, occasionally have a desire to not be known in those binary "he" "she" terms. So we explored some of that. This is a new area for most people and it was a new turf for this body and they invited us to share what we

know from the experience of kids and what we have seen there.

Q. And what were some of the examples of the discrimination that you testified to regarding the children?

Mr. Rienzi: Objection, hearsay.

The Court: Overruled.

The Witness: So one scenario that I recall in a way is typical of the experience of kids is a young man, and I think he identifies himself as male, [Page 164] who was in care because he had been harassed by his own birth family about his emerging sexual identity. I don't recall if there was physical abuse in that case. But it would not be uncommon for gay kids to be both physically and emotionally abused in their family of origin. It's one of the reasons in general that gay kids come into child welfare for protection, because they are not welcome at home.

Mr. Rienzi: Objection, Your Honor. Counsel has yet proffered the witness as an expert. I don't know if we are there yet, but it sure seems like the witness is venturing into generalities as opposed to any fact testimony.

The Court: Do you have questions in regard to his qualifications?

Mr. Rienzi: Absolutely, Your Honor.

The Court: Do you have any other questions in regard to his qualifications?

Ms. Cortes: In regards to his qualifications, no, Your Honor.

Mr. Rienzi: May I ask, Your Honor, what the topic is he is being proffered as an expert on?

Ms. Cortes: Your Honor, I think as Mr. Cervone has testified thus far, he is being proffered as an expert regarding child advocacy—well, more [Page 165] specifically the problems faced by children within the foster care system, and in particular the LGBTQ youth, and also as to his conclusions and observations as to the importance of a safe foster care system for that LGBTQ youth.

The Court: Okay. You can ask questions, Counsel.

Mr. Rienzi: Thank you, Your Honor.

Cross-examination - Qualifications

By Mr. Rienzi:

Q. Mr. Cervone, you're an attorney?

A. Yes.

Q. You're an attorney in this case?

A. Not any longer.

Q. That's not true, is it? You have not withdrawn from the case, have you?

A. Well, in point of fact I have not entered my appearance in the case in large part because I have not figured out how to do so in the federal filing system. I am on the papers and we anticipate my counsel withdrawing me from those papers.

Q. But you have not withdrawn yet, correct?

A. Like I said, I have not entered myself, but we have not effectively withdrawn.

Q. You have participated as an advocate in these [Page 166] proceedings, have you not?

Ms. Cortes: Objection.

The Court: Overruled.

By Mr. Rienzi:

Q. You have participated as an advocate in these proceedings, have you not?

A. I am not sure I have.

Q. Your name is on a brief, sir, is it not?

A. Yes.

Q. That's—you are a lawyer, you understand that to be participating as an advocate, correct?

A. In that sense, sure.

Q. And that brief has been accepted by the Court as an amicus brief, correct?

A. Yes.

Q. And there's a pending motion with your name on it for participation via intervention, is that correct?

A. Yes.

Q. And the motion is on behalf of child advocates, which is the organization you are the executive director of, correct?

A. Correct.

Q. Have you ever participated as a testifying witness in another case in which you have been an advocate?

[Page 167]

A. Yes, actually last month.

Q. Where was that?

A. That was in the Court of Common Pleas in Philadelphia County.

Q. Did you participate as an expert witness?

A. No.

Q. I heard the description from—counsel for the city is not your lawyer, correct?

A. Correct.

Q. I heard the description from counsel for the city about the topic on which you are an expert and I want to make sure I understand it. So you are being proffered as an expert on children and the impact on LGBTQ youth in the foster care system, is that correct?

A. Well, it's their proffer. You know, I know what I know. I am not sure. To be honest, I don't think I can comment on how they are proffering me.

Q. Your expertise is working with children, correct?

A. Representing children, working with children, yes.

Q. Your expertise is not representing and working with parents, correct?

A. I certainly have a lot of experience in representing parents. I have represented parents. Like [Page 168] I said, I taught some people how to represent adults. I have on more than a few occasions represented both parents and adults in a variety of court proceedings in my career, you know, mostly as comes about as – on behalf of former clients, former client children of ours who have grown up and they have something else in their life.

Q. Sure. We had a meeting in a room right outside before this, sir?

A. Yes.

Q. And you recall in that meeting you told me that your expertise is in dealing with the children's side of it, not the parent side of it. Do you recall telling me that?

A. So I don't think I would have put it that way. Forgive me, I don't again mean to avoid you. We are children's lawyers, I am a children's lawyer. As an office, we only represent kids. Because I have a law license and because I am the boss, I get to represent who I want. And so I try to respect the boundaries that we have all agreed to as an office, but on occasion I enter my appearance in some way or other on behalf of adults.

Q. You don't consider yourself an expert in the interest of adults, do you?

[Page 169]

Ms. Cortes: Objection to the relevance.

The Court: Overruled.

The Witness: I do think—I think I have some expertise. I teach people how to represent adults, sure.

By Mr. Rienzi:

Q. More than any other lawyer who represents adults?

Ms. Cortes: Objection.

The Court: Yes, sustained.

By Mr. Rienzi:

Q. Other than sometimes representing adults, do you have any other claim to expertise in the interest of adults?

A. Well, so—yes.

Q. And what is that?

A. So the administrative office of Pennsylvania courts invited me to co-lead a training series for parent and children lawyers in Pennsylvania across the state, along with a colleague from community legal services in Philadelphia. We assembled a faculty of lawyers and judges and I believe a social worker. And we conducted essentially a road show of two full days of CLE training in six cities over, you know, a summertime three summers ago, I think, in which we trained probably [Page 170] 80 percent of the lawyers who serve parents and children in dependency proceedings.

We regularly train—I and my colleagues regularly train the court-appointed bar in Philadelphia County who represent parents and children. We are the designated CLE provider for the first judicial district in order to qualify those lawyers to represent parents in dependency proceedings. I have published extensively on the—really the nature and scope and demands of representation for children. And lastly, I am a scrivener of the standards of practice for lawyers who represent children and parents in dependency proceedings which standards have been approved by the Pennsylvania State Children Child Study Team.

Q. You have a lot of experience training lawyers to represent both adults and children, is that fair?

A. Yeah. We really feel like it's all of a piece.

Q. Do you have any experience in child psychology?

Ms. Cortes: Objection, vague.

By Mr. Rienzi:

Q. Do you have any training in child psychology?

The Court: Overruled.

The Witness: So during my master's training, I had several courses related to family dynamics. While they were not in the psychology program [Page 171] at LaSalle University, there were, I believe, all of those courses were offered in the theology program, but there was a course in family dynamics, there was study of genealogy and—they call that transgenerational influences. I would not in any way hold myself out to be a psychologist, and my wife urges me not to try to practice therapy.

Q. What principles and methods do you expect to be applying in your testimony today?

Ms. Cortes: Objection, calls for a legal conclusion, Your Honor.

Mr. Rienzi: The Daubert Standard under Rule 702 requires that he be applying reliable principles and methods. I am simply asking what they are.

The Court: Overruled.

The Witness: So as I said, I help write the standards and practice for the representation of children. And I imagine I would reference what many of us consider to be best practice standards for the care of children, the representation of children and service to children. Certainly as well, my general knowledge and training as a lawyer in this field for 30 years. Yeah.

Q. Anything else? Any other principles and methods [Page 172] you expect to be applying today?

A. Well, I am fairly knowledgeable about the canons of ethics, the rules of juvenile court procedure, the juvenile act and related bodies of law that pertain to this area of practice. Certain bodies of law that address responsibilities related to discrimination or nondiscrimination in practice. As well, I have been the administrator of a program of representation of, you know, a nonprofit agency. And so I have some background and expertise in nonprofit management. In, you know—yeah.

Q. You said you worked as an attorney for Saint Gabriel's system for five years, is that correct?

A. Correct.

Q. Saint Gabriel's system is part of Catholic Social Services, a party to this case, correct?

A. Correct.

Q. And in fact, Saint Gabriel's system is on the same contract that's at issue about foster care, correct?

Ms. Cortes: Your Honor, I don't see how this is relevant to this voir dire regarding Mr. Cervone.

The Court: Overruled.

The Witness: I am not aware of the [Page 173] current state of the contract.

By Mr. Rienzi:

Q. When you were at Saint Gabriel's, did you understand that there was a contract with the city that covered both Saint Gabriel's and foster care?

A. Well, my recollection would have been that they were separate contracts, but it's been a long time.

Q. Okay.

Mr. Rienzi: Your Honor, we object to the introduction of Mr. Cervone as an expert. His participation violates the witness advocate rule.

Whether he'd like to or not, he is an advocate in this case. He has signed pleadings in this case, his name appears on briefs in this case. He submitted a declaration that says that the organization he leads, child advocates, has an interest in this case. He is also a former lawyer for one of the organizations that is on the contract. And on top of that, I did not hear any description of reliable principles and methods. I heard a discussion of experience that he has, but did not hear reliable principles and methods that under rule 702 and Daubert are going to be applied, so we would object, Your Honor.

The Court: Your objection is overruled.

Mr. Rienzi: I assume, Your Honor, I will [Page 174] get another chance to come up and cross-examine after the direct examination is completed.

The Court: Cross-examine as to the substance of his testimony.

Mr. Rienzi: Yes, thank you.

Direct examination

By Ms. Cortes:

Q. I think when we last spoke, Mr. Cervone, that you were letting her honor know the basis of your testimony regarding discrimination on the LGBTQ youth.

A. Yes.

Q. I was not sure if you had concluded your testimony on that or –

A. You mean particularly regarding the prior testimony?

Q. Correct.

A. Well, in point of fact, one of the reasons—yeah, so I believe, and it has been my experience, that children—LGBT youth come into our child welfare system in part because how they are treated in their own families. And sometimes they continue to have those bad experiences when they are in the care of families who the system engages, resource parents, child care workers, and others.

Q. So based on that—based on that observation, [Page 175] how important then is it to have a foster care system that has affirming values for LGBT youth?

A. Well, I think it's absolutely essential that our client children feel welcome and supported in their person and in their identity, that they come to a system for refuge from what is essentially oppression, from abuse and neglect, often, as I said, typically targeted on their identity and it is absolutely essential that they find in all of us, in the child welfare system and all of its practitioners a place of justice, a place of healing and a place of safety. And in no uncertain terms that means that homes must be welcoming to them. They must be affirming to them, they must be places and people and organizations that say yes to their exploration of their own identity. In a sense, it goes without saying that the young person is still exploring himself or herself in their identity. That's what we are

all doing as young people, and it's essential that that young person have a safe place in which to do that.

Q. Now, were you here yesterday—well, it's been multiple days. I mean nobody was here yesterday. But were you here—

The Court: I was here.

By Ms. Cortes:

Q. Were you here, Mr. Cervone, in Courtroom 16b a [Page 176] few days ago when Mr. Amato testified?

A. Yes.

Q. Did you hear his testimony regarding CSS's practices on same-sex couples?

A. Yes.

Q. Did you have any reaction to that testimony?

Mr. Rienzi: Objection, vague.

The Court: Overruled.

The Witness: Yeah, I was pretty upset by it.

By Ms. Cortes:

Q. Why were you upset by that?

A. Well, you know, I heard—I believe it was his reference to their mission as welcoming all and valuing all. And then he proceeded to explain how some people are not welcome and supported. It was news to me that there is a bit of a litmus test for qualification as a foster parent and resource parent in the CSS system.

And that felt to me itself contrary to the spirit of the child welfare system as a whole. It was—I really crystalized in sitting in this room during that

testimony this notion that I referenced earlier that from the perspective of the child, the system needs to be a welcoming system. And I thought Jim—I will call him Jim, I have known him for a really long time and I [Page 177] like him a lot as a person. I was surprised that the system—that their system is so explicitly unwelcoming of certain types of people.

Q. Did you have any reaction or did you have any concerns regarding what Mr. Amato said as to its effect on prospective foster parents that are LGBTQ or in a same-sex union?

A. Yes, I think he is wrong. I think he, if I am to characterize it, I thought he stated, at least implied, that their practice would not work to dissuade prospective resource parents from coming forward to serve, that they clearly—they are fairly explicit that they would dissuade them from coming to their agency. He also obviously was rather explicit that if one came forward, they would send that person or couple to some other agency, not try to talk them out of doing business, to be—fair enough. But in point of fact, I believe that this practice may have the effect of dissuading prospective resource families from serving children at all. That if people believe that this is a system that is allowed to discriminate, they will have a crises in confidence about working in the system.

I feel like it's a lot like when it is revealed that the system is not performing well. And I am somebody who sometimes helps to make those headlines [Page 178] by revealing or helping to reveal when the system is not performing well. And certainly I have heard that folks have had a crisis of confidence, should I come to work here, should I come to be involved with this system that seems so chaotic. I feel like we have gotten

beyond that in the present administration of the system for the last bunch of years. But I think that's the type of effect and message that it will have to prospective foster families, same-sex families, who will say why should I come to a system that tolerates that form of discrimination?

Ms. Cortes: Your Honor, I'm just going to have a moment. May I have a moment to confer with counsel?

The Court: Yes.

(Brief pause in the proceeding.)

By Ms. Cortes:

Q. Mr. Cervone, you talked about the potential impact on the LGBTQ youth that are currently in the foster system. Do you have an opinion or do you think this will affect all of the children in the foster care system? "This" meaning CSS's practice that we heard about today—or not today, throughout this hearing?

Mr. Rienzi: Objection.

The Court: Do you understand the [Page 179] question?

The Witness: Well, I think there are lots of possible effects. I'm not sure where you would go with it but I think there are effects across the spectrum, from my perspective. So I think I understand the question.

The Court: Okay.

Mr. Rienzi: Objection.

The Court: Overruled.

The Witness: So I think that the—let's just start with the loss of homes that Jim Amato referenced, and I think it would be sad to lose those homes, but that the

system will survive, that the number of homes that are at issue long-term is—you know, thankfully it's not 1,000 homes and it's better than—or ten homes that might be lost were CSS elected to get out of the business, as Jim suggested. I think the system might get many of those resource families will migrate over to other agencies, some will not. That is what has happened in every other, in a sense, closure of an agency.

Agencies close for a variety of reasons. They go out of business, they move on and the foster parents are left to decide do they still want to foster. And we have seen foster parents who are with Agency A [Page 180] migrate over to Agency B. So I expect that the system will handle that effect. I think the effect on children presently in care is one that I am and our office is very concerned about. We hope that these agencies and this Court do not cause those kids to be turned out on the street on June 30 when the current contract expires. That would be very upsetting.

I thought Jim was pretty clear and noble in saying that they don't intend to turn any of those kids out. At some point they may feel that—they may feel differently from a business perspective, that they can no longer run those homes or their agency. So we all will have to work hard to mitigate those effects. You know, the effect of the continued placement of kids in homes in an agency that is allowed to, in a sense, put out this message that same-sex couples are somehow not to be valued or inappropriate, whatever word you want to put as to the, in essence, the valuation of them.

As I referenced earlier in the qualifications section, I think will give kids precisely the wrong message and it would be an upsetting one. The kids who come to a

system for justice now need a system that feels unjust. It feels discriminatory and that will have a bad—that will have a terrible effect on [Page 181] all the kids in the system who come to understand it. We find kids are pretty smart and thoughtful and they ask questions like that and I expect that they will have their own crisis in confidence about this system in care.

Ms. Cortes: Thank you.

Cross-examination

By Mr. Rienzi:

Q. Mr. Cervone, you said that Catholic having to stop foster care on June 30th would be a bad thing, is that correct?

A. It would.

Q. And you said the number, it's good that it's not 1,000, but it's not zero either, is it?

A. That's correct.

Q. And you said some will transfer but you know that some won't end up transferring, correct?

A. I imagine so.

Q. And for some number of kids they will end up having to switch homes, possibly foster parents they are with, correct?

A. Well, yeah, I think as you heard this morning from Ms. Figueroa, it's a dynamic business, so kids are kind of coming and going from these homes all the time. So, you know, if they have 130—if they have 120 kids [Page 182] today, a year from now just in the ordinary course of things, easily half of those kids won't even be

in care, right? So some of this—it's just the natural attrition of kids going home. The general preference of the system is for kids to go home. There's a constant pressure. It's in federal law, it's in state law, it's in everybody's kind of awareness of it, we are trying to get them at home.

So you said will some be turned onto the street or will some be perhaps—listen here, will some have to go somewhere else? I suppose so. What that number will be, we can't know.

Q. But to your mind, are you saying that's not that big a deal?

A. Big a deal for every kid every time they are changed, except when the change is for a good reason. You know, it's referenced all the time in the course of the last three days, is it bad for kids to move. Well, not if they are in a bad home, right? We start with the premise that kids are removed from bad homes. Was the move from their parent, who is abusive, bad? Well, to the kid it might be, right, because kids, they love even their abusers, right, for all those reasons that we know.

Q. You have no reason to think that the homes they [Page 183] would be moved away from while they are currently at Catholic, that those are bad homes, do you?

A. No. As I said before, the three people that you had up here all seem entirely noble. I can't—I don't think any of us could abstractly or remotely evaluate or value the—in a sense, the bond, the well-being, how those kids are doing in these several 120 homes. We have to imagine that because they are regularly reviewed and because the courts have approved them

they are at least decent. But I can't tell if it would be a major loss or a minor one for this or that kid to lose this or that foster home.

Q. So then do you also think Commissioner Figueroa was wrong when she closed intake over concerns about children having to eventually transfer away from Catholic?

A. No.

Q. Her reason was that transferring would be bad. Do you recall that?

Ms. Cortes: Objection.

The Court: Overruled.

The Witness: You asked about closing intake, not transfer? It's new kids versus current kids?

By Mr. Rienzi:

[Page 184]

Q. Commissioner Figueroa's testimony this morning, and I believe on Tuesday, was that she closed intake because it would not be in the best interest of the children to be placed in homes with Catholic when they may eventually need to be transferred out of homes.

A. Oh, yeah, yeah. That's right, I remember that point. I thought it was last night that she made that point, but whenever she made it. So what she said—what I came away understanding of that point, if I get this right, is until we sort out this problem, we ought not to put, in a sense—we should not have to put more children into the problem.

Q. Because it is a problem if they have to transfer away when Catholic closes, correct?

A. It certainly might be a problem. As I said, every transfer—you know, we start from the premise in child welfare that permanency and stability are baseline premises, so we want a kid to remain in a good place. You are building relationships. You want the kid to have a sense that when he leaves in the morning to go to school, he does not have to think about that he is coming back here tonight. That's what we mean by permanency in the short order. So yeah, it's bad. We try to avoid transfers.

Q. Terrific, thank you.

[Page 185]

You said before that you thought Catholic's policy may have an effect of dissuading some LGBTQ parents from entering the system at all. In other words, not just with Catholic, but elsewhere?

A. Yes.

Q. Is that correct, is that what you said?

A. Yes.

Q. You said "may" because you don't actually really know, correct?

A. That's correct.

Q. And you also said you think it will have a terrible effect on kids in the system. And you don't actually know that either, do you?

A. Well, so I have had a bunch of conversations with kids over the years, you know, 15, 20, maybe 30, in which kids have talked about—I have certainly

observed them as well, in a sense, speaking to large groups in kind of a lecture format. We sometimes have kids train lawyers. We think it's—and it works, it's just a really neat dynamic. And they talk about the experience of being discriminated against in the child welfare system. And we ask them, well, what was your experience in the child welfare system? They say, it was bad. I was discriminated against. So they don't think about it just in terms of the bad actor who [Page 186] discriminated against them, they think about their time in care and they think about the whole system. They think of it, in a sense, all of a piece. So that's really what I was referencing and I think they will see it as bad.

Q. And in those conversations, none of them mentioned Catholic's view that it would not do home studies for LGBTQ couples, correct?

A. That's correct.

Q. I heard you to be saying that your concern about the effect on kids is that they will know that in the system there's an entity or an actor who is not affirming of their sexual orientation, is that accurate? I don't want to put words in your mouth. I am just trying—that's correct?

A. Um-hum.

Q. As long as the Catholic Church maintains its current teachings on sexuality, won't kids know that just by seeing the name Catholic?

A. They might.

Q. So do you think Catholic itself needs to be out of the foster care business entirely, based on your argument?

A. I really have no opinion on that. I would love for them to stay in the business. I would love for them [Page 187] to approach same-sex marriages differently.

Q. You disagree with the Catholic Church's religious teachings on that?

Ms. Cortes: Objection to the relevance.

The Court: Sustained.

Mr. Rienzi: Your Honor, his views on the Catholic Church's teachings about same-sex marriage, when he is saying he thinks Catholic has the wrong view to remain in the foster system.

The Court: He didn't say that. What he said was he would hope that they would change their view and they would welcome same-sex parents.

By Mr. Rienzi:

Q. If I can just pin that down. So you would hope that the Catholics Church would change its views on same-sex marriage, correct?

A. I am not one to believe that the Catholic Church is a monolith, so I am reluctant to talk about the Catholic Church and its teachings.

Q. How about the catechism?

Ms. Cortes: Objection.

The Court: Well, now we are really going far afield.

Mr. Rienzi: Your Honor, with all due respect –

[Page 188]

The Court: Let's just go to Catholic Social Services.

By Mr. Rienzi:

Q. Do you think Catholic Social Services needs to change its beliefs on sexuality and marriage?

A. I would love for them to.

Q. And you talked about kids' experience in homes that you said were not LGBT affirming, is that fair?

A. Say that again.

Q. Is that part of your experience that you were telling us about?

A. Say that again.

Q. Earlier you testified about the experience of LGBT kids in homes that were not affirming, correct?

A. Yes.

Q. Is it your view that foster parents who subscribe to the teachings of the Catholic Church and the catechism are unfit to be foster parents because they would not be LGBT affirming?

Ms. Cortes: Objection.

The Court: Sustained.

By Mr. Rienzi:

Q. Do you think there are religious views that in your mind should disqualify people from being foster parents?

[Page 189]

Ms. Cortes: Objection.

The Court: Sustained.

By Mr. Rienzi:

Q. You said you worried about the message it would send to LGBT kids if Catholic Social Services were

permitted to continue acting according to its faith. Have you thought about the impact on Catholic foster parents and Catholic kids of the city excluding Catholic Social Services from foster care?

Ms. Cortes: Objection, mischaracterizes his testimony and it's a compound question.

The Court: Yes, break it down, please.

By Mr. Rienzi:

Q. You testified earlier about the impact that allowing Catholic to continue would have on LGBT kids, correct?

A. Yes.

Q. And your view is that if the city allows Catholic to continue operating according its religious beliefs, that would be harmful for kids, correct?

Ms. Cortes: Objection, that mischaracterizes his testimony.

The Court: Overruled. He can explain that answer.

The Witness: Yes.

[Page 190]

By Mr. Rienzi:

Q. And you said it may—to be fair, I don't want to put words in your mouth. You said it may, but you didn't actually know, correct?

A. Right.

Q. Have you thought about the impact that it would have on Catholic kids for the city to exclude Catholic Social Services from foster care?

The Court: Assuming that they are not LGBTQ?

Mr. Rienzi: Either way, actually. I don't mean to specify. I just mean Catholic, I don't mean to specify.

The Witness: Well, if we are talking about Catholic kids—I have met a lot of Catholic kids in my life, I can't recall one that has the problem with same-sex marriage that the church does, so I don't think the effect would be negative on Catholic kids if CSS changed its practice.

By Mr. Rienzi:

Q. How about Catholic foster parents?

A. You know, I did not hear in your witnesses and I don't know how other Catholic foster parents come down on the question of same-sex marriage. They—I was actually interested in whether your witnesses were going [Page191] to go there, and I think I heard them say that they believe in the teachings of the Catholic Church. And I came away thinking that was a fairly generic statement. And as a Catholic myself, I believe in the teachings of the Catholic Church, too, just not all of them, so—and that's my experience with Catholics in general, that we are a bit selective in our followings of the teachings of the church. So I would expect that foster parents would be similar.

Q. But some may not be, correct?

A. I would have to imagine, sure.

Mr. Rienzi: Your Honor, if I can just have one quick minute, please?

The Court: Yes.

(Brief pause in the proceeding.)

By Mr. Rienzi:

Q. Mr. Cervone, you said you have known Catholic Social Services for a long time?

A. Yes.

Q. What is your overall opinion of Catholic Social Services?

A. Very positive.

Ms. Cortes: Objection as to relevance.

The Court: Overruled.

By Mr. Rienzi:

[Page 192]

Q. And you said you have known Mr. Amato for a long time?

A. Yes.

Q. And I understand you disagree with some of the—you didn't like some of the things he said yesterday, correct?

A. Yes.

Q. Do you think he is an honest guy?

A. Yes.

Q. And so you don't think he is lying when he testifies, correct?

A. I would never call Jim Amato a liar. I have no idea how he feels about the issues he testified to.

Mr. Rienzi: Nothing further, Your Honor.

The Court: Okay. Any other questions?

Ms. Cortes: No, Your Honor.

The Court: Thank you.

The Witness: Thank you, judge.

Ms. Cortes: And, Your Honor, with Mr. Cervone's testimony, the defendants would like to mark exhibits, all the exhibits that the defendants have marked. I believe it's 1 through 6, but I will defer to the court record on that, and we would also want to make sure that Plaintiffs' Exhibits 13 and 15 are marked and moved into the record along with the affidavits of Ms. [Page 193] Kimberly Ali and Commissioner Cynthia Figueroa.

Mr. Rienzi: Your Honor, we would object on the declarations of their witnesses and we would simply say—we are fine if we want to have a rule that says both sides' declarations of their witnesses come in. That was what we were proposing yesterday, on Tuesday, to get the declarations of all witnesses in, but I don't see how we could possibly have rule that says the plaintiffs' declarations get kept out, but the defense declarations—

The Court: Well, I believe that the Court ruled that the witness who was not here to testify, her affidavit could be admitted. Now, if you wish to have—I don't believe that there was a request for the other affidavits to be admitted of the other witnesses who testified.

Mr. Rienzi: I apologize, I may have been unclear at some point about that, but to the extent we are doing this now, I would certainly move that the declarations of our other witnesses who testified can be admitted into the record. They are properly before the Court. It's Rule 65, which allows declarations.

Mr. Field: Your Honor, if I might, we had understood their requests and the Court's ruling yesterday to be that the affidavits of their witnesses [Page 194] who

did testify were also admitted in addition to Doe Foster Mother Number 1. If that was not the case, we would not be making the motion as to the affidavits of our witnesses who testified.

The Court: Okay. So the witnesses will be—the affidavits will be permitted to be admitted.

Mr. Rienzi: To make sure I am clear because I—I think we did not have –

Mr. Field: Testifying witnesses plus Doe Foster Mother Number 1.

Mr. Rienzi: So I think I can withdraw my objection to the Ali and Figueroa declarations, but then the Fulton, Paul, Simms-Busch, Amato and Doe Mother 1 declarations, I think we have agreement they are all in, along with Ali and Figueroa.

The Court: Well, not agreement as to Doe Mother 1.

Mr. Rienzi: Doe Mother 1 you permitted.

The Court: I permitted that.

Mr. Rienzi: So then yes, I withdraw my objection to theirs, as long as we are clear on the understanding as to all of our declarations.

The Court: Okay.

Ms. Cortes: That would be it, Your Honor. Then we would rest.

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Your Honor, just to make the record clear, and I am assuming no objection from Mr. Rienzi, we would also move—I think I said this, but just to be abundantly clear, I would mark and move to admit Plaintiff's Exhibit 13 and 15 into evidence.

The Court: Yes, I believe that they were admitted previously.

Mr. Rienzi: And, Your Honor, to the extent there was any lack of clarity, I would also move to admit all of the exhibits that we had in, obviously with the exception of the tweets that we had the offer of proof on earlier this morning.

The Court: Yes. The tweets—some of them were marked, some of them were not marked, but they are part of the record.

Mr. Rienzi: Thank you, Your Honor.

The Court: Okay. Before we proceed to closing, is there anything further from the plaintiff?

Mr. Rienzi: Nothing on evidence, Your Honor. One housekeeping detail I just wanted to be clear on. I understand our deadline for responding to the motion to intervene to be Friday, June 29th, and I am calculating that based on when we actually receive the brief. If you recall, there was an earlier filing that essentially alerted everybody—and I appreciate [Page 196] it, alerted everybody that something would be coming. And I just want to make sure the Court is not thinking that our deadline runs from that earlier alert. I assume we get the two weeks from when they actually filed the moving papers.

Ms. Roper: No objection from the potential intervenors.

The Court: Okay. That's 6/29?

Mr. Rienzi: That's what I have, Your Honor.

The Court: Before the Court hears closing arguments, I believe that we have a request from the—at this point the ACLU to address the court?

Ms. Roper: Yes, Your Honor, the ACLU and the parties that represents as amici Philadelphia Family Pride. But essentially, yes, Your Honor, an attorney from the ACLU would argue.

The Court: The Court is inclined to permit it, but I guess the question is at what point. I think it would be appropriate to let the plaintiffs proceed, then hear from the defense, the amici, and then any response that counsel for plaintiffs wish to make.

Ms. Roper: It certainly suits us, Your Honor. We don't intend to repeat things the city has already said. We will try to respect everybody's time.

[Page 197]

The Court: Will Counsel need a few minutes before we proceed?

Mr. Rienzi: I would love a few minutes before we start.

The Court: Okay, then we will take a few minutes.

Mr. Rienzi: Thank you very much.

Ms. Cortes: Thank you, Your Honor.

(Brief recess.)

The Court: Are we ready to proceed?

Mr. Rienzi: I am, Your Honor. Thank you, Your Honor. As you know, we are here on Plaintiffs' motion for a temporary restraining order or a preliminary injunction. As you have heard from the witnesses, the situation is urgent. Right now there is ongoing harm. There are beds that are empty from parents who work

with Catholic Social Services to whom the city is refusing to send children, not because the city thinks those are bad homes, because the city is freezing intake to those houses because of a separate fight. Right now there are actually children in congregate care and elsewhere whose lives would be improved if they were placed in those homes, and they are not being placed in those homes. We know about some of them. We know some of their names. We know Doe [Page 198] Child 1 because we found out about Doe Child 1. There are a lot of kids whose names we don't know who could be in those homes. You heard Jim Amato testify that typically they never have more than four or five vacancies and now they are getting up to 26. Well, I don't know the names of those kids, but those are real human beings, they belong in good foster homes, there are loving homes available, and because of the city's violation of the law, they are not allowed to be there.

You heard Mrs. Paul testify about the harm to her, about the fact that this is her gift, this is what she does for the world. She has done it for 133 children. She wants to continue participating, the city will not send children her way. You heard James Amato testify about how the June 30th deadline will impact, how layoffs will need to start soon without new referrals, how the foster program will need to shut down within a matter of months.

The city says it will accept a new contract, but it will only accept a new contract that either A, involves Catholic agreeing to violate its religious beliefs, which it simply cannot do. Or B, requires Catholic to proceed with no referrals, which is suicide for the foster agency. So the situation is dire, the harm is real, there

are actual human beings [Page 199] who are and will continue to suffer without relief.

Fortunately, state and federal law make the city's actions illegal and provide a firm basis for a temporary restraining order or a preliminary injunction. Simply put, the government is only allowed to force somebody to violate their religious beliefs, which is precisely what the city is trying to do. Governments are only allowed to put somebody in that position if they have a compelling government interest and they are using the least restrictive means to pursue that interest. And what the testimony made clear over and over again is that the Government's case is nowhere close to those standards.

Let me start with the Religious Freedom Protection Act. This is the Pennsylvania statute. It is parallel to the federal RFRA statute that the Supreme Court has recently interpreted in several cases. What the Pennsylvania RFRA says is that the government cannot impose a substantial burden on someone's sincere religious exercise unless it has a compelling government interest, and the government has to demonstrate that. The government must demonstrate a compelling government interest and that it is using the least restrictive means.

First, sincere religious exercise. I [Page 200] think that might be the only thing or one of the few things that there is no dispute in the courtroom in front of Your Honor over the last three days. I don't think there is any doubt that Catholic is engaged in a sincere religious exercise. There are folks who disagree with that exercise. There are folks who think they should have a different view of their religious principles, but I did not hear anyone to suggest that Catholic was

acting on anything other than its sincere religious beliefs.

Pennsylvania law gives four ways in which a government action can impose a substantial burden, and here every one of them is met. One alone would do, but all four are met. The government's action constrains or inhibits conduct or its expression mandated by a person's sincerely-held religious beliefs. That's the case here. Catholic takes care of children because of Jesus' injunction to take care of children and to take care of widows and orphans, in the Bible. It's obviously sincere religious belief.

Their beliefs about sex and marriage are also sincere religious beliefs. There has been no claim that it is anything other than a sincere belief that they are acting on. Significantly curtails a person's ability to express adherence to the person's religious [Page 201] faith. Well, by forcing Catholic to certify the relationships of same-sex couples, the government would be curtailing Catholic's ability to express adherence to their religious faith. They would be forcing them as a requirement to help kids to publicly violate their religious beliefs.

And to be clear, Catholic is not saying, I need to go in and tell everybody Couple A or Couple B is a bad couple. Catholic is not rushing to say, let me go pass judgment. Catholic is saying, please let me stand aside. Please let me stand aside. I don't want to have to sit down and write evaluations of some couple's life that my church disagrees with. I don't want to write that. And so Catholic for years has just had the position that if somebody comes and asks me, I am just going to step aside, right.

They are not going to say, no, you can't be a foster parent. They just want to say I have got religious beliefs that don't match with what you want to do, and so I am not really the right person to write this up for you. But guess what, there are 28 others in the city who are happy to do it. Now, that's utterly hypothetical, Your Honor. It's utterly hypothetical. We talked about speculation a lot when people were objecting to each other's questions. The whole [Page 202] controversy is speculative because there is no evidence of a single actual applicant ever. No evidence of a single actual applicant ever who has asked Catholic to do a home study for foster care and who Catholic has referred away. There's not one, because it's a hypothetical dispute. In that hypothetical dispute, Catholic's religious beliefs are clear and their religious exercise would be clear. They would say, I can't do it. But it's never happened.

It's also a substantial burden if the government denies a person the reasonable opportunity to engage in activities which are fundamental to the person's religion. Well, taking care of orphans, fundamental, fundamental to the Catholic Church's religion. And it's work they were doing in the city long before the city was doing the work in the city. The city has imposed a regime that says, well, now you can only do it under contract with me, and most of the time Catholic is totally fine to do it through contract with the city. But ultimately this was church work long before it was city work. And what the city is saying now is well, you got to violate a couple of your religious beliefs if you want to still take care of the kids. That's what they are saying, and on Pennsylvania law, that's a substantial burden on religion. [Page 203]

The fourth way you get a substantial burden compels conduct or expression which violates a specific tenet of a person's faith. Again, the same thing, right. The government is trying to force Catholic to certify things that it just can't certify to. And again, Catholic is not rushing to say, I want to go condemn, they are saying I want to stand aside. And if you let me stand aside, I want to go take care of those kids which I have been doing since long before the city did.

Under Pennsylvania law, the only way the city can get away with imposing those burdens is if it has a compelling government interest. Here you saw the evidence, they can't come close to meeting that burden. They can't come close to meeting it. Why not? A couple of reasons. One, there is no proof that anyone has ever been harmed. There's no proof a single soul has ever asked for the service. Absent proof of at least somebody being harmed, right. Even the expert at the end, Mr. Cervone. To his credit, very honest man, said at the end, I am just—I am paraphrasing, but he said I said may, I don't really know. He said may. He does not really know. The city does not really know.

When Ms. Ali was on the stand and it was asked, is that a really important interest—or I think [Page 204] first the word was compelling and then there may have been an objection to it. But she was asked about the strength of that interest, what's the strength of your interest in making sure every agency does the home studies? Her answer was not, it's supremely important. Her answer was, it's an interest like any other interest that we have. That was her answer, it's in the transcript from Monday afternoon or Tuesday. It was not, this is a supremely important interest.

And here is how you also know that it's not a supremely important interest, no witness could name any place where it was ever written down before, right. And this is a theme that runs throughout the government's case. Their whole contract argument depends on foster care being a public accommodation. Being a public accommodation, therefore the Fair Practice Ordinance covers it. Well, they have been running a foster care system for years. But there is no indication anyplace that they have ever taken the position that what they were running is a public accommodation, no indication that they ever told the agencies it was a public accommodation. There's just nothing.

If it were a public accommodation, you could not do all the things that the state law requires [Page 205] you to do, like look into somebody's mental stability, look into somebody's existing family relationships, right. Imagine a world where you could do those things—well, here is how you know it's not a public accommodation. You can't do those things before selling somebody a cup of coffee or a ticket on the train, right. You can't say, well, you are not coming in here because I think you have a mental disability. You can't say, you can't come in here because I have evaluated your existing family relationships and I don't think they are that great, right. You can't do that in a real public accommodation.

Foster care is not a public accommodation, never has been. It's a made-up theory for this case that no one can point to any document anyplace referencing before this case. It's a newly minted theory for this case, but it does not work. Because by definition foster care is not about everybody who lines up and wants it gets it.

It's about looking after the interest of children. And the law has allowed for years, for many years, different agencies with different specialties and different requirements. State law does not say, these are the only requirements and you may do no more. That is not what it says. State law says that you get to consider these things. It says [Page 206] you also can consider an applicant's ability to work with the agency. And it certainly does not say you may add no more, right.

And the city's own webpage, which maybe they want to change now because they realize that it's inconsistent with their theory here. The city's own webpage says that different agencies can have different requirements. The city's webpage refers foster—the city's foster parent handbook refers them to that state association. That state association says these are minimum requirements. Everything that predates this controversy says that agencies are allowed to have their own requirements and that's fine. It's a judgment-call type of situation, not a public accommodation. Not everybody gets one. In real public accommodations, you can't consider the race of the child or the racial wishes of a foster parent before placing them, but they do. You can't consider the disability of somebody before letting them do something, but they do. They have not done to shut anybody down, they have not turned off intake to those people because it's not a public accommodation. It's a newly minted argument. It has no basis in the way they have done anything.

If that were real, if it were actually a compelling interest to enforce that, they would enforce [Page 207] it on race and on disability, and they would have

talked about it and applied it to themselves sometime in the preceding years. They made it up for this case, Your Honor, it's not real.

The city also lacks a compelling interest because they have no evidence that anybody has actually been harmed. Again, they are claiming to rectify a harm. There is no indication anybody has been harmed. There is no indication that same-sex couples are knocking on the door of the Catholic Church and saying, hey, Catholic Church, I would like you to be the one who comes in and evaluates my family relationships, right. The city tells people, go look for somebody who is a good fit, right, they say look for somebody who is a good fit.

So far as we know, there have been not same-sex couples who go to the Catholic Church and say, come on into my house and tell me what you think of my family relationships. That actually is not terribly surprising, right. The Catholic Church has well-known teachings on sexuality and marriage, and it's entirely likely that gay families do not look at the Catholic Church and say, I would like you to come in and evaluate my family life. And so people go to agencies that are good fits for them. Religious Catholics go to Catholic. [Page 208] there are—as Commissioner Figueroa said, there are 28 agencies in the city that provide home studies for LGBT couples. Although she thinks that's true, they actually never checked with most of the secular agencies, but she thinks that's true.

There is no indication that there is a problem. There is no indication that a single soul has ever been denied the ability to be a foster parent by Catholic's religious beliefs. And so in light of all of that, they simply don't

have a compelling government interest under state law.

They certainly have not used the least restrictive means available to pursue that interest. There are other ways to let people become foster parents. There are lots of agencies, right. I think it's very telling the testimony you heard over the LGBTQ foster parent recruiting event in the mayor's office of LGBT affairs. The office of LGBT affairs is a part of city government and it exists—it exists to serve LGBT people. And there's not a problem with that, there is nothing wrong with that. Why? Because it's not like people who are not LGBT can't go get government services. They can't get service from that office, but they can get service from any other office and it's fine. So the city does that directly as the city, but [Page 209] the city is saying that a network of contractors who are private entities, who are not the city, some of whom are religious, they have to serve everybody all the time, right, that's the claim. Catholic can only do this if it serves everybody all the time.

And I don't think it's just that the city wants them to do the home study, I assume the city wants them to do the home study and insists—and insists that they say that these couples relationships are good and this would be a good place to raise children.

The Court: Now that's speculative.

Mr. Rienzi: It is speculative, Your Honor. But I don't think it would do much good if what they were saying was you have got to do the home study, but you are free to say no. Maybe that's their idea, but they sure don't have a compelling interest in that, right. If what they are saying is you got to do the home study, but we

don't care what you say in the outcome and you are allowed to say that I don't think this is a good relationship. They really could not possibly have a compelling interest in that because that helps nobody. That would really just be trying to force a religious group to violate its beliefs with no benefit to anybody. So I don't think that's what they mean, but I agree with you, and to be clear, I don't mean to [Page 210] suggest there was evidence on that point.

The government has also violated the free exercise clause. Under the free exercise clause, the government can't—well, the government faces strict scrutiny in several different ways under the free exercise clause. First, it's rule that you must do every home study that somebody asks you for is not a neutral and generally applicable rule. Nobody can find any example of when they have ever said it before this controversy. You heard testimony from Jim Amato and from Toni Simms-Busch about the many circumstances in which foster agencies do send people to other agencies that they think are better fits for them.

The claimed policy that you must do every home study is not neutral and it's not generally applicable. In fact, it has not been applied and it's not religiously neutral because it was invented—it was invented to deal with the situation of two religious entities. That's why it was invented, that's why no one can talk about any reference to it any time other than 2018, because it did not exist.

The city when it set out to examine the problem with one exception there was added today after the fact, but with one exception only inquired of religious groups. They did not ask whether any of the [Page 211] nonreligious agencies certified same-sex couples at all.

And so there is one addition at the end of one group called NET who happens to be friends with the commissioner. The rest of the nonreligious groups have never even been asked, right. So the government only set out to ask the religious groups. And the government has never told the nonreligious groups, either tell me your policy on same-sex couples, right. It would be interesting to know that. The city actually does not even know it even today, can't be that compelling, right. But also, they have not asked them, tell me whether you do a home study for everybody who knocks on the door. They have not told them that they must do that home study and they have not inquired as to whether they are actually doing that home study. This is not a neutral and generally applicable law, this is a targeted—a targeted investigation only asking about religious groups, not applied to any of the nonreligious groups.

You heard also from both Jim Amato and from Commissioner Figueroa about the direct religious discussions that the government engaged in with Catholic. Again, the government has no doubt that Catholic is a religious enterprise. I don't think they have any real—their lawyer at one point said foster care was a business. I don't think from what you heard [Page 212] from any of the witnesses, including the city's witnesses, that it's plausible to say this is a business. Catholic does it at a loss of about \$3.8 million a year.

But when talking about what Catholic should do, Commissioner Figueroa said times have changed, it's not 100 years ago. You ought to listen to Pope Francis. And there was a little bit of a tension between Commissioner Figueroa's testimony and Jim Amato's.

Mr. Amato testified that she also said you ought to listen to Pope Francis instead of the archdiocese or instead of the archbishop.

It's a government official in a government building telling a religious organization which religious leader to listen to. That's outrageous. That's fairly unprecedented. The government does not get to go to the religious group and say, I am going to tell you which religious leader you are going to listen to. And if you don't do it my way, we are going to take you out of the foster care business. But that's essentially what the city is doing. They told us what set of religious beliefs we ought to follow. The archdiocese just can't follow those, they disagree. They have a disagreement about a lot of things, but the government should not be telling people which religious [Page 213] beliefs to follow, which religious leader to follow.

The government certainly should not have the opinion that there are certain religious beliefs that you really ought to let go of by now, you really ought to let go of that one. The government has no business having an opinion on that, and they certainly have no business directly telling religious groups what religious beliefs are okay and what are not okay. That is outright and open religious discrimination from a government official in a government office. They are not allowed to do it.

So you have the investigation that starts with only calling the religious, the investigation that continues, with one exception, not checking with any of the nonreligious either about this or any other referral situation, and then you have the government telling them they ought to get over their religious beliefs, they ought to listen to a certain religious leader.

The Court: Well, it's not just a certain religious leader, it's the head of the Catholic Church.

Mr. Rienzi: Oh, it sure is, Your Honor. But the government does not get to be the one who figures out what Pope Francis means. But Archbishop Chaput has a different view of what Pope Francis meant than the Philly Inquirer does. I am not competent to [Page 214] tell the answer to that either, but the government sure is not competent to tell that, right, so "you ought to listen to the pope" is not a neutral statement, right. I think they have a pretty clear view of what they think the pope means. And I don't think the government has got any business having a view on the subject. The government has no competence and no authority to have a view on that subject, certainly not to threaten religious groups with it.

Compelled speech, Your Honor. Under—and just to finish up on free exercise. Under any of these theories, under the religious discrimination theory, under the not-neutral and generally-applicable theory and under the theory that there are individualized government exemptions and individualized government assessments. You get to strict scrutiny under the free exercise clause. Any one of them will do, we have got all of them. And under strict scrutiny again, the government can only win if it could prove a compelling government interest and least-restrictive means. It can't, it has not—from their own mouths they actually said it is not that compelling, they have to lose.

There's also a compelled speech claim. The government wants to force Catholic to provide these [Page 215] certifications. Catholic does not want to do it. That is a clear case of compelled speech. The government is not allowed to say to Catholic, you have

to say the things I want you to say. But that's what they are trying to do. They are saying, if you want to do foster care for these other families, you are going to have to make these certifications and you are going to have to express your opinions about these families and their relationships. Catholic does not want to. Under the First Amendment, they can't be required to.

You heard a little bit of testimony from the city claiming that recruitments and signing up of families—I guess they said a couple of different things. At times they said recruitment and signing up of families is part of the contract. There is no indication that they pay anything for that. There is no indication that they check anything on that. Elsewhere they seem to say it's not DHS's job, it's somebody else's job.

Certainly Catholic is not acting as the city and certainly it is not spending money under the contract when it just steps aside. So you might have an argument about maybe there is overhead and something else, but when Catholic just says, you know what, I can't do that, they are not spending the city's money, [Page 216] they are not operating as the city, they are operating as themselves and they are stepping aside. They are not taking actions under that contract. They are choosing not to and they are exercising a statutory and constitutional right to choose not to do that.

The city does not deny and, in fact, has been crystal clear that it is attempting to force Catholic to make written certifications endorsing the relationships of couples in same-sex marriage who apply for home studies. That's the only thing Catholic could do to satisfy them here. They have to fill out those state

criteria, and if they don't, the city says you are out of luck and you are out of foster care.

The city is right that when the city is contracting the city gets a measure of discretion. But the city does not get the discretion to force people to engage in compelled speech and it does not get the discretion to force people to violate their religious beliefs. Here, they are doing both of them and they must lose.

The city acts like it will be big deal, and Mr. Cervone at times acted like it would be a big deal if you maintain the status quo. And by status quo, I mean the status quo ante. So the status quo I am referring to is the status quo before they cut off [Page 217] referrals. So until early March is what I mean by the status quo, because that's what we are asking Your Honor to put back in place, at least for a period of time while we litigate the rest of the case.

The city acts like it would be a big deal to resume that status quo. The reality is they operated under that status quo for a long time and nobody had a problem. There was no problem. There is not a single same-sex foster parent applicant who has not been able to become a foster parent, zero. And you heard Mr. Amato's testimony that actually single same-sex people who apply to them get certified, right. It's really this narrow issue. As a religious matter, the church can't do the certification about the relationships. That's it. And the city's solution is you are gone, you are out of this work, and sure it's bad if some kids get transferred, sure it's bad if some homes say empty, sure it's bad if some kids stay at places they shouldn't be, but we will eventually catch up and sort it out.

But that's not the law. The law in this country allows for diversity. It allows for diversity. And so it allows a world in which you have both gay foster parents and a Catholic agency that has different beliefs about religion and sex. And they don't all have to agree on everything all the time. I think one of the [Page 218] teachings of the *Masterpiece* case, which just came out a couple of weeks ago, was precisely that we have to find ways to actually live together in this society of people who don't all share the same beliefs. It's a free people. So in a free place we are not always going to share the same beliefs. It can't be the case that we get to a point where there is one acceptable view on marriage and then you can't do any social work in the city or you can't do this social work unless you share it.

In *Masterpiece*, the majority actually talked about the situation of a church refusing to do a same-sex wedding and they said that was the easy case, right. They said the harder case, sellers of commercial services, the business guy selling the cakes, even that that guy won, but the easy case to them in their opinion was the clergy who says, I can't do the wedding. Well, Catholic is precisely in that situation, right. Catholic is like the clergy. They are part of the Catholic Church and they are simply saying, look, I can't do things that openly and directly violate my religious beliefs. I want to go take care of the kids in the city as I have for decades, I can't do this thing that violates my religious belief. What *Masterpiece* said about that is that that's okay because people can [Page 219] accept that that is a religious exercise and because it's not standing in the way of people getting—it's not harming dignity or standing in the way of

people getting services, because they can get services elsewhere.

The same is true here. Marriages, like foster care, have some relationship to the government, right. You need a license from the government to get married. So it's not that it's utterly unconnected to the government. But what it is is that people can understand not every church has to have the same views about sex and morality. It's kind of ridiculous to think that every church is going to have identical views on those things, and the government should not be in the position of trying to crush one, trying to kick it out of the public sphere because it has the wrong views. Teachings of *Obergefell* and *Masterpiece* actually both point in the direction of saying, we are allowed to have disagreement and we have got to find ways to work together. And here the logical way to work together is to let Catholic keep taking care of kids, but not kick them out of the sphere just because they have a different set of religious beliefs. The city may wish that they would move on from those beliefs. Mr. Cervone may wish that they would move on from those beliefs, but [Page 220] they are entitled to have them. State and federal law let them have them.

With that, Your Honor, we suggest that—we very much ask this Court to provide a temporary restraining order or preliminary injunction and do to so as quickly as possible. And if I could then reserve the rest of my arguments for rebuttal afterward. Thank you.

The Court: Okay. I will hear from the city.

Ms. Ewing: May it please the court, Catholic Social Services asked for this hearing for the extraordinary

relief of a temporary restraining order on the basis that it would suffer immediate and irreparable harm unless the city will be ordered to operate under an expired contract or soon-expired contract or to enter into a new full contract with CSS immediately. There have been multiple days of testimony which have demonstrated that there is no need for such extraordinary relief in this case. None of the harms that Catholic Social Services focused on, whether its own loss of business, or its foster parents' interest, or its failed attempt to suggest that the city is not acting in the best interest of children, satisfies the injunction standard. Nor is CSS likely to succeed on the merits, and both the city and the public interest [Page 221] will suffer if this Court were to issue an injunction.

I am going to focus on the key evidence from this week's hearing and a few issues which were directly raised by Catholic. Since this was an evidentiary hearing and in the interest of brevity, the city relies on our briefing for any merits arguments that I do not discuss again today.

First, I want to talk about harm a little bit. Catholic has presented no evidence of urgent or actual irreparable harm that would merit an injunction. All of their attempts to show harm have either failed or they are irrelevant to a TRO, preliminary injunction analysis. First, Catholic Social Services argued that they won't be able to provide foster care as part of its religious mission without a contract which allows new placements. But their own testimony about their other foster care activities, such as congregate care, their contracts with other counties to provide foster care, and indeed their other contracts with the city all show that Catholic Social Services will be able to exercise its

charitable missions to be taking care of children, and rebut their claim. And their harms to—that are in the nature of business losses, such as whether they will lose contracts so that they may have to downsize, these types of harms are not considered irreparable in [Page 222] this circuit. And it is not critical. One of the sort of things that we have—there has been a lot of discussion whether they are a business, whether they are not a business. They are a nonprofit cooperation with employees and they engage in—and they enter into contracts to perform services and are claiming business harms.

Second, they tried to portray a foster care crisis, although it is unclear how Catholic itself is harmed by that allegation in a way that would warrant a TRO. But even their claim there that this is some kind of overall urgent foster care crisis was belied by the testimony of—certainly by the DHS witnesses. Similarly, there is no evidence of any crisis that has resulted from DHS halting the intake to Catholic Social Services. Their evidence is that there are some open Catholic foster homes.

They have also tried to argue that the way that the Department of Human Services has handled exceptions to intake following the intake closure has somehow harmed or threatened to harm children. Again, the evidence that has been presented is that DHS is looking at this issue from the prism of the best interest of the children, that they have determined that all current kids can remain with their families until [Page 223] they leave the system, that if necessary that foster families will be able to work with other agencies as has been done in the past with many other closures or losses of contracts for foster care. And

the testimony from the three foster parents did not rule this out. Not surprisingly, because you would expect that they would want to stay if they have a bond with the child, that that would be the determinative factor. But the evidence is also that DH leadership has and will allow intake exceptions for best interest reasons. And these are reasons such as siblings coming into care and going to the foster family that is looking after other siblings in the family. Or if there is a former foster parent involved where that would be a good fit to go back. But there has been no evidence that where—in any instance in which DHS leadership has been asked for an exemption or it has been brought to their attention that there is one of these cases that any permission has been denied. It has always been granted.

So finally, we have the testimony of Mr. Amato who appeared to testify that DHS, you know, would negotiate an interim transitional contact with the city to—rather than walk away from—on June 30th with no contract and close its foster homes. The city has offered an interim agreement to CSS which will even keep [Page 224] compensation rates the same as in the current contract and will last—we have offered them a one-year contract in order to allow the relationship to wind down with—you know, in an orderly fashion. That in itself removes any urgency which could warrant any extraordinary relief from this Court.

Now, I would like to talk a little bit about the merits, another prong of the TRO, preliminary injunction analysis. There have been many arguments made in this case which the city regards as either dwelling on irrelevant points or to the extent they are irrelevant, offering inadequate evidence to sustain them. I want

to go through a few of those. For example, whether or not Catholic Social Services is performing its foster care work as a religious mission is not the point. This is not a case in which the city is coming in to interfere with private charitable work. The fact that—it's the opposite, it's—Catholic Social Services has accepted a contract from the City of Philadelphia to perform work which the City of Philadelphia is charged with by the commonwealth to take care of abused and neglected children by providing them with foster care. And we have delegated through contracts part of that obligation, part of the providing of foster care to the 28 or 29 or 30 foster care [Page 225] agencies which have entered into contracts with the city. You don't have to sign a contract. You can negotiate the contract, you can walk away. If a provision is a deal breaker for one side or the other, you have to walk away, one side or the other.

So the first point is that you are not substantially burdened if you agree to a provision in a contract. You can't then unilaterally change that obligation after the contract has been in effect and say it does not apply to me because I have this exception or for religious reasons. That's something that needs to be worked out up front. These contracts are to provide public social services. They are paid for with taxpayer dollars and obviously you have seen, it's an exhibit, it has many terms. But one of the—certainly the city disagrees with Catholic Social Services as to whether the contract requires them to recruit and certify foster parents. I think if you read the contract and as we have explained in our briefs, it is part of their scope of services. And we believe it is part of their scope of services and part of the overall compensation structure. The Commonwealth of Pennsylvania sets

the criteria for evaluating prospective foster families, and none of these criteria are religious in nature.

Another provision of our contract is that [Page 226]—and it's clearly set forth in the contract, is that all families must be treated equally under the—and with no discrimination. I have heard all kinds of efforts to minimize the references to the Fair Practices Ordinance in the contract and I will get to that in a second, but the nondiscrimination provisions in the contract are put there for a reason. It is not something that—you know, I have heard a lot of argument of well, no one has ever tried to apply this, here is—we have not called every one of our contractors to ask whether they are complying with it. It's a provision of the contract. We have a right to expect that when our contractor sign a contract that they are doing what they say they are going to do and have obliged themselves to do unless we find out to the contrary. And in this case, it was only when the Inquirer article came out and in the aftermath of the Inquirer article through inquiries, Catholic Social Services clearly stated that it would not be able to comply with that provision that was in the contract.

And so at that point, you know, we reached the decision that the contract is coming to an end, and it looks as if they are not going to be able to enter into a new one and make the decision to sign when we both know that this is very important and a deal [Page 227] breaker to the city.

I want to go to the public accommodation argument which I've heard a lot about, and I think this is mostly another red herring and I will explain why. We don't have to parse the Fair Practices Ordinance and all of its applications. Although we do take the position that

recruiting and selecting and supporting foster parents is a service, and a service is included in the Fair Practices Ordinance. And there is no exception in the Fair Practices Ordinance for private businesses, so we think that it does apply. But the new contracts that will be—that have been extended to—the full contracts to the agencies with which we are working on full renewals, and the full contract consistently that we would be offering to Catholic Social Services, as there was testimony, clarify that the contract obligation is not to discriminate against any of the protected categories under the fair practices ordinance for the length of the new contract. And so whether or not, you know, just standing alone every definition of the Fair Practices Ordinance is met, which we think it is, but we have made it clear that in the upcoming contract and in the contract going forward that there can be no discrimination on the basis of sexual orientation. [Page 228]

And I have also heard a lot about, you know, foster care being—you know, whether foster care is a service or not, I guess. The parts that are of concern to us are refusals to deal and refusals to certify in a nondiscriminatory way. These are the classic pieces of an antidiscrimination law. And so the DHS witnesses testified very clearly and extensively that it is the choice of the foster parent to be—to choose the foster service provider. They can receive information, but it is their ultimate choice. And the discrimination problem comes into play when the foster care agency refuses to deal with them. That is the same type—in concept, the same type of discrimination of refusing to sell somebody something, refusing to provide a service for them, another kind of service. You are saying, you needn't apply here, we are not here for you. We think

that is clearly covered by our antidiscrimination law and policy. Again, to certify is to follow the state certification requirements and to—which are directed at whether or not a family is going to be able to be a nurturing caretaker and to render a decision on that basis.

I also heard a lot of cross examination that seem to be attempting to establish secular exemptions. I would just like to say that the only [Page 229] relevant question under the exemption cases is whether DHS recognized secular exemptions that undermine the same purposes to the same degree as the religious exemption that Catholic seeks. And the answer is that the ones that Catholic tried to establish on cross dealt with things like proximity or language or special medical needs. Actually, as I said, Deputy Commissioner Ali rejected all of these as being even exemptions at all because she said it has to be the applicants who choose. But all of those relate to looking out for the best interest of children. None of those reasons undermine our antidiscrimination laws or policies. And thus cases such as *Blackhawk* and *Lighthouse*, which we are assuming they are trying to make an exemption argument under, don't apply.

But the biggest failure on the merits that really needs to be discussed is we maintain that the city—that CSS was unable to demonstrate the substantial burden on religious practice which they claim our contract imposes. Jim Amato did testify that same-sex marriage is against Catholic doctrine. But that testimony does not in itself articulate a conflict between that religious belief and the contract obligation that we believed that Catholic was performing not to discriminate and to evaluate all

applicants [Page 230] equally. Because the contract does not require Catholic or the Catholic Church to recognize any marriage in order to certify foster parents. So the mere fact of—that same-sex marriage is against Catholic doctrine does not mean that CSS can't do its job of evaluating applicants fairly under the state criteria. The Court does not have to blindly accept that there is a conflict. It is entitled to examine the contract and to see if there actually is a conflict that would require CSS to require—to recognize same-sex marriages. We submit you won't find that.

Mr. Amato also testified that certifying a same-sex couple's home would somehow be what he called I believe a validation of the couple's relationship. Again, we maintain that the contract and the state requirements don't require CSS to validate or affirm any relationship. The criteria are directed toward assessing the applicant's ability to nurture a child. So, for example, if you have a couple and the relationship is that they are at each other's throats constantly during the home study, you might say this is not a relationship that bodes well for them being a caretaker of a child. But whether they are married or in a single sex relationship does not have to be validated or affirmed.

[Page 231]

And as a matter of law, I direct the Court to cases such as the *Harris Funeral Home* case in the 6th Circuit which expressly held that simply complying with an antidiscrimination statute does not as a matter of law require—is not the same thing as a validation or endorsement. That case, by the way, also speaks to another of Mr. Rienzi's points which is whether or not we are dealing with a compelling state interest and a

narrowly-tailored means of addressing it. Our position is that we never get to that because the substantial burden is not established. But if for any reason we ever get to the strict scrutiny analysis, there are many cases. The *Harris Funeral Home* is one. In another context we have the Supreme Court's decision in the Roberts versus the Jaycees. They all recognize that antidiscrimination statutes do further a compelling governmental interest, an extremely important compelling governmental interest. And I am not sure which one of those cases uses this language. They both agree that enforcement of an antidiscrimination statute is the least restrictive means of furthering the interest. One of the cases says that it's the precise way to further the governmental interest.

Going back to the substantial burden for a second, Mr. Amato also stated that Catholic teaching [Page 232] was—that what he called the lifestyle represented by a same-sex couple was unacceptable in parenting, presumably meaning Catholic would consider all same-sex couples to be unfit to foster parent. But they offered no evidence that a gay married couple could not be excellent nurturing caretaker. That's why nothing like that is in the state criteria and that is what empirical research shows is the case. The Department of Human Services is entitled to rely upon such research when it sets its contractual requirements for how it wants this part of the job done, and the city is entitled to outlaw discriminatory conduct which is rooted in disapproval of the lifestyle of a protected group.

So while CSS did not establish a substantial burden, Mr. Amato's testimony did clearly show that Catholic was inserting purely religious criteria into the secular

criteria established by the state. He testified that Catholic would certify neither same-sex couples nor unmarried heterosexual couples on religious grounds. But then, which was—and I think you heard testimony from the commissioner today, new to DHS and the city on Tuesday afternoon he described yet another religious requirement that CSS had interposed into the certification process, that Catholic would not certify a foster family unless the applicants could [Page 233] produce a, quote, pastoral letter, unquote, from a clergy member that attested that the applicants actively participated in religious services. This further complicates Catholic's ability to comply with the city's contract in that, I think Article 15, that same section that deals with the Fair Practices Ordinance, there is actually an earlier sentence that completely makes it clear that there can be no discrimination on the basis of religion. But we now have a new problem in addition to the problem which brought us here which complicates the ability of Catholic Social Services to comply with the city's contract. Neither the city nor its contractors can impose a religious test or discriminate on the basis of religion and deny certification solely because an applicant can't produce a letter attesting that he or she is a believer versus a nonbeliever, or it seemed from the testimony they could be a believer but not an active church-goer and would be unable to get that letter. This raises new constitutional problems for the city and for—potentially for CSS.

And lastly I heard Mr. Rienzi—he made an argument that by—that we were compelling speech and thereby violating first amendment speech rights of Catholic Social Services in addition to the religious free exercise and RFRA claims. But the key point with [Page 234]

regard to compelled speech cases is that the government can't restrict speech that is outside of the program that has been entered into. When the restriction applies to the program activities themselves, which the party has entered into voluntarily, like a contract, that speech can be regulated. We think it is clear here that the certification process, the recruitment process is squarely within the contract between the city and Catholic, and that therefore the compelled speech line of cases has no applicability.

Finally, I want to talk about the remaining issues with respect to the issuance of an injunction, and all of those militate against its issuance with regard to public factors and the—what the effect of an injunction would be. DHS is obligated to act in the best interest of 6,000 or more children, 6,000 in foster care and 10,000 total for whom it has custodial responsibility. And as the commissioner and Deputy Commissioner Ali testified, that requires them—they have made the decision that they need to keep intake closed unless or until Catholic Social Services can sign a full contract, that it cannot permit foster care agency contractors to discriminate in ways that will depress badly-needed diversity of foster care families and DHS's resulting ability to determine the [Page 235] best fit for each child who comes into placement. As the testimony—as I heard the testimony, I think the commissioner testified children are not widgets. You don't just one comes in and you say, oh, there's an open home, they go in. They have particular needs and there is a particular need within the city and in DHS to have as many different kinds of foster care families and to make them feel welcome so that the best fit for the children can be made.

DHS cannot permit its contractor agencies to send messages that would harm potential applicants who fear being stigmatized and humiliated, and these are people who have been subject often to some stigmatization and humiliation. They may well be deterred and not want to go through that again.

Also there is a potential that it could harm—the message would be that, you know, some applicants need not apply. And the city should be able to enforce its well-established antidiscrimination laws and policies. The City of Philadelphia and the Fair Practices Ordinance and associated policies have been in effect for decades. This is not something new.

So for this Court to order anything beyond what DHS is already doing, which is making placements with Catholic when case-specific factors such [Page 236] as sibling placements are in the best interest of those children, would act to undermine DHS's determinations and to harm the city's decades-long efforts to battle discrimination. This would irreparably harm the city and is not in the public interest. In addition, an injunction here would not restore the status quo. The current contract, which apparently Catholic Social Services wants to extend over the expiration date, does actually not require us to provide any intake or specific numbers of children to any agency, to CSS. CSS is actually asking or seeking to force the city to enter into—to either extend a contract with terms that are not in there or to enter into a new contract on terms which the city has rejected as to any other contractor agency.

And finally, an injunction would put the city in the position of knowingly providing foster care services with religious criteria, including Catholic Social

Services' admitted now use of pastoral letters which raise additional constitutional issues, so that even if the claims which underlie their motion for preliminary injunction and TRO would be ruled upon by this Court, there are new issues which would cause us to be unable to contract with them.

Give me a second, Your Honor. [Page 237]

Just one more—I noted during Mr. Rienzi's argument that he seemed to be arguing that there was no problem if there were no complaints. The contract obligation not to discriminate, Catholic Social Services has told us it cannot comply with that. Discrimination is not okay based on the number or lack of number of complaints.

But for all these reasons, because Catholic Social Services has not been able to meet any of the prongs of the injunction standard, the city respectfully requests that its motion be denied. But I have one last request, which is that because the city just became aware of that pastoral letter requirement on Tuesday, it had not been part of our prior briefing. If the Court feels it would be helpful as to the additional problems which we believe this requirement raises, we have prepared a very short letter brief which we would be happy to hand to the Court, if the Court desires.

The Court: Okay. You can hand it up.

Ms. Ewing: Thank you. Thank you, Your Honor.

The Court: Thank you.

Mr. Rienzi: Your Honor, is it me or is it the ACLU next?

The Court: The ACLU is next.

[Page 238]

Mr. Rienzi: That's what I thought.

Ms. Cooper: Good afternoon, Your Honor.

The Court: Good afternoon.

Ms. Cooper: And thank you for the opportunity to be heard.

Plaintiffs are asking the Court to issue an extraordinary ruling of law. They are asking the Court to hold that an organization that enters into a contract with the government to provide a government service has a right to then alter that provision of—the provision of that public service to conform to its religious beliefs. Like many public child welfare systems around the country, the city has chosen to maximize children's family placement options by barring discrimination based on race, religion, sexual orientation and other characteristics that have no bearing on one's ability to care for a child.

CSS' religious beliefs do not entitle it to accept the city contracts and taxpayer dollars to perform some child welfare services on behalf of the city and then commandeer the system to impose its own standards. The potential consequences of such a ruling are pretty staggering. Just think, what if there were an agency that held a religious belief that children must be subjected to corporal punishment that violates [Page 239] state child abuse laws. There are plenty of religious faiths with beliefs about that. What if there were a religious agency that had a religious objection to providing medical treatment to children who are injured or sick. The implications of the legal ruling that Plaintiffs are asking for cannot be confined to

religious-based objections to same-sex couples, because under the Establishment Clause, the government and the courts cannot give preference to some religious beliefs over others. You can't say, this religious belief we will defer to and approve, this religious belief we are not going to give you the same treatment.

The fact that Plaintiffs are asking the Court to order the city to allow this kind of free rein by religiously-affiliated contract agencies demonstrates a profound misunderstanding of the right to free exercise of religion. The right to free exercise protects against government interference with religious institutions; pursuit of their own interests. The Supreme Court said that very clearly in the *Kiryas Joel* case. The right to free exercise does not establish a right to have the government create opportunities for you to exercise your religion and then fund those opportunities. Indeed, funding religious activities directly violates the Establishment Clause, as I will [Page 240] discuss in a few moments.

In the briefing, the plaintiffs rely on, I believe, *Trinity Lutheran*, and that's a case that is often mischaracterized in this kind of discourse around these issues. This case does not support the extraordinary claim Plaintiffs make here. It establishes for sure that the government could not disqualify religious organizations from a public benefit because of their religious identity. But even if a government contract to perform a government service could be considered a public benefit, which of course it is not, as some cases in our brief make clear, but even assuming it were, the city has not denied CSS a contract or referrals of children because it is Catholic

or even because it holds religious beliefs. The city suspended referrals because of CSS' refusal to comply with its nondiscrimination requirement. *Trinity Lutheran* in no way suggests that a contract agency's religious beliefs give it the right to dictate how it provides government-contracted services.

But also I want to address very briefly the speech claim, and I just have a very small amount to add to what the city had to say about that. But the *Agency for International Development* case is very clear in distinguishing between speech that is part of the [Page 241] scope of the contract, and when the government leverages a contract to try to prohibit speech that an entity engages in outside the scope of the contract. Just because—I think if Philadelphia were to tell Catholic Social Services that it could not engage in speech in other domains, that would be a constitutional problem and we would be standing with them on that for sure. But the speech they are talking about, providing home studies and certifications of foster parents, that is precisely what the contract is about.

Now, I don't think we heard from the plaintiffs about really the other major problem with their theory, which is the Establishment Clause. The First Amendment does have two parts, and the other—or at least about religion, and the other part is the establishment clause. And so not only does the city have no legal obligation to permit its contract agencies to impose religious eligibility criteria on prospective foster parents, if it did so, the city itself would be violating the Establishment Clause. The Establishment Clause prohibits the use of religious eligibility criteria in the provision of government

services, whether that service is provided by government employees themselves, DHS employees, or organizations contracted by the government to perform that government function. [Page 242] The Philadelphia Department of Human Services could certainly not screen out prospective foster families based on failure to meet a religious test. It could not say only Christians or only Jews, cannot say no same-sex couples because of our religious objection. Therefore, the agency that hires and pays with taxpayer dollars to perform this very service that is a government function cannot do so either.

And the Supreme Court made crystal clear in the *Larkin* case and the *Kiryas Joel* that the Establishment Clause prohibits the government from delegating a government function to a private entity and then allowing that government function to be performed using religious criteria.

In addition, there is the funding issue I touched on earlier. The Supreme Court has made absolutely clear in case after case that the Establishment Clause bars the government funding of religious activity. Here, allowing the use of religious criteria in the screening of prospective foster parents, which is a government function, again under contract with the state to perform this government function, that is religious activity. And I would just point to the *Bowen v. Kendrick* case where the Supreme Court recognized that allowing religious-based discrimination [Page 243] by a government-funded service provider would be one form of impermissibly advancing religion.

There is a third reason why allowing contract agencies to use religious criteria in the foster licensing process would violate the Establishment Clause, and that

there is a line of Supreme Court cases that says that when the government preferences religion to the detriment of others, to the detriment of third parties, that's a violation of the Establishment Clause, and I would point the Court to the *Estate of Thornton* as a seminal case on that point. Here, accepting Plaintiff's position would cause significant harm to the children in the child welfare system by depriving them of good families and cause harm to the would-be families who seek to care for them.

Plaintiffs will likely say this is a question of religious accommodation, if they come back up again. And, you know, there are lots of accommodation cases in the Supreme Court and other courts. But this is not religious accommodation. The cases like *Amis* and *Hosanna Tabor*, those cases involve accommodating religious organizations to get exemptions from generally-applicable laws that apply to everybody in their own private activities.

This is not about accommodation. This is [Page 244] about a case—this is a case in which they are asking for the government to delegate this government function to this organization, and for the government to then allow them to provide those government services using religious criteria, and that is absolutely what the Establishment Clause prohibits.

Turning back to the harms that would result, those also go to the balance of equities, of course, and a further reason why the requested TRO and PI should be denied. And in fact, it is these very harms that caused proposed intervenors of making to—to seek to participate in this case. Allowing discrimination by agencies that have religious objections to same-sex couples would harm the at-risk children that the foster

care system is meant to protect as well as the families who would care for them, and these harms are very much intertwined. Starting with the families, just to sort of unpack it a little bit.

The families can be harmed in a variety of ways. Starting with those who maybe go to—would go to Catholic Social Services or any like-minded agencies if the court were to rule in their favor. Those people could be subject to discrimination, and the Supreme Court in *Heart of Atlanta* and other cases has recognized the degradation and the humiliation and [Page 245] embarrassment that can come with discrimination. This is a serious harm that the Supreme Court has recognized. And that degradation, the degradation of that kind of experience is not lessened by the fact that the discrimination is done politely or that it is called a, quote, referral. “We will not serve your kind” is a degrading humiliating experience that the city clearly has a compelling interest in wanting to prevent.

In addition, all prospective foster parents headed by a same-sex couple would face the uncertainty about whether they would face discrimination in the process, making it more difficult, stressful. If the Court were to accept Plaintiffs’ position and the LGBT community were to learn that in Philadelphia, pursuing foster parenting comes with the risk of exposure to lawful discrimination against them. And a rule of law would say, agencies are lawfully entitled to discriminate against LGBT or people of same-sex couples, it is hard to fathom how many people could be deterred from subjecting themselves to that process, knowing that it is perfectly legal to discriminate against them in the process.

Finally on this topic, even if there were clarity about which agencies discriminate and some couples were well-enough informed to avoid the agencies [Page 246] that would not accept them, that means that same-sex couple families or prospective families headed by same-sex couples get a reduced choice of agency options. The plaintiffs talk a lot about 28 agencies available, what is the big deal. There are 28 other agencies available. Imagine a scheme in which you had a system where say Christians get the choice of 30 agencies and everybody else gets 28, or white people get 30 agencies, African Americans have to settle for fewer options. That is a stigmatizing system for the city to impose on its population.

Also, put aside the stigma, the reduced options would mean that some families would not be able to work with the agency among the existing agencies that might be most appropriate for them. The plaintiffs emphasized that—particularly the individual plaintiffs, that the services of CSS are so outstanding that they are not sure that they would continue fostering if they could not work with CSS, even if that meant ceasing to care for the children they obviously love. Yet Plaintiffs' position is that same-sex couples should not be able to benefit from those services and instead should have to accept agencies that are completely unacceptable to individual Plaintiffs.

In addition, we heard testimony about how [Page 247] different agencies have different expertise in terms of the children that they care for. So if it happened to be a faith-based agency objecting to same-sex couples or—let's put in any other substitute group, because of course a ruling here would reply to any religious-based objection to any group, so an agency that had a

religious-based objection to interracial couples or to X, Y, Z groups, same-sex couples. If that agency happened to be one of the agencies that specializes in medically needy children, I forget the particular terminology, that would mean that a family in that group, the interracial couple or the same-sex couple who wanted to care for a medically needy child, perhaps they are doctors or nurses, would not have the option of working with that agency. So there was a lot of talk of the children not being widgets and fungible, which is absolutely—I agree with that. Also the agencies are not necessarily fungible. So giving a menu of options for heterosexual couples and a reduced set of options for same-sex couples is harmful, again for the stigma reason and for the practical reason.

Turning to the interest of the children, turning away qualified foster parents based on religious criteria conflicts with the professional and accepted child welfare practice standards that exist to protect [Page 248] children. And I would refer the Court to the Child Welfare League of America standards of excellence and adoption, I believe foster care practice as well. Because each child's needs are unique, meeting the best interest of a particular child means having as large and as diverse a pool of qualified licensed families as possible to optimize that fit that we have heard some discussion about between child and family. Especially given the current need for more qualified families for older youth and LGBT youth and perhaps other groups, it is contrary to the interest of Philadelphia foster children for the city's contracting agencies to refuse to accept qualified parents for reasons that are unrelated on the best interest of the children. And to refuse to place children with a class

of families that may just include that family that is best situated or perhaps the only family that is available, ready, willing and able to meet the needs of a particular child. If same-sex couples are turned away by CSS and any other like-minded agencies, or deterred from pursuing fostering altogether because they know that agencies are permitted to discriminate against them and they perhaps don't want to take that risk, children lose out on good families.

It is also important to recognize that – [Page 249] and I touched on this earlier, that if CSS is entitled to refuse to accept same-sex couples because of its religious beliefs about marriage, then all faith-based agencies will be able to turn away prospective families who fail to conform to any of their religious beliefs. Again, the Establishment Clause prohibits preferencing some religious beliefs over others. So some denominations don't view marriages between people of different faiths as a valid union. Some don't recognize second marriages after divorce. A religious-affiliated agency might object to foster parents who work on the Sabbath as defined by the agency, or who eat pork or who allow their children to attend public schools. And again, as we learned in the hearings this week, that CSS itself has other religious-based objections. No unmarried couples of any sexual orientation and no one who is not a church-goer able to secure a clergy letter. Requiring the city to allow each foster care agency to implement its own religious criteria for foster families could result in a patchwork of such exclusions, creating even more barriers to finding families for children who need them. So the children's interest in getting more families weighs decidedly against granting the requested relief.

But in addition, again as I touched on [Page 250] earlier, it's not agency certified. The risk of a ruling for the plaintiffs not only compromises the city's ability to maximize family options for children, it also opens the door to giving agencies carte blanche to impose on children who are wards of the government a denial of services, medical services, no school. Whatever their religious belief might mean. Again corporal punishment that—based on a biblical view that may violate state child abuse laws, it would open up the door to allowing an unlimited number of potential harms to children.

I want to touch very briefly on what is felt to be perhaps a suggestion by Plaintiffs' counsel that the city's knowledge that CSS has religious beliefs about marriage means that—or this is how I understood it, anyway—means that the city was aware all along that CSS put those religious beliefs above the professional established child welfare standards of accepting all qualified families to give children the best array of placement options. There is no basis for this assumption. There are numerous faith-based agencies that hold religious beliefs about marriage and hold lots of religious beliefs that may be relevant. But they know that they put the child welfare professional standards and the interest of children [Page 251] first. Indeed, as we heard in this case, Bethany Christian Services, which apparently has similar religious beliefs about marriage as CSS, apparently is willing to comply with the terms of the nondiscrimination requirement.

I do want to say just a few words about Plaintiffs' reliance on the *Masterpiece Cakeshop* case. To support it, they argue that that supports its contention that

the city's enforcement of its nondiscrimination requirement was based on hostility towards CSS' religious beliefs. None of the evidence the plaintiffs claim support this accusation creates any inference that the city's enforcement was based on antireligious animus as opposed to a desire to ensure that all prospective families are welcomed. They distort the *Masterpiece* ruling beyond recognition. Just to give some examples, there is simply nothing hostile to religion about the statement that quote, we cannot use taxpayer dollars to fund organizations that discriminate against people because of their sexual orientation or same-sex marriage status, it's not right. That was an example of a statement that they deemed hostile to religion. If mere disagreement with permitting government funding of discrimination constitutes impermissible hostility towards religion, [Page 252] that would preclude any enforcement of nondiscrimination requirements against government contractors who refuse to comply based on religious objections. *Masterpiece* did not say this.

Nor does the city's statement that quote, we would not allow such discrimination against, for example, Catholic couples or mixed race couples and we cannot allow it with respect to same-sex couples either constitute hostility towards religion. *Masterpiece* does not mean that referencing other forms of discrimination in the context of a discussion about religiously-motivated sexual orientation discrimination impermissibly shows hostility towards religion. Indeed, the *Masterpiece* case itself, in that case itself the Court cited *Piggie Park*, one of the most famous race discrimination cases in the country, for the proposition that religious objections generally, quote, do not allow business owners and other actors

in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally-applicable public accommodation clause. So uttering race discrimination in the same breath as sexual orientation discrimination or other forms of discrimination does not amount to hostility towards religion.

Interestingly, though, Plaintiffs' [Page 253] protest of this statement from the city as, quote, comparing CSS religious beliefs to racist discrimination, close quote, seems to be an acknowledgment, as I read it, that it would be improper to allow religiously-affiliated agencies to exclude prospective families based on a religious objection to say interracial couples. Yet they seem to be suggesting that their religious beliefs about who should be foster parents deserves the city's approval and deference. But, of course, again, the Establishment Clause does not allow that picking and choosing.

And the comments from the mayor from several years ago, you know, that that somehow you can dot that—connect the dots to say that that demonstrates the city's decision in 2018 to enforce this contract demonstrates hostility towards CSS's faith. *Masterpiece* does not support that giant leap. In that case they were talking about the adjudicative statement from a member of the adjudicative body that was charged with hearing a discrimination complaint. The Court in no way suggested that had Colorado officials ever expressed disagreement with the leadership of the business owner's faith community that enforcement of state laws against the business owner or any organizations affiliated with his

faith would be forever [Page 254] assumed to be based on hostility toward faith.

I just have a bit more, if the Court will indulge. I feel compelled to discuss the plaintiffs' use of the "referrals" terminology. They seem to be attempting to shoehorn this case into *Lukumi* to claim selective enforcement by citing the fact that agencies may refer families to other agencies that have special expertise. These are not exemptions from the city's nondiscrimination requirement. They are comparing apples to oranges. Using the nomenclature "referral" does not make the refusal to accept same-sex couples any less discriminatory. They are using smoke and mirrors with this referral language to make discrimination appear benevolent towards the families discriminated against under their policy.

CSS is not simply advising prospective parents that other agencies may be a better fit for them or may, you know, give them a choice of other agencies. They are refusing service to same-sex couples, period. I think if an agency had a policy of refusing to accept interracial couples or non-Christians, I think even Plaintiffs would agree that this is discrimination even if the agency referred those families to other agencies politely and refused to serve them.

One last thing that was just mentioned in [Page 255] the cross examination. Plaintiffs seem to be implying that the city's refusal to allow the use of the religious eligibility criteria in its public child welfare system to exclude same-sex couples violates federal law. That was sort of how I was interpreting the line of cross. And I just want to make clear that there is no federal law or regulation that requires states to permit faith-based agencies to dictate the terms of government

services provided. Indeed, the federal statute that requires equal treatment of faith-based service providers that participate in providing services and government programs. Specifically, I am going to read the language from that because it makes quite clear that it does not allow this or require it. It says here—and this is 42 USC 290kk-1. Religious organizations are eligible to be program participants on the same basis as any other nonprofit private organization as long as the programs are implemented consistent with the Establishment Clause and the Free Exercise Clause of the First Amendment to the United States Constitution.

And this is—I want to call the Court's attention to the next line. Nothing in this chapter shall be construed to restrict the ability of the federal government or a state or local government in [Page 256] receiving funds under such programs to apply to religious organizations. The same eligibility conditions in designated programs that are applied to any other nonprofit private organization. In other words, when religious organizations enter into government contracts, the government is not required to tailor their contract or their services to meet the religious needs of the agency.

Again, I just want to—actually, you know what, I am going to stop there because I have been speaking long enough and just see if the court has any questions for me.

The Court: I have no questions.

Ms. Cooper: Thank you.

The Court: Thank you.

Mr. Rienzi: Let me start where the parties and the amicus agree, kids are not widgets. That's great, we agree. Kids should be placed in homes that serve their best interest. Everybody agrees. I think everybody actually said a version of this one, as many different kinds of foster families as possible is good for kids. We agree. The question is, are you going to get there if you have a government-imposed litmus test that says people—organizations with certain religious beliefs can't participate in the [Page 257] system, right. So the alternative—I thought it was fascinating, the ACLU is talking about well, Catholic seems like a good agency. We ought to make that available for everybody.

That's not something that is on the table in the case. What is on the table in the case is, are they going to get shut down or not, right? So the ACLU's requested relief is not expand Catholic, that's not something the government can do. It is shut down Catholic because Catholic should not be available to anybody, right. So I thought Commissioner Figueroa actually said it best, whether Catholic wins the case or doesn't win the case, there's 28 agencies available in this city who will certify same-sex families.

Counsel for the ACLU talked a lot about establishment clause concerns, about what happens when the government delegates its functions to a religious entity. Here is why that argument misses the mark in this case. Certifications of families for foster care are not the city's function to delegate. It's just not the city's function. Commissioner Figueroa said that, their documents say that. Their documents also make clear that in no way is Catholic the agent of the city. Those are the terms of the contract. So it's not the city's function to delegate. [Page 258]

And they can't be violating the Establishment Clause simply by allowing Catholic to do what Catholic has done long before the city was involved in this line of work, which is Catholic brings in families that Catholic brings to the table and thinks are good to bring to the table. If we want a world where we have as many foster families as possible, another thing I think everybody has said today, want as many foster families as possible, well, different groups can reach different communities better. And saying that we are going to shut the door and we are going to say Catholic can't do it because Catholic doesn't say they are in favor of each and every family makes no sense. It's contrary to the interest that city says it is pursuing.

There was a reference to the *Alliance for an Open Society* case, *AOC v. Aid*, which talked about how the government is not permitted to require speech outside of what it's contracting for. When it's paying for something, the government is allowed to say, hey, I paid you for that, say it my way. When it's not paying for something, they don't get to use the fact that they are paying you over here to make you engage in speech over there.

That's precisely what is going on here. [Page 259] they don't pay anybody a penny for home studies. And they certainly don't pay anybody a penny who steps aside from home studies. You don't draw a check from the government when you say, actually I can't do that one. So they don't pay a penny, it's outside of what they are paying for. *AOC* actually quite clearly dictates that the plaintiffs have a valid compelled speech claim.

There were arguments about third party harms and how the claim based on the *Thornton* case that where there are third party harms the religious party has to

lose because the Establishment Clause says so. Here is the easy way to know that that's not right. *Hosanna Tabor v. EEOC*, a nine-nothing decision from the Supreme Court on both free exercise and establishment clause grounds saying that the government could not apply an otherwise valid nondiscrimination law, discrimination against the disabled. The government could not apply that otherwise valid nondiscrimination law against a church, a church school. *Hobby Lobby* also rejects the argument that any burden on third parties creates an establishment clause problem.

And if we needed anything fresher, we could just go back to *Masterpiece* from five minutes ago, right, or two weeks ago. Here is the Supreme Court, the seven justices in the majority, and this is not when [Page 260] they are talking about—not when they are talking about the commission, they are just talking generally. When it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. That was the easy case according to seven justices earlier this month. It's just like this case. Marriage is both a religious event and also a civil contract. You have to get a government license to get married. The government regulates marriage. In some ways it's a government function.

If the arguments from the ACLU and the city were correct, then the Supreme Court has to be wrong, because then you can't have the government allowing religious groups to have their different religious beliefs on something like sex and marriage while still

doing stuff that somehow involves the government. Yet the Court said it was easy because it is easy. Because our laws do not give the government the ability to dictate the one and only correct answer to complicated questions like sex and marriage. It's a free country, people have lots of different beliefs. The Supreme Court repeatedly—they said it in [Page 261] *Obergefell*, they said it again in *Masterpiece*, has made clear that we need to be able to live together with a diversity of different beliefs and that the government can't be in the position of punishing the quote unquote wrong set of beliefs.

There was a lot of talk about the harm that would occur, the stigma, I think was mentioned a few times, the harm and the stigma that would occur if the government were to allow Catholic to continue operating according to its religious beliefs. First, again, that's not a winning constitutional argument, says *Masterpiece*, right. If that were a winning constitutional argument, seven justices could not say that the church can say they won't do gay weddings, because then the government would be allowing a stigma in a government function. That's not what the law is. It's not what the law is.

But we heard a lot from the city over the past few days about all of the exceptions they have granted, all the kids who they have gone ahead and placed in families through Catholic. And I would ask, if they have such a compelling interest, if it's such a compelling important interest to not work with Catholic, well then, why are they making all of these exceptions? And if the exceptions are so harmful, if it's so [Page 262] terrible for people to live in a world where we don't all agree

about religion and sex and marriage, then how come people have not suffered from those exceptions?

Answer, they have not suffered. They are actually not harmful. People disagree. I strongly suspect that a lot of these couples have deep disagreements with the Catholic Church. And in America, that's okay. It's okay for the Catholics to say I disagree with the same-sex couple over there and I think—you know, my religion says you should do it differently. It's okay for a lot of other people, including Commissioner Figueroa, to have deeply-held beliefs that the Catholic Church is dead wrong. In a free country that's fine. And in a free country that should not be disqualifying for either group and for either side to participate in the public spirit, particularly to do something that Catholic is proven to do very well, which is help kids.

You heard argument again about the harms that would occur, and I would just remind the Court again, there is no evidence that anyone has even asked for the service. There is no evidence that anybody has—under the Supreme Court's case *Brown v. Entertainment Merchants Association*, the government is not allowed to rely on ambiguous proof to carry its compelling interest [Page 263] burden. It actually needs to have real proof of actual harm.

And I was disappointed before when we suddenly had a surprise expert witness, but the surprise expert witness ended up, to his credit, quite truthfully saying, I don't know, it might be harmful. I think it's harmful, but I don't really know. And under the law, the government loses at that point. Under the law, they have not carried their burden when the answer is, I don't know, I think so but I can't prove it. That means government loses.

There was some discussion about the contract and the public accommodations language in the contract. I would point out again, the government simply declined to brief the question of whether this is a public accommodation. They seem to keep assuming it is a public accommodation in part because the words "public accommodation" appear in the contract. I would simply point out that that paragraph makes clear that it's about a lot of different things. It talks about residential and real property. There's another paragraph later in section 15 that talks about not giving the government goods that come from Northern Ireland. That's not because there is goods going on in this contract. There is no goods going on in this [Page 264] contract. That's because this boilerplate that appears in a million city contracts, that's why it's this thick, it does not prove that it's a public accommodation. And again, I would just say the city's own actions and the way foster care is done prove conclusively that is not a public accommodation, it was never intended to be one. They just needed to come up with an argument.

The city spoke about contract renewal and said, well, this is just a matter of not renewing a contract. I would simply point out the government does not get to stop being the government because there is a contract involved. The law is actually quite clear that people contracting with the government still have their first amendment rights. They have the same first amendment rights that at-will employees of the government have. That's clear 3rd Circuit law. So the government does not just get to say, well, it's a contract, I don't have to worry about respecting your religion or I don't have to worry about not forcing you

to speak because it's a contract. Because it's a contract is not a first amendment defense.

The city, actually, as I understood it, was also arguing that maybe Catholic is wrong about its religious requirements. Maybe they are wrong when they think that God does not want them to fill out the [Page 265] paperwork and certify these couples. And I would simply say it is not for the government, nor respectfully for the Court, to decide what Catholic's religious exercise is. That is their sincere religious exercise. There is no serious challenge to it in the evidence. That's their religious exercise. Maybe the city thinks they are wrong, but the bottom line is their sincere religious exercise is, I can't sign the form, I can't do that thing. It is not for the city to come back and try to redefine it and say, we think you are wrong. That is just as inappropriate as the Pope Francis discussion at DHS. That's for the religious people to decide, it's not for the government to decide.

Let me end on the balance of harms issue that has been discussed. It's now really clear because now when—I mean we have actually heard from the intervenor on the witness stand, we have heard from intervenor's counsel, we've heard from the city, they can't find anybody who was harmed by the old system, zero, they can't find a soul. That old system so far as we are aware and so far as the evidence shows, hurt no one, not a single gay couple that couldn't go be a foster parent if they wanted to. Not a single gay couple actually turned away by Catholic. There is just no evidence of a soul who was harmed. And so as [Page 266] Commissioner Figueroa said, you have got the same number of agencies available either way.

So you have got this hypothetical claim that somebody might be injured, although we don't know who and we have got no proof of it. But that's the government's argument against the status quo. But in order to vindicate that alleged interest, they are willing to do real harm to real actual people, both the agency and the parents and the kids. They acknowledge we have some open Catholic homes. Well, that's not just words, right. Some open Catholic homes is beds and families where foster kids should be sleeping right now. And the government is not letting them sleep there.

You heard from Commissioner Figueroa that just like they did in March, they have still have got 700 plus kids in congregate care, and as she told that reporter, about 250 of them could be living in families. That number has not moved an inch in the past three months. Do you think there is any serious world in which the opening up of those 26 beds at Catholic homes doesn't move some real live kids to get into foster homes? Of course it does.

The government talked about their exceptions policy. And we heard some testimony. No one has closed on it and I will not either, other than to [Page 267] make this observation. We heard some testimony about Doe Child Number 1, and if one thing is clear, I am sure, Your Honor, is that it was a complicated mess. There's a complicated mess over that child. But that's instructive, because that shows that when you are in a world where you can't just proceed normally and you have to go get special exceptions from the top of the top, right, from the top levels of city government, I believe was the phrase. You have to go get exceptions at the top. And when you don't have a written policy and you have not told everybody at the bottom, it's

ridiculous to assume that you are finding out about all the kids who need to be placed in all the right places. There is just no reason to assume that.

So the current situation that is going on right now with the illegal freeze of intakes hurts real people, real kids, real foster parents, real agencies. And that's harm that should be stopped. And the idea that out of our desire to make sure that everyone gets to use the agency they want, we are going to go to people who have deliberately chosen Catholic, who love Catholic, who have been with Catholic decades, and we are going to say, sorry, you can't have Catholic any more. And we are going to take that away from real actual people in order to vindicate the hypothetical [Page 268] situation that has not actually arisen yet that somebody might show up to Catholic and ask for the Catholic Church to come in and evaluate their family life in this circumstance simply does not make any sense. And I would end by pointing the Court to two cases in our brief, *Marks v. Jackson* and *Reilly v. City of Harrisburg*. What they both say is that the irreparable harm and balance of harm showings, that's a sliding scales, I am sure Your Honor is aware from the preliminary injunction factor analysis, but that a strong showing on irreparable harm and balance of harms can even lessen what a party needs to do on success on the merits. For the reasons we have said, we think actually success on the merits is quite clear. We think what the government is doing violates state and federal law, federal law, both first amendment and related to their funding. So we think the merits are actually quite straightforward, but if you have any doubt, the harm alone should be able to carry the day for the injunction. So with that, we

would ask Your Honor to enter the injunction. Thank you.

The Court: Okay, thank you. The Court holds the matter under advisement. However, I would request of the parties that they file findings of facts and conclusions of law by the 28th of June. And the [Page 269] Court will issue its ruling shortly thereafter. Is there anything further?

Mr. Rienzi: No, Your Honor.

Ms. Cortes: No, Your Honor.

The Court: Okay. Have a good evening.

(All rise.)

* * *

[Appx. 1002]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

SHARONELL FULTON,
CECELIA PAUL, TONI
LYNN SIMMS-BUSCH,
and CATHOLIC SO-
CIAL SERVICES,

Plaintiffs,

v.

CITY OF PHILADEL-
PHIA, DEPARTMENT
OF HUMAN SERVICES
FOR THE CITY OF
PHILADELPHIA, and
PHILADELPHIA COM-
MISSION ON HUMAN
RELATIONS,

Defendants.

Civil Action

No. 18-2075

Assigned to the
Honorable Judge Tucker

DECLARATION OF DOE FOSTER MOTHER #1

1. I am over the age of 21 years old and capable of making this declaration pursuant to 28 U.S.C. § 1746. I have not been convicted of a felony or been convicted of a crime of dishonesty. I have personal knowledge of all of the contents of this declaration.

2. I am a foster parent who works with Catholic Social Services. I have fostered fourteen children over eighteen years as a foster parent, and I have adopted two of them. Some of the children I have cared for have had significant special needs and learning disabilities. For

example, more than one of the children I have cared for was diagnosed with autism.

[Appx. 1003]

3. Catholic Social Services has provided me with significant support and resources to help me care for the needs of my foster children, and they also provided me with additional help as I worked to meet the needs of my autistic foster children. I have been able to call social workers at any hour and receive an answer from someone I knew and trusted, and I have always relied heavily on the social workers I interact with. These social workers have always demonstrated the highest level of care and have shown great love and attention to my children. Although I am not Catholic, I am a religious person and I appreciate the spiritual environment at Catholic Social Services and the way that seems to motivate a dedication to children. My own religious beliefs inspire me to want to care for children in need.

4. I have never worked with another foster agency and I am not certified to receive foster placements through any other agency. I want to continue working with the agency and social workers whom I trust.

5. I received a new foster son, Doe Foster Child #1, in October of 2016. Doe Foster Child #1 is a young child, but he is the age that other children have normally already started speaking in full sentences. However, when Doe Foster Child #1 came to my home he never spoke at all in the beginning. He also had great difficulty eating, and he was very fearful of other normal activities like taking a bath. Because he did not speak, it was also difficult to understand in the beginning what Doe Foster Child #1 needed. After consultation

with my Catholic Social Service social workers, and with medical attention, Doe Foster Child #1 was diagnosed with autism. Because of Doe Foster Child #1's age, we do not know yet Doe Foster Child #1's level on the [Appx. 1004] autism spectrum. We began to take Doe Foster Child #1 to receive therapy for autism, and we also had more information about how to meet Doe Foster Child #1's needs.

6. In the months after coming to our family, Doe Foster Child #1 began to show remarkable progress. He began to say some words, like "hi" and "bye," he would play happily in the bath, and he showed great affection and attachment to our family members. Doe Foster Child #1 is also the same age as my grandson who lives with me. The two boys shared a room and developed a deep bond. I would often find them playing together in the backyard.

7. On one occasion, one of my adult children took Doe Foster Child #1 to the dentist for an appointment. Doe Foster Child #1 was so fearful and upset when he thought he would be taken from our family. But when he came back after the appointment he bolted out of the car and into the house and held me tight as he happily and repeatedly said, "hi, hi." I assured him that this was his home, that he did not need to worry, that I loved him, and everything was ok.

8. When I have adopted foster children in the past, one of my adult children co-signed on the adoption. That way if anything ever happened to me, I had peace of mind knowing that my adopted child would still be taken care of.

9. Within the last few months, Doe Foster Child #1's social worker asked if I wanted to adopt Doe Foster

Child #1. He said that no other families were interested in adopting. I expressed interest in adopting, but I explained that I needed to consult with my adult children and figure out who would co-sign on Doe Foster [Appx. 1005] Child #1's adoption. Because of different events going on in the lives of my adult children, I knew that this would take some time.

10. Just a few weeks ago, Doe Foster Child #1 was removed from my home to be placed with another foster family who was immediately ready to adopt Doe Foster Child #1. I was heartbroken when this happened. I thought that I would have more time and be able to adopt Doe Foster Child #1 myself. When the social worker with the CUA in charge of Doe Foster Child #1 came to pick him up to take him away, I kissed him goodbye and told him how much I loved him. But every time the social worker tried to lead Doe Foster Child #1 out of our home, he would wriggle free and come running back to hold me. Doe Foster Child #1 finally had to be carried crying from our home. I watched from the window in my house as my adult son helped carry Doe Foster Child #1 out. While doing so, my son kept assuring Doe Foster Child #1 that it would be ok, that he would like his new family, and that we would always love him.

11. Very recently, the social worker with the CUA in charge of Doe Foster Child #1 contacted me and let me know that an emergency situation had arisen with the foster family Doe Foster Child #1 was placed with, and all the children in that home were being immediately removed. He did not give me details, but he asked if I would be willing to take Doe Foster Child #1 back. My

immediate response was, "bring my son home." The social worker said he needed to check with DHS and would get back to me.

[Appx. 1006]

12. The social worker then followed up the same day and informed me that DHS denied the request to place Doe Foster Child #1 with me because I work with Catholic Social Services. DHS apparently told the social worker that "Catholic Social Services is going through a case right now and DHS is not approving him to come back here." I was devastated when I heard this news. The social worker seemed upset as well. The social worker said that the only option they had for Doe Foster Child #1 was a temporary respite home, but he would be moved from that home after a few days while they searched for another home.

13. I repeatedly expressed my desire to Doe Foster Child #1's social worker that he bring Doe Foster Child #1 back to my home. I also communicated this to my social workers at Catholic Social Services. I also spoke with my adult son, who told me he was prepared to co-sign on Doe Foster Child #1's adoption if we could get him back. I communicated the fact that I was immediately prepared to adopt Doe Foster Child #1 to my social workers and Doe Foster Child #1's social worker, but the social workers still did not bring Doe Foster Child #1 back home. My grandson frequently asks when Doe Foster Child #1 will come back home.

14. Recently, the social worker informed me that Doe Foster Child #1 was having difficulty associated with normal bodily functions. The social worker asked if I had any advice to help Doe Foster Child #1. It sounded to me as though Doe Foster Child #1 was regressing,

and that some of these problems were related to Doe Foster Child #1's earlier issues with eating properly. I gave the social worker detailed instructions about how to prepare Doe Foster Child #1's food, what he liked to eat, [Appx. 1007] and how to help him with other bodily functions. But I also expressed again that the best thing for Doe Foster Child #1 would be to come back to our family. When Doe Foster Child #1 lived in our home, he was thriving and he felt safe and loved.

15. I have learned that Doe Foster Child #1 has not been receiving his regular and needed therapy for his autism, because Doe Foster Child #1's school called me to ask why Doe Foster Child #1 had not been attending his special classes and receiving therapy. The school wondered if Doe Foster Child #1 was sick since he had not been attending. I am worried about his physical and emotional wellbeing right now. I also understand that Doe Foster Child #1 has since been moved to another temporary respite home, and that there is no other permanent home available for Doe Foster Child #1 right now. My understanding is that under normal circumstances, Doe Foster Child #1 would have been placed with me so that I could give him the love and care he needs, and we could proceed with the adoption process. DHS has not provided me with any reason—other than its dispute with Catholic Social Services—for refusing to let me care for Doe Foster Child #1, I say prayers for his return throughout the day and look at Doe Foster Child #1's pictures every night. I frequently call his social worker to see if I can do anything to get Doe Foster Child #1 back. I cannot understand why Doe Foster Child #1 is being kept from me.

[Appx. 1008]

JA 503

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 6, 2018.

/s/Doe Foster Mother #1

Doe Foster Mother #1

JA 504

[Appx. 1018]

City of Philadelphia
Department of Human Services

Contract Number 16-20030-04
Original Contract Number 16-20030
290 - Placement Services

[PSC (SAA) 290 rev]
[Rev. Date: June2017]

CONFORMED

STANDARD AMENDMENT AGREEMENT

This STANDARD AMENDMENT AGREEMENT (“Amendment Agreement”) is made as of September 20, 2017 and effective July 1, 2017 (the “Effective Date”) by and between the City of Philadelphia (“the City”), by and through its DEPARTMENT OF HUMAN SERVICES (“Department”), and CATHOLIC SOCIAL SERVICES (“Provider”), a nonprofit corporation, with its principal place of business at 222 NORTH 17th STREET, PHILADELPHIA, PENNSYLVANIA 19103.

BACKGROUND

The City and Provider entered into a certain Contract, Contract Number 16-200301 dated November 30, 2015, which includes the City of Philadelphia Professional Services Contract General Provisions for the Department of Human Services (the “General Provisions”), the Provider Agreement, Cross Agency Response for Effective Services (“CARES”) Limited License Agreement (when applicable), and any and all attachments, exhibits and documents thereto (collectively, the “Base Contract”), wherein Provider agreed

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to render various Services to the City in accordance therewith; and

The City and Provider entered into an amendment to the Base Contract, Contract Number 16-20030-01, for the period July 1, 2015 to June 30, 2016; and

The City and Provider entered into an amendment to the Base Contract, Contract Number 16-20030-02, for the period July 1, 2015 to June 30, 2016; and

The City and Provider entered into an amendment to the Base Contract, Contract Number 16-20030-03, for the period July 1, 2016 to June 30, 2017; and

[Appx. 1019]

Hereinafter, the Base Contract and all prior amendments, if any, shall be referred to as the “Base Contract as Amended;” and

It is necessary to INCREASE the amount of compensation payable under the Base Contract as Amended by Nineteen Million, Four Hundred Thirty Thousand, Nine Hundred Ninety-One Dollars and Twenty-Three Cents (\$19,430,991.23), in order for Provider to continue to render the Services and provide the Materials specified in the Base Contract as Amended and this Amendment Agreement; and

The City and Provider have agreed to amend certain terms and conditions of the Base Contract as Amended, as set forth herein; and

In consideration of the mutual obligations set forth herein, and each intending to be legally bound, the City and Provider covenant and agree as of the Effective Date as follows:

ARTICLE I: AMENDMENTS TO THE CONTRACT

With the exception of the following amendments set forth in this Amendment Agreement, and subject to councilmanic appropriation of funds, the terms and conditions of the Provider Agreement “as amended” shall be and remain in full force and effect:

1.1 Incorporation of Background. The Background is incorporated by reference herein.

1.2 Definitions. Capitalized terms not otherwise defined herein shall have the meanings set forth in the Base Contract as Amended.

1.3 Term. The term of the Base Contract as Amended is extended for an Additional Term commencing JULY 1, 2017 and expiring JUNE 30, 2018.

1.4 Compensation. As compensation for the Services and Materials being provided under this Contract, the City covenants and agrees to set the amount of compensation payable to Provider for the current contract term at Nineteen Million, Four Hundred Thirty Thousand, Nine [Appx. 1020] Hundred Ninety-One Dollars and Twenty-Three Cents (\$19,430,991.23). Notwithstanding anything in the Contract to the contrary, in no event shall the amount certified by the Finance Department for Services and Materials under the Contract, including this Amendment Agreement, exceed Forty-Three Million, One Hundred Seventy-Eight Thousand, Seven Dollars and Twenty-Three Cents (\$43,178,007.23).

1.5 Services and Materials. Section 2.1 of the Provider Agreement, is amended in accordance with the attach-

ments listed below, which are attached to this Amendment Agreement and incorporated herein by reference.

(a) S.A.A.-1: Service, Rate, Maximum Days/Units

(b) S.A.A.-2: Scope of Services

Section 2.1 of the Provider Agreement, is amended in accordance with the Exhibits listed below, which are available on the Provider Extranet and incorporated herein by reference.

(c) S.A.A.-3: Community Umbrella Agency Practice Guidelines

(d) S.A.A.-4: Day Treatment Standards

(e) S.A.A.-5: Foster Family Care Standards

(f) S.A.A.-6: Group Home Standards

(g) S.A.A.-7: Institutional Care Standards

(h) S.A.A.-8: Re-Integration Standards

(i) S.A.A.-9: Specialized Behavioral Health Standards

(j) S.A.A.-10: Maternity Mother/Baby Standards

(k) S.A.A.-11: Medical Standards

(l) S.A.A.-12: Supervised Independent Living Standards

(m) S.A.A.-13: Streamlined Standards

(n) S.A.A.-14: CARES Limited License Agreement

(o) S.A.A.-15: Balanced and Restorative Justice Standards

[Appx. 1021]

1.6 Additional Provisions. Other provisions, including, without limitation, OEO participation commitments and any exceptions or modifications to the General Provisions of the Contract, are set forth in the following clause(s) and incorporated herein by reference:

(a) DHS is increasing its administrative efficiency through the use of electronic record keeping and data sharing technology. As these updates occur, the Department will continue to notify providers of these technology requirement changes through written notices. Failure to comply with any DHS technology requirements (including, but not limited to the use of P-Web and P-DRIVE) may result in a financial penalty and/or a finding that an Event of Default has occurred.

1.7 Acknowledgment of General Provisions. Provider specifically acknowledges that Provider has read and understands the terms and conditions contained in the General Provisions and acknowledges that by executing this Amendment Agreement, Provider shall be legally bound by all of the terms of this Contract, including, but not limited to, those set forth in the General Provisions. The revised General Provisions are attached to this document and are explicitly accepted by the Provider.

1.8 Acknowledgment of Standards. Provider specifically acknowledges that Provider has read and understands the terms and conditions contained in the applicable above referenced Performance and Service Standards ("Standards") formerly known as Service Description and Contract Requirements, Service Description, Performance Standards, Service Standards; Procedural Manuals and/or Guides which are available on the Provider Extranet at (http://dhs.phila.gov/extranet/extrahome_pub.nsf/

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Content/ServiceStandards) which are incorporated to this Amendment Agreement by reference. Provider acknowledges that by executing this Amendment Agreement, Provider shall be legally bound by all of the terms of this Contract, including, but not limited to, those set forth in the Standards currently published on the Provider Extranet and any and all subsequent amendments.

(SIGNATURE PAGE TO FOLLOW)

[Appx. 1022]

IN WITNESS WHEREOF, the Parties hereto, intending to be legally bound by all of the Contract Documents, have caused the Contract to be executed by their respective duly authorized officers as of the date in the heading of this Standard Amendment Agreement.

APPROVED AS TO
FORM
SOZI PEDRO
TULANTE,
CITY SOLICITOR

Per: /s/ Crystal T.
Espanol
7777BBC1F E44C9
Name: Crystal T.
Espanol
Title: Assistant City
Solicitor

THE CITY OF PHILA-
DELPHIA

Through: The Depart-
ment of Human Services

By: /s/ Cynthia Figueroa
A9C82E46A1939B
Name: Cynthia Figueroa
Title: Commissioner

CATHOLIC SOCIAL
SERVICES

By: /s/ James Amato
6C6D46268B844FD
Name: James Amato
Title: Vice President

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By: /s/ Franz Fruehwald
D426312A44334D4
Name: Franz Fruehwald
Title: Chief Financial
Officer Assistant
Treasurer

[Appx. 1023]

City of Philadelphia Contract Routing Slip

External Negotiation/Encumbrance & Budget Verification (Conformance Manager)

1. Review contract as signed by vendor and consult with supervisor.

x Click the check box to attach additional documentation, if required.

2. Confirm Encumbrance; supervisor routes in ACIS to Budget Verification.

3. Confirm Budget Verification completed in ACIS.

x Send to Law.

Approve as to Form (Attorney)

Click the check box to attach additional documentation, if required.

x Route in ACIS to Finance

Finance Certification

x Attach the Endorsement Sheet then route in ACIS to Finance Review.

Finance Review

x Review then route in ACIS to Department Signs Contract.

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Departmental Review (Conformance Manager)

x Route in ACIS to Conformance.

Conformance Review (Conformance Clerk)

x Conform Contract.

* * *

[Appx. 1031]

CITY OF PHILADELPHIA
DEPARTMENT OF HUMAN SERVICES

“We believe that a community-neighborhood approach with clearly defined roles between county and provider staff will positively impact safety, permanency, and well-being.”

What are we working together to achieve?

- More children and youth maintained safely in their own homes and communities.
- More children and youth achieving timely reunification or other permanence.
- A reduction in the use of congregate care.
- Improved child, youth, and family functioning.

S.A.A.-2

Scope of Service:

For General, Kinship, and Teen Parent/Baby
Resource Home Care Providers

July 2017

[Appx. 1032]

Statement of Purpose:

This Scope of Service is made and entered into between Catholic Social Services (the Provider) and the

Philadelphia Department of Human Services (DHS), and sets forth the services for general, kinship, and teen parent/baby resource home care.

Throughout this document, the term “Resource Parent” refers to both kinship parents and non-relative foster parents.

When a child or youth is placed through a Community Umbrella Agency, CUA, the Provider offers ongoing support and coaching to Resource Parents through Provider Staff.¹ The Provider is required to work collaboratively with the CUA. Contracts between DHS and all CUAs set forth services for resource home care with case management responsibilities remaining with the CUA. When the child or youth is receiving case management services directly from DHS, the Provider must also deliver case management services to the Resource Parent, parent or other reunification resource, and the child or youth and collaborate with the assigned DHS Social Worker (DHS cases).

Department Overview:

The mission of the Department of Human Services (DHS) is to provide and promote safety, permanency, and well-being for children and youth at risk of abuse, neglect and delinquency. DHS is organized in the following Divisions: Administration and Management, Child Welfare Operations Division, Community Based Prevention Services, Finance, Juvenile Justice Services, and Performance Management and Technology. DHS continues to implement the Improving Outcomes for Children (IOC) model. The vision for IOC is to:

¹ Provider Staff is responsible for recruiting and certifying foster and kinship homes.

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- Maintain children and youth safely in their own homes and community.
- Timely reunification or other permanency.
- Reduce use of congregate care.
- Improve children, youth, and family functioning.

As it relates to Resource Home care, the IOC framework provides a single Case Manager to work with assigned families. The case management service is provided by Community Umbrella Agencies who are embedded in the communities they serve.

For children and youth for whom the Provider continues to provide case management services, the case management staff interact on a regular basis with schools, medical, dental, and behavioral health providers; various community resources; and all service providers indicated on an Individual Service Plan (ISP) or Family Service Plan (FSP). For youth funded and placed by a CUA, the Provider interacts with external resources as needed, collaborates and communicates with the CUA, and continues to support the resource caregivers.

Provider Organizational Overview:

Mission Statement: Catholic Social Services of the Archdiocese of Philadelphia continues the work of Jesus by affirming, assisting and advocating for individuals, families, and communities.

Vision and Values Statement: Catholic Social Services Vision:

[Appx. 1033]

Catholic Social Services exists to transform lives and bring about a just and compassionate society where every individual is valued, families are healthy and

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strong, and communities are united in their commitment to the good of all. We envision a world touched by God's mercy; where poverty and need are alleviated, and all people share justly in the blessings of creation.

Catholic Social Services Values:

Compassion: genuine care and heartfelt concern for those we serve

Dignity: respect for each person created in God's image, regardless of color, capacity, or age

Charity: generosity toward all people in response to God's goodness to us

Justice: defense of and advocacy for the rights of the poor, vulnerable, and disadvantaged

Excellence: professional competence and responsible stewardship of time and resources

Problems and Issues to be Addressed:

Ideally, children and youth should be with their own families. When this is not possible, resource homes ensure that children and youth can be maintained safely in their own community. All resource home procedures and resources must be directed to supporting reunification or other permanency options, and the overall positive functioning of children, youth, and their families. Resource Parents must function as mentors to legal families to support these goals. An increased focus on recruiting resource caregivers who can manage adolescents is required in order to reduce the use of congregate care. There must also be a continued focus on the need for resource homes for children who are 0-6 years of age. The specific Issue to be addressed by the

JA 515

Provider is to recruit, screen, train, and provide certified resource care homes for dependent children or youth, some of whom will need support to address behavioral health, medical, and educational needs. Homes for teens including pregnant teens and teen parents (teen parent/baby placements) are a priority in order to reduce the use of congregate care.

Program Objectives:

The program objectives are to provide trauma informed and culturally competent placement resources via trained resource caregivers. Resource caregivers also serve as a mentor and support to the legal family. Anticipated outcomes for resource home care services are:

- To provide children with protection, care, and a nurturing environment with certified Resource Parents which can include extended family members while a permanent plan can be established within a set time frame.
- To focus on identifying strengths, developing protective capacities and building resiliency and adoptive coping skills.
- To facilitate participation in service delivery and/or treatment provided by external resources so that healthy partnerships can be created and goals on the service plans can be archived.
- To provide opportunities to strengthen and develop youth assets.
- To promote social competency skills.
- To ensure that youth is available for assigned court related appearances.

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- To collaborate with the CUA case manager, DHS and/or other team members in planning the transition into the next level of care which will ideally be family reunification.
- To access medical, dental and behavioral health services as needed.
- To provide support, including access to resources, to achieve academic and vocational goals.

Program Overview:

Resource Home (Foster Care and Kinship Care): The primary goal of Resource Home Care is to support the safety, stability, permanency, and well-being needs of the child or youth and legal family. Resource [Appx. 1034] Parents provide general care and supervision for children and youth placed in their home. For CUA cases, the Provider focus is on supporting the Resource Parent while case management is provided by the CUA. For cases in which DHS also provides case management, the Provider delivers case management services and ongoing support to the parents and reunification resource. Whether providing services for a DHS case or a CUA case, the safety, stability, permanency, and well-being needs of the child or youth and legal family support includes developing a mentoring relationship with the legal family specifically in ways that foster positive family relationships and reunification. Resource caregivers are screened, trained, and certified by the Provider. In kinship care, the caregiver may also be an extended family member, friend, previous Resource Parent, or other professional who in the past has established a relationship with the child.

General level resource care, including kinship: Children and youth identified for this service category mostly demonstrate a moderate degree of behavioral,

social, emotional, intellectual, and educational needs or issues. Service needs are compounded by normal placement adjustment issues. Routine care and supervision of the children and youth is manageable with some ongoing training and support from the Provider. Siblings are placed together whenever possible.

In addition:

- Youth may require access to special education, or developmental or vocational services. This will be specified in either the FSP or the SCP depending on who is primarily responsible for case management functions (DHS or CUA).
- The child's or youth's biological family requires support and to maintain their emotional bond with their children and to address identified safety issues and permanency goals.
- Children and youth may require therapy or other therapeutic services provided by external resources as specified in either the FSP or the SCP, depending on who is primarily responsible for case management functions (either DHS or CUA).
- Children and youth require routine health care or may have minor health or medical needs for which follow up care is to be provided.
- The Provider agency staff or Resource Parents, or both participate in teaming meetings and development of SCP (CUA cases).

Teen Parent/Baby Foster or Kinship Placement Services: Teenage parents and their child who are identified for this service category demonstrate difficulty in behavioral, social, emotional, or intellectual development. The adolescent is not prepared to assume their

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current parental role. The child's legal family is typically not equipped to adequately address the adolescent needs.

This service includes:

- General care of healthy infants or toddlers requiring routine care. The adolescent is physically healthy and requires routine care.
- Neither the teen nor the child requires specially trained Resource Parents.
- Parents or reunification resource, if different, requires support and to maintain their emotional bond with the teen and the teen's child and to address identified safety issues and permanency goals.

Services:

Referrals:

The DHS Central Referral Unit and the DHS On-going Worker, the DHS Investigating Worker (if a newly accepted case), or CUA Case Manager (CUA CM) must share with the Provider pertinent information as required by the five county standards which include: medical consent form, Medical and Immunization Records, Universal referral, service plan, placement history, court disposition, Court Orders, educational records, birth certificate, and the name of the child's or youth's attorney.

[Appx. 1035]

Case Management:

Case management will be provided either by the Provider (for DHS placements) or one of the CUA's (for CUA placements). The CUA Case Manager will visit the resource home at least once per month. For DHS

placements, the Provider Case Manager will visit the home as required pursuant to DHS performance standards.

For CUA placements, the Provider offers support to the resource caregivers via a Provider Staff as defined earlier in this document. They may visit the resource caregiver as often as needed but at a minimum, once per quarter. They provide other supportive services to resource caregivers and act as a possible liaison to CUAs as needed.

For DHS placements, there is a Provider Case Manager assigned to the case.

Examples of relevant topics to be discussed with the DHS Worker or CUA Case Manager include:

- Child's or youth's adjustment to the home.
- Behavior management strategies.
- Child's or youth's educational, medical, and behavioral health progress.
- Resource Parent's ability to meet needs and assistance needed.
- Relationship with parents and reunification resource, and quality of visits (if applicable).

Examples of relevant topics to be discussed with Case Manager (CUA or DHS) include:

- Placement stability.
- Relationship issues with the other children in the resource home.
- Child's educational, medical, and behavioral health needs and proposed interventions.
- Behavior management strategies utilized by the Resource Parents.

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- Relationship between Resource Parent and parents and reunification resource, if different and issues related to the resource caregiver as a mentor.
- Clarification of the role of the CUA Case Manager.
- Youth's interaction in the community and use of community resources.
- Progress or lack of progression toward attainment of service plan goals.
- Permanency planning.
- Results of Like Skills Assessment and related planning to help youth develop life skills.
- Provision of routine medical and dental care.
- Supplemental services or needs.

All resource caregivers and the Provider must ensure that:

- Three nourishing meals and additional snacks daily are provided and any special dietary needs or religious food restrictions are accommodated. Food is never to be withheld as a means of discipline.
- Provide children and youth with new, age appropriate, and seasonal clothing. All clothing should be purchased new with the child or youth, when appropriate, having choice in the selection. Consignment shops may be used as long as all household members utilize this option. Foster children and youth are to be treated no differently. All clothing purchased is the property of the child or youth. Purchase of necessary clothing is never to be withheld as a means of discipline by Resource Parents.

All resource homes must and the Provider must ensure that:

JA 521

- The home is free of infestation, structural damage that poses an immediate threat to safety, lead (unless being treated), non-functioning utilities, fire or other health or safety hazards.
- There must be a working land line phone within the residence.
- The home meets all of the requirements of an approved adoptive placement. At the same time, Resource Parents must be willing to work with and mentor the reunification resource to ensure [Appx. 1036] that children and youth can reunify in a timely way. If reunification is not feasible, Resource Parents must be willing to consider being a permanency resource for children and youth placed in their care.

More specifically resource homes must meet the following criteria:

- All doors leading outside of the house are able to be locked or otherwise secured.
- There are cribs for infants and beds for each child and youth.
- There are working smoke detectors, fire extinguishers, and carbon monoxide detectors. Chemicals and drugs are stored properly away from children and youth.
- Firearms are locked and ammunition is stored separately in a locked container.
- Safe infant and toddler care, as applicable to the age of the children placed in the home including:
 - Safe bathing and the use of bath water thermometers.
 - Safe sleeping.

JA 522

- Car seats appropriate to the age and weight of the children if the resource family owns or will transport children in a vehicle.
- Child proofing of the home and environment including stair gates, radiator covers, fireplace guards and other necessary safety devices including outlet covers.

The home must have and the Provider must ensure that there are the following resources:

- Mobile Crisis number and contacting procedures.
- Suicide Prevention Hotline number.
- Poison Control number.
- Smoke detectors and fire extinguishers.
- Police Department number and contacting procedures.
- Drug and Alcohol Intervention numbers and contacting procedures.
- No smoking signs.

The Provider must complete an inspection of the above for all Resource Parents on a quarterly basis. The Provider is responsible for offering training and related support to Resource Parents that includes the impact that trauma has on youth behaviors and functioning, ways to motivate positive behaviors of children and youth, and strategies on ways to manage child and youth behaviors and encourage positive behaviors in a manner that is not vindictive, abusive, or degrading for children and youth placed by CUA's, this support is provided to resource caregivers by Provider Staff. The Provider recognizes that the interaction between a caring Resource Parent and the child or youth is an opportunity to help them recognize their inherent assets and strengths, and develop acceptable behaviors. Such support assists children and youth in developing

skills that promote their successful integration into the community.

Provider and Resource Parents are prohibited by both PA Regulation and DHS policy from using corporal punishment, threats or derogatory remarks, the depriving of meals, and the depriving of visits with parents or others, verbal abuse or any punitive, unusual, or unnecessary consequences for behaviors.

In deciding on an effective means of intervening during conflict, Resource Parents assess and ensure the following:

- The child's or youth's ability to problem solve and social or emotional maturity.
- There is open communication with the child or youth to understand reactions and feelings.
- Set clear limits and guidelines for positive behavior and ensure they have been communicated effectively.
- That expectations for improved behaviors are defined or explained so that youth can develop new skills and receive Incentives for pro social or positive behaviors.

[Appx. 1037]

If the Provider Staff (CUA cases) or Provider Case Manager (DHS cases) suspect that the disciplinary actions occurring in the foster home violate the Pennsylvania Child Protective Services Law, it is the mandated obligation of the Provider Staff to immediately report this incident to the Pennsylvania Child Abuse Hotline and to DHS. In some cases, the police and the District Attorney's Office may also be involved in investigating any alleged criminal actions. The State investigates these reports and determines if the incident

is indicated or unfounded. State Foster Family Care Regulations mandate that the agency remove children and youth in situations where their safety is in question. Children and youth may require removal from the resource home while an investigation is taking place unless an acceptable plan of supervision can be put in place to ensure safety. This decision is made in conjunction with the Southeast Regional Office investigating the report, the CUA CM, if a CUA case and either the DHS Worker or the DHS Investigator assigned.

If the decision is made to allow the child or youth to remain in the home during or following an investigation, a written plan of supervision must be developed by the appropriate case management team. If the Resource Parent is placed on probation for this or any other reasons, no additional placements will be made in the Resource Parent's home during a probationary period or whenever the investigation is complete.

All placement moves must be legally approved by the Court or by agreement of all parties except in the case of emergencies. It is the case management's team responsibility to obtain Court authorization to move children or youth through the City of Philadelphia Law Department.

Visitation:

The frequency and duration of visits both with reunification resources, concurrent plan resources, and siblings must be as liberal as possible from the time of placement. Whenever possible, visitation should be weekly but parental and sibling visitation cannot be less than twice monthly unless otherwise prohibited or

specified by Court. The visitation plan must be discussed and agreed upon. It must be accommodating to the schedules of the reunification resource, children, and youth and include weekends or evenings or both where needed.

For DHS placements, Provider Case Managers are responsible for visitation. For CUA placements, CUA's are responsible for visitation based on the SCP. Either Provider or CUA must ensure that children and youth have adequate resources and Items provided by the Resource Parent to have successful visits. This may include a provision of transportation for the visitation, food, diapers, etc. to meet the child's needs.

Whenever children or youth are placed or re-placed, a visit must occur between the child or youth and the parent from whom they are removed as soon as possible and no later than two business days.

An introductory meeting between the Resource Parent or the Provider Staff and the parents must also occur within five business days of the placement or replacement. Resource Parents should communicate with the parents or other reunification resources regularly and at least monthly about the children or youth outside of regularly scheduled visits. Siblings are to be placed together whenever possible. When siblings are not able to be placed together, visits are to occur between the siblings bi-weekly, at a minimum, unless otherwise directed by Court Order.

Whenever possible visits must be:

- In the home of the reunification resource unless there is a Court Order, clear documentation in the visitation plan, service plan or in a Structured Progress Note as to why this cannot occur. If other

than the home of the reunification resource, visits must be in a family-like and family friendly visitation space that allows for normal parent-child interaction, ideally in the home of a relative or Resource Parent. If such home is not available, visits should occur at a community [Appx. 1038] location familiar to the child, youth, or parent (such as a recreation center, playground, or church). The option of last resort is a family-friendly area of the Provider's as the case manager or subcontractor for a CUA. In order to move from the best option in the hierarchy to a lower option, the higher option must be ruled out and the reasons for ruling it out must be clearly documented. When visits are not in the home, a progression plan for visits in the home must be considered at the service plan meetings and court hearings.

- Supervised only if necessary, based on clear threats to the safety of children and youth or Court Order. Persons supervising visits must ensure safety, remain in line of sight and earshot, and provide unobtrusive constructive feedback and coaching on parenting.
- Accommodating to the schedules of the reunification resource, children, and youth.

Transportation: Will be coordinated between all parties. Visits between parents and children and youth are critical to support and enhance the process of reaching the goals of reunification.

Teaming: For DHS cases, the Provider's Case Manager participates in DHS Family Service Plan (FSP) meetings and develops the Individual Service Plan (ISP). For CUA cases, Resource Parents or an agency

representative, such as Provider Staff as defined earlier, or both will participate in teaming as needed. Information critical for decision making and planning will be shared with the CUA Case Manager prior to all teaming meetings.

Court:

For CUA, Provider Staff may be called upon to testify to safety or any other matters as providers currently are called upon. The Law Department will notify the CUA CM, and, if necessary, subpoena the provider. For DHS cases, the Provider Case Manager appears in court and provides safety testimony as well as family progress Information to the Court.

Placement Disruption:

Providers and Resource Parents must give 30 days notice to DHS CRU regarding the need to remove a child or youth.

Whenever there appears or it is reported by either the child or youth or the Resource Parent that the placement is in danger of disruption or the Resource Parent gives 30 days notice, the Provider must notify CRU immediately. An email must be sent to DHS_CRU@phila.gov with the subject line to read: "30 Day Notice."

If a CUA case, the CUA CM is to be notified and a Placement Stability Conference must be requested. The Provider and Resource Parent must be invited and must participate in this conference. The focus of the conference is to determine whether there are additional supports that could be put into place to avoid the disruption.

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If it is a DHS case, the Provider and DHS Worker and Supervisors must conference the case together to determine whether there are additional supports that could be put into place to avoid the disruption.

Reporting:

High Profile Cases:

In an effort to keep abreast of high profile cases, Child Welfare Operations Leadership is requiring that all Directors of all agencies report to the appropriate Operations Director (DHS Front End, DHS Permanency and Well-being Services, or DHS CUA) via telephone and email any high profile case that come to their attention. These high profile cases must be conferenced with the assigned chain of command, including the CUA Director, and then the Director determines if a CWO Management team meeting is needed. This is a collaborative effort between CWO Management and Support Centers to extend support and guidance to DHS Social Work Services and CUA staff in their decision-making.

[Appx. 1039]

Criteria:

- Death of a child or youth involved with DHS or In a DHS Involved household.
- Any missing child 12 years of age or under and active with DHS (committed to DHS or receiving in-home services).
- Any child or youth sexually abused while in care.
- Media report Involving DHS cases or families.
- Any child or youth committed to DHS and hospitalized subsequent to injury (whether accidentally or intentionally injured).

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- The arrest of a kin, Resource Parent, or any household member of a resource home, including any child or youth committed to the Department.
- Notification from any placement agency that a child or youth has been moved due to a report of abuse or neglect and the kin, Resource Parent, or household member is the alleged perpetrator.
- Any other type of incident as may be subsequently designated by the Department as High Profile.

Notification Procedure:

- The Provider must immediately notify the CUA Chain of Command until an in-person contact is made or through the CUA after hours mechanism.
- The CUA staff who is informed must notify the chain of command {up to Director level}.
- Directors must immediately notify via telephone the Operations Director who has responsibility for their service and subsequently send an email notification within 24 hours to
 - Operations Director for Front End Services;
 - Operations Director for Permanency and Well-being Services;
 - Operations Director for Improving Outcomes for Children; and
 - Chief of Staff for the Deputy Commissioner.
- The CWO Deputy Commissioner will be contacted as needed. The CWO Deputy Commissioner notifies the Commissioner and other Executive Staff members as appropriate and always if the media is involved.
 - After hours notifications must be given to the Hotline Staff and Hotline Staff must immediately alert the Operations Director.

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The above does not relieve any agency required to report incidents through HCSIS.

Information Sharing:

Routine information that emerges during or between visits such as a change in school functioning, relevant communication with a family member, emerging wellness concerns, or new legal family information that potentially changes goals or objectives identified In the FSP or SCP, whichever is applicable, must be reported to the DHS Worker or Supervisor (DHS case), or the CUA Case Manager or Supervisor (CUA case), during the same business week that the information becomes known.

Media Inquiries:

In the event that the Provider receives a media inquiry, the Provider must notify the CUA Director and DHS Communications Director. Staff are not permitted to comment or even acknowledge a case, but should direct such inquiries to the Department's Communications Director.

Megan's Law Requirements:

When a sexually violent predator from the National Megan's Law database lives or moves within 1000 feet of any of a Provider's resource home, the Provider receives an electronic notification from the Department. Upon receipt of this notification, the Provider must do the following:

[Appx. 1040]

- Make a telephone call (within 24 hours of the electronic notification) to the resource home notifying the Resource Parent that a sexually violent predator lives within 1000 feet of the home.

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- Visit the resource home within 48 hours and:
 - Review the Megan's Law Safety Plan with the Resource Parent and any youth 14 and older.
 - Have all parties sign the Megan's Law Notification and Safety Plan.
 - Provide a picture of the predator.
- Mail a copy of the signed Megan's Law Notification/Safety Plan or Receipt of Megan's Law Notification and Safety Plan to the DHS Ombudsman in care of the DHS Commissioner's Office: 1515 Arch Street, 8th Floor, Philadelphia, PA 19102
- Email the signed Megan's Law Notification and Safety Plan to the CUA Director of Quality Assurance for any child or youth residing in the facility.

Foster Parent Registry

Providers promptly provide information to the PA Foster Parent Registry regarding Resource Parent Caregiver status and changes in status between annual certification and re-certification time frames.

Providers must ensure current and updated copies of each Resource Caregiver's Certificate of Compliance are provided to the Department and the CUA. Providers must upload Resource Home certification information and documentation to the Provider Licensure module of DHSCConnect whenever Resource Caregivers are certified and whenever their certification status changes.

Mentoring:

The Resource Parent must play a role in facilitating reunification as described in the service plans. Primarily this will be based on the Resource Parents' capabilities to serve as a mentor to the legal family and assist

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legal family in strengthening parental capabilities, assisting with planned activities, modeling and fostering positive parent-child interaction.

See also, the DHS Performance Standards, DHS policy, and as appropriate, the IOC Practice and Fiscal Guidelines for relevant policy.

Hours and location of work:

The Provider must have 24 hours a day, 7 days a week accessibility. For CUA cases, resource homes are located ideally in the CUA region.

Emergency contact procedures are as follows:

Departmental supervisory staff will provide emergency coverage on a rotational basis to ensure access to agency assistance and services outside of regular business hours for referrals from the Philadelphia Department of Human Services and Community Umbrella Agencies for the placement of children in appropriate foster homes and to respond to emergencies involving the children and families served by the program. The on call supervisor can be reached at 215-808-8656.

The administrative office for the Provider is located at:

Catholic Human Services
222 N. 17th Street
3rd floor
Philadelphia, PA 19103

[Appx. 1041]

Referrals are typically accepted during normal work hours although emergency placements are considered on a case by case basis.

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Staffing Structure:

Attach Agency Organizational Chart and Program Organizational Chart.

Technology requirements:

Internet access to utilize DHSCConnect.

Funding restrictions:

(Insert N/A or describe restrictions)

The program is overseen by:

Robert Montoro, MSW, Administrator

[Appx. 1042]

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[Appx. 1043]

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[Appx. 1044]

THE CITY OF PHILADELPHIA
PROFESSIONAL SERVICES CONTRACT

JA 534
GENERAL PROVISIONS
FOR
DEPARTMENT OF HUMAN SERVICES
CONTRACTS

Revision Date; June 2017

[Appx. 1045]

The City of Philadelphia
Professional Services Contract
Department of Human Services
General Provisions

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GENERAL PROVISIONS

ARTICLE I: DEFINITIONS

1.1 ADA. “ADA” shall have the meaning set forth in Section 15.5 (Americans with Disabilities Act) below.

1.2 Additional Services and Materials. “Additional Services and Materials” shall have the meaning set forth in Section 3.3 (Additional Services and Materials; Change in Scope of Services) below.

1.3 Additional Term, Additional Terms. “Additional Term” and “Additional Terms” shall have the meanings set forth in Section 2.2 (Additional Terms) below.

1.4 Agency. “Agency” shall have the meaning set forth in Section 7.8 (Audits Pursuant to Section 6-400 of the Home Rule Charter) below.

1.5 Aggregate Actual Cost. “Aggregate Actual Cost” means the sum of all Total Actual Costs incurred by Provider in provision of the Services.

1.6 Appropriated Fiscal Year. “Appropriated Fiscal Year” shall have the meaning set forth in Section 6.4 (Crossing Fiscal Years) below.

1.7 Amendment. “Amendment” means (a) a written modification or change to any Contract Document signed by both Parties, and (b) a Modification Notice (see Section 6.9 Maximum Daily Rate, Days of Care or Units of Service (or combination thereof) below).

1.8 Applicable Law. “Applicable Law” means all applicable present and future federal, state or local laws, ordinances, executive orders, rules, regulations and all court orders, injunctions, decrees and other official interpretations thereof of any federal, state or local court, administrative agency or governmental body, including the City, the Commonwealth and the United States of America. Applicable Law includes, without limitation, the Philadelphia Home Rule Charter, the Philadelphia Code, the Pennsylvania Code, and the specific laws set forth in Article XV (Additional Covenants of Provider Relating to Certain Applicable Laws) below, each as amended from time to time.

1.9 Applicant. “Applicant” has the meaning as set forth in Subsection 17-1401(1) of The Philadelphia Code, as it may be amended from time to time. As of June 2012, that definition was “[a] Person who has filed an application to be awarded a Non-Competitively Bid Contract.”

1.10 CBES. “CBES” means Community Based Emergency Shelter, an emergency placement facility for delinquent or alleged delinquent youth.

[Appx. 1053]

1.11 Certification of Restrictions on Lobbying. “Certification of Restrictions on Lobbying,” if required in the Provider Agreement, means a certificate in the form attached to the Provider Agreement.

1.12 City. The “City” means The City of Philadelphia, a corporation and body politic existing under the laws of the Commonwealth of Pennsylvania, and includes its various executive and administrative departments, agencies, boards and commissions, including the Department, and its legislature, City Council (defined below). The City is a City of the First Class under the laws of the Commonwealth of Pennsylvania.

1.13 City Agency. “City Agency” has the meaning as set forth in Subsection 17-1401(5) of The Philadelphia Code, as it may be amended from time to time. As of June 2012, that definition was “[a]ny office, department, board, commission or other agency of the City of Philadelphia.”

1.14 City Council. “City Council” means the Council of The City of Philadelphia, as described in Article II of the Philadelphia Home Rule Charter, as it may be amended from time to time. City Council is the legislature of the City.

1.15 City-Related Agency. “City-Related Agency” has the meaning set forth in Subsection 17-1401 (9) of The Philadelphia Code, as it may be amended from time to time. As of June 2012, that definition was “[a]ll authorities and quasi-public corporations which either: receive appropriations from the City, have entered into continuing contractual or cooperative relationships with the City, or operate under legal authority granted to them by City ordinance.”

1.16 Code. The “Code” unless otherwise specified shall mean the Philadelphia Code, as it may be amended from time to time.

1.17 Commissioner. “Commissioner” means the Commissioner of the Department of Human Services of the City.

1.18 Commonwealth. “Commonwealth” means the Commonwealth of Pennsylvania.

1.19 Community Behavioral Health. “Community Behavioral Health” or “CBH” means Community Behavioral Health, a Pennsylvania nonprofit corporation incorporated for the purpose of helping to ensure that Philadelphians with mental health and substance abuse needs receive the most appropriate and effective treatment in the least restrictive and most cost effective setting.

1.20 Consultant. “Consultant” has the meaning as set forth in Subsection 17-1401 (6) of The Philadelphia Code, as it may be amended from time to time. As of June 2012, that definition was “[a]ny Person used by Provider to assist in obtaining a Non-Competitively Bid Contract through direct or indirect communication by such Person with any City Agency or any City officer or employee, if the communication is undertaken by such Person in exchange for, or with the understanding of receiving, payment from Provider or any other Person; provided, however, that “Consultant” shall not include a full-time employee of Provider.”

[Appx. 1054]

1.21 Contract. The “Contract” means the agreement of the Parties evidenced by the Contract Documents. References to this “Contract” shall mean this Contract as

the same may be in effect at the time such reference becomes operative.

1.22 Contract Cost Principles. The “Contract Cost Principles” means the “City of Philadelphia Contract Cost Principles and Guidelines,” as it may be amended from time to time, which specifies the Department’s guidelines for the qualitative and quantitative evaluation of contract services and materials, the determination of allowable costs, and the standards to determine the allowability of individual cost items. (Copies are available from the Department upon request.)

1.23 Contract Documents. The “Contract Documents” means these General Provisions, the Provider Agreement, the Limited License Agreement for the Cross Agency Response for Effective Services (CARES) (where applicable) and any and all other documents or exhibits incorporated by reference in either the General Provisions or the Provider Agreement, and any and all Amendments to any of these documents.

1.24 Contributions. “Contributions” shall have the meaning set forth in the Pennsylvania Election Code, 25 P.S. Section 3241.

1.25 Community Umbrella Agency. “Community Umbrella Agency” or “CUA” means an agency located in a defined geographic area that provides a continuum of services to children and youth at risk of abuse, neglect, or delinquency, as further described in the Scope of Services.

1.26 CRU. “CRU” means Central Referral Unit.

1.27 CWO. “CWO” means Child Welfare Operations of the Department. CWO was formerly known as the Children and Youth Division (“CYD”).

1.28 CYD Policy Manual. “CYD Policy Manual” (formerly the Operations Manual) means the document and its revisions which contains all the policies of the Department’s Child Welfare Operations.

129 Department. The “Department” or “DHS” means the Department of Human Services of the City.

1.30 Departmental and Administrative Policy Directives. “Departmental and Administrative Policy Directives” means those policy or procedural directives regarding programs and operations of the various divisions of the Department that are issued to Providers by the Commissioner or the Commissioner’s designee which may include, but is not limited to, Deputy Commissioners, Policy and Planning, and Provider Relations and Evaluations of Programs (PREP).

1.31 Discharge Plan. “Discharge Plan” means the document submitted by Provider to the Department upon discharge of a child from Provider’s agency. The Discharge Plan outlines the Services Provider has provided to the child and the child’s family, the effectiveness of those Services, and any additional services recommended by Provider.

[Appx. 1055]

1.32 Discharge Summary. “Discharge Summary” means a description of the Services provided to a child and the child’s family by Provider, and a statement of the reasons for the child’s discharge.

1.33 EPSDT. “EPSDT” means Early and Periodic Screening, Diagnosis and Treatment, a Pennsylvania Medical Assistance program initiative providing medical services to children aged 0-21 years.

1.34 Event of Default. “Event of Default” means those events defined and identified in Section 12.1 (Events of Default) of these General Provisions.

1.35 Event of Insolvency. “Event of Insolvency” means (a) the filing of a voluntary petition by Provider under the Federal Bankruptcy Code or any similar state or federal law; or (b) the filing of an involuntary petition against Provider under the Federal Bankruptcy Code or any similar state or federal law which remains undismissed for a period of forty-five (45) days; or (c) Provider’s making of an assignment for the benefit of creditors; or (d) the appointment of a receiver for Provider or for the property or assets of Provider, if such appointment is not vacated within forty-five (45) days thereafter; or (e) any other proceeding under any bankruptcy or insolvency law or liquidation law, voluntary or otherwise; or (f) Provider’s inability to pay its obligations as they mature; or (g) Provider’s insolvency as otherwise defined under any Applicable Law.

1.36 Exhaustion of Capacity. “Exhaustion of capacity” means the utilization of all of the Service capacity (whether beds in the case of out-of-home placement, or units or slots of Service in the case of non-placement), of Provider.

1.37 Family Court. “Family Court” means that judicial division of the Court of Common Pleas for Philadelphia County with original jurisdiction over all matters pertaining to dependent and delinquent children.

1.38 Financial Assistance. “Financial Assistance” has the meaning set forth in Section 17-1401(16) of The Philadelphia Code, as it may be amended from time to time. As of June 2012, that definition was “[a]ny grant, loan, tax incentive, bond financing subsidy for land

purchase or otherwise, or other form of assistance that is realized by or provided to a Person in the amount of fifty thousand dollars (\$50,000) or more through the authority or approval of the City, including, but not limited to, Tax Increment Financing (TIF) aid, industrial development bonds, use of the power of eminent domain, Community Development Block Grant (CDBG) aid or loans, airport revenue bonds, and Enterprise Zone or similar economic development zone designations (such as Keystone Opportunity Zones, Keystone Opportunity Expansion Zones, Keystone Opportunity Improvement Zones, and Economic Development District Zones), but not including any assistance to which a Person is entitled under a law enacted before the Person applied for or requested such assistance.”

1.39 Fiscal Year. “Fiscal Year” means the fiscal year of the City, which commences on July 1 of each calendar year and expires on June 30 of the next succeeding calendar year.

[Appx. 1056]

1.40 Form Authorizations. “Form Authorizations” means the “CRU Fax Cover Transmittal Sheet for Referral and Service Authorization” and “DHS After-Hours Fax Cover Transmittal Sheet for Referral and Service Authorization.” The authorization forms will provide the Provider with the required documentation of proof or authorization to provide services to a child prior to accepting the child for service. Once the Fax Sheet has been received, Provider cannot make further requests for this form or for a Form 85-29 printout.

1.41 FSP. “FSP” means Family Service Plan, the document prepared by the Department which outlines those Services required for the family of the child or children committed to, or under the supervision of, the Department.

1.42 Functional Expenditure Report. “Functional Expenditure Report” means a report required by Subrecipient Audit Guide.

1.43 General Provisions. “General Provisions” means these “The City of Philadelphia Professional Services Contract General Provisions for Department of Human Service Contracts,” which contains the standard provisions required by the City in its professional services contracts for the Department of Human Services, and any exhibits identified in these General Provisions.

1.44 HealthChoices. “HealthChoices” means the program operating under a waiver from the Centers for Medicare and Medicaid Services (formerly Health Care Financing Administration) pursuant to Section 1915(b) of the Social Security Act, 42 U.S.C. 1396(n), to provide mandatory managed health care to Medical Assistance recipients in Bucks, Chester, Delaware, Montgomery and Philadelphia Counties.

1.45 Improving Outcomes for Children. “Improving Outcomes for Children” or “IOC” means the City’s multi-year reform plan to create a single case management system with distinct and well-defined roles for both DHS and Provider agencies.

1.46 Independent Audit Report. “Independent Audit Report” means a report prepared by a Certified Public Accountant who, pursuant to AICPA Professional

Standards, is not (a) a member of the board of Provider, (b) an officer or employee of Provider, or (c) a partner, director, officer or employee of a partnership, corporation or association who is a member of the board of Provider, or a director, officer or employee of Provider.

1.47 Initial Term. “Initial Term” shall have the meaning set forth in Section 2.1 (Initial Term) below.

1.48 Intent to Adopt. “Intent to Adopt” means that report which is required by the Adoption Act (23 Pa. C.S. § 2531), to be filed with the Court of Common Pleas by the person or persons intending to adopt a child, confirming said person or persons intent to adopt.

1.49 Interpretation; Number, Gender. The words “herein” “hereof” and “hereunder” and other words of similar import refer to this Contract as a whole, including the all of the Contract Documents, and not to any particular article, section, subsection or clause contained in the Contract Documents. Whenever the [Appx. 1057] context requires, words used in the singular shall be construed to include the plural and vice versa, and pronouns of any gender shall be deemed to include the masculine, feminine and neutral genders.

1.50 ISP. “ISP” means the Individual Service Plan, that document prepared by Provider in accordance with the FSP, which identifies the specific Services Provider will render to the child and the child’s family.

1.51 JPO. “JPO” means the Juvenile Probation Officer.

1.52 Materials. “Materials” means any and all reports, records, documents, documentation, information, supplies, plans, original drawings, specifications, computations, sketches, renderings, arrangements, videos,

pamphlets, advertisements, statistics, and other data, computer tapes, computer software, and other tangible work product or materials prepared or developed by Provider in connection with the Services, or for Provider by a Subcontractor in connection with the Services, and supplied to the City by Provider or its Subcontractor pursuant to this Contract.

1.53 Medical Assistance. “Medical Assistance” or “MA” means that program authorized under Article IV(f) of the Public Welfare Code, which is administered in accordance with Title XIX of the Social Security Act (42 U.S.C. §1396), and the regulations from time to time promulgated thereunder, to provide for specific medically necessary medical services and items furnished to eligible recipients by approved providers enrolled in the program.

1.54 Mental Health Procedures Act. “Mental Health Procedures Act” means the law, codified at 50 P.S. §§7101-7503, as it may be amended from time to time, which governs the procedures for voluntary and involuntary mental health treatment in the Commonwealth of Pennsylvania.

1.55 Modification Notice. “Modification Notice” means written notice from the City to Provider that informs Provider of the City’s intent to modify the maximum daily rate, number of days of care or units of Services under this Contract. The Modification Notice operates as an amendment to this Contract.

1.56 Non-Competitively Bid Contract. “Non-Competitively Bid Contract” has the meaning set forth in Section 17-1401 (12) of The Philadelphia Code, as it may be amended from time to time. As of June 2012, that definition was “[a] contract for the purchase of goods

or services to which the City or a City Agency is a party that is not subject to the lowest responsible bidder requirements of Section 8-200 of the Charter, including, but not limited to, a Professional Services Contract, and any renewal of such a contract (other than a renewal term pursuant to an option to renew contained in an executed contract).”

1.57 Out-of-Home Placement. “Out-of-Home Placement” means those Services that involve placement of a child outside of the child’s home, including, without limitation, placement in a foster care home, a group home, a residential treatment facility, or any similar placement setting.

1.58 PA DHS. “PA DHS” means the Commonwealth Department of Human Services.

[Appx. 1058]

1.59 Party; Parties. A “Party” means either the City or Provider; the “Parties” means the City and Provider.

1.60 PBC. “PBC” or “Performance Based Contract” means a contract model that incentivizes performance and ties Provider’s payment and contract renewal to performance outcomes.

1.61 Person. “Person” means any individual, sole proprietorship, association, company, firm, partnership, limited partnership, joint venture, corporation, limited liability company or other form of entity or association recognized by law.

1.62 Placement Amendment. “Placement Amendment” means that document which is a part of the FSP, and which identifies those Services that are required for a child who is placed outside of his or her home.

1.63 Policy Transmittals and Guides. “Policy Transmittals and Guides” means those notifications to Providers of changes in Departmental policies or procedures in the of the Department that are issued on an interim or emergency basis.

1.64 Professional Services Contract. “Professional Services Contract” has the meaning set forth in Section 17-1401(15) of The Philadelphia Code, as it may be amended from time to time. As of June 2012, that definition was “[a] contract to which the City or a City Agency is a party that is not subject to the lowest competitive bidding requirements of Section 8-200 of the Charter because it involves the rendition of professional services, including any renewal of such a contract (other than a renewal term pursuant to an option to renew contained in an executed contract).”

1.65 Provider. “Provider” means the Person providing Services and Materials to the City as defined in the heading of the Provider Agreement.

1.66 Provider Agreement. The “Provider Agreement” means the instrument, part of the Contract Documents, which sets forth the terms, covenants and conditions specific to Provider’s engagement by the City to provide the Services and Materials under this Contract.

1.67 Provisional. “Provisional” means conditional, pending confirmation or validation.

1.68 Referring Agency. “Referring Agency” means the Department.

1.69 Responsible Official. The “Responsible Official” means the director, commissioner or other head of the Department.

1.70 *Santiago* Consent Decree. “*Santiago* Consent Decree” means the Third Amended Stipulation and Order, dated January 21, 1988, amending *Santiago, et al. v. City of Philadelphia et al.* (C.A. No. 74-2589, E.D. Pa.), a consent decree, and requiring the Department to maintain the population at the Philadelphia Juvenile Justice Services Center at a maximum of one hundred five (105) youth.

1.71 Scope of Services. “Scope of Services” means the document(s) incorporated by reference and/or the document(s) attached as an exhibit (or as exhibits) to the [Appx. 1059] Provider Agreement, which set(s) forth the Services to be rendered and Materials to be provided under this Contract, the time frames within which the Services are to be rendered and the Materials are to be provided, and other certain requirements Provider must satisfy in rendering the Services and providing the Materials.

1.72 Services. “Services” means the work to be performed under this Contract as specified in the Provider Agreement.

1.73 Single Case Plan. “Single Case Plan” means a coordinated plan developed as set forth in the Scope of Services, as it may be modified and revised from time to time.

1.74 Subcontract. “Subcontract” means a contract made between Provider and a Subcontractor providing for the completion of some part or parts of the Services or Materials by a Subcontractor.

1.75 Subcontractor. “Subcontractor” means a Person performing under a contract with Provider some part

of the Services or Materials. It includes a Person performing some part of the Services or Materials under contract with another Subcontractor at any tier.

1.76 Subrecipient Audit Guide. “Subrecipient Audit Guide” means the document entitled City of Philadelphia Subrecipient Audit Guide, which specifies the City’s audit requirements, as amended from time to time. (Copies are available in the Office of the Director of Finance of the City.)

1.77 Suspension Notice. “Suspension Notice” means a written notice from the City to Provider pursuant to Section 14.2 (Termination or Suspension) below suspending Provider’s performance under this Contract.

1.78 Suspension Period. “Suspension Period” means the period designated by the City in a Suspension Notice during which the City has suspended Provider’s performance under this Contract.

1.79 SWAN. “SWAN” means the State Wide Adoption Network, a state wide adoption system which is administered by the Pennsylvania Council of Childrens’ Services under contract with PA DHS.

1.80 Term. “Term” has the meaning set forth in Section 2.1 (Initial Term) of the Provider Agreement.

1.81 Termination Notice. “Termination Notice” means a written notice from the City to Provider terminating this Contract.

1.82 Transition. “Transition” means the planned progression and transfer of Services and Materials from Provider’s Contract to either another provider or another contract with the same Provider.

1.83 Transition Notice. “Transition Notice” means a written notice from the City to Provider evidencing the

City's intent to transition the Services and Materials to be provided under this Contract to another.

[Appx. 1060]

1.84 Total Actual Cost. "Total Actual Cost" means the sum of all allowable expenses incurred by Provider in the provision of a particular Service under the Contract.

1.85 Vacancy. "Vacancy" means the existence of an available bed in a placement program, or an available service unit or slot in a non-placement program.

ARTICLE II: TERM

2.1 Initial Term. The initial term ("Initial Term") of this Contract is set forth in the Provider Agreement. In no event shall the Initial Term exceed one (1) year.

2.2 Additional Terms. The City may, at its sole option, amend this Contract to add on an annual basis up to three (3) successive one (1) year terms ("Additional Terms"), unless any shorter term (or terms) is specified in the Provider Agreement. Unless otherwise stated in the Provider Agreement, the same terms and conditions applicable in the Initial Term shall be applicable in the Additional Term(s). The City shall give Provider thirty (30) days written notice of its intent to amend this Contract to add an Additional Term prior to each annual Additional Term. Each Additional Term shall be subject to appropriation of funds by City Council for such Additional Term. There shall be no liability or penalty to the City for electing not to amend the term of this Contract to add Additional Terms. Each Additional Term of this Contract shall be deemed to constitute a separate contract, whose term shall not exceed one (1) year.

ARTICLE III: PROVIDER'S DUTIES AND
COVENANTS

3.1 Performance Requirements. Provider shall provide all Services and Materials in accordance with this Contract and applicable professional standards. All payments to Provider are contingent upon satisfactory performance of the terms and conditions set forth in this Contract, as determined by the Commissioner in his or her sole discretion.

3.2 Compliance with Applicable Law. Provider shall comply with the requirements of all Applicable Law with respect to Provider's activities, Services, Materials and facilities used in connection with any aspect of this Contract, whether or not such Applicable Law is specifically identified by name in this Contract. Provider shall inform the Commissioner, in writing, of any notices of violations of any Applicable Law within forty-eight (48) hours of Provider's receipt thereof, and shall correct any violations within the time prescribed by law, or immediately in the case of any emergency. In the case of out-of-state placements, the regulations of the licensing state and municipality, if any, shall apply except when such regulations are in conflict with PA DHS or City policies governing the [Appx. 1061] maintenance and care of children in its custody, in which case the more stringent standard shall apply.

(a) Title IV(e) of the Social Security Act ("Title IV(e)") and Adoption and Safe Families Act ("ASFA") Compliance. In compliance with the requirements of Title IV(e), ASFA, and corresponding Commonwealth of Pennsylvania law, Provider agrees to do the following:

- (1) Assure and document the safety of each child for every face to face contact.

- (2) If unsafe conditions exist, notify the Department of Human Services, immediately, and document the steps taken to remedy the unsafe conditions.
 - (3) Provide timely outreach and services to families in accordance with the Family Service Plan.
 - (4) Utilize a concurrent planning process while other possible permanent alternatives, including a primary goal of reunification, are being explored.
 - (5) Document reasonable efforts exercised by Provider to accomplish the Family Service Plan goals and objectives.
 - (6) Document and notify the Department when the parent(s) fail(s) to maintain substantial and continuing contact with their children.
 - (7) Document and notify the Department, when there exists, or Provider believes there exists, compelling reasons not to file a petition to terminate parental rights of a child who has been in placement fifteen (15) of the previous twenty-two (22) months.
 - (8) Document and notify the Department, when there exists, or Provider believes there exists, aggravated circumstances (as defined by the Juvenile Act, 42 Pa. C.S.A. 6301 et seq.).
- (b) Compliance with Title VI of the Civil Rights Act of 1964. The Department, as a recipient of federal funding from the federal Department of Health and Human Services, is bound by Title VI of the 1964 Civil Rights Act and its implementing regulations to take reasonable steps to provide meaningful access to its

programs and activities by its language minority populations. In keeping with this mandate, the Mayor of Philadelphia has issued Executive Order “Access to Federally Funded City Programs and Activities for Individuals with Limited English Proficiency” dated September 29, 2001 requiring that reasonable steps be taken to ensure that all citizens of the City of Philadelphia have access to programs and activities without regard to English proficiency.

[Appx. 1062]

Provider agrees to cooperate fully with the Department in its efforts to achieve full compliance with this mandate. Provider will assess the level of services provided to clients with limited English proficiency, report those findings to the Department within the timeframe and in the format requested; and, to take any additional actions that may be requested by the Department from time to time to ensure compliance with Title VI.

(c) Compliance with the Prison Rape Elimination Act of 2003 (PREA) PL 108-79, 42 U.S.C. Chapter 147 §§15601-15609. Provider agrees that if it is providing services to delinquent children, children held pursuant to a delinquent petition, or services relating to the confinement of children in any way then the Provider shall be obligated to comply with the Prison Rape Elimination Act of 2003 and all related standards as they may be amended from time to time.

(d) Fostering Connections To Success and Increasing Adoption Act of 2008. Provider shall collect and provide appropriate documentation at a minimum of every six (6) months that all youth turning eighteen (18) years old are notified of the right to remain in care

or re-enter care until twenty-one (21) years old if they continue to meet the definition of “child” under the Juvenile Act and the court grants their request.

(e) Activities and Experiences for Children in Out-of-Home Placements Act of 2015. Provider shall comply with all requirements of the Activities and Experiences for Children in Out-of-Home Placements Act, including, without limitation, the reasonable and prudent parent standard established by the Act and all policies and regulations established by PA-DHS related to the Act.

(1) If Provider operates an Out-of-Home placement setting other than a resource family home, such as: a group home, shelter, RTF, institutional care facility, or other similar placement setting, then Provider shall designate an individual to provide decision-making authority under the reasonable and prudent parent standard for children residing in Provider’s care in accordance with staffing and supervision requirements applicable to the placement setting. The individual designated shall consult with all appropriate DHS, CUA, and Provider caseworkers or staff members who are most familiar with the child in applying and using the standard.

(2) If Provider operates resource family homes, such as: foster homes, kinship homes, or other similar placement settings, then Provider shall provide training and monitoring of the resource families [Appx. 1063] regarding the application and use of the reasonable and prudent parent standard.

(3) Consistent with Section 3.5 of this contract below, Provider shall require these same provisions

in each of its Subcontracts for Out-of-Home placement services, with appropriate substitution of party identities.

3.3 Additional Services and Materials; Change in Scope of Services. Except as set forth in Section 6.8 (Monitoring of Fund Utilization) below, at any time during the Term of this Contract, the City may, by written change order or request delivered by notice to Provider, make changes to the Scope of Services under this Contract, and the Parties will, if appropriate, negotiate an adjustment in compensation if necessary, subject to appropriation of funds by City Council. Provider shall not commence to perform or provide, and the City shall not pay for, any services or materials not included in this Contract (the “Additional Services and Materials”) unless and until Provider receives written pre-authorization (by change order or other request) from the Commissioner that specifies the Additional Services and Materials to be provided. In no event shall the rates charged by Provider for said Additional Services and Materials exceed the lowest of (a) Provider’s then current standard rates for such Services or Materials, (b) such rates as the City and Provider may have negotiated for this Contract, as set forth in the Provider Agreement, or (c) the lowest rate or rates that Provider may then be charging to other purchasers of like Services and Materials. If Provider requests changes to the Scope of Services, Provider must demonstrate to the satisfaction of the City, in its sole discretion, that the changes are necessary and not due to the acts or omissions of Provider. The City shall pay Provider additional compensation above the limit set forth in the Provider Agreement only if and when an Amendment to this Contract is duly executed by the

Parties. The City shall have no responsibility or liability whatsoever for any fee, or for costs incurred by Provider for any services, materials or other costs or expenses, other than the Services and Materials and any duly approved Additional Services and Materials.

3.4 Responsibility.

(a) Notwithstanding the acceptance and approval by the City of any Services performed or Materials provided, Provider shall continue to be responsible for the professional quality, technical accuracy and the coordination of all Materials and Services provided by Provider under this Contract. Provider shall, without additional compensation, promptly and diligently correct any errors, defects, deficiencies or omissions in Provider's Materials and Services.

[Appx. 1064]

(1) Plan of Correction. This section applies to Providers who have been or who may be requested to submit a Plan of Correction (POC) to DHS regarding performance concerns. Provider acknowledges that DHS, by requesting a POC, does not resolve or waive the issues raised by DHS under any other notices and other communications and that under the Contract (and as it may be amended from time to time) Provider remains under the duty to explain and rectify any matters that have been or may be raised by DHS or its designee.

Provider agrees that the final accepted POC (and if applicable, any DHS addendum to POC) is incorporated by reference to the contract. By signing contract, Provider agrees to be bound by the additional terms and conditions of the POC submitted by Pro-

vider and any addendum submitted by DHS. Failure to submit or comply with the terms of the POC shall constitute an Event of Default as prescribed in Section 12.1(a) and (c), permitting DHS to exercise the remedies available in Section 13.1, including but not limited to, termination of the Contract.

By entering into a contract with Provider while requesting a POC, DHS reserves and does not waive its rights to enact Section 3.1 Performance Requirements, to rely on Section 3.4(b) Responsibility and/or or to invoke Article XIV: Transition, Termination and Suspension of the General Provisions for any of the reasons provided nor does it waive any remedies available under Article XIII: Remedies.

(b) Furthermore, by entering into a contract with DRS and/or continued performance under this contract while submitting a POC, Provider maintains its obligation to comply with all of the provisions of Article III: Provider's Duties and Covenants of the General Provisions. The City's review, approval or acceptance of, or payment for, any of the Materials and Services required under this Contract shall not constitute any representation, warranty or guaranty by the City as to the substance or quality of the matter reviewed, approved or accepted and shall not be construed to operate as a waiver or estoppel of any of the City's rights or privileges under this Contract or of any cause of action arising out of the performance of this Contract. No Person shall have any right to rely in any way on the City's review, approval or acceptance of Provider's Services or Materials. Provider shall be and remain liable in accordance with this Contract and Applicable Law for all damages to the City caused by Provider or the

Services or Materials provided by Provider. Review, approval or acceptance by the City or the Commissioner under this Contract shall not constitute or be construed to constitute approval otherwise required by any City department, board, commission, or other regulatory agency in the exercise of such department's, board's, commission's or agency's independent regulatory authority or police powers under Applicable Law.

[Appx. 1065]

(c) Without limiting Provider's responsibility as set forth above, if any act or omission of Provider or error or deficiency or omission in the Services or Materials provided by Provider requires any change in the Scope of Services or any portion thereof, Provider shall promptly complete such change at no additional cost to the City.

(d) CUA Case Management. For a Provider whose Services include Out-of-Home Placement of any child, in-somuch as case management services are provided by a CUA under contract with DHS or according to Applicable Law, the Provider must abide by the respective CUA's policies and procedures, and cooperate with, assist, and take direction from the respective CUA in the performance of Provider's Services under this Contract.

3.5 Subcontracts.

(a) Provider shall not delegate or enter into any Subcontract for the performance of any of its obligations under this Contract, in whole or in part, without on each occasion first obtaining the written consent of the Commissioner or a designee.

(b) Provider shall submit to the Commissioner or her designee copies of all proposed Subcontract(s) to be entered into by Provider, along with Provider's written request for the City's consent. All such Subcontracts must specify that:

- (1) work performed by Subcontractor shall be in conformity with the terms of this Contract;
- (2) nothing contained in such Subcontract shall be construed to impair the rights of the City under this Contract;
- (3) the City's consent to or approval of any Subcontract shall not create any obligation of the City to any Subcontractor;
- (4) nothing contained in such Subcontract, or under this Contract, shall create any obligation of the City to any Subcontractor;
- (5) the City shall be expressly designated a third party beneficiary of the Subcontract;
- (6) upon request by the City (at the City's sole option) and upon receipt of written notice from the City stating that this Contract between the City and Provider has been terminated, Subcontractor agrees that it will continue to perform its obligations under the Subcontract for the benefit of the City in conformity with the terms and conditions of this Contract, provided the City pays Subcontractor for the Services rendered and Materials provided by Subcontractor from and after the date of the termination of this Contract between the City and Provider at the same rate or in the same amount as set forth in the Subcontract for those

Services and Materials provided by Subcontractor after such date of termination;

[Appx. 1066]

(7) Under each Subcontract, the Subcontractor, at any tier, shall be bound by the same terms, covenants and conditions as Provider under this Contract, including without limitation: Confidentiality, Availability and Retention of Records, Inspection, all audit requirements, Independent Audits, Compliance Audit Reports, audits and inspection by government representatives, Placement and Referral Process requirements, Insurance, Indemnification, and Litigation Cooperation requirements. Any item required to be submitted to the City under this section shall be submitted to the City directly, with a copy to the Provider, unless otherwise directed by the Commissioner or their designee in writing;

(8) Under each Subcontract, the Subcontractor shall be subject to quality assurance, fiscal and performance reviews which include site evaluations and inspection of records, that will be directed at compliance of state and federal law and regulations, including but not limited to Title IV-E of the Social Security Act, Temporary Assistance for Needy Families (TANF), the Public Welfare Code (including Act 148), the Child Protective Services Law, and compliance of the requirements under this Contract;

(9) Subcontractor shall, effective on the date of the Subcontract, presently, fully and unconditionally assign, transfer and set over to the City all of Subcontractor's right, title and interest in and to any

sales and/or use tax which may be refunded as a result of a claim for refund for any materials purchased in connection with the Subcontract or this Contract, and Subcontractor shall covenant and agree that, (i) other than as directed by the City, it will not file a claim for refund for any sales or use tax which is the subject of this assignment; and (ii) the City, in its own name or in the name of Subcontractor, may file a claim for a refund of any sales or use tax covered by this assignment;

(10) Subcontractor shall not be indebted to the City. To satisfy this requirement, Provider shall include the requirement of subsection 4.1(f) (No Indebtedness to the City) below, with appropriate adjustments for the identity of the parties, in all Subcontracts that are entered into for work to be performed pursuant to this Contract;

(11) Subcontractor shall comply with Chapter 17-400 of The Philadelphia Code. To satisfy this requirement, Provider shall include the requirements of Subsection 15.2(a) (The Philadelphia Code, Chapter 17-400) below, with appropriate adjustments for the identity of the parties, in all Subcontracts that are entered into for work to be performed pursuant to this Contract);

(12) Subcontractor shall comply with Section 17-104 of The Philadelphia Code. To satisfy this requirement, Provider shall include the requirements of Subsection 15.2(b) (The Philadelphia [Appx. 1067] Code, Section 17-104) below, with appropriate adjustments for the identity of the parties, in all Subcontracts that are entered into for work to be performed pursuant to this Contract; and

(13) Subcontractor is not and shall not become suspended or debarred by the Commonwealth, any other state or the federal government throughout the term of the Subcontract.

(14) Subcontractor shall comply with Chapter 17-1300 of the Code to the extent it is applicable to a Subcontractor that is also a Service Contractor (as defined in Chapter 17-1300) providing Services under the Subcontract, and to Subcontractors at any tier that are also Service Contractors providing Services under this Contract. To satisfy these requirements, Provider shall notify its Subcontractors of these provisions; shall incorporate this paragraph and Section 15.10 below, with appropriate adjustments for the identity of the parties, in each Subcontract; and shall require its Subcontractors to include such terms in any lower-tier Subcontract that is, or may become, covered by Chapter 17-1300.

(c) No permitted Subcontract shall relieve Provider of any obligation under this Contract. Provider shall be as fully responsible for the acts and omissions of its Subcontractors and Persons either directly or indirectly employed or retained by them as it is for the acts and omissions of Provider and Persons directly or indirectly employed or retained by Provider.

(d) Any purported Subcontract made in violation of this Section or of any other Section in this Contract shall be null and voidable.

(e) City-Related Agencies.

(1) If Provider is a City-Related Agency. Provider shall abide by the provisions of Chapter 17-1400 of The Philadelphia Code in awarding any contract(s)

pursuant to this Contract as though such contracts were directly subject to the provisions of Chapter 17- 1400, except that the exception set forth at Section 17-1406(8) of The Philadelphia Code shall apply to Provider as if Provider were listed in that subsection.

(2) Unless approved by the City to the contrary, any approvals required by Philadelphia Code Chapter 17-1400 to be performed by the City Solicitor shall be performed on behalf of a City-Related Agency by its General Counsel; any approvals required to be performed by the Director of Finance shall be performed on behalf of a City-Related Agency by its Chief Financial Officer; and any approvals required to be performed by the Mayor shall be performed on behalf of a City-Related Agency by its Executive Director. Any notices required to be sent under Chapter 17-1400 to designated City officials, shall be sent in electronic form to [Appx. 1068] those designated City officials.

(f) Provider shall submit to the Commissioner or her designee final copies of all executed Subcontracts entered into by Provider.

3.6 Conflict of Interest; Related Party Transactions.

(a) Provider shall adhere to Department policy and to 55 Pa. Code §3680.63, as it may be amended from time to time, regarding conflicts of interest and related party transactions. Without limitation of the foregoing, related party transactions shall also include any transactions involving any direct or indirect financial interest of Provider's board members, executive personnel, or their immediate families.

(b) Provider shall furnish the Department with copies of all documents submitted to PA DHS for the purpose of securing a prior written determination pursuant to §3680.63, including a copy of the written determination.

(c) Provider shall disclose all related party transactions in its annual fiscal report to the City.

3.7 Relationship with the City or Family Court.

(a) Neither Provider's personnel nor any Subcontractor personnel shall be employees of the City, employees of the Family Court, or any other governmental officer or employee whose salary is paid out of the City Treasury. Provider shall notify the City of any Provider personnel or any Subcontractor personnel who have any employment or other contractual relationship or agency relationship with the City or with the Family Court.

(b) Pursuant to Section 20-607(c) of The Philadelphia Code, as it may be amended from time to time, neither Provider's personnel nor any Subcontractor personnel, nor any parent, spouse, child, brother, sister or like relative-in-law, nor any person, firm, partnership, corporation, business association, trustee or straw party owned or operated by any of them, shall be financially interested in any award, contract, lease, case, claim, decision, decree or judgment made by any such personnel while in the service of the City until at least two (2) years after the expiration of such person's service or employment with the City.

(c) Provider must maintain documentation in its personnel files that provides verification that it has informed all of its personnel and Subcontractors of their

obligation to report to Provider whether they are currently or subsequently become employed by DHS.

3.8 Time Frame for Submissions. Provider shall perform any and all Services and shall submit any and all Materials required by this Contract within the time frames set forth in the Scope of Services attached as an exhibit to the Provider Agreement or as mutually agreed upon in writing by the City and Provider. Absent any such written time frames, Provider shall perform its obligations under [Appx. 1069] this Contract diligently and promptly and in any and all events before the scheduled expiration of the Term.

3.9 Prompt Payment by Provider. Provider agrees to promptly pay all Persons which have furnished labor or supplies in connection with the Services, the Materials or this Contract, including, without limitation, Subcontractors and suppliers. Provider shall provide, upon request of the City, reasonable evidence that these Persons have been fully and timely paid.

3.10 Sales and Use Tax. The City is not subject to federal, state or local sales or use taxes or federal excise tax. Provider hereby assigns to the City all of its right, title and interest in any sales or use tax which may be refunded as a result of any materials, including any Materials, purchased or any services, including any Services, rendered in connection with this Contract and unless directed otherwise by the City, Provider shall not file a claim for any sales or use tax refund subject to this assignment. Provider authorizes the City, in its own name or the name of Provider, to file a claim for a refund of any sales or use tax subject to this assignment.

3.11 Adherence to Departmental Policy. Provider shall be bound by all current Departmental and Administrative Policy Directives, Policy Transmittals and Guides, the CYD Policy Manual, applicable Performance and Service Standards, applicable Practice Guidelines, and any applicable PA DHS and/or Office of Children, Youth, and Families transmittals and bulletins as these documents may be amended from time to time. The Department may provide access to these documents on the Provider Extranet website or by making copies of these documents available to the Provider upon request. 3.12 Adoption License.

(a) If Provider's Services include foster family care, Provider agrees as follows:

(1) Provider shall, at Provider's option, (a) apply for and obtain, within sixty (60) days from the effective date of this Contract, a valid, current adoption license from the PA DHS; or, (b) immediately upon the effective date of this Contract, become affiliated with a child welfare agency that possesses a valid, current adoption license.

(2) Provider shall become affiliated with SWAN immediately upon the effective date of the Contract.

(b) Provider shall cooperate with the City in the City's efforts to facilitate the adoption of children in foster care, and Provider shall refer all children in its custody to SWAN when the child has a court sanctioned goal of adoption. If there is no known adoption resource, SWAN shall register such children with the appropriate adoption exchanges.

[Appx. 1070]

3.13 Routine Transportation Costs. With the exception of those costs associated with a runaway, the specific provisions for which are set forth at Section 3.29 (Absence of a Child), Provider shall be responsible for all routine transportation costs incurred by Provider in fulfilling the terms of this Contract.

3.14 Family Visit Food Costs. Provider shall be responsible for the costs of food for the child while the child is visiting his or her family.

3.15 Payment for Placement Services. Provider shall use payments under this Contract to purchase only those Services that are reimbursable under Applicable Law and the Contract Cost Principles, unless Provider has received prior written approval from the Commissioner or the Commissioner's designee to purchase non-reimbursable Services. This requirement applies equally whether the Services are purchased directly by Provider or indirectly through Provider's Subcontractor, or Provider's referral to another agency.

3.16 EPSDT; Managed Care. Provider shall comply with the City's EPSDT initiative. Compliance shall include, without limitation, Provider's securing of all licenses and permits necessary for Provider to participate in the Medical Assistance program, HealthChoices or managed care organizations (where appropriate); Provider's timely submission of all forms and reports required by the Commonwealth Office of Medical Assistance, HealthChoices or managed care organizations; and Provider's timely pursuit of any and all appeals of the Commonwealth's denial or discontinuance of EPSDT funding to Provider, or denial, discontinuance or reduction of medical services by HealthChoices or managed care organizations.

Provider shall comply with the City's initiative to integrate behavioral health services with other health and social services provided to children and families. Compliance shall include) without limitation, the following:

- (a) Provider shall use 1-888-545-2600, the central contact number of Community Behavioral Health (CBH), for the purpose of securing mental health and substance abuse services for children and their caregivers;
- (b) Provider shall document fully in the case file the results of each referral to CBH; and
- (c) Upon request by DHS and/or CBH and with proper authorization, Provider shall release to CBH any documents and/or reports regarding behavioral health services provided to children and families. Provider must maintain centrally located documentation regarding whether a child/youth has received a full [EPSDT] screening within sixty (60) days of entering placement, unless the child has had a screening and the results are available, and whether the subsequent treatment indicated has been initiated/scheduled within ninety (90) days upon entering placement. Youth transferring from one foster care agency to another and youth transferring from a facility licensed under Chapter 3800 regulations to a foster care agency may be exceptions.

[Appx. 1071]

3.17 Service Requirements.

- (a) Provider shall provide Services to the children and youth and their families in accordance with the FSP, any Placement Amendments, and Form Authorizations.

(b) Provider shall submit a Scope of Services which shall be consistent with Department's Program Standards and Applicable Law.

(c) Provider's Scope of Services shall be current, shall satisfy the City's requirements as to form and content, and shall be attached as an exhibit to the Provider Agreement.

3.18 Web-Based Central Referral Unit (CRU) System Participation.

(a) The Department utilizes a Web-Based CRU System for all its non-PBC providers. Upon its implementation, Provider shall report all its vacancies, by age and gender, by participating in the Department's Web-Based CRU System, and in any additional tracking system the Department may identify, and Provider shall update the system on a weekly basis, and/or more frequently for emergency shelter programs. Failure to comply with this provision may result in the Provider not receiving referrals from the Department's CRU. Provider has twenty-four (24) hours to accept or reject a referral.

(b) The Department shall monitor Provider's compliance with this provision and shall only make referrals based upon vacancies reported through this system. The Department, in its sole discretion, may periodically utilize additional resource tracking systems.

3.19 Dependent Placement Referrals. Provider shall accept youth with deferred or dual adjudications in its dependent facility. To the extent permitted by law, including applicable state regulations, Provider shall accept dependent youth in its delinquent facilities if such youth are otherwise eligible for admission into Provider's facility. Delinquent Providers agree that their

Scope of Services shall not exclude dependent children from their program unless they are required by law to do so.

3.20 Referral Disputes. Provider shall submit a written quarterly report to the Commissioner's designee detailing the number and circumstances of each referral dispute registered in accordance with Section 5.2(b)(3) of these General Provisions. Excessive referral disputes, as determined by the Commissioner in his/her sole discretion, may cause the City to terminate this Contract.

3.21 Rejection of Referral. Provider shall not reject a child or family for Services based upon the location or condition of the family's residence, their environmental or social condition, or for any other reason if the profiles of such child or family are consistent with Provider's Scope of Services or DHS's applicable standards as listed in the Provider Agreement, unless an exception is [Appx. 1072] granted by the Commissioner or the Commissioner's designee, in his/her sole discretion.

3.22 Notice of Referral Acceptance or Rejection

(a) Except for Performance Based Contract Providers, Provider shall notify the Commissioner within twenty-four (24) hours of its decision to accept or reject placement referrals; provided, however, Provider's rejection of a placement referral must be in accordance with the process set forth in Section 5.2(b)(3) of the General Provisions. Provider shall provide the Commissioner with a written statement of the basis for each rejected referral within twenty-four (24) hours of the rejection unless an exception is granted by Commissioner or Commissioner's designee.

(b) Within seventy-two (72) hours of accepting a case that has been designated as a Kinship Care placement, Provider must visit the placement and complete an assessment of the kinship caregiver's home to ensure that it is in compliance with State regulations regarding foster homes

3.23 Documentation of Referrals. Providers must maintain centrally located documentation regarding each referral that the Provider receives from DHS. Provider must maintain the following information: the date of receipt of referral; the requesting DHS division (CWO or JJS); the name, age and race of the child; presenting primary problem; and whether the child was accepted or rejected for admission to the program and if applicable, the reason for rejection.

3.24 Vacation, Holiday Placement. Provider shall ensure that each child in an Out-of-Home Placement has uninterrupted Services and placement in the event Provider's office closes for vacation or holidays.

3.25 Adequate Clothing. It shall be Provider's responsibility to purchase a seasonally adequate and complete wardrobe for each child in placement in its program and for any child who is being discharged from its program.

3.26 Return of Medical Assistance Card. At the time of discharge or within seventy-two (72) hours of an unplanned discharge, Provider shall return the Medical Assistance card of any child who has been removed or discharged from Provider's placement to the City; otherwise, Provider shall be liable for any charges incurred after discharge. Provider agrees that, upon its return of the child's Medical Assistance card to the

City, Provider will cooperate fully with the Department for the purpose of re-enrolling the child with a primary care physician.

3.27 Service Reports.

(a) Progress Reports. Provider shall submit to the City, on a quarterly basis, a written progress report for each child for whom Services are provided. The report shall be consistent with the ISP, shall present an evaluation of [Appx. 1073] the child's current status, and shall include a statement of Provider's treatment goals. If the City purchases residential treatment Services under the Contract, Provider shall submit a diagnostic study and treatment plan to the City within thirty (30) days after the child's initial placement.

(b) Placement Objectives; Adjustment Reports. When the Services purchased under the Contract include residential Services, Provider shall, within ninety (90) days after the child's initial placement, submit a report to the City which evaluates the child's adjustment to placement and the child's prognosis. Within one hundred eighty (180) days after the initial placement, Provider shall submit a report to the City which examines whether a less restrictive placement is appropriate for the child. The City generally expects that Provider will move children to a less restrictive placement, and that children have the capacity to make use of a less intensive Service within one hundred eighty (180) days after their initial placement in a residential facility. With the exception of those children committed to the Juvenile Justice System as the result of the commission of delinquent acts, when Provider recommends that a child receive more than one hundred eighty (180) days of residential services, Provider shall present written justification for the recommendation

to the, Department, and shall participate in a case review within one hundred eighty (180) days after the child's placement. Provider shall allow visits by authorized City employees, upon oral or written request, for discussion or review of information pertinent to the child, or for interviews with the child and the child's natural family. If the child is placed in foster family residential treatment, and is supervised by Provider, Provider shall arrange for all contacts by the City with the child and foster family through the staff of Provider. The use of conference calls between the City, the natural family, and the residential treatment facility or the foster family will be regularly scheduled by Provider when distance prevents regular contact.

With regard to children with special medical needs, Provider shall provide all training necessary to the individual(s) with whom the child will reside in order to accommodate those needs. Individuals to be trained may include, without limitation, the child's legal guardian(s) or the child's biological, kinship, foster or adoptive parent(s).

(c) Notice of Child's Location. Providers shall promptly notify the City of the exact placement location and address of each child placed in accordance with the terms of the Contract. A child shall not be moved from one location to another even within a Provider's own system without PRJOR written notice to the Department and applicable approval of court, except in emergency situations that place the child in imminent risk of harm. In non-emergency situations, Provider must furnish the City, in writing, with information regarding any proposed move of a child including, but not limited to, the exact new address of the child as soon as that address is known, plans for education, and

plans for transfer of [Appx. 1074] applicable medical and therapeutic services but in no event less than seventy-two (72) hours prior to the move. In emergency situations, Provider shall notify the City of the new address orally and in writing with information regarding any proposed move of a child including, but not limited to, the exact new address of the child as soon as that address is known, plans for education, and plans for transfer of applicable medical and therapeutic services immediately after ensuring the safety of the child or children involved.

A failure to comply with this provision constitutes an Event of Default pursuant to Section 12.1(a). If Provider fails to comply with this provision, the City may exercise any of the Remedies available to it pursuant to Section 13.1.

(d) Copies of ISPs, Other Reports. Provider shall promptly provide the City with copies of each ISP, periodic reviews of ISPs, and in-home and day care services reports. Provider's ISP form for children and youth, as well as quarterly reports on each child and family shall be consistent with the FSP and Applicable Law. In addition, Provider shall promptly submit all requisite reports to Family Court and to Community Behavioral Health or its successor or assigns.

(e) In Home Services and Foster Care Outcomes Requirements. All providers are required to implement and utilize all forms and procedures in home services and Foster Care Services. Provider shall comply with all current, newly enacted and subsequent outcome requirements enacted during the term of the Contract, including any and all amendments thereto.

(f) Compliance with Temporary Assistance for Needy Families (“TANF”) Reporting Requirements. Provider shall comply with all requirements needed to document and claim under TANF the eligible services delivered by the Provider. Compliance shall include, without limitation, submitting the following:

- (1) Once a month, the list of clients receiving services that month on the form prescribed by the City;
- (2) Once a month, the standard summary invoice on the form prescribed by the City;
- (3) Once a year, a properly completed Means Test Worksheet (MTW) for each child receiving services. A MTW must be completed when a child first comes into service, so each month the Provider must provide a properly completed MTW for every child who came into care that month. That MTW is valid for twelve (12) months from the date the MTW was completed. If the client continues to receive services beyond twelve (12) months, a new MTW must be completed.

[Appx. 1075]

(g) Unusual Incident, Safety Alert and HCSIS Reports. Provider shall notify DHS, orally and in writing of any fatality or incident, as required by state regulations, including but not limited to 55 Pa. Code 3680.21, and state and DHS directives, including but not limited to, the Policy and Procedure Guide dated February 23, 2010, “Using and Responding to the Safety Alert Tool for Families Receiving In Home Services and the Home and Community Services Information System (HCSJS) Reports for Children in PA Placements.”

(h) Documentation of arrests of children/youth. Providers must maintain centrally located documentation regarding all arrests by law enforcement of children and youth being served by the Provider. The Provider must maintain the following information: the date of the report, the DHS division (CWO or JJS) that placed the child with the Provider agency or program; the name, age and race of the child; the date and time the arrest occurred; and reason for the arrest by the law enforcement agency.

(i) Documentation of restraints of children/youth. Providers must maintain centrally located documentation regarding all restraints of children/youth served. Provider must maintain the following information: the date of the report; the DHS division (CWO or JJS) that placed the child with the Provider agency or program; the name, age and race of the child; reason for restraint; date and time the restraint occurred; type of restraint used; name of employee(s) who performed the restraint; duration of the restraint; name of employee(s) who observed the child; and the result of restraint (i.e., injuries incurred, hospitalization, etc.). Provider shall abide by all applicable law and directives in regards to restraints of pregnant females.

(j) Documentation of Truancy. Provider must maintain centrally located documentation regarding whether a child/youth has been truant (three (3) unexcused absences within the school year) during the time the child/youth was placed with Provider. If the Provider fails to comply with these requirements, the City may withhold payments to the Provider until such time that the Provider complies with these requirements.

3.28 Transitional and Discharge Planning. Provider shall comply with any Departmental and Administrative Policy Directives, and all applicable laws, regulations, and directives regarding transition and discharge planning and development.

[Appx. 1076]

(a) Upon Agreement of the Parties.

(1) Provider shall submit to the City a Case Closing Summary and close the case pursuant to Departmental Policy following child's discharge from Provider's care, along with important documents including, without limitation, birth certificate, Social Security card, court order, and copies of any other documents requested by the City that relate to the child.

(2) Provider shall administer and distribute money acquired or received by the child in accordance with Applicable Law and any applicable Discharge Plan. Provider acknowledges that such funds are the property of the child.

(b) Upon Request of Provider. In cases where the child's discharge from Provider's care is requested by Provider, and is not made pursuant to a mutually agreed upon service plan or court-ordered removal, Provider shall submit to Commissioner a written explanation detailing the basis for the requested discharge. If the request is approved by the Commissioner or Commissioner's designee, Provider shall give the City thirty (30) days formal written notice of its intent to discharge; if the child is a special needs child (as that term is defined by the Department and Applicable Law), Provider shall give the City ninety (90)

days formal written notice. If a discharge on an emergency basis proves necessary, the City may, in its sole discretion, permit a shorter notice period. Provider may not unilaterally discharge a child or case.

(1) Unplanned discharges. In accordance with the requirements of Section 3.28(b) and subject to Provider's full compliance therewith, Provider is authorized to discharge a child from its care and custody only after Provider has confirmed with the Department's Central Referral Unit that an alternative placement has been identified and Provider has contacted the Department's Social Worker regarding the date, time and place of discharge. The discharge documents must include a statement of the reason for the discharge. Provided further, that in compliance with the thirty (30) or ninety (90) day notice requirement set forth in Section 3.28(b), Provider will forward such notice both to the Department Social Worker and to the Central Referral Unit. Provider further agrees to include with the notice a current evaluation addressing the child's treatment needs.

(c) Delinquent Children.

(1) When a delinquent child is recommended for discharge, Provider shall submit to the Probation Department of the Court of Common Pleas, the Juvenile Justice Services Administrator of the [Appx. 1077] Department, and the District Attorney, a complete summary of all information pertaining to the child's adjustment and progress, and any recommendations of Provider, one (1) month prior to the anticipated discharge date.

(2) If a delinquent youth or an alleged delinquent youth is placed in a CBES or, in the case of a delinquent youth, in a delinquent facility, and while residing at such facility is arrested on new charges; and if at the time of the arrest the youth was not a runaway youth; then Provider shall accept and transport the youth back to the facility pending court disposition of the new charges. Provider may obtain an exception to this provision if Provider's facility has exhausted its capacity, or if the youth is committable pursuant to the Mental Health Procedures Act, is eligible for detention at the Philadelphia Juvenile Justice Services Center pursuant to the *Santiago* Consent Decree, or is eligible for admission to an acute care facility for medical purposes. If Provider determines that the youth, because of the new charges, is not suitable for its program, Provider may, after accepting the youth back to its facility, request that the referring agency of the City grant an exception to this provision by following the procedures outlined in Section 5.2(b)(3).

(d) Documentation of discharges of children/youth. Providers must maintain centrally located documentation regarding each child that is discharged from Provider's agency. Provider must maintain the following information: the date of the discharge from the Provider's agency or program; the DHS division (CWO or JJS) that placed the child; the name, age and race of the child; and the reason that the child was discharged (including successful progress of original presenting problem; AWOL; negative discharge; etc.).

3.29 Absence of Child.

(a) When a child voluntarily absents himself or herself from the supervision of Provider or Provider's designee

for a period of twenty-four (24) hours, the child is to be considered a runaway and Provider shall:

(1) Notify all appropriate parties, including the Department, police, the National Center for Missing and Exploited Children, and, if appropriate, the Philadelphia Juvenile Probation Department of the Court of Common Pleas. Immediate oral notice shall be given to the Department and the Philadelphia Juvenile Probation Department (if appropriate), as soon as Provider determines that the child is determined to be a runaway but in no event later than [Appx. 1078] twenty-four (24) hours after departure. Provider shall give written notice not later than the next working day. Provider shall also give oral and written notice, in the manner set forth above, as soon as the child is found or returned to Provider's physical custody. Provider shall notify the Philadelphia Juvenile Probation Department of any runaway at the following numbers:

Weekends. Evenings and Holidays 686-4818 or
4999 Intake Unit

When the child is alleged or adjudicated delinquent, Provider shall notify the District Attorney at 686-4000.

(2) Reserve the child's placement for seven (7) days from the time of knowledge of the child's departure, unless the City notifies Provider to the contrary. Upon such notice, the City or CUA shall be obligated to compensate Provider for maintaining availability of the placement. If the child is located within the seven (7) day period, Provider shall accept the child back into placement in accordance

with the exception and appeal procedure described at Section 5.2(b)(3)

(b) Upon mutual agreement of Provider and the Commissioner's designee, the seven (7) day period may be extended.

(c) When a child who is still in the care of Provider is found within the county of placement or a contiguous county, Provider shall be responsible for transportation costs for returning the child. In all other situations, the City shall be responsible for the cost of transportation. If Provider makes arrangements for the use of public transportation in returning a child who has run away, the City shall be responsible for transportation costs only when it has given prior approval. With the exception of delinquent children, this subsection (c) shall apply only to children placed in the legal custody of the Department.

3.30 Provider's Publications. Provider shall identify the Department as a funding source in all literature, documents reports or pamphlets which Provider publishes, develops or produces in connection with this Contract.

3.31 Certifications. Provider shall obtain Certifications as required by law and by DHS policy. Herein, "Certifications" shall be understood to mean: (i.) a report of Federal criminal history record information dated no more than one (1) year-to-the-day prior to the individual's start date and obtained by submitting a full set of fingerprints in a manner described by PA DHS to the Federal Bureau of Investigation (FBI), (ii.) a Pennsylvania Criminal History Record Report dated no more than one (1) year-to-the-day prior to the individual's start date, (iii.) a certification from PA DHS

dated no more than one (1) year-to-the-day prior to the [Appx. 1079] individual's start date certifying whether the applicant is named in the PA DHS maintained central register as an alleged perpetrator in a pending child abuse investigation, the perpetrator in a founded report of child abuse, the perpetrator in an indicated report of child abuse, the perpetrator in a founded report for a school employee or the perpetrator in an indicated report for a school employee, (iv.) criminal history and child abuse record certifications from any other current or previous state of residence within the past five (5) year period and dated no more than one (1) year-to-the-day prior to the individual's start date, and (v.) any other record or certification requested by the Department.

(a) Prior to commencing employment or service with the Provider or Subcontractor, any individual for whom Certifications are required must swear or affirm in writing that the individual has not been disqualified from employment or service under the Child Protective Services Law, 23 Pa. C.S. § 6344(c), and has not been convicted of an offense similar in nature to a crime listed in 23 Pa. C.S. § 6344(c) under the laws or former laws of the United States or one of its territories or possessions, another state, the District of Columbia, the Commonwealth of Puerto Rico or a foreign nation, or under a former law of the Commonwealth of Pennsylvania.

(b) Certifications shall be obtained prior to the approval and/or hiring of any applicant. Provider shall obtain Certifications for all applicants for employment including without limitation: employees, agents, independent contractors, volunteers having contact with children, all prospective foster parent applicants, all

prospective adoptive parent applicants, all prospective PLC custodians, all prospective foster home Household Members, all prospective adoptive parent Household Members, and all prospective PLC custodian Household Members. A "Household Member" shall herein be defined as: any individual 18 years of age or older spending thirty (30) days or more in a home during a calendar year.

(c) This section shall be applicable to all staff including without limitation executive, administrative, and operational staff.

(d) Provider shall obtain the required Certifications for all current employees, agents, independent contractors, volunteers having contact with children, foster parents, adoptive and prospective adoptive parents, PLC custodians and prospective PLC custodians, and all of their respective Household members for whom this information has not already been obtained.

(e) Providers have a continuing obligation to obtain updated Certifications every sixty (60) months.

[Appx. 1080]

(f) The PA DHS is utilizing Cogent Systems to process FBI record checks. Provider shall be responsible for entering into an agency agreement with Cogent Systems so that Provider may pay for the fees for all prospective foster and adoptive parent applicants and their respective Household Members applying through the Provider or establish an agency policy to require that applicants pay the fees themselves. These records must be included, when applicable, in the documentation forwarded to the DHS Licensure Unit when foster homes are certified or recertified.

(g) According to the Child Protective Services Law (“CPSL”), 23 Pa. C.S. § 6301 et seq.), an individual may not be hired or approved for employment or participation in a program, activity, or service, including but not limited to employment as either a foster parent or an adoptive parent, if that individual has been convicted of any of the following offenses or if the individual has been convicted of the attempt, solicitation, or conspiracy to commit any of the following offenses:

- Criminal Homicide
- Aggravated Assault
- Stalking
- Kidnapping
- Unlawful Restraint
- Rape
- Statutory Sexual Assault
- Involuntary Deviate Sexual Intercourse
- Sexual Assault
- Aggravated Indecent Assault
- Indecent Assault
- Indecent Exposure
- Incest
- Concealing Death of a Child
- Endangering the Welfare of Children
- Dealing in Infant Children
- Felony Prostitution and Related Offenses
- Obscene and Other Sexual Materials and Performances
- Corruption of Minors
- Sexual Abuse of Children
- Felony Offense Under the Controlled Drug, Device and Cosmetic Act, committed within the five (5) year period immediately preceding individual’s application

(h) Other than the last criminal offense listed- Felony Drug Offense – there is no time limitation on the enumerated criminal convictions. For example, an aggravated assault from thirty-five (35) years ago shall have the same effect as an aggravated assault conviction this year: namely, [Appx. 1081] the individual shall be precluded from employment or participation in a program, activity, or service.

(i) Provider shall not approve an applicant as a foster parent, prospective adoptive parent, or PLC custodian if they or any Household Member are named as the perpetrator in a founded report of Child Abuse or a report equivalent to a founded report of Child Abuse in another state.

(j) Provider shall not approve an applicant as a foster parent, prospective adoptive parent, or PLC custodian if they or any Household Member are named as the perpetrator in an indicated report, or a report equivalent to an indicated report in another state, within the previous 5 years. A perpetrator and those with a Household Member named as a perpetrator in an indicated report or the equivalent of an indicated report from another state more than five years ago may be approved as a foster parent, prospective adoptive parent, or PLC custodian, but only with the written approval of the Commissioner or his/her designee at the director level or higher.

(k) Provider shall not approve an employee, agent, independent contractor, or volunteer having contact with children for service if they are named as the perpetrator in a founded report of Child Abuse or a report equivalent to a founded report of Child Abuse in another state, within the previous 5 years. A perpetrator named in a founded report, or the equivalent of a

founded report from another state, more than 5 years ago may only be approved as an employee, agent, independent contractor, or volunteer having contact with children for service upon the written approval of the Provider's Executive Director, President, or similar Chief Executive Officer. Such written approval shall be determined on a case by case basis and record of such written approval shall be maintained in accordance with section 7.4 of these General Provisions.

(l) Provider shall not approve an employee, agent, independent contractor, or volunteer having contact with children for service if they are named as the perpetrator in an indicated report, or a report equivalent to an indicated report in another state, within the previous 5 years. A perpetrator named in an indicated report, or the equivalent of an indicated report from another state, more than 5 years ago may only be approved as an employee, agent, independent contractor, or volunteer having contact with children for service upon the written approval of the Provider's Executive Director, President, or similar Chief Executive Officer. Such written approval shall be determined on a case by case basis and record of such written approval shall be maintained in accordance with section 7.4 of these General Provisions.

[Appx. 1082]

(m) Provider shall immediately require any of its employees, agents, independent contractors, volunteers having contact with children, foster parents, prospective adoptive parents, or Household members of either a foster home or prospective adoptive home to submit new Certifications to Provider in the manner required in this section for a new applicant should Provider

have or ever develop a reasonable belief that such Certifications would disqualify the individual or home they reside in from approval under this section or Applicable Law. Costs for these certifications shall be borne by the Provider.

(n) Provider shall require all employees, agents, independent contractors, all adoptive, foster and kinship parents, and all of Provider's volunteers having contact with children to notify Provider in writing if they are arrested for or convicted of an offense that would constitute grounds for denying employment or participation in a program, activity or service, or if they are named as a perpetrator in a founded or indicated report. Such written notice shall be provided not later than 72 hours after the arrest, conviction or notification that the person has been listed as a perpetrator.

(o) Provider shall immediately notify the Department of any disqualifying Certification.

(p) Waiver: Waiver of any of the provisions of this section may be requested only for those provisions not required by Applicable Law. Such waivers shall only be valid with the express written approval of the Commissioner or his/her designee at the director level or higher and only to the extent permitted by Applicable Law.

3.32 Child Death Review. Provider shall conduct an internal review when a child placed with Provider, whether or not placed by the City, dies as the result of suspected child abuse or neglect. The review shall include cases that are currently active and also those that were known to Provider within the past sixteen (16) months. Provider shall conduct said review simul-

taneously with the Child Protective Service (CPS) investigation. Provider's review shall assess compliance with statutory, regulatory, and county requirements; and compliance with Provider's policies and procedures, including examination of supervisory and training requirements, for the purpose of determining whether the appropriate level of service was provided to the child, the child's family and/or foster family. A written report detailing the findings and conclusions of the death review shall be submitted to DHS within thirty (30) days following receipt of the report of suspected abuse if applicable. In addition, Provider shall participate in Act 33 meetings.

3.33 Foster Parent Agreements. Provider shall include in its agreements with foster parents the requirement that foster parents shall not maintain in their households, [Appx. 1083] at the same time, other children committed to the Department of Human Services who are placed with other Philadelphia County foster family care agencies.

3.34 Group Home Provision. Provider must obtain the prior written approval of the City of Philadelphia, through the Commissioner or the Commissioner's designee, prior to acquiring, whether through purchase or lease, a group home or institution situated in the City of Philadelphia for the purpose of providing services to Philadelphia County dependent or delinquent youth. Provider further agrees that it must obtain written approval of the Commissioner or the Commissioner's designee before making any change in the type of dependent or delinquent youth for whom services will be provided on these properties.

3.35 Adoption and Permanent Legal Custodianship. Provider shall complete and/or ensure the completion

of a family profile according to the Department, City and State specifications for caretakers the City identifies as appropriate for adoption and permanent legal custodianship. The fee payable for the work to complete the family profile will be determined by the revised Statewide Adoption Network ("SWAN") state bulletin by reference.

ARTICLE IV: PROVIDER'S REPRESENTATIONS AND COVENANTS

4.1 Provider's Representations and Covenants. Provider makes the following representations, warranties and covenants upon which the City has relied as a material consideration for the execution and delivery by the City of this Contract. The representations, warranties, and covenants stated below shall continue throughout the Term of this Contract. In the event said representations, warranties, and covenants are or become untrue or inaccurate, Provider shall promptly give notice thereof to the City, specifying the manner in which said representation, warranty, or covenant is untrue or inaccurate.

(a) Good Standing. If Provider is not an individual, Provider is a business corporation, limited liability company, partnership, limited partnership or other business entity duly organized, validly existing and in good standing under the laws of the state of its incorporation or organization. Provider is duly licensed, qualified and in good standing in the Commonwealth of Pennsylvania and in all jurisdictions in which it conducts business activities relating in any way to the performance of the Services and delivery of the Materials under this Contract, including, but not limited to, the jurisdiction in which Provider is organized. If Pro-

vider is a not-for-profit corporation or otherwise an entity determined to be tax exempt pursuant to Section 501(c) of the Internal Revenue Code by the Internal Revenue Service, then Provider has procured, and shall maintain in full force and effect, all consents and approvals necessary in connection with such tax-exempt and non-profit status.

(b) Authority to Act. Provider has full legal power and authority to execute and deliver this Contract, and provide the Services and Materials as set [Appx. 1084] forth herein. Provider has duly authorized by all necessary actions the execution and delivery of this Contract on behalf of Provider by the individual or individuals signing the Provider Agreement. This Contract is the legal, valid and binding obligation of Provider, enforceable against Provider in accordance with the terms set forth herein. The execution and delivery of this Contract by Provider will not result in a default under or a breach or violation of (1) Provider's certificate or articles of incorporation or bylaws, partnership agreement, limited liability company operating agreement or other pertinent organization documents, as applicable; (2) any Applicable Law or any judgment, decree order, license¹ permit or other instrument or obligation to which Provider is now a party or by which Provider may be bound or affected; and (3) Provider's tax exempt status, if applicable. No consent, approval or authorization is required of any regulatory authority or governmental agency, or of any shareholder, partner, member, manager or other party related to Provider.

(c) Legal Obligation. This Contract has been duly authorized, executed and delivered by Provider, by and through individuals duly authorized to execute this

Contract on behalf of Provider, and constitutes the legal, valid and binding obligation of Provider, enforceable against Provider in accordance with its terms.

(d) No Litigation Preventing Performance. There is no litigation, claim, consent order, settlement agreement, arbitration, agency proceeding, investigation, challenge or other proceeding pending or threatened against Provider, its properties or business or any individuals acting on Provider's behalf, including, without limitation, Subcontractors, in which any Person seeks to enjoin or prohibit Provider from entering into or performing its obligations under this Contract.

(e) Requisite Licensure and Qualifications. Provider and all of the Persons acting on Provider's behalf, including, without limitation, Subcontractors and their Subcontractors at any tier, in connection with the Services and Materials provided under this Contract, possess and, at all times during the Term of this Contract, shall possess all approvals, licenses, board certifications or eligibilities, training, certifications, qualifications and other credentials, including, without limitation, all licenses required for eligibility to receive Medical Assistance or other third party reimbursements, required in accordance with Applicable Law and the terms of this Contract, to perform the Services and provide the Materials. Provider shall provide the City with copies of all approvals, licenses, credentials and certifications required under this Section upon request by the City.

Provider and all foster family homes, whether relative or nonrelative, shall have current, full Certificates of Approval and/or licensure [Appx. 1085] throughout the Term of this Contract. Temporary or provisional

approval and/or licenses do not satisfy this requirement.

Provider shall notify the Commissioner or Commissioner's designee, orally, electronically, and in writing, of any violations of the requirements of this section within twenty-four (24) hours of Provider's receipt of notice or other knowledge thereof, including changes which place Provider, Subcontractors, or a foster home in a provisional license status, or any other approval and/or license violation. Electronic notices of violation of this section shall be sent via email to DHSLicensure@phila.gov. **DHS will not reimburse foster care agencies for services provided to homes without documentation of full licenses.**

(f) No Adverse Interests. Except as disclosed in writing and approved in advance by the Responsible Official, neither Provider nor any of its directors, officers, members, partners or employees, has any interest, or will acquire any interest, directly or indirectly, that would or may conflict in any manner or degree with the performance or rendering of the Services and Materials.

(g) No Indebtedness to the City. Provider and any and all entities controlling Provider, under common control with Provider or controlled by Provider are not currently indebted to the City, and will not at any time during the Term of this Contract (including any Additional Term(s)) be indebted to the City, for or on account of any delinquent taxes (including, but not limited to, taxes collected by the City on behalf of the School District of Philadelphia), water bills, sewer bills, liens, judgments, fees or other debts for which no written agreement or payment plan satisfactory to the City has been established. Provider shall remain current during the Term of this Contract under all such

agreements and payment plans, and shall inform the Responsible Official in writing of Provider's receipt of any notices of delinquent payments under any such agreement or payment plan within five (5) days after receipt. In addition to any other rights or remedies available to the City at law or in equity, Provider acknowledges that any breach or failure to conform to this representation, warranty and covenant may, at the option of the City, result in the withholding of payments otherwise due to Provider under this Contract or any other agreement with the City under which the City may then owe payment of any kind, and, if such breach or failure is not resolved to the City's satisfaction within a reasonable time frame specified by the City in writing, may result in the offset of any such indebtedness against said payments or the termination of this Contract for default (in which case Provider shall be liable for all excess costs and other damages resulting from the termination), or both. In addition, Provider understands that false certification, representation or warranty by it is subject to prosecution under Title 18 Pa. C.S.A. § 4904.

[Appx. 1086]

(h) Commercial Activity License. If Provider is a "business" as defined in Section 19-2601 of the Code, Provider has and shall maintain during the Term of this Contract, a valid, current Commercial Activity License, issued by the City's Department of Licenses and Inspections, to do business in the City.

(i) Subcontractor Licensure; No Indebtedness to the City. Each Subcontractor, if any, holds and shall maintain during the term of the Subcontract, a valid, current Commercial Activity License to do business in the

City, if required by Applicable Law. To the best of Provider's knowledge, information and belief, the representations made in any Subcontract that Subcontractor is not indebted to the City are true and correct.

(j) Non-Suspension; Debarment. Provider and all of the individuals acting on Provider's behalf including, without limitation, Subcontractors, are not under suspension or debarment from doing business with the Commonwealth of Pennsylvania, any other state, or the federal government, or any department, agency or political subdivision of any of the foregoing. If Provider cannot so warrant, then Provider shall submit to the Responsible Official a full, complete written explanation as to why Provider cannot so warrant. Provider shall reimburse the City for the reasonable cost of investigation incurred by the City or the Commonwealth of Pennsylvania Office of Inspector General for investigation of Provider's compliance with the terms of this or any other contract between Provider and the City which results in the suspension or debarment of Provider. Such costs shall include, but are not limited to, salaries of investigators; including overtime, travel and lodging expenses, expert witness and documentary fees and attorney fees and expenses. Provider shall not be responsible for costs of investigations which do not result in Provider's suspension or debarment

(k) Prohibiting Religious Activities. Provider shall not provide religious instruction, conduct religious worship or services, or in any way proselytize any individual in connection with the Services provided, either directly or indirectly, under this Contract.

Provider shall inform all individuals to whom Services are provided, whether directly or indirectly, of the following: “The Philadelphia Department of Human Services’ selection of a faith-based provider of social services is not an endorsement of the Provider’s religious character, practices or beliefs. No Provider of social services may discriminate against you on the basis of religion, a religious belief or your refusal to actively participate in a religious practice.”

The above representations, warranties and covenants shall continue throughout the Term of this Contract. In the event said [Appx. 1087] representations, warranties and covenants are or become untrue or inaccurate, Provider shall promptly give notice thereof to the City, specifying the manner in which said representation, warranty or covenant is untrue or inaccurate.

(l) Non-Lobbying Certification. No federally appropriated funds have been paid, by or on behalf of Provider, to any person for influencing or attempting to influence an officer or employee of any agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with the awarding of any federal contract, the making of any federal grant, the making of any federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any federal contract, grant, loan or cooperative agreement.

If any funds other than federally appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with this Contract, Provider

shall complete and submit Standard Form LLL, "Disclosure of Lobbying Activities," in accordance with its instructions.

If this Contract or any Subcontract is funded with federal funds, Provider shall require that this language be included in the award documents for all subawards at all tiers (including Subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients and Subcontractors shall certify and disclose accordingly.

Provider understands that this is a material representation of fact upon which reliance was placed when this Contract was entered into. Submission of this certification is a prerequisite for making or entering into this Contract imposed under Section 1352, Title 31, U.S. Code, and Provider agrees that the execution of this Contract shall constitute the requisite submission.

The above representations, warranties and covenants shall continue throughout the Term of this Contract. In the event said representations, warranties and covenants are or become untrue or, inaccurate, Provider shall promptly give notice thereof to the City, specifying the manner in which said representation, warranty or covenant is untrue or inaccurate.

4.2 Notice of Change. If there is a material change in the foregoing representations made by Provider for itself or on behalf of any of its Subcontractors, or a [Appx. 1088] circumstance occurs adversely affecting Provider's business integrity, Provider shall promptly notify Responsible Official of such changed circumstances.

ARTICLE V: SERVICE REQUIREMENTS

5.1 Scope of Services. Services provided include the Services described in the Provider Agreement and all the obligations under this Contract. The Services encompass the following general categories:

- (a) Services to dependent, delinquent, and non-adjudicated children and their families; and
- (b) Other professional services, including consulting and training services.

5.2 Placement and Referral Process.

(a) Eligibility for Services. With the exception of children adjudicated delinquent, the City will be responsible for the determination of eligibility for public care and Services, and for the assumption of legal custody, if required, for all children provided Services under the Contract.

(b) Referral Process.

(1) With the exception of children adjudicated delinquent, the City shall, prior to Provider's acceptance of a child, furnish Provider with a social summary, including a family summary and a medical history. To the extent such information is available to the City, the City shall also provide related school information, a signed psychological evaluation, and a signed psychiatric evaluation.

(2) When Provider receives a referral from the City for placement, with the exception of state approved residential treatment facility placements, the City will cooperate with Provider in arranging a pre-placement visit or conference. The participants may include, but are not limited to, the child, par-

ent or guardian, and County caseworker or probation officer. Provider will not be obligated to pay transportation costs for participants who attend the visit or conference.

(3) Provider may reject a child and family only if it has exhausted its capacity under this Contract. If Provider determines that a child or family is not acceptable for reasons other than exhaustion of capacity, it must notify the Commissioner in writing within twenty-four (24) hours of the rejection detailing the basis of the intended rejection and request an exception to this provision. The Commissioner or Commissioner's designee's decision to grant or reject the request shall be final.

[Appx. 1089]

(c) Residential Treatment Facility Placement. In the event that a child requires services that can only be provided in a residential treatment facility (RTF), Providers are to obtain approval from Community Behavioral Health (CBH) PRIOR to the RTF placement.

(d) Emergency Shelter Placement. In the case of Out-of-Home Placement in an emergency shelter, Provider will accept all referrals as stated in the Performance Standards. Provider may only reject a referral if:

- Provider has exhausted its capacity under the Contract;
- the youth is committable pursuant to the Mental Health Procedures Act 50 P.S. § 7101 et seq.;
- the youth is eligible for detention at the Philadelphia Juvenile Justice Services Center pursuant to the *Santiago* Consent Decree; or
- the youth is eligible for admission to an acute care facility for medical purposes.

If Provider determines that a child placed in an emergency shelter is not suitable for its program for reasons other than those identified in this Section 5.2, Provider may, after accepting the child into emergency shelter, request an exception to this provision by following the procedures outlined in Section 5.2(b)(3). Emergency shelter services must be accessible to the City for the placement of children twenty-four (24) hours per day, seven (7) days per week.

(e) Availability of Placement Providers. All Providers of Out-of-Home Placement services to children shall be prepared to receive referrals and to accept children into placement at all times, twenty-four (24) hours per day, seven (7) days per week. Out-of-Home Placement Providers shall respond to placement referrals within one hour of their being contacted and will work immediately to secure placement for each child referred.

(f) Information Sharing Following Acceptance for Placement. Except in emergency situations, when the City receives official notice of acceptance by Provider for Out-of-Home Placement of a referred child, the City shall send to Provider available and pertinent information and documentation within five (5) business days after receipt of notice, or as soon as possible thereafter.

(g) Information Sharing in Emergency Out-of-Home Placement Cases. In the event of an emergency Out-of-Home Placement, the City shall make every effort to supply Provider with all available records, reports, [Appx. 1090] summaries, and any other pertinent information as soon as possible after the date of acceptance.

(h) Collaborative Planning. Provider, with the participation of all other necessary participants, shall develop an ISP, which shall be consistent with the FSP and Applicable Law. If DHS is responsible for case management, then DHS, with the participation of the Provider and all other necessary participants, shall develop an FSP, including a Placement Amendment. If a CUA is responsible for case management, then CUA, with the participation of the Provider and all other necessary participants, shall develop a Single Case Plan, which incorporates the ISP and shall be consistent with Applicable Law.

(i) Clothing. The City shall ensure that each child entering Out-of-Home Placement with Provider shall have at least minimally adequate clothing. If the City determines that the child's clothing is inadequate, it may authorize Provider to purchase the necessary clothing as outlined in the Departmental and Administrative Policy Directives.

(j) Life skills training for children in placement. Provider shall comply with Departmental and Administrative Policy Directives regarding the provision of life skill services for all youth in placement who have attained the age of twelve (12) years or above, regardless of their permanency goals. Concurrent with the ongoing reasonable efforts toward permanency, Provider will address the child's need to acquire the life skills needed for adult self-sufficiency. The Individual Service Plan will identify self-sufficiency goals and specific courses of action that the child will take to prepare for the pursuit of these goals. Provider's agency case worker will provide direct social work and other services to help the child prepare for self-sufficiency as an adult, including:

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- Provision of life skills training
- High school retention and support
- Career clarification and decision-making
- Preparation for post-secondary education or vocational training
- Planning for acquisition of permanent housing upon discharge
- Support in identifying and coping with feelings of separation and loss that will be encountered upon emancipation

Provider shall identify and facilitate access to the resources needed for youth to acquire the skills necessary for self-sufficiency, including resources to support educational and employment goals and the acquisition of housing upon discharge.

[Appx. 1091]

Failure to comply with these requirements constitutes an Event of Default pursuant to Section 12.1(a). If Provider fails to comply with the requirements under Section 5.2, the City may exercise any of the remedies available pursuant to Section 13.1 including withholding of payment

5.3 Medical and Dental Costs.

(a) Responsibility for Payment. The maximum fee(s) set forth in the Provider Agreement and Article VI of these General Provisions do not include payment of medical expenses. The City shall provide the necessary means of payment for medical expenses for the child only in the absence of a third party payor. The City shall apply for public benefits on behalf of the children and youth, including Public Assistance, Medical Assistance, Social Security or SSI, and the City shall furnish Provider with Medical Assistance card(s)

or such information as is necessary to secure third party payments.

(b) Medical Assistance. For delinquent children and children placed in the legal custody of the City, the City shall provide financial coverage for medical expenses through the MA program. The City shall not provide financial reimbursement for medical expenses which are not covered by the MA eligibility guidelines, or for services provided by vendors who are not MA-approved. Reimbursement shall be paid directly to the MA-approved vendor, not to Provider.

(c) Limits of the City's Responsibility.

The City shall not be responsible for the following medical expenses:

- (1) those expenses incurred prior to the effective date of this Contract;
- (2) those expenses that are in excess of the applicable MA rate, unless Provider obtained prior written approval from the City;
- (3) those expenses for services not covered by the applicable MA category for which the child or youth is eligible, unless Provider has obtained prior written approval from the City;
- (4) those expenses for which the vendor refuses to bill MA; and
- (5) those expenses for services for which prior authorization from a managed care organization, including CBH, is required and has not been obtained, and for which Provider is seeking payment from the City. Provider shall be responsible for obtaining treatment authorization prior to securing

the services; failure to do so shall result in Provider bearing sole liability for payment for such services.

[Appx. 1092]

(d) Elective Services. The City shall not assume responsibility for elective services (including medical or dental) unless Provider obtains prior written approval from the City.

5.4 Change in Laws. If, during the Contract Term, there are changes in PA DHS regulations regarding MA reimbursement, the City and Provider agree to negotiate an Amendment, to set forth revisions to Section 0 (Medical and Dental Costs) hereof, to conform to such changes. The City and Provider further agree that the remaining provisions of this Contract shall remain in full force and effect and binding on the Parties.

5.5 Right of Review and Rejection. The City reserves the right to inquire into the background and qualifications of Persons retained by Provider to provide Services, and to reject the use of any persons, families, or households which, in the City's sole judgment, are determined not to be in the best interests of the child or families for whom the Services are required.

ARTICLE VI: COMPENSATION

6.1 Requisite Documents. Prior to the City's payment for placement Services furnished by Provider to delinquent or alleged delinquent youth, Provider must possess the following completed and current documents:

- (1) Form Authorizations;
- (2) FSP;
- (3) Placement Amendment, if any;

(4) CY-61 (Application for Initial Determination for Title IV-E Placement Maintenance and Medicaid); and

(5) Court Order

6.2 Certification of Available Funds. Provider acknowledges that payments under this Contract shall not exceed the amount certified by or on behalf of the City's Director of Finance as available for this Contract. A copy of the form signed by the Office of the Director of Finance showing the amount of currently available funds will be attached to the fully executed Contract returned to Provider. During the Initial Term and any Additional Term(s) of this Contract, the City reserves the right to fund any remaining balance of this Contract amount in varying amounts from time to time as funds become available, not to exceed in total the maximum amount stated in this Contract. Provider agrees that the City shall not be obligated to fund this Contract except out of funds certified by or on behalf of the City's Director of Finance as currently available, even if those funds are less than the maximum amount stated in this Contract. If sufficient funds are not certified as available at any time, the City may exercise its options described in Section 6.3 (Unavailability of Funds) below.

6.3 Unavailability of Funds. If funding for this Contract from any source is not obtained and continued at an aggregate level sufficient to allow for payment for [Appx. 1093] the Services performed and Materials delivered under this Contract, the City may exercise one of the following options without liability or penalty to the City:

- (a) Terminate this Contract effective upon a date specified in a Termination Notice; or
- (b) Continue this Contract by reducing, through written notice to Provider, the amount of this Contract and Services and Materials, consistent with the nature, amount and circumstances of available funding.

The City's exercise of either option under this Section shall not affect any obligations or liabilities of either Party accruing prior to such termination or reduction of Services or Materials. Provider shall be compensated in accordance with the terms of this Contract for Services and Materials satisfactorily performed and delivered prior to such termination or modification of this Contract under this Section.

6.4 Crossing Fiscal Years. If any portion of the compensation set forth in this Contract is to be paid in any City fiscal year following the fiscal year in which the Initial Term or any Additional Term of this Contract commences (in either case, "Appropriated Fiscal Year"), Provider understands and agrees that the portion of the compensation under this Contract payable with City funds for any period following the Appropriated Fiscal Year is subject to the discretion of City Council as to future appropriations. If, for any reason, funds for any such portion of the compensation are not appropriated by City Council in any Fiscal Year following the Appropriated Fiscal Year, this Contract and the City's liability under this Contract shall automatically terminate at the end of the then current Appropriated Fiscal Year; provided, however, that Provider shall be compensated in accordance with the terms of this Contract for Services and Materials satisfactorily performed and delivered prior to the end of the then current Appropriated Fiscal Year.

6.5 Allowability of Cost Items. All payments by the City to Provider under this Contract shall be subject to the limitations on the allowability of cost items imposed by the City of Philadelphia Contract Cost Principles and Guidelines.

6.6 Advances. The City may, in the City's sole discretion, offer providers of per diem placement services (including Provider, if applicable) a one twelfth (1/12) advance payment, based on the maximum amount of this Contract, if Provider meets the following criteria:

- (1) Contract and/or encumbrance is \$50,000.00 or over;
- (2) Agency is not-for-profit;
- (3) Service is to be provided for at least 5 DHS placement clients;
- (4) Agency has submitted audited financial statements by required date;
- (5) Audit review does not indicate possible financial difficulties;
- (6) Provider performance reviews have been satisfactory;
- (7) Provider has been contracting with DHS for at least 3 years; and

[Appx. 1094]

- (8) A decrease in payments and/or placements, as determined by DHS, is not expected.

The advance to Provider shall be repaid by Provider to the City by reducing a proportionate amount of the advance from subsequent monthly payments by the City

to Provider. The entire advance amount must be repaid no later than the April 30th invoice unless otherwise approved by the DHS Commissioner; not to exceed the end of the fiscal year for which the advance is provided. The City, in its sole discretion, may waive any or all of the criteria enumerated in (1)-(8) above.

6.7 Income From Contract Funds. Provider shall provide a written report to the City accounting for all income derived either directly or indirectly by Provider from the use of funds paid to Provider under this Contract or with respect to any activities of Provider in connection with this Contract, including, but not limited to, sale, publication, registration fees, interest, program service fees, and service charges on fees. If required by the City, at the City's sole discretion, Provider shall use all such income to set off against and reduce payments to Provider otherwise due under this Contract.

6.8 Monitoring of Fund Utilization. Provider and the City shall monitor utilization of funds encumbered under this Contract. Provider shall furnish the City with current utilization reports on a monthly basis. In the event of mutually agreed upon overutilization, the City will, proceeding under Section 3.3 (Additional Services and Materials; Change in Scope of Services) above, authorize an Amendment to this Contract to compensate Provider for such overutilization.

6.9 Maximum Daily Rate. Days of Care or Units of Service (or combination thereof). The City shall not compensate Provider for any increases in the maximum daily rate, number of days of care or units of service set forth in the Provider Agreement without the prior written approval of the Commissioner. By execution of

this Contract, Provider agrees that the City may modify, upon issuance of a Modification Notice to Provider, the maximum daily rate, number of days of care or units of service that the City agrees to purchase under this Contract. In the event the maximum daily rate, number of days of care or units of service are increased, the date of such increase shall be the date stated in the Modification Notice. Any decrease in the maximum daily rate, number of days of care or units of services shall be made upon issuance of a Modification Notice not less than thirty (30) days prior to the effective date of such decrease.

6.10 Total Actual Cost. The maximum fee(s) set forth Section 4.1 in the Provider Agreement represents the maximum daily rate multiplied by the anticipated units of Services. The City shall pay Provider only for Provider's Total Actual Cost for Services set forth in the Provider Agreement, not to exceed the maximum amount set forth in Section 4.1 of the Provider Agreement. Total Actual Cost shall be limited to those expenditures permitted by Applicable Law, the City's Functional Expenditure Report, and the City of Philadelphia Contract Cost Principles and [Appx. 1095] Guidelines, as each may be amended from time to time. Actual cost shall be measured as of the end of the current fiscal year (unless a different date is approved in writing by the Commissioner or Commissioner's designee), and shall be documented on the Independent Functional Expenditure Report prepared and certified by a Certified Public Accountant. The Functional Expenditure Report shall be submitted to the City not more than one hundred twenty (120) days after the expiration or earlier termination date of this Contract.

6.11 Excess Compensation. If, as documented on the Independent Functional Expenditure Report prepared and certified by a Certified Public Accountant, compensation exceeds Provider's Total Actual Cost for Services, the City shall recover such excess compensation over Total Actual Cost by deduction from subsequent Provider billings to the Department or by accepting a refund from the Provider. The City may recover excess compensation at any time after it is documented. Total recovery of excess compensation by deductions from subsequent Provider billings shall be accomplished over a nine (9) month maximum duration, unless a longer period is authorized in writing by the Commissioner or Commissioner's designee. Any extension of the recovery period, requested by the Provider or otherwise, beyond nine (9) months shall not create a bar to recovery by the City. If Provider ceases to contract with the City before the City has recovered all or any portion of the excess compensation, Provider shall promptly pay such excess amount to the City. The amounts of any deductions from Provider billings to the City in recovery of prior excess compensation over Total Actual Cost shall not be a part of actual costs for Department funded programs for the fiscal period during which it was deducted.

6.12 Unpaid Amounts. Provider must notify Department in writing at the address set forth in the Provider Agreement of any payments it claims are due to it under this Contract and which remain unpaid by the City, not more than sixty (60) days after the expiration of the then current Term of this Contract. Failure to adhere to the time limitation set forth in this Section may result in Provider's forfeiture of any unpaid balances or, in the sole discretion of the City, the require-

ment that Provider pay any and all additional administrative costs incurred by the City to process the invoices.

6.13 Invoices. To meet the City's requirements of a complete and accurate invoice a Provider must have a validly conformed contract with the City for the time period in which the Provider's duties were performed and a Provider must be in compliance with all of the terms of that contract, including, but not limited to, the Scope of Services, DHS Provider Standards, and all applicable Article VII audit requirements. A Provider shall submit their invoices to the City on a monthly basis. The City must receive invoices not more than ten (10) business days following expiration of the month for which the invoice is submitted.

[Appx. 1096]

6.14 Golden Parachute Agreements. Provider shall not utilize funds under this Contract to fund in whole or in part the payment of Golden Parachute agreements or any similar agreements negotiated with its employees or agents.

6.15 Indirect Rate Requests. The budget-based, cost reimbursement contract Provider may request an indirect rate for indirect expenses. In order to be eligible for indirect rate approval, Provider must ensure that the request conforms to the requirements outlined in the Contract Cost Principles.

(a) For cost reimbursement contracts over \$500,000.00, Provider must submit a detailed justification including line item indirect expense cost calculations, regardless of the percentage of the indirect rate that is being requested.

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- (b) For cost reimbursement contracts under \$500,000.00 with a request of an indirect rate of greater than 10% of the total budget, Provider must submit a detailed justification including line item indirect expense cost calculations.
- (c) For cost reimbursement contracts under \$500,000.00 with a request of an indirect rate of equal to or less than 10% of the total budget, Provider is not required to submit a detailed justification including line item indirect expense cost calculations, unless specifically requested by DHS.
- (d) The value of any applicable Subcontracts shall not be part of Provider's indirect percentage calculations.
- (e) All indirect rate approvals are at the sole discretion of DHS.
- (f) DHS may require a detailed justification including line item indirect expense cost calculations for all indirect rate requests at any time; all provisions to the contrary notwithstanding.

6.16 Timely Payment From Pennsylvania State Funds. Complete and accurate invoices submitted to the City, for which the City receives State reimbursement and for which the State funds have already been appropriated by the State for reimbursement to the City, shall be paid within thirty (30) days of receipt of the invoice.

ARTICLE VII: AUDITS; INSPECTION RIGHTS;
RECORDS

7.1 City Audit. From time to time during the Initial Term and any Additional Term(s) of this Contract, and for a period of five (5) years after the expiration or termination of this Contract, the City may audit any and

all aspects of Provider's performance under this Contract, including but not limited to its billings and invoices. Audits may be conducted by representatives, agents or contractors of the City, including the Department, or other authorized City representatives including, without limitation, the City Controller. If requested by the City, Provider shall submit to the City all vouchers or invoices presented for payment [Appx. 1097] pursuant to this Contract, all cancelled checks, work papers, books, records and accounts upon which the vouchers or invoices are based, and any and all documentation and justification in support of expenditures or fees incurred pursuant to this Contract. All books, invoices, vouchers, records, reports, cancelled checks and other materials shall be subject to periodic review or audit by the City.

7.2 Inspection. All Services and Materials shall be subject to inspection and review by City, federal and state representatives, as may be applicable, or their designees, at the offices of Provider in the City, or in another location with the City's consent. Provider shall cooperate with all City, state and federal inspections and reviews conducted in accordance with the provisions of this Contract. Such inspection and review of Provider's Services and Materials, including, without limitation, programs and facilities, shall be in the sole discretion of the inspecting or reviewing entity. Such inspection or review may include, without limitation, meetings with consumers, review of staffing ratios and job descriptions, and meetings with any of Provider's staff members who are either directly or indirectly involved in providing Services or Materials.

7.3 Availability of Records. Provider shall make available to the City at reasonable times during the Term

of this Contract and for the period set forth in Section 7.4 (Retention of Records) below, all records pertaining to this Contract for the purpose of inspection, audit or reproduction by any authorized representative (including any agent or contractor and the City Controller) of the City, the Commonwealth Secretary of PA DHS or Auditor General, and any other federal and/or state auditors, as may be applicable.

7.4 Retention of Records. Provider shall retain all records, books of account and documentation pertaining to this Contract for a period of five (5) years following expiration or termination of this Contract; if, however, any litigation, claim or audit is commenced prior to expiration of said five (5) year period, then the records shall be retained until all litigation, claims or audit findings have been completely terminated or resolved, without right of further appeal, or if Applicable Law requires a longer period, then the records shall be retained for such longer period.

7.5 Independent Audit.

(a) Combined City contracts that total less than \$300,000 in a fiscal year. If requested by the City, Provider shall submit to the City an Independent Audit Report that is acceptable to the City and prepared and certified by a Certified Public Accountant (CPA) acceptable to the City. The Independent Audit Report shall be prepared in accordance with the following audit requirements:

- (1) Provider shall submit a separate audit for each individual entity that contracts with the City. An individual entity includes each [Appx. 1098] entity with a distinct taxpayer identification number or social security member, or employer identification

number. It is intended that this requirement be followed in addition to any other requirements of: the law, other regulatory bodies, or other financial statement presentations.

(2) The basic financial statements to be filed will include: the Statement of Financial Position, the Statement of Activities, the Statement of Cash Flows and the Statement of Functional Revenue and Expenses by Contract number and Program name.

(3) Provider shall ensure that a final audit of the financial transactions relating to each City contract shall be performed in compliance with all requirements of the Subrecipient Audit Guide, which is incorporated in this Contract by reference. This audit shall verify that all invoiced costs are actual, authorized and eligible for reimbursement in accordance with each City contract's requirements.

(4) Provider agrees to make full and prompt refund to the City of amounts of money which result from audit exceptions due to Provider's performance hereunder, or result from non-compliance with Applicable Law and this contract, including, without limitation, the Contract Cost Principles.

(5) The City reserves the right to disallow fees paid by Provider for audit services under this contract if the final audit report is not submitted in the manner and within the time frame prescribed in this Section or if subsequent review of audit work papers discloses deficiencies in required performance.

(6) Provider shall submit all audit documentation, as described above, pertaining to this Contract no later than one hundred twenty (120) days after the

end of the Term of this Contract, unless a different time is approved, in writing, in accordance with City's audit policies, which are incorporated in this contract by reference. Provider's failure to submit the audit documentation in the time required shall be a basis for withholding processing of invoices for payment, and other remedies the City has at its discretion in accordance with this contract and the City's audit policies.

(b) Combined City contracts that total \$300,000 or more in a fiscal year. Provider shall submit to the City an Independent Audit Report that is acceptable to the City and prepared and certified by a Certified Public Accountant (CPA) acceptable to the City. The Independent Audit Report shall be prepared in accordance with the following audit requirements:

[Appx. 1099]

(1) Provider shall submit a separate audit for each individual entity that contracts with the City. An individual entity includes each entity with a distinct taxpayer identification number or social security number, or employer identification number. It is intended that this requirement be followed in addition to any other requirements of: the law, other regulatory bodies, or other financial statement presentations.

(2) The basic financial statements to be filed will include: the Statement of Financial Position, the Statement of Activities, the Statement of Cash Flows and the Statement of Functional Revenue and Expenses by Contract number and Program name.

(3) Provider shall ensure that an audit of the financial transactions relating to each City contract shall be performed.

a) As applicable, the audit shall be in compliance with all requirements of the Subrecipient Audit Guide, which is incorporated in this contract by reference. This includes Department specific required disclosures and schedules. This audit shall verify that all invoiced costs are actual, authorized and eligible for reimbursement in accordance with this contract's requirements.

1) When the combined total of all City contracts with the Provider is greater than \$300,000 but the combination of all federal and state funds received by the Provider, from all sources, is less than \$500,000, the Provider must provide a financial audit in accordance with generally accepted auditing standards. Specifically, the report shall contain a Balance Sheet, Statement Of Activities And Changes In Net Assets, and A Statement Of Cash Flows.

2) When the combined total of all funds received by the Provider from the federal and state governments, from all sources, are equal to or greater than \$500,000, the Provider must provide a financial audit in accordance with generally accepted government auditing standards (Yellow Book Audit), regardless of the combined total of all City contracts. Specifically, the report shall contain a Balance Sheet, Statement Of Activities And Changes In Net Assets, and A

Statement Of Cash Flows. In addition, there must be an opinion given on Internal Control Over Financial Reporting.

[Appx. 1100]

3) When the combined total of all funds received by the Provider from the federal government, from all sources, is equal to or greater than \$750,000, the Provider must provide a Single Audit in accordance with the United States Code of Federal Regulations Title 2 (2 CFR).

b) Providers shall adhere to all other auditing requirements imposed by state and/or federal legislation and regulation, including but not limited to audit submission timelines, on funding source(s) that provider receives through this contract, if the funding source(s) are comprised of state and/or federal funds.

(4) Provider agrees to make full and prompt refund to the City of amounts of money which result from audit exceptions due to Provider's performance hereunder, or result from non-compliance with Applicable Law and this contract, including, without limitation, the Contract Cost Principles.

(5) The City reserves the right to disallow fees paid by Provider for audit services under this contract if the final audit report is not submitted in the manner and time frame prescribed in this Section or if subsequent review of audit work papers discloses deficiencies in required performance.

(6) Provider shall submit all audit documentation, as described above, pertaining to this Contract no

later than one hundred twenty (120) days after the end of the Term of this Contract, unless a different time is approved, in writing, in accordance with City audit policies, which are incorporated in this contract by reference. Provider's failure to submit the audit documentation in the time required shall be a basis for withholding processing of invoices for payment, and other remedies the City has at its discretion in accordance with this contract and the City's audit policies.

7.6 Compliance Audit Reports. If this Contract is funded in whole or in part with Commonwealth or federal funds, Provider must prepare and submit compliance audit reports to the Department as required under Applicable Law and any contracts pertinent to the Department's receipt of such funds.

7.7 Program Records; Reporting Costs.

(a) Reports Concerning Provider's Costs. In addition to the financial and compliance audits, Provider shall (1) identify that part of its per diem rate or unit cost that is attributable to Services rendered; and (2) identify any [Appx. 1101] unallowable costs, as defined by Applicable Law, this Contract, and the Contract Cost Principles.

(1) Providers of Title IV-E eligible services, regardless of their physical location, are required to provide complete, timely and accurate Title IV-E submissions.

a) Providers must secure approved Title IV-E rates for all eligible services as a condition of receiving full funding for Title IV-E services from DHS. If, after a reasonable timeframe (as determined by DHS), Provider has failed to secure

approved Title IV-E rates, DHS may retroactively decrease payable per diems to the prior year's city portion of such per diems. If no prior year Title IV-E per diem rate was established, DHS reserves the right to establish a temporary city share rate until the Provider's Title IV-E package has been approved.

b) Title IV-E rate packages must include rates for all Out-of-Home Placement services provided to DHS. If DHS's contracted rates are greater than the projected per diem included in the Title IV-E rate packages, DHS's contracted rates shall be reduced to the Title IV-E rates.

(b) Purchase Category. In reporting financial, program or Service information, Provider shall reflect costs by purchase category for each Service rendered under this Contract.

(c) Unallowable Costs; Third Party funds.

(1) In the calculation of unallowable costs under Title IV-E, this Contract, or the City of Philadelphia Contract Cost Principles and Guidelines, contributed Services are to be used to offset unallowable costs before computing the unreimbursed amount which Provider will report to the City.

(2) Unless otherwise required by the Department to obtain maximum reimbursement from any third party source, Provider agrees that third party funds received from a government funding source (which may be used to pay for costs incurred in providing a child welfare Service provided under this Contract) or third party donor restricted funds

(which may be held for a specific child welfare Service provided under this Contract), shall be credited in the following manner:

a) first against unallowable costs; then,

[Appx. 1102]

b) against the difference between the Actual Allowable Costs incurred by Provider and the per diem cost paid by the City for the Service; then,

c) to reduce the payments otherwise required to be made by the City under this Contract, by applying the remaining funds to such costs on a percentage basis, calculated by dividing the cost for each Service under this Contract by the total cost of all Services provided under this Contract.

7.8 Audits Pursuant to Section 6-400 of the Home Rule Charter. Any Provider that is an Agency, as defined in Section 6-400 of the Philadelphia Home Rule Charter shall permit the City Controller to audit its affairs as authorized in Section 6-400 during the Initial Term or any Additional Term. Under Section 6-400, an Agency is any entity that receives funds from the City, and either a) is created by, or whose board of directors is in whole or part appointed by, one or more City officials or bodies; or b) is organized pursuant to legal authority granted to it by City ordinance.

ARTICLE VIII: ASSIGNMENT

8.1 Assignment By Provider. Provider shall not assign this Contract, or any part of this Contract, or delegate performance of this Contract (other than to its own work forces), without obtaining the prior written consent of the Commissioner or designee. The decision

whether to consent to an assignment, the timing of consent (if any), and conditions to such consent, if any, shall each be at the City's sole discretion. Any consent to the assignment of any monies to be paid under this Contract shall not relieve Provider from the faithful performance of any of its obligations under this Contract or change any of the Terms and Conditions of this Contract. Any purported assignment in violation of this provision shall be void and of no effect. The City's consent to an assignment shall not release the assignor from any liability accrued or thereafter accruing under this Contract. Any assignment or purported assignment shall be in writing and shall contain an express assumption by the assignee of all liability accrued or thereafter accruing under this Contract. Consent by the City to any assignment shall not be deemed a course of conduct, dealing or performance with respect to any other assignment or proposed assignment. For purposes of this Section 8.1 (Assignment by Provider), an assignment includes the acquisition of the Provider, or a controlling interest therein, through a sale of stock, assets, or otherwise; a corporate or other merger; and the appointment of a receiver or bankruptcy trustee; and the transfer of this Contract or of control of Provider in any bankruptcy or other insolvency proceeding.

8.2 Applicability in Case of Bankruptcy or Insolvency. A receiver or trustee of or for Provider in any federal or state bankruptcy, insolvency or other proceeding concerning Provider shall comply with the requirements set forth in Section 8.1 (Assignment by Provider) above.

[Appx. 1103]

8.3 Personal Services. Provider acknowledges that the Services and Materials are the personal services of Provider and the City shall have no obligation to accept performance by a third party without the Commissioner's or designee's prior and express written consent.

ARTICLE IX: INDEPENDENT CONTRACTOR; INDEMNIFICATION; LITIGATION COOPERATION

9.1 Independent Contractor. Provider is an independent contractor and shall not in any way or for any purpose be deemed or intended to be an employee or agent of the City. Neither Provider nor its agents, employees or Subcontractors shall in any way represent that they are acting as employees, officials or agents of the City.

9.2 Indemnification. Provider shall indemnify, defend and hold harmless the City, its officers, employees and agents, from and against any and all losses, costs (including, but not limited to, litigation and settlement costs and counsel fees and expenses), claims, suits, actions, damages, liability and expenses, occasioned wholly or in part by Provider's act or omission or negligence or fault or the act or omission or negligence or fault of Provider's agents, Subcontractors, independent contractors, suppliers, employees or servants in connection with this Contract, including, but not limited to, those in connection with loss of life, bodily injury, personal injury, damage to property, contamination or adverse effects on the environment, intentional acts, failure to pay any Subcontractors and suppliers, any breach of this Contract, loss of data, data security breach, and any infringement or violation of any proprietary right (including, but not limited to, patent, copyright, trademark, service mark and trade secret).

9.3 Litigation Cooperation. If, at any time, the City becomes involved in a dispute or receives notice of a claim or is involved in litigation concerning the Services and Materials provided under this Contract, the resolution of which requires the Services or cooperation of Provider, and Provider is not otherwise obligated to indemnify and defend the City pursuant to the provisions of Section 9.2 (Indemnification) above, Provider agrees to provide such Services and to cooperate with the City in resolving such claim or litigation as Additional Services and Materials under Section 3.3 (Additional Services and Materials; Change in Scope of Services) above and require any Subcontractors to abide to this Section 9.3.

9.4 Notice of Claims. If Provider receives notice of a legal claim against it in connection with this Contract, Provider shall submit appropriate written notice of such claim to its insurance carrier within the time frame required for submission of claims by the applicable insurance policy and, within ten (10) business days of receipt of notice of the claim, to the Commissioner.

[Appx. 1104]

ARTICLE X: INSURANCE

10.1 Insurance. Unless otherwise approved by the City's Risk Manager in writing, Provider shall, at its sole cost and expense, procure and maintain, or cause to be procured and maintained, in full force and effect, the types and minimum limits of insurance specified below, covering Provider's performance of the Services and the delivery of the Materials. Provider shall procure, or cause to be procured, all insurance from reputable insurers admitted to do business on a direct basis

in the Commonwealth of Pennsylvania or otherwise acceptable to the City. All insurance herein, except Professional Liability insurance, shall be written on an “occurrence” basis and not a “claims-made” basis. In no event shall Provider perform any Services or other work until Provider has delivered or caused to be delivered to the Responsible Official and the City’s Risk Management Division the required evidence of insurance coverages. All insurance coverages shall provide for at least thirty (30) days prior written notice to be given to the City in the event coverage is materially changed, cancelled, or non-renewed. The City, its officers, employees, and agents, shall be named as additional insureds on the General Liability Insurance policy. Coverage shall also include sexual abuse/molestation coverage. As outlined in Section 10.3, Provider shall also deliver or cause to be delivered to the City an endorsement stating that the coverage afforded the City and its officers, employees and agents, as additional insureds, will be primary to any other coverage available to them and that no act or omission of the City, its officers, employees or agents shall invalidate the coverage.

(a) Workers’ Compensation and Employers’ Liability.

(1) Workers’ Compensation: Statutory Limits

(2) Employers’ Liability: \$100,000 Each Accident - Bodily Injury by Accident; \$100,000 Each Employee - Bodily Injury by Disease; and \$500,000 Policy Limit - Bodily Injury by Disease.

(3) Other states insurance including Pennsylvania.

(b) General Liability Insurance.

Limits of Liability:

JA 637

(1) For all Out-of-Home service categories, including, but not limited to, day treatment and day care centers: Two million dollars (\$2,000,000.00) per occurrence;

(2) For all in-home service categories: One million dollars (\$1,000,000.00) per occurrence;

[Appx. 1105]

Coverage:

- (1) Premises operations;
- (2) Blanket contractual liability;
- (3) Personal injury liability;
- (4) Products and completed operations;
- (5) Independent contractors;
- (6) Employees and volunteers as additional insureds;
- (7) Cross liability;
- (8) Broad form property damage (including completed operations); and
- (9) Sexual abuse/molestation.

(c) Automobile Liability Insurance.

- (1) Limit of Liability: \$1,000,000 per occurrence combined single limit for bodily injury (including death) and property damage liability.
- (2) Coverage: Owned, non-owned, and hired vehicles.

(d) Professional Liability Insurance.

(1) Health Care Providers subject to the Medical Care Availability and Reduction of Error (MCARE) Act, as amended:

a) Hospital and Nursing Homes including officers and employees: \$1,000,000 each occurrence, \$4,000,000 annual aggregate.

b) Individuals and Professional Corporations: \$1,000,000 each occurrence; \$3,000,000 annual aggregate.

(2) All Health Care and Human Services Providers not subject to the MCARE Act, as amended: \$1,000,000 each occurrence; \$3,000,000 annual aggregate.

(3) Professional Liability Insurance may be written on a claims-made basis provided that coverage for occurrences happening during the performance of the Services required under this Agreement shall be maintained in full force and effect under the policy or “tail” coverage for a period of at least two (2) years after completion of the Services.

10.2 Self-Insurance. Provider may not self-insure any of the coverages required under this Contract without the prior written approval of the Commissioner and the City’s Risk Manager. In the event that Provider wants to self-insure any of the coverages listed above, it shall submit to the Commissioner and the City’s Risk [Appx. 1106] Manager, prior to Provider’s commencement of Services or delivery of any Materials hereunder¹ a certified copy of Provider’s most recent audited financial statement, and such other evidence of its qualifications to act as self-insurer (e.g. state approval) as may be requested by the Commissioner or the City’s Risk Manager. In the event the City grants

such approval, Provider understands and agrees that the City, its officers, employees and agents shall be entitled to receive the same coverages and benefits under Provider's self-insurance program that they would have received had the insurance requirements set forth above been satisfied by a reputable insurer admitted and duly authorized to do business in the Commonwealth of Pennsylvania or otherwise acceptable to the City. If at the time of commencement of the Term of this Contract, Provider self-insures its professional liability or workers' compensation and employers' liability coverage, Provider may, in lieu of the foregoing, furnish to the City a current copy of the state certification form for self-insurance or a current copy of the State Insurance Commissioner's letter of approval, whichever is appropriate. The insurance (including self-insurance) requirements set forth herein are not intended and shall not be construed to modify, limit or reduce the indemnifications made in this Contract by Provider to the City, or to limit Provider's liability under this Contract to the limits of the policies of insurance (or self-insurance) required to be maintained by Provider hereunder.

10.3 Evidence of Insurance Coverage. Certificates of insurance evidencing the required coverages must specifically reference the City contract number for which they are being submitted, indicate that the City of Philadelphia, its officers, employees and agents are named as additional insureds and that coverage is included for sexual abuse/molestation. The original certificates of insurance and a copy of Provider's current sexual abuse/molestation endorsement must be submitted to the City's Risk Manager at the following address:

JA 640

The City of Philadelphia
Office of the Director of Finance
Division of Risk Management
1515 Arch Street, 14th Floor
Philadelphia, PA 19102-1579
(Fax. No.: 215-683-1705).

A copy of the certificates of insurance shall be submitted to the Commissioner at the address of the Department set forth in the Notice Section of the Provider Agreement. Both submissions must be made at least ten (10) days before work is begun and at least ten (10) days before each Additional Term. The City, in its sole discretion, may waive the ten (10) day requirement for advance documentation of coverage in situations where such waiver will benefit the City, but under no circumstances shall Provider actually begin work (or continue work, in the case of an Additional Term) without providing the required evidence of insurance. The actual endorsement adding the City as an additional insured must specifically reference the City contract number and be submitted to the City's [Appx. 1107] Risk Manager at the above address. The City reserves the right to require Provider to furnish certified copies of the original policies of all insurance required under this Contract at any time upon ten (10) days written notice to Provider.

10.4 Fidelity Bond. When required by the City, Provider shall, at its sole cost and expense, obtain and maintain during the Initial Term and any Additional Term(s) of this Contract, a fidelity bond in an amount equal to the greater of (a) Ten Thousand Dollars (\$10,000) or (b) the amount specified in the Provider Agreement, covering Provider's employees who have

financial responsibilities related to the receipt and disbursement of funds under this Contract. In lieu of a fidelity bond, Provider may obtain coverage for crime insurance with limits that are the greater of (a) ten thousand dollars (\$10,000) or (b) the amount specified in the Provider Agreement. The fidelity bond or crime insurance, whichever is obtained by Provider, shall name the City as a beneficiary. Evidence of the existence of the fidelity bond or crime insurance shall be submitted to the City prior to the commencement of Services in conformity with the requirements of Section 10.3 (Evidence of Insurance Coverage) above.

ARTICLE XI: OWNERSHIP OF MATERIALS; PROPRIETARY INFORMATION; CONFIDENTIALITY

11.1 City Data. Except as may be provided otherwise in the section of the Provider Agreement dealing with exceptions to these General Provisions, "City Data" shall include: any and all records, documents, and data furnished by the City to Provider in relation to the work required under the Contract; and all Deliverables, Materials, other work product(s), and items of work created by Provider as part of, or to perform work required under, the Contract. "City Data" shall not, however, include any information which: was known to Provider, prior to the commencement of its performance of the Contract, free of any obligation to keep it confidential; is proprietary to Provider; was generally known to the public at the time of receipt by Provider, or becomes generally known to the public through no act or omission of Provider; or was' independently developed by Provider, unrelated to work performed for the City, and without knowledge or use of any information obtained from the City.

11.2 Ownership of Materials.

(a) Subject to Applicable Law, all Materials shall be the sole and absolute property of the City and the City shall have title thereto and unrestricted use thereof. To the extent that any Materials relating to this Contract developed by or for Provider embody a copyrightable work, including, but not limited to, a “compilation” as that term is used in 17 U.S.C. § 101, as amended from time to time, the City and Provider agree that such copyrightable work(s) shall be considered as one or more “works made for hire” by Provider for the City, as that term is used in 17 U.S.C. §§ 101 and 201 (b), as amended from time to time. To the extent that any Materials [Appx. 1108] relating to this Contract developed by or for Provider embody one or more copyrightable works but are neither a “compilation” nor any other form of “work made for hire,” Provider hereby assigns, and agrees to execute instruments evidencing such assignment, all copyrights in all of such works to the City. Provider shall cause all Materials developed or produced by Provider and any Subcontractor in connection with this Contract which embody a copyrightable work to bear the following designation: “© __ The City of Philadelphia” [complete then current year in blank line].

(b) Without limitation of the foregoing, and in order to ensure continuity of care, medical records may be retained in the custody and control of Provider. The City shall be allowed unlimited access to all medical records, and if copies are required they shall be made at Provider’s expense.

(c) Provider shall make available to the City, upon the City’s request, a copy of any Materials prepared by or

for Provider in performance of this Contract, at no cost to the City.

(d) All computer programs, tapes and software developed under this Contract shall be compatible with specifications set by the Department.

(e) Provider hereby grants, and shall require its Subcontractors to grant, to the City a royalty-free, nonexclusive and irrevocable right to publish, translate, reproduce, deliver, perform and authorize others to do so, all studies, media, curricula, reports and other Materials not owned by the City under this Contract but which relate to the performance of the Services, Materials or this Contract; provided, however, that Provider shall not be required to grant such right to the City with respect to any Materials for which Provider would be liable to pay compensation to third parties because of such grant.

(f) If federal or Commonwealth funds are used for the development of new software or for modifications of software, the Provider hereby grants to the Commonwealth of Pennsylvania and the federal government a royalty-free, nonexclusive and irrevocable license. Said license shall include the rights to reproduce, publish, or otherwise use, and to authorize others to use for State and Federal Government purposes, including software or modifications thereof and associated documentation designed, developed or installed with federal financial participation. Said license shall apply except when in the case that the software purchase is of proprietary operating/vendor software packages (e.g., ADABAS or TOTAL) which are provided at established catalog or market prices and sold or leased to the general public.

[Appx. 1109]

11.3 Non-Disclosure and Destruction of Data. Provider and its employees, agents, Subcontractors, suppliers, and any person or entity acting on its behalf (i) will maintain in strict confidence all City Data; (ii) will not, without the City's written permission, issue, divulge, disclose, publish, communicate, or distribute any City Data to any person or entity except as may be strictly necessary to perform under the Contract; (iii) will not, without the City's written permission, in any way use any City Data for their businesses, research, or other advantage or gain (except as may be strictly necessary to perform under the Contract), including, without limitation, any use of City Data in any presentation, demonstration, or proposal to perform work, to the City or to others, that may be conducted or created as part of their business activities or otherwise; and (iv) except as required by Applicable Law, will immediately upon termination of the Contract return all City Data to the City, destroy any and all copies of any City Data that are in their possession, whether on paper or in electronic or other form and, if requested by the City in writing, will certify in writing that there has been full compliance with this section.

ARTICLE XII: EVENTS OF DEFAULT

12.1 Events of Default. Each of the following shall be an Event of Default by Provider under this Contract:

- (a) Failure by Provider to comply with any provision of this Contract;
- (b) Occurrence of an Event of Insolvency with respect to Provider;

- (c) Falseness or inaccuracy of any warranty or representation of Provider contained in this Contract or in any other document submitted to the City by Provider;
- (d) Misappropriation by Provider of any funds provided under this Contract or failure by Provider to notify the City upon discovery of any misappropriation;
- (e) A violation of law which results in a guilty plea, a plea of nolo contendere, or conviction of a criminal offense by Provider, or any of its directors, employees, or agents (1) directly or indirectly relating to this Contract or the Services or Materials provided under this Contract, whether or not such offense is ultimately adjudged to have occurred; or (2) which adversely affects the performance of this Contract; or (3) in any factual circumstances bearing any substantial similarity to any of the Services under this Contract;
- (f) Indictment or other issuance of formal criminal charges against Provider, its directors, employees or agents for any criminal offense or any other violation of Applicable Law directly relating to this Contract or Services or Materials, in any factual circumstances bearing any substantial [Appx. 1110] similarity to any of the Services under this Contract or which otherwise adversely affects Provider's performance of this Contract in accordance with its terms, whether or not such offense or violation is ultimately adjudged to have occurred;
- (g) Debarment or suspension of Provider or any agent, employee or Subcontractor of Provider under federal, state or local law, rule or regulation; and/or
- (h) Any act, omission, or misrepresentation which renders Provider ineligible for a City contract or renders

the contract voidable under Philadelphia Code Chapter § 17-1400.

12.2 Notice and Cure. The City agrees that the City will not exercise any right or remedy provided for in Section 13.1 (The City's Remedies) below because of any Event of Default unless the City has first given written notice of the Event of Default to Provider, and Provider, within a period of ten (10) days thereafter, or such additional cure period as the City may authorize, shall have failed to correct the Event of Default; provided, however, that no such notice from the City shall be required nor shall the City permit any period for cure if:

- (a) Provider has temporarily or permanently ceased providing Services and/or Materials;
- (b) The Event of Default creates an emergency which requires, as determined by the City in the City's sole discretion, immediate exercise of the City's rights or remedies;
- (c) The City has previously notified Provider in the preceding twelve (12) month period of any Event of Default under this Contract;
- (d) An Event of Default occurs as described in 12.1(b), (c), (d), or (f) above; or
- (e) Provider has failed to obtain or maintain the insurance or any bond required under this Contract.

Nothing contained in this Section shall limit the City's rights under Article XIII (Remedies) below.

ARTICLE XIII: REMEDIES

13.1 The City's Remedies.

(a) In the event Provider has committed or permitted an Event of Default and has been notified thereof in accordance with Section 12.2 (Notice and Cure) above, then the City may, but shall not be obligated to, without [Appx. 1111] further notice to or demand on Provider and without waiving or releasing Provider from any of its obligations under this Contract:

- (1) perform (or cause a third party to perform) this Contract, in whole or in part, including, without limitation, obtaining or paying for any required insurance or performing other acts capable of performance by the City. Provider shall be liable to the City for all sums paid by the City and all expenses incurred by the City (or a third party) pursuant to this Section 13.1, together with interest at a rate equal to the Prime Rate as set by First Union National Bank or its successors, plus five (5) percent, provided, however, such interest rate and expense shall not exceed the highest legal rate permitted in the Commonwealth of Pennsylvania thereon from the date the City or its agent incurs such costs. The City shall not in any event be liable for inconvenience, expense or any other damage (including, but not limited to, consequential damages or lost profits) incurred by Provider by reason of the City's performance or paying such costs or expenses, and the obligations of Provider under this Contract shall not be altered or affected in any manner by the City's exercise of its rights under this Section 13.1 (The City's Remedies);
- (2) withhold payment of, or offset against, any funds payable to or for the benefit of Provider;

(3) collect, foreclose or realize upon any bond, collateral, security or insurance provided by or on behalf of Provider;

(4) exercise any other right the City has or may have at law, in equity, or under this Contract.

(b) In the event Provider has committed or permitted an Event of Default and has been notified thereof in accordance with Section 12.2 (Notice and Cure) above, then the City may, but shall not be obligated to, without waiving or releasing Provider from any of its obligations under this Contract, terminate or suspend this Contract in whole or in part, as set forth more fully in Article XIV (Transition, Termination, and Suspension) below. In the event of partial termination or suspension, Provider shall continue the performance of this Contract to the extent not terminated or suspended.

(c) The Services and Materials purchased from Provider are unique, personal in nature and not otherwise readily available. Accordingly, Provider acknowledges that, in addition to all other remedies to which the City is entitled, the City shall have the right, to the fullest extent permitted under Applicable Law, to enforce the terms of this Contract without limitation, by a decree of specific performance or by injunction restraining a [Appx. 1112] violation, or attempted or threatened violation, of any provision of this Contract.

13.2 Concurrent Pursuit of Remedies; No Waiver. The City may exercise any or all of the remedies set forth in this Article XIII (Remedies), each of which may be pursued separately or in conjunction with such other remedies as the City in its sole discretion shall determine. No extension or indulgence granted by the City

to Provider shall operate as a waiver of any of the City's rights in connection with this Contract. The rights and remedies of the City as described in this Article XIII (Remedies) and as described elsewhere in this Contract shall not be exclusive and are in addition to any other rights or remedies available to the City under this Contract at law or in equity.

ARTICLE XIV: TRANSITION, TERMINATION AND SUSPENSION

14.1 Transition. As provided for in Section 2.1, this Contract shall not exceed the term period of one (1) year. However, the City shall have the right at any point, in either whole or in part, to transition the Services and Materials covered under this Contract to another contract. At least sixty (60) days notice of the need to transition the Services and Materials covered under this Contract will be provided with a transition start date and transition end date.

14.2 Termination or Suspension. In addition to its rights under Articles VI (Compensation) and XIII (Remedies) above, the City shall have the right, in either whole or in part, to terminate this Contract or suspend Provider's performance under this Contract at any time during the Initial Term or any Additional Term(s) of this Contract, for any reason, including, without limitation, the convenience of the City. If this Contract is terminated, the City shall issue a written Termination Notice, which shall set forth the effective date of the termination. If this Contract is suspended, the City shall issue a written Suspension Notice, which shall set forth the effective date of the suspension.

14.3 Provider Responsibilities Upon Transition, Termination or Suspension.

(a) Upon the City's transmission of a Transition Notice, Termination Notice or a Suspension Notice under any provision of this Contract, Provider and its agents, employees and Subcontractors, shall

(1) take immediate action in an orderly manner to discontinue Services and Materials, and demobilize work forces to minimize the incurrence of costs; and

(2) upon request by the City by notice to Provider, collect, assemble and transmit to the City all Materials in-such state of completion as may exist as of the effective date of the transition, termination or suspension. All such Materials shall be clearly labeled and indexed to the satisfaction of the Commissioner and delivered to [Appx. 1113] the Commissioner by Provider on or before the date for delivery of the Materials set forth in the Transition Notice, Termination Notice or Suspension Notice or, if no such date is set forth in the Termination Notice or Suspension Notice, then before the effective date of termination set forth in the Transition Notice, Termination Notice or Suspension Notice. Provider waives and releases any and all right to any retaining or charging liens or similar right or remedy in favor of Provider.

(b) The City's transition, termination or suspension of this Contract shall not affect any obligations or liabilities of either Party accruing prior to the effective date of such termination or suspension.

(c) There shall be no liability, cost or penalty to the City (including, but not limited to, consequential damages or lost profits) for transition, termination or suspension of this Contract.

14.4 Payment of Provider upon Transition, Termination or Suspension.

(a) Upon termination or suspension of this Contract by the City for an Event of Default, Provider shall be entitled to payment of such an amount, to be determined by the City and subject to audit, as shall compensate it for the work satisfactorily performed prior to the termination date; provided, however, that:

(1) no allowance shall be included for termination expenses or for anticipated profits, unabsorbed or under absorbed overhead, or unperformed Services and Materials not satisfactorily delivered; and

(2) the City shall deduct from any amount due and payable to Provider prior to the termination date, but withheld or not paid, the total amount of fees, costs or additional expenses incurred by the City in order to satisfactorily complete the Services and Materials required to be performed by Provider under this Contract, including the expense of engaging another provider for this purpose, and such other damages, costs, losses and expenses of the City as may be incurred or result from such termination for an Event of Default.

(b) In the event of transition, termination or suspension of this Contract by the City for the City's convenience, Provider shall be paid such an amount as shall compensate Provider for the portion of the Services satisfactorily performed and Materials satisfactorily delivered prior to the date of transition, termination or

suspension. The City shall not pay Provider any amount for Provider's transition, termination or suspension expenses or anticipated profits, unabsorbed or underabsorbed overhead, or unperformed Services and Materials not satisfactorily delivered.

[Appx. 1114]

14.5 Special Suspension Rules. Suspension of Provider's performance under this Contract after an Event of Default shall not constitute a waiver or release of any liability of Provider for such Event of Default or any of the City's damages or other remedies arising out of such Event of Default; nor shall such suspension be deemed an election of remedies in derogation of any other remedy. Provider acknowledges that the City shall have the right, at its sole discretion, to suspend Provider's performance in the event City Council or the Commonwealth of Pennsylvania does not appropriate funds for the performance of this Contract. In the event that the City-issues a Suspension Notice to Provider, such suspension shall continue from the effective date specified in the Suspension Notice until a date specified in the Suspension Notice which shall be not more than one hundred eighty (180) days after the effective date or the date of judgment in any pending trial, whichever is later (such period, the "Suspension Period"). On or prior to the expiration of the Suspension Period, the City shall either terminate this Contract by giving a Termination Notice pursuant to Section 14.2 (Termination or Suspension) above, or by notice to Provider, instruct Provider to resume the delivery of Services and Materials pursuant to this Contract upon the expiration of the Suspension Period. After issuing a Suspension Notice, the City shall pay any invoices submitted by Provider for Services

rendered prior to the commencement of the Suspension Period or otherwise payable by the City to Provider under this Contract, subject to all of the City's rights and remedies against Provider, including but not limited to, its rights of set off and its right to review and accept Services and Materials prior to payment therefor.

**ARTICLE XV: ADDITIONAL REPRESENTATIONS
AND COVENANTS OF PROVIDER RELATING TO
CERTAIN APPLICABLE LAWS**

In addition to the representations, warranties and covenants made by Provider in Article IV, Provider further represents, warrants and covenants that, to the extent of their applicability to Provider, Provider is in compliance with the laws, ordinances, regulations and executive orders described below. By executing this Contract, Provider thereby certifies to such compliance. Provider further certifies that the representations, warranties, and covenants provided pursuant to this Article shall continue to remain true throughout the Term of this Contract or any other period of time required by such laws. In the event said representations, warranties, and covenants are or become untrue or inaccurate, Provider shall promptly give notice thereof to the City, specifying the manner in which said representation, warranty, or covenant is untrue or inaccurate. The provisions of this Article are not intended to limit the applicability of the other provisions of this Contract, including, without limitation, Provider's agreement to comply with all Applicable Law.

15.1 Non-Discrimination; Fair Practices. This Contract is entered into under the terms of the Charter, the Fair Practices Ordinance (Chapter 9-1100 of the Code) and the Mayor's Executive Order No. 04-86 (the

“Executive Order”), as they may be amended from time to time, and in performing this Contract, Provider shall not discriminate or permit discrimination against any individual because of race, color, religion or national origin. Nor shall Provider discriminate or permit [Appx. 1115] discrimination against individuals in employment, housing and real property practices, and/or public accommodation practices whether by direct or indirect practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, differentiation or preference in the treatment of a person on the basis of actual or perceived race, ethnicity, color, sex, sexual orientation, gender identity, religion, national origin, ancestry, age, disability, marital status, source of income, familial status, genetic information or domestic or sexual violence victim status, Human Immunodeficiency Virus (HIV) infection, or engage in any other act or practice made unlawful under the Charter, Chapter 9-1100, the Executive Order, or under the nondiscrimination laws of the United States or the Commonwealth of Pennsylvania. In the event of any breach of this Section 15.1 (Non-Discrimination; Fair Practices), the City may, in addition to any other rights or remedies available under this Contract, at law or in equity, suspend or terminate this Contract forthwith.

15.2 Chapter 17-400 of the Philadelphia Code: Exclusionary Private Organizations.

(a) In accordance with Chapter 17-400 of the Code, Provider agrees that its payment or reimbursement of membership fees or other expenses associated with participation by its employees in an exclusionary private organization, insofar as such participation con-

fers an employment advantage or constitutes or results in discrimination with regard to hiring, tenure of employment, promotions, terms, privileges or conditions of employment on the basis of race, color, sex, sexual orientation, religion, national origin or ancestry, constitutes, without limiting the applicability of Articles XII (Events of Default) and XII (Remedies) above, a substantial breach of this Contract entitling the City to all rights and remedies provided in this Contract or otherwise available at law or in equity.

(b) Provider agrees to cooperate with the Commission on Human Relations of the City in any manner which the Commission deems reasonable and necessary for the Commission to carry out its responsibilities under Chapter 17-400 of the Code. Provider's failure to so cooperate shall constitute, without limiting the applicability of Articles XI (Events of Default) and XII (Remedies) above, a substantial breach of this Contract entitling the City to all rights and remedies provided in this Contract or otherwise available at law or in equity.

15.3 Executive Order 03-12: Minority, Woman and Disabled Business Enterprise Participation. In accordance with Executive Order 03-12 (the "Antidiscrimination Policy"), the City, acting through its Office of Economic Opportunity ("OEO"), has established an antidiscrimination policy that relates to the solicitation and inclusion of Minority Business Enterprises ("MBE"), Woman Business Enterprises ("WBE"), and Disabled Business Enterprises ("DSBE") [Appx. 1116] (collectively, "M/W/DSBE") in City contracts. The purpose of this Antidiscrimination Policy is to ensure that all businesses desiring to do business with the City

have an equal opportunity to compete by creating access to the City's procurement process and meaningfully increasing opportunities for the participation by M/W/DSBEs in City contracts at all tiers of contracting, as prime contractors, Subcontractors and joint venture partners. In furtherance of this policy, the City will, from time to time, establish participation ranges for City Contracts and City Related Special Projects. Provider agrees to comply with the requirements of the Antidiscrimination Policy, and where participation ranges are established by OEO, Provider agrees, without limitation, to submit documentation responsive to each of the participation ranges established for the Contract.

(a) General Requirements. In furtherance of the purposes of the Antidiscrimination Policy, Provider agrees to the following:

(1) Provider, if it has achieved participation commitments with M/W/DSBEs, represents that it has entered into legally binding agreement(s) with M/W/DSBEs as participants under this Contract ("Participant Agreement(s)") for the services and in the dollar amount(s) and percentage(s) as specified in the M/W/DSBE Participation Exhibit to this Contract (the "Contract Commitment(s)").

(2) Provider shall secure the prior written approval of the Office of Economic Opportunity ("OEO"), before making any changes or modifications to any Contract Commitments made by Provider herein, including, without limitation, substitutions for its MBEs, WBEs and/or DSBEs, changes or reductions in the services provided by its M/W/DSBE Subcontractors, or changes or reductions in the dollar

and/or percentage amounts paid to its M/W/DSBE Subcontractors.

(3) Unless otherwise specified in a Participant Agreement as described in (a) (1) above, Provider shall, within five (5) business days after receipt of a payment from the City for work performed under the Contract, deliver to its M/W/DSBE Subcontractors the proportionate share of such payment for services performed by its M/W/DSBE Subcontractors. In connection with payment of its M/W/DSBE Subcontractors, Provider agrees to fully comply with the City's payment reporting process which may include the use of electronic payment verification systems.

(4) Provider shall, in the event of an increase in units of work and/or compensation under the Contract, increase its Contract Commitment(s) with its M/W/DSBE Subcontractors proportionately, which increase shall be reflected in the Participant [Appx. 1117] Agreement(s). OEO may from time to time request documentation from Provider evidencing compliance with this provision.

(5) Provider shall submit, within the time frames prescribed by the City; any and all documentation the City may request, including, but not limited to, copies of Participant Agreements, participation summary reports, M/W/DSBE Subcontractor invoices, telephone logs and correspondence with M/W/DSBE Subcontractors, cancelled checks and certification of payments. Provider shall maintain all documentation related to this Section for a period of five (5) years from the date of Provider's receipt of final payment under the Contract.

(6) Provider agrees that the City may, in its sole discretion, conduct periodic reviews to monitor Provider's compliance with the terms of this Antidiscrimination Policy.

(7) Provider agrees that in the event the City determines that Provider has failed to comply with any of the requirements of this Antidiscrimination Policy, including substantial compliance with any Contract Commitment, the City may, in addition to any other rights and remedies it may have under the Contract which includes termination of the Contract, exercise one or more of the following remedies which shall be deemed cumulative and concurrent:

- a) Debar Provider from proposing on and/or participating in any future contracts for a maximum period of three (3) years.

- b) Recover as liquidated damages, i.e., without institution of a civil lawsuit, one percent (1%) of the total dollar amount of the Contract, which amount shall include any increase by way of amendments to the Contract, for each one percent (1%) (or fraction thereof) of the shortfall in Contract Commitment(s) to Provider's M/W/DSBE Subcontractors.

(8) No privity of contract exists between the City and any M/W/DSBE Subcontractor identified herein and the City does not intend to give or confer upon any such M/W/DSBE Subcontractor(s) any legal rights or remedies in connection with the Subcontracted services pursuant to the Antidiscrimination Policy or by reason of this Contract except

such rights or remedies that the M/W/DSBE Subcontractor may seek as a private cause of action under any legally binding contract to which it may be a party. The remedies enumerated above are for the sole benefit of the City and City's failure to enforce any provision or the City's indulgence of any non-compliance with any provision hereunder, shall not operate as [Appx. 1118] a waiver of any of the City's rights in connection with this Contract nor shall it give rise to actions by any third parties including identified M/W/DSBE Subcontractors.

(b) Special Requirements Applicable to Non-Profit Providers. In the event the Provider is a non-profit, the Contract may not be subject to M/W/DSBE participation ranges, but Provider shall demonstrate its compliance with the Antidiscrimination Policy in the following manner:

(1) Provide to the OEO annually, a written diversity program identifying the race, gender and ethnic composition of its board of directors, its employment profile, a list of all vendors that the nonprofit does business with in its M/W/DSBE procurement program (e.g., "M/W/DSBE Supplier Diversity Program") and a statement of the geographic area(s) where its services are most concentrated; and

(2) Demonstrate, to the OEO's satisfaction, that the non-profit's organization makes appropriate efforts to maintain a diverse workforce and board of directors and operates a fair and effective M/W/DSBE procurement program.

(c) Criminal Liability for Fraudulent or False Statements. It is understood that false certification or rep-

resentation made in connection with this Antidiscrimination Policy may be subject to prosecution under Title 18 Pa. C.S. Sections 4107.2 and 4904.

15.4 Federal Laws. Provider shall comply with the provisions of Title VI of the Civil Rights Act of 1964 (42 U.S.C. Sections 2000d-2000d.7), Section 504 of the Federal Rehabilitation Act of 1973 (29 U.S.C. Section 794), the Age Discrimination Act of 1975, (42 U.S.C. Sections 6101-6107), Title IX of the Education Amendments of 1972 (20 U.S.C. Section 1681), and 45 C.F.R. Part 92, as they may be amended from time to time, which together prohibit discrimination on the basis of race, color, national origin, sex, handicap, age and religion.

15.5 Americans With Disabilities Act. Provider understands and agrees that no individual with a disability shall, on the basis of the disability, be excluded from participation in this Contract or from providing Services or Materials under this Contract. By executing and delivering this Contract, Provider covenants to comply with all provisions of the Americans With Disabilities Act (the "ADA"), 42 U.S.C. §§12101-12213, and all regulations promulgated thereunder, as the ADA and regulations may be amended from time to time, which are applicable (a) to Provider; (b) to the benefits, Services, Materials, activities, facilities and programs provided in connection with this Contract; (c) to the City, or the Commonwealth of Pennsylvania; (d) to the benefits, services, activities, facilities [Appx. 1119] and programs of the City or of the Commonwealth; and (e) if any funds under this Contract are provided by the federal government, which are applicable to the federal government and its funds, benefits, services, activities, facilities and programs applicable

to this Contract. Without limiting the applicability of the preceding sentence, Provider shall comply with the “General Prohibitions Against Discrimination,” 28 C.F.R. Part 35.130, and all other regulations promulgated under Title II of the ADA, as they may be amended from time to time, which are applicable to the benefits, services, facilities, programs and activities provided by the City through contracts with outside contractors.

15.6 Northern Ireland.

(a) In accordance with Section 17-104 of the Code, Provider (including any parent company, subsidiary, exclusive distributor or company affiliated with Provider) (1) confirms that it does not have, and agrees that it will not have at any time during the Term of this Contract (including any extensions of the Term), any investments, licenses, franchises, management agreements or operations in Northern Ireland and (2) agrees that no product to be provided to the City under this Contract will originate in Northern Ireland, unless Provider has implemented the fair employment principles embodied in the MacBride Principles.

(b) In the performance of this Contract, Provider agrees that it will not use any suppliers, Subcontractors or subconsultants at any tier (1) who have (or whose parent, subsidiary, exclusive distributor or company affiliate have) any investments, licenses, franchises, management agreements or operations in Northern Ireland or (2) who will provide products originating in Northern Ireland unless said supplier, subconsultant or Subcontractor has implemented the fair employment principles embodied in the MacBride Principles.

(c) Provider agrees to cooperate with the City's Director of Finance in any manner which the said Director deems reasonable and necessary to carry out the Director's responsibilities under Section 17-104 of the Code. Provider expressly understands and agrees that any false certification or representation in connection with this Section 15.6 (Section 17-104 of the Code) and any failure to comply with the provisions of this Section 15.6 (the Section 17-104 of the Code) shall constitute a substantial breach of this Contract entitling the City to all rights and remedies provided in this Contract or otherwise available at law (including, but not limited to, Section 17-104 of the Code) or in equity. In addition, Provider understands that false certification or representation is subject to prosecution under Title 18 Pa. C.S. Section 4904.

15.7 Limited English Proficiency. Provider understands and agrees that no individual who is limited in his or her English language proficiency shall be denied access to [Appx. 1120] Services provided under this Contract on- the basis of that limitation. As a condition of accepting and executing this Contract, Provider shall comply with all provisions of Title VI of the Civil Rights Act of 1964, Executive Order No. 12250 of the President of the United States, publication of the Mayor of the City of Philadelphia's Executive Order entitled, "Access to Federally Funded City Programs and Activities for Individuals with Limited English Proficiency" dated September 29, 2001, and all regulations promulgated thereunder, as the Act and regulations may be amended from time to time, which are applicable (a) to Provider, (b) to the benefits, services, activities and programs provided in connection with this Contract, (c) to the City, or the Commonwealth of

Pennsylvania, and (d) to the benefits, services, activities and programs of the City or of the Commonwealth, and if any funds under this Contract are provided by the federal government, which are applicable to the federal government and its benefits, services, activities and programs. Without limiting the applicability of the preceding sentence, Provider shall comply with 45 C.F.R. 80 et. seq. and all other regulations promulgated under Title VI of the Civil Rights Act of 1964, as they may be amended from time to time, which are applicable to the benefits, services, programs and activities provided by the City through contracts with outside contractors.

15.8 Business, Corporate and Slavery Era Insurance Disclosure. In accordance with Section 17-104 of the Code, the Provider, after execution of this Contract, will complete an affidavit certifying and representing that the Provider (including any parent company, subsidiary, exclusive distributor or company affiliated with Provider) has searched any and all records of the Provider or any predecessor company regarding records of investments or profits from slavery or slaveholder insurance policies during the slavery era. The names of any slaves or slaveholders described in those records must be disclosed in the affidavit.

The Provider expressly understands and agrees that any false certification or representation in connection with this Section and/or any failure to comply with the provisions of this Section shall constitute a substantial breach of this Contract entitling the City to all rights and remedies provided in this Contract or otherwise available in law (including, but not limited to, Section 17-104 of the Code) or equity and the Contract will be deemed voidable. In addition, it is understood that

false certification or representation is subject to prosecution under Title 18 Pa. C.S. Section 4904.

15.9 Protected Health Information

(a) The City of Philadelphia is a “Covered Entity” as defined in the regulations issued pursuant to the federal Health Insurance Portability and Accountability Act of 1996 (“HIPAA”). The City’s business activities include both (1) functions which make the City a Covered Entity, and, therefore, subject to HIPAA, and (2) functions that are not subject to HIPAA. In accordance with 45 CFR §164.105(a)(2)(iii)(D), the City has [Appx. 1121] designated certain departments and units of the City as health care components that must comply with HIPAA (“Covered Components”). The Covered Components of the City as of April 1, 2017 include: Ambulatory Health Services (a unit of the Philadelphia Department of Public Health (“PDPH”)); the Philadelphia Nursing Home (a unit of PDPH); the Sexually Transmitted Disease Control Program (a unit of PDPH); the Philadelphia Public Health Laboratory (a unit of PDPH); the Benefits Administration Unit of the Office of Human Resources; Emergency Medical Services (a unit of the Philadelphia Fire Department); and the Office of Behavioral Health and Intellectual Disability Services. This list is subject to change, and any department or unit of the City that the City in the future determines to be a Covered Component under HIPAA shall be deemed to be a Covered Component for purposes of this Section 15. 9.

(b) To the extent (1) this Contract is entered into by the City for or on behalf of a Covered Component and/or requires the performance of services that will be delivered to or used by a Covered Component (whether or not the City department or unit through

which the City entered the Contract is a Covered Component), and (2) Provider is a “Business Associate” of the City, as defined in 45 CFR §160.103, Provider shall comply with the City’s Terms and Conditions Relating to Protected Health Information (“City PHI Terms”) posted on the City’s website (at <https://secure.phila.gov/eContract/> under the “About” link). The City PHI Terms are hereby incorporated in this Section 15.9 as if fully set forth herein. (A printed version of the City PHI Terms, in the City’s sole discretion, also may be attached to this Contract.)

15.10 Chapter 17-1300 of The Philadelphia Code: Philadelphia 21st Century Minimum Wage and Benefits Standard

(a) Provider is a “Service Contractor” in that by virtue of entering into this Contract, Provider has entered into a “Service Contract,” as those terms are defined in Section 17-1300 of the Code. Any Subcontract between Provider and a Subcontractor to perform work related to this Contract is a “Service Contract” and such Subcontractors are also “Service Contractors” for purposes of Chapter 17-1300 as are any Subcontract and Subcontractor at any tier providing Services under this Contract. (Chapter 17-1300 is accessible at <http://www.amlegal.com/library/pa/philadelphia.shtml>.) If such Service Contractor (Provider or any Subcontractor at any tier) is also an “Employer,” as that term is defined in § 17-1302 of the Code (more than 5 employees), and further described in § 17-1303 of the Code, then absent a waiver, during the Initial Term and any Additional Term, in addition to any applicable state and federal requirements, Provider shall [Appx. 1122] provide, and shall enter into Subcontracts and otherwise cause any Subcontractors at any

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tier that are also Service Contractors to provide their respective covered Employees (persons who perform work for a covered Employer that arises directly out of a Service Contract), with at least the minimum wage standard and minimum benefits standard, and required notice thereof, stated in Applicable Law and in Chapter 17-1300 of the Code. A summary of the current requirements is as follows:

(1) Minimum Wage

Commencing as of January 1, 2016, for wages to be provided on and after January 1 of each year during which the Initial Term and any Additional Term is in effect, Provider, and any Subcontractor at any tier, shall provide their covered Employees with an hourly wage, excluding benefits, that is no less than the result of multiplying \$12 by the then current Consumer Price Index Multiplier (CPI Multiplier) as annually adjusted. For purposes of determining the minimum hourly wage required, the CPI Multiplier is calculated annually by the City's Director of Finance by dividing the most recently published Consumer Price Index for all Urban Consumers All Items Index for Philadelphia, Pennsylvania, by the most recently published Consumer Price Index for all Urban Consumers (CPI-U). The then current minimum hourly wage applicable to City contractors and subcontractors will be posted on the City's website. As of January 1, 2017 that wage is \$12.10 per hour.

(2) Minimum Benefits

(a) To the extent an Employer provides health benefits to any of its employees, then absent a waiver, during the Initial Term and any Additional Term, in addition to any applicable state and federal requirements, such

Employer shall provide each full-time, non-temporary, non-seasonal covered Employee with health benefits at least as valuable as the least valuable health benefits that are provided to any other full-time employees of the Employer; and

(b) provide to each full-time, non-temporary, non-seasonal covered Employee at least the minimum number of earned sick leave days required by Code Section 17-1305(2).

(3) Change in Law

(a) Generally. Chapter 17-1300 of the Philadelphia Code requires that employers pay the higher of either: 150% of the federal minimum wage, or \$12 multiplied by the CPI Multiplier. To the extent a [Appx. 1123] change in law would require an increase in wages or benefits under Chapter 17-1300 (for example, an increase in the federal minimum wage to \$9.00/hour, which would increase the required City minimum wage to \$13.50 due to the Chapter's requirement of 150% of the federal minimum wage), such new requirement will take effect only at the start of an Additional Term, if any, commencing on or after the date of the new legal requirement.

(b) If covered, absent a waiver, Provider shall promptly provide to the City all documents and information as the City may require verifying its compliance, and that of all Service Contractors providing Services under the Contract, with the requirements of Chapter 17-1300. Each covered Service Contractor shall notify each affected Employee what wages and benefits are required to be paid pursuant to Chapter 17-1300.

(c) Absent a waiver, a Provider subject to Chapter 17-1300 shall comply with all of its requirements as they exist on the date when the Provider entered into this Contract with the City or into an amendment thereto. Provider shall take such steps as are necessary to notify its Subcontractors of these requirements, and to cause such Subcontractors to notify lower-tier Subcontractors that are Service Contractors of these requirements, including, without limitation, by incorporating this Section 15.10, with appropriate adjustments for the identity of the parties, in its Subcontracts with such Subcontractors. A Provider or Subcontractor at any tier subject to Chapter 17-1300 that fails to comply with these provisions may, after notice and hearing before the Director of Finance or such other officer or agency designated by the Mayor, be suspended from receiving financial assistance from the City or from bidding on and/or participating in future City contracts, whether as a prime contractor or a Subcontractor, for up to three (3) years. City Council may also initiate a similar suspension or debarment process. Such suspension or debarment shall be in addition to any of the other sanctions or remedies set forth in Chapter 17-1300 or this Contract.

(d) Without limiting the applicability of Articles XI (Events of Default) and XII (Remedies) above, Provider's failure to comply, or the failure of Subcontractors at any tier to comply, with the requirements of Chapter 17-1300 shall constitute a substantial breach of this Contract entitling the City to all rights and remedies provided in this Contract or otherwise available at law or in equity.

(e) Provider's covered Employees shall be deemed third-party beneficiaries of Provider's representation,

warranty, and covenant to the City under this Section 15.10 only, and the covered Employees of a Subcontractor at any tier that is also a covered Employer performing Services directly or [Appx. 1124] indirectly under a Subcontract at any tier shall be deemed third-party beneficiaries of their Employer's representation, warranty and covenant to Provider or such Subcontractors at any tier, as the case may be, under this Section.

(f) The City may grant a partial or total waiver of Chapter 17-1300 based on specific stipulated reasons elaborated in Section 17-1304 of the Code. An overview offering guidance on the applicability of, and requirements placed on City contractors and Subcontractors by Chapter 17-1300 of the Code is available on the City's website at <https://secure.phila.gov/eContract/> under the "About" link; see "Minimum Wage and Equal Benefits Ordinances Impacting Some City Contractors."

15.11 Chapter 17-1400 of the Philadelphia Code: Contributions and Other Mandatory Disclosures.

(a) Provider confirms on behalf of itself and its Subcontractor(s) that no contribution(s) have been made, and agrees that none shall be made during the Term of this Contract, and any Additional Term, by Provider, any Subcontractor, or any party from which a contribution can be attributed to the Provider or Subcontractor, that would render the Provider or Subcontractor, as applicable, ineligible to apply for or enter into a Non-Competitively Bid Contract under the provisions of Code Sections 17-1404(1) and 17-1405; and that disclosures made as part of its application to receive a Non-Competitively Bid Contract contain no material misstatements or omissions. Breach of this

covenant shall constitute an event of default and render the Contract voidable at the City's option, and, as to contributions attributable to Provider, shall make the Provider liable for liquidated damages to the City in the amount of ten percent (10%) of the maximum payments to the Provider allowed under the Contract, regardless whether actually paid. The City may exercise any or all of the remedies set forth in this Section 15.11 (Contributions and Other Mandatory Disclosures), each of which may be pursued separately or in conjunction with such other remedies as the City in its sole discretion shall determine. No extension or indulgence granted by the City to Provider shall operate as a waiver of any of the City's rights in connection with this Contract. The rights and remedies of the City as described in this Section 15.11 and as described elsewhere in this Contract shall not be exclusive and are in addition to any other rights or remedies available to the City under this Contract at law or in equity.

(b) Provider shall, during the term of the Contract, and any Additional Term, and for one year thereafter, disclose any contribution of money or in-kind assistance the Provider, or any Subcontractor or Consultant utilized by [Appx. 1125] Provider in connection with this Contract, has made, or any individual or entity has made if such contributions can be attributed to Provider, or such Subcontractor or Consultant pursuant to the attribution rules of Section 17-1405, during such time period to a candidate for nomination or election to any public office in the Commonwealth of Pennsylvania or to an individual who holds such office, or to any political committee or state party in the Commonwealth of Pennsylvania, or to any group, committee or

association organized in support of any such candidate, office holder, political committee or state party, and the date and amount of such contribution.

(1) It shall not be a violation of Section 15.11(b) if Provider fails to disclose a contribution made by a Consultant because the Provider was unable to obtain such information from the Consultant, provided the Provider demonstrates that it used reasonable efforts to attempt to obtain such information, including, at a minimum:

(a) Entering into a written agreement with the Consultant for such Consultant's services, before the filing of the application for the Contract, and before the Consultant communicated with a City department or office, official or employee on behalf of the Provider;

(b) Including in such agreement a provision requiring the Consultant to provide the Provider in a timely manner with all information required to be disclosed under the provisions of Chapter 17-1400 of the Code, and providing, in effect, that the agreement will be terminated by the Provider if the Consultant fails to provide all required information on a timely basis and that no further payments, including payments owed for services performed prior to the date of termination, will be made to the Consultant by or on behalf of the Provider as of the date of such termination;

(c) Communicating regularly with the Consultant concerning the Consultants obligations to

provide timely information to permit the Provider to comply with the provisions of Chapter 17-1400; and

(d) Invoking the termination provisions of the written agreement in a full and timely manner.

(c) The Provider shall, during the Term of the Contract, and any Additional Term, and for one year thereafter, disclose the name and title of each City [Appx. 1126] officer or employee who, during such time period, asked the Provider, any officer, director or management employee of the Provider, or any Person representing the Provider, to give money, services, or any other thing of value (other than a Contribution as defined in Section 17-1401) to any Person, and any payment of money, provision of services, or any other thing of value (other than a Contribution as defined in Section 17-1401) given to any Person in response to any such request. The Provider shall also disclose the date of any such request, the amount requested, and the date and amount of any payment made in response to such request.

(d) The Provider shall, during the Term, and any Additional Term, of the Contract, disclose the name and title of each City officer or employee who directly or indirectly advised the Provider, any officer, director or management employee of the Provider, or any Person representing the Provider that a particular Person could be used by the Provider to satisfy any goals established in the Contract for the participation of minority, women, disabled or disadvantaged business enterprises. The Provider shall also disclose the date the advice was provided, and the name of such particular Person.

(e) The disclosures required by Sections 15.11(b), (c) and (d) shall be made utilizing the online disclosure update process through Provider's eContract Philly account which can be accessed on the City's website at www.phila.gov/contracts by clicking on eContract Philly. Such disclosures shall be made within five (5) business days of the action or event requiring Provider to update its disclosures. In the case of updates to political contributions made by Provider required by Section 15.11(b), the attribution rules of Section 17-1405 shall apply to determine what contributions must be disclosed under this provision as contributions of the Provider or of a Consultant. Provider is advised that any individual who submits an update on eContract Philly must be an authorized signatory of the Provider, authorized to make the required updated disclosures.

(f) Reports generated automatically by the online process for the updated disclosures required by Sections 15.11(b), (c) and (d) will be automatically forwarded to the President and Chief Clerk of Council, and to the Mayor, Director of Finance, Procurement Department, and the Department of Records.

[Appx. 1127]

15.12 Executive Order 10-16: Gifts.

(a) Pursuant to Executive Order 10-16, no City officer or employee may accept or receive a payment, subscription, advance, forbearance, rendering or deposit of money, services, entertainment, invitation, food, drink, travel, lodging or anything of value, unless consideration of equal or greater value is conveyed in return, from any person who, at time or within 12 months preceding the time a gift is received:

- 1) Is seeking, or has sought, official action from the officer or employee;
 - 2) has operations or activities regulated by the officer's or employee's agency, department, office, board or commission, or, in the case of gifts to members of the Mayor's Cabinet, has operations or activities that are regulated by any agency, department, office, board or commission within the Executive and Administrative branch; or
 - 3) has a financial or other substantial interest in acts or omissions taken by the officer or employee, which the officer or employee is able to substantially affect by his or her official action.
- (b) Additionally, no City officer or employee shall accept or receive a gift of any value from any person that engages in lobbying on behalf of a principal for economic consideration, and is registered as such, pursuant to the requirements of Section 20-1202 of The Philadelphia Code, including any attorney at law while engaged in lobbying.
- (c) Provider understands and agrees that if it offers anything of value to a City official or employee under circumstances where the receipt of such item would violate the provisions of this Executive Order, Provider shall be subject to sanctions with respect to future City contracts. Such sanctions may range from disqualification from participation in a particular contract to debarment, depending on the nature of the violation.
- (d) All City employees presented with gifts or gratuities as indicated in Executive Order 10-16 have been instructed to report these actions to the appropriate authorities. All Providers, who are solicited for gifts or gratuities by City employees are urged to report these

incidents to the appropriate authorities, including but not limited to, the Office of the Inspector General.

[Appx. 1128]

15.13 Chapter 17-1900 of the Philadelphia Code: Equal Benefits Ordinance.

(a) Unless Provider is a government agency, this is a “Service Contract” as that term is defined in Section 17-1901 (4) of the Code. If the Service Contract is in an amount in excess of \$250,000, then pursuant to Chapter 17-1900 of the Code, Provider shall, for any of its employees who reside in the City, or any of its employees who are non-residents subject to City wage tax under Section 19-1502(1)(b) of the Code, extend the same employment benefits the Provider extends to spouses of its employees to life partners of such employees. Provider certifies that (i) it is in compliance with the requirements of Chapter 17-1900, (ii) its employees have been notified of the employment benefits available to life partners pursuant to Chapter 17-1900, and (iii) such employment benefits are currently, or will be made available within the time required by Section 17-1902(2), or that the Provider does not provide employment benefits to the spouses of married employees.

(b) Provider acknowledges and agrees that the following terms are included in this Contract:

- (1) Provider shall notify its employees of the employment benefits available to life partners pursuant to Chapter 17-1900 of the Code.
- (2) Noncompliance by the Provider with the requirements of Chapter 17-1900 of the Code shall be a material breach of this Contract.

(3) Discrimination or retaliation by the Provider against any employee on account of having claimed a violation of Chapter 17-1900 shall be a material breach of this Contract.

(4) In addition to any other rights and remedies available to the City pursuant to this Contract at law or in equity, a material breach of this Contract related to Chapter 17-1900 may result in the suspension or debarment of Provider from participating in City contracts for up to three (3) years.

(c) An overview offering guidance on the applicability of, and requirements placed on City contractors by Chapter 17-1900 of the Code is available on the City's website (at <https://secure.phila.gov/eContract/> under the "About" link) (see "Minimum Wage and Equal Benefits Ordinances Impacting Some City Contractors").

[Appx. 1129]

ARTICLE XVI: MISCELLANEOUS

16.1 Governing Law. This Contract shall be deemed to have been made in Philadelphia, Pennsylvania. This Contract and all disputes arising under this Contract shall be governed, interpreted, construed and determined in accordance with the laws of the Commonwealth of Pennsylvania, without giving effect to principles of Pennsylvania law concerning conflicts of laws.

16.2 Amendments; Waiver. Except as provided in Section 6.9 (Maximum Daily Rate, Days of Care or Units of Service) above, this Contract may not be amended, supplemented, altered, modified or waived, in whole or in part, except by a written Amendment signed by the Parties. Except to the extent that the Parties may have otherwise agreed in writing in an Amendment,

no waiver, whether express or implied, by either Party of any provision of this Contract shall be deemed: (a) to be a waiver by that Party of any other provision in this Contract; (b) to be a waiver by that Party of any breach by the other Party of its obligations under this Contract; or (c) a course of conduct, dealing or performance with respect to any other matter arising hereunder. Any forbearance by a Party in seeking a remedy for any noncompliance or breach by the other Party shall not be deemed to be a waiver of rights and remedies with respect to such noncompliance or breach.

16.3 Integration. The Contract Documents forming this Contract, including the Provider Agreement and the General Provisions and the exhibits incorporated by reference therein, contain all the terms and conditions agreed upon by the Parties, constitute the entire agreement among the Parties pertaining to the subject matter hereof, and supersede all prior agreements, understandings, negotiations and discussions, whether oral or written, of the Parties (except to the extent specifically set forth herein). No other prior or contemporaneous agreements, covenants, representations or warranties, oral or otherwise, regarding the subject matter of this Contract shall be deemed to exist or to bind any Party or to vary any of the terms contained in this Contract.

16.4 No Joint Venture. The Parties do not intend to create, and nothing contained in this Contract shall be construed as creating, a joint venture arrangement or partnership between the City and Provider with respect to the Services or the Materials.

16.5 No Third Party Beneficiaries. Nothing in this Contract, express or implied, is intended or shall be

construed to confer upon or give to any Person, other than the Parties, any rights, remedies¹ or other benefits, including but not limited to third-party beneficiary rights, under or by reason of this Contract. This Contract shall not provide any third party with any remedy, claim, liability, reimbursement, cause of action or other right other than any such remedy, claim, etc. existing without reference to the term of or the existence of this Contract.

[Appx. 1130]

16.6 Counterparts. This Contract may be executed in one or more counterparts, each of which shall be deemed an original but all of which, taken together, shall constitute one and the same instrument.

16.7 Severability and Partial Invalidity. The provisions of this Contract shall be severable. If any provision of this Contract or the application thereof for any reason or in any circumstance shall to any extent be held to be invalid or unenforceable, the remaining provisions of this Contract and the application of such provision to Persons, or circumstances, other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each provision of this Contract shall be valid and enforceable to the fullest extent permitted by law.

16.8 Survival. Any and all provisions set forth in this Contract which, by its or their nature, would reasonably be expected to be performed after the termination of this Contract or are expressly stated as surviving or intended to survive, shall survive and be enforceable after such termination. Any and all liabilities, actual or contingent, which have arisen in connection with this Contract shall survive the expiration or earlier

termination of this Contract, including without limitation: Provider's representations, warranties and covenants set forth in Article IV (Provider's Representations and Covenants) above; Provider's obligation to indemnify, defend and hold harmless the City, its officers, employees and agents as set forth in Section 9.2 (Indemnification) above; and the Parties' rights and obligations set forth in Article XI (Ownership of Materials; Proprietary Information; Confidentiality) above.

16.9 Determination of Disputes. Any dispute arising between the City and Provider under or with respect to either Party's covenants, obligations, powers, rights or duties under this Contract shall be submitted to and decided by the Commissioner or his or her designee. The Commissioner or his or her designee shall render and reduce to writing his or her decision, and furnish a copy to Provider by notice under this Contract. In connection with any dispute under this Contract, the Commissioner shall offer Provider an opportunity to offer evidence in support of its position concerning the subject matter of the dispute. This Section shall not be construed to limit the benefit to the City of Articles XII (Events of Default) or XIII (Remedies) above.

16.10 Interpretation; Order of Precedence. In the event of a conflict or inconsistency between the terms of the Contract Documents, the terms of the General Provisions shall govern, followed by the terms of the Provider Agreement, and lastly by any exhibit, attachment, or other document incorporated by reference into the Contract. The foregoing notwithstanding, the Provider Agreement may expressly supersede, create exception to, or otherwise modify the General Provisions by specific reference thereto in a section of the

Provider Agreement created and labeled for such purpose.

16.11 Headings. The titles, captions or headings of Articles, Sections and Exhibits or schedules in this Contract are inserted for convenience of reference only; do not [Appx. 1131] in any way define, limit, describe or amplify the provisions of this Contract or the scope or intent of the provisions, and are not a part of this Contract.

16.12 Statutory and other Citations. All statutory or other citations of law referenced in the Contract shall refer to the statute referenced, as it may be amended or superseded from time to time.

16.13 Days. Any references to a number of days in this Contract shall mean calendar days unless this Contract specifies business days.

16.14 Forum Selection Clause; Consent to Jurisdiction. The Parties irrevocably consent and agree that any lawsuit, action, claim, or legal proceeding involving, directly or indirectly, any matter arising out of or related to this Contract, or the relationship created or evidenced thereby, shall be brought exclusively in the United States District Court for the Eastern District of Pennsylvania or the Court of Common Pleas of Philadelphia County. It is the express intent of the Parties that jurisdiction over any lawsuit, action, claim, or legal proceeding shall lie exclusively in either of these two (2) forums. The Parties further irrevocably consent and agree not to raise any objection to any lawsuit, action, claim, or legal proceeding which is brought in either of these two (2) forums on grounds of venue or *forum non conveniens*, and the Parties expressly consent to the jurisdiction and venue of these

two (2) forums. The Parties further agree that service of original process in any such lawsuit, action, claim, or legal proceeding may be duly effected by mailing a copy thereof, by certified mail, postage prepaid to the addresses specified in Section 5.1 Notice of the Provider Agreement.

16.15 Waiver of Jury Trial. Provider hereby waives trial by jury in any legal proceeding in which the City is a party and which involves, directly or indirectly, any matter (whether sounding in tort, contract or otherwise) in any way arising out of or related to this Contract or the relationship created or evidenced hereby. This provision is a material consideration upon which the City relied in entering into this Contract.

16.16 Notices. All notices, demands, requests, waivers, consents, approvals or other communications which are required or may be given under this Contract shall be in writing and shall be deemed to have been duly made (a) on the date received or refused if delivered by hand with receipt given or refused; (b) on the next business day if delivered by a nationally recognized overnight courier service (e.g., Federal Express or United Parcel Service); (c) on the date confirmed for receipt by facsimile if delivered by facsimile; (d) on the date of receipt or refusal of delivery if sent by certified or registered United States mail, return receipt requested; or (e) on the date confirmed for receipt by electronic mail if delivered by electronic mail. In each case notices shall be sent to the addresses set forth in Section 5.1 of the Provider Agreement, or to such other address as either Party may specify to the other by a notice complying with the terms of this Section 16.16.

[Appx. 1132]

16.17 E-signatures. DHS is increasing its administrative efficiency through the use of electronic signature technology.

(a) Technology Changes. As updates become necessary, the Department will continue to notify providers of technology requirement changes through the use of the Department Extranet and/or any other established means of communication identified by the Department.

(b) Electronic Submissions. Submission of electronic invoices and documents shall be considered binding and have the full and same effect as a signed paper submission. By submitting an invoice or document electronically Provider certifies that the information in that invoice or document is true and correct to the best of Provider's knowledge, information, and belief, and that the submission constitutes Provider's signature and certification as if it were physically written.

(c) Breach. Failure to comply with any DHS e-signature technology requirements (including, but not limited to the use of www.phila.gov/contracts and eContract Philly) may result in a financial penalty and/or a finding that an Event of Default has occurred.

[Appx. 1152]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

SHARONELL FULTON,
CECELIA PAUL, TONI
LYNN SIMMS-BUSCH,
and CATHOLIC SO-
CIAL SERVICES,

Plaintiffs,

vs.

CITY OF PHILADEL-
PHIA, DEPARTMENT
OF HUMAN SERVICES
FOR THE CITY OF
PHILADELPHIA, and
PHILADELPHIA COM-
MISSION ON HUMAN
RELATIONS,

Defendants.

Civil Action
No. 18-CV-2075

DECLARATION OF CYNTHIA F. FIGUEROA

I, Cynthia F. Figueroa, declare as follows:

1. I am the Commissioner of the Department of Human Services (“DHS”) for the City of Philadelphia. I was appointed to this position in July 2016, effective September 2016.
2. Prior to being appointed Commissioner, I was the Chief Executive Officer of Congreso de Latinos Unidos,

a nonprofit focused on strengthening Latino communities through social, economic, education and health services.

3. From 2008 to 2011, I served as Deputy Commissioner for DHS and was responsible for the oversight of what was then known as the Division of Community Based Prevention Services. In that role, I oversaw all child welfare prevention services delivered by community based providers including development of the Education Support Center.

[Appx. 1153]

4. Prior to that, I was the Executive Director of Women Against Abuse, a nonprofit organization in Philadelphia that advocates against domestic violence and provides services to victims.

5. As the Commissioner of DHS, I supervise one of the largest child welfare agencies in the country. In my role, I serve as the County Administrator to deliver our Federal and State mandated child welfare service for Philadelphia. I have direct oversight of 1500 employees, a budget of over \$600 million, and approximately 250 contractors. In this capacity, I am familiar with the Department's operations, policies, procedures, and contracts, including the practices that are the subject of this action.

6. The City of Philadelphia Department of Human Services is committed to providing and promoting safety, permanency, and well-being for children and youth at risk of abuse, neglect and delinquency.

7. DHS operates Philadelphia's child abuse hotline and investigates allegations of child abuse and neglect. To find placements for children who are not safe

in their own homes, DHS contracts with state-licensed foster care agencies who recruit, certify, and service foster homes for these children. The goal of foster care is to reunite children with their families. DHS also manages Community Umbrella Agencies (CUAs), six private organizations that provide case management and other support services in 10 geographic regions throughout Philadelphia. CUAs serve children and families whose cases are accepted for service.

8. While agencies work with specific foster families to provide training and support, a CUA case manager coordinates the relationship between the foster family, the child, and the child's biological family with the goal of reunification.

[Appx. 1154]

9. The Archdiocese of Philadelphia operates a CUA and a foster care agency which is Catholic Social Services. Recently, the City began ranking CUAs. Catholic CUA was ranked second out of ten geographic regions. DHS does not currently rank foster care agencies and has not ranked Catholic Social Services in the last several years.

10. Currently, approximately 6,000 children in DHS's custody are in out-of-home placement. Approximately 86% of those are in family foster care and approximately 12% are in congregate care (i.e., group homes).

11. Approximately 54% of the children in family foster care are in kinship care, which is foster care with a relative or someone who has a significant relationship to the child. Approximately 45% are with families who have been certified as foster parents and who do not have a kinship relationship to the child.

12. In Fiscal Year '17, DHS reunified 1250 children with their families, finalized 636 adoptions and finalized 138 permanent legal custodianships.

DHS' Recruitment Drive

13. Recruitment and certification of new families are essential and integral parts of the work of the City's foster care agencies.

14. Each of the City's contracts includes these responsibilities.

15. Because it has the ultimate responsibility of children in its legal custody, DHS is always trying to identify new, qualified foster parents, including through its own recruitment efforts.

16. For example, this year DHS issued an "urgent call" to recruit new foster parents. DHS did this in order to build additional capacity into the system.

[Appx. 1155]

17. As part of this effort, DHS was trying to specifically recruit more families to serve children with special needs, older children, children with specialized behavioral health needs, and lesbian, gay, bisexual, transgender, and questioning (LGBTQ) youth, based in part on reports DHS received from LGBTQ youth who had negative experiences in homes that did not support them.

18. In addition, DHS' "urgent call" sought to recruit new foster parents to reduce the number of children in congregate care, and in particular, the number of older children in such care. DHS' experience is that there is a greater proportional number of LGBTQ youth in the population of older foster children. This also factored into DHS' recruitment efforts.

19. This “urgent call”, however, does not indicate that there is a “crisis” in identifying new homes. Nor does the fact that City seeks to expand its foster care resources indicate that there are not enough foster homes available. At any given time, there are certified foster parents associated with one of the City’s foster care agencies who are willing to care for a new child in their home. These households may be awaiting a placement or have exercised their discretion not to take a child due to their own preferences and willingness to accept certain children due to the child’s age or the needs of the child.

20. As a result of this recruitment effort, since January 75 new families have been certified.

21. On occasion, and usually for a short period of time, there are children who the City is unable to immediately place with a foster family or in congregate care. There can be many reasons for this, including that on occasion a child comes into the City’s custody in the middle of the night.

[Appx. 1156]

22. The City’s data regarding the placement of foster children reflects that over the past year, the congregate care rate has remained the same.

Closure of CSS Intake

23. On March 9, 2018, DHS was asked by a reporter for the *Philadelphia Inquirer* whether DHS was aware of any organizations discriminating against same sex couples. At that time, DHS was not aware of any such discrimination, but the reporter disclosed that a same-sex couple said they had been turned away by another foster care agency, Bethany Christian Services. The

reporter indicated they reached out to CSS and were awaiting a comment.

24. DHS First Deputy Commissioner Jessica Shapiro and I then contacted CSS to determine whether the statements in the article were accurate. Jim Amato of CSS confirmed the CSS would not certify same-sex couples as foster homes or for adoptions.

25. On March 13, 2018, the *Philadelphia Inquirer* published a story titled “Two foster agencies in Philly won’t place kids with LGBTQ people.” According to the article, neither Bethany nor CSS would place children with LGBTQ couples. A copy of the story is attached here as Exhibit 2-B.

26. In the past, as DHS Commissioner, I have had to suspend referrals and close intake at agencies for a variety of programmatic and administrative reasons.

27. On or about March 14, 2018, I determined that Bethany and CSS’s public position raised a concern that it would discriminate against same-sex couples in violation of their contract with the City and the City’s Fair Practices Ordinance.

[Appx. 1157]

28. I determined that DHS would suspend referrals and close intake at both agencies as long as they refused to certify qualified same-sex foster parents. I did this because CSS told us it could not comply with its contract.

29. In making this decision, I determined based on my professional experience that DHS would continue to be able place children in appropriate family foster homes. It is important to note that roughly half of family foster home placements are kinship care, which do not

strain existing foster care capacity. I also knew that there were currently a number of foster families' homes with other agencies willing to accept new foster children and anticipated that our recruitment drive would bring additional families into the system. And since then we have been able to certify 75 new families.

30. In addition, as CSS had communicated that it could not comply with the contract with the City and the City's Fair Practices Ordinance, I had to also consider the best interest of any children who might be placed with CSS in the future.

31. I was concerned that because CSS was in breach of the contract, placing additional children with them-except on an individual, case by case basis-would not be in those children's best interest because of the risk of disruption related to CSS' no longer being a foster care agency for the City.

32. The following day, March 15, 2018, First Deputy Commissioner Shapiro, Kimberly Ali, and I met with representatives of Bethany and CSS. Following the meeting with CSS, Deputy Commissioner of Child Welfare Operations Kimberly Ali called CSS to inform them that DHS was suspending referrals and closing their foster home intake.

33. Following this call, Jim Amato of CSS contacted leadership at DHS to request waivers related to specific children.

[Appx. 1158]

34. Since March 15, 2018, there have been at least two instances where CSS has requested waivers by contacting me to request those waivers. Kimberly Ali

worked with CSS in both cases and the waivers were granted.

35. The closure of intake to CSS has had minimal impact on DHS operations. The percentage of children placed in congregate care (as opposed to family foster care) has remained consistent since the closure. Similarly, the number of childcare room overnight stays has actually decreased slightly from nine to eight per month since the closure.

36. I decided on this course of action with CSS with the consideration of arranging an interim contract that would permit CSS to continue to provide services to foster children and families it already had in its care. I continue to believe such an interim agreement is in the best interest of those foster children, however I also continue to believe that permitting CSS to continue to referrals and performing foster home intake services is not in the best interest of children.

Bethany

37. Since suspending referrals to Bethany, the City has been in discussions with Bethany to resolve the dispute.

38. While the City and Bethany are still negotiating a contract for the next fiscal year, the parties are close to a resolution and Bethany has agreed in principle to comply with the Fair Practices Ordinance and to institute a nondiscrimination policy.

39. I fully expect Bethany to enter into a full contract with the City for next fiscal year and that DHS will resume referrals and reopen intake at Bethany.

[Appx. 1159]

JA 691

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct, based upon my own knowledge and/or belief.

DATE: June 12, 2018

/s/Cynthia F. Figueroa

Cynthia F. Figueroa

[Appx. 1160]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

SHARONELL FULTON,
CECELIA PAUL, TONI
LYNN SIMMS-BUSCH,
and CATHOLIC SO-
CIAL SERVICES,

Plaintiffs,

v.

CITY OF PHILADEL-
PHIA, DEPARTMENT
OF HUMAN SERVICES
FOR THE CITY OF
PHILADELPHIA, and
PHILADELPHIA COM-
MISSION ON HUMAN
RELATIONS,

Defendants.

Civil Action
No. 18-CV-2075

DECLARATION OF KIMBERLY ALI

I, Kimberly Ali, declare the following:

1. I am employed by the City of Philadelphia, Department of Human Services (“DHS”) as the Deputy Commissioner of Child Welfare Operations. I was appointed to this position in October 2016. I report directly to DHS Commissioner Cynthia F. Figueroa.
2. I have worked for the City of Philadelphia since January 2000, when I joined the Department of Human Services as a Social Worker. I held that position until

February 2002, when I became a Social Work Supervisor. I held that position until December 2006, when I was promoted to be a Human Services Program Administrator. In that role, among many other responsibilities, I provided oversight and monitored level of care [Appx. 1161] decisions for the identification and completion of referrals for in home and placement services.

3. I held that position until May 2009, when I was promoted to be a Human Services Staff Services Director of Provider Relations and Evaluation of Programs. In that role, among many other responsibilities, I managed 25 program analyst staff, responsible for monitoring and evaluating a total of 400 child welfare, delinquent, and prevention contracts to ensure quality services to children, youth, and families.

4. I held that position until October 2010, when I became DHS's Operations Director. In that role, I managed and coordinated the daily operations of DHS including its hotline, investigations, and ongoing provision of services to families.

5. I held that role until November 2014, when I was promoted to become the Chief Implementation Officer for Improving Outcomes to Children, a large-scale system transformation into a community based service delivery model, which involved the safe transfer of families from DHS to Community Umbrella Agencies (CUAs). I also created a structured Level Of Care Instrument that determines the least restrictive placement setting for children and youth. I held that role until October 2016 when I was promoted to be the Deputy Commissioner of Child Welfare Operations.

6. As the Deputy Commissioner of Child Welfare Operations, in addition to other duties, I supervise and support the Child Welfare Operations at DHS, one of the largest child welfare agencies in the country. In my role, I assist Commissioner Figueroa and the Department in achieving our goals, overseeing day-to-day operations, systemic issues, and future planning and initiatives. In this capacity, I am familiar with the Department's [Appx. 1162] operations, policies, and procedures, including the practices that are the subject of this action.

7. The City of Philadelphia Department of Human Services is committed to providing and promoting safety, permanency, and well-being for children and youth at risk of abuse, neglect and delinquency.

Foster Care in Pennsylvania

8. State law requires county children and youth agencies like DHS to develop a plan for the provision of protective services for children, and to provide or purchase those services, including the provision of foster care services for children placed in its care.

9. For at least 20 years, Philadelphia has used private agencies to provide services to children and families involved with DHS.

10. DHS values the expertise of private agencies that provide foster care services, and which are frequently located in communities close to homes of origin of children and families needing services.

11. There are 30 foster care agencies in Philadelphia.

12. 51 % of children living in family foster care live within 5 miles of their home of origin, and 76% live within 10 miles.

13. The Pennsylvania Department of Human Services licenses foster care agencies. State law and regulations establish the criteria for the certification of prospective foster parents (“resource parents”). These criteria include a DHS history screening and criminal and child abuse history screenings, with limits of certification of individuals with a history of certain prohibited offenses and child abuse history in some circumstances.

[Appx. 1163]

14. Agencies are also required to evaluate a prospective resource parent’s ability to provide care, nurturing, and supervision to children, their supportive community ties, the household composition, their ability to work with a child with special needs, and their financial stability.

15. Foster care agencies are required to register all resource parent applicants on a state “resource family registry.”

16. If a resource parent meets the criteria, a foster care agency must certify the applicant.

17. Even once a foster care agency certifies a resource parent, pursuant to its contract with foster care agencies, DHS can determine that it does not want Philadelphia children placed in that home, such as when there are concerns about the resource parent’s prior or current involvement with DHS.

DHS Custody and Placement Process

18. DHS runs a hotline for reports of alleged child abuse or neglect. DHS also receives reports from a state-run hotline and online portal. If the report contains factual allegations that would constitute child

abuse or neglect, the report is accepted for investigation and DHS conducts a safety assessment of the situation/child's environment to determine if a safety threat to a child exists. If the safety threat rises to the level of present danger and the child is deemed unsafe, DHS obtains a court order to remove the child from their home and to place the child in foster care.

19. If a child is removed, there will be a hearing at Family Court within 72 hours, at which time the court will determine if the initial removal was appropriate, and if so, it may commit the child to the legal custody of DHS if circumstances have not changed.

[Appx. 1164]

20. Each child in the legal custody of DHS, as well as those who are receiving in home services, receives case management services. These services are provided by one of six private Community Umbrella Agencies (CUAs) with whom DHS contracts. Each CUA provides services in one of 10 geographic regions of Philadelphia.

21. Because DHS is committed to providing services to children and families in their communities, once it is determined that a family needs services, families are assigned to a CUA automatically via an electronic system based on the family's geographic region, with some rare exceptions.

22. Each child serviced by a CUA has a case manager at that CUA. The case manager's responsibilities include assessing the child's safety through visitation, completing a case plan for the child's needs, ensuring the child receives all behavioral health, medical, and educational services for the duration of the case and intervening when necessary.

23. Each CUA case manager has a supervisor, who is supervised by the CUA case management director. DHS provides a practice coach on site to provide technical assistance and learning support to the CU As, and these staff are further supervised by other DHS staff. In addition, DHS has an Operations Director, Staci Boyd, who oversees all of the CUAs. Ms. Boyd reports directly to me.

24. With regard to identifying a placement, DHS will first ask the family to identify kin, i.e. family members or other people with close relationships with the family who can care for the child. If kin are identified, DHS performs preliminary child abuse and criminal clearances, DHS history clearance, home assessment, and if appropriate will place the child in the home of kin, and identify a foster care agency to certify the kinship home as a foster care home.

[Appx. 1165]

25. When kin cannot be identified, the worker submits the referral to the Central Referral Unit (CRU), which is managed by DHS. CRU consults with a nonprofit entity called Community Behavioral Health (CBH), and identifies the correct level of placement and seeks to identify an appropriate placement provider. There are different types of placements, depending on the needs of the child and the level of care needed. Placement providers include but are not limited to: family foster care homes, congregate care facilities (i.e. group homes and institutions), and residential treatment facilities.

26. Once DHS determines the level of care a child needs, it sends a referral to all agencies providing that level of care. Agencies with a potential foster home will

relay this information to the CRU, who will provide the information to the CUA. The CUA and the agency then negotiate a placement date. If there are multiple potential foster homes, the CRU chooses which one meets the child's best interest.

Transferring Foster Care Agencies

27. While many resource parents stay with a single agency, some families change agencies either due to dissatisfaction with the agency or because their foster child has a need that is higher than the original agency can serve, such as a child with a behavioral issue that requires additional expertise better provided by another agency.

28. In these instances, the assigned worker at the CUA would make a referral to DHS's Central Referral Unit, stating that the entire foster home wants to transfer to another provider agency. Often times, the foster parent selects a new foster care provider agency from the list of Philadelphia foster care agencies. When a transfer occurs, DHS arranges for the previous agency to send over the foster care and child's files to the new agency.

[Appx. 1166]

29. The new agency begins to serve the family as soon as it receives the referral. The new agency needs to complete its own certification process of the foster home within 60 days of receiving the referral, but the child remains in the same foster home throughout the process so that the transfer is seamless.

30. As noted above, children are placed in different levels of foster care based on the child's needs: general,

specialized behavioral health, or medical. The majority of placements are for permanent foster care placement because of need to stabilize the child.

31. However, a child can be placed in respite foster care, which is a short-term, temporary placement, when, for example, the foster parent is travelling and cannot bring the foster child or when there is a medical issue with the foster parent, they need a break, or if there is a report of child abuse or neglect in the foster home.

32. Foster care agencies and CUAs generally do not make referrals to other agencies; the referrals must be made through DHS's CRU. The only referrals that agencies may make are to another home within their agency, such as for respite care. Under their contract with DHS, they are required to identify respite homes. If they are unable to do so, the referral for another home goes back to CRU.

33. There have been numerous times when DHS' CRU, at the direction of the DHS Commissioner, has stopped referring children to a particular agency, either on a temporary basis due to concerns about a particular agency, or on a permanent basis when the agency stops providing services of its own volition or when DHS terminates the contract.

[Appx. 1167]

34. For instance, in March 2016 when Lutheran Children and Family Service of Eastern Pennsylvania decided to stop providing foster care services, there were over 100 children involved who were transitioned to other foster care agencies over a three month period.

35. In that instance, DHS and Lutheran leadership met with all of the foster parents to whom Lutheran provided services. DHS leadership made themselves available and explained to the families that the goal was to keep children in the same home and not disrupt the children in their care. Some families had a particular agency in mind that they were willing to transfer to. For those who didn't have an agency in mind, DHS provided a list of family foster care agencies and then followed up to ensure each family selected one. Lutheran, the sending agency, prepared a foster parent file as well as a child file, and then provided them to the receiving agency.

36. This whole process was managed through CRU along with the CUAs, who, at that time, made some direct referrals to other agencies. No significant issues arose during this process as families were allowed to select the agency that they wanted to transition to. In many instances, DHS was able to look to the date the child was scheduled to be reunified with their family or adopted (called the permanency date) and if possible, expedite that process so that the child would not need to be placed with a second agency at all.

Referral Suspension Waivers

37. When referrals to agencies have been temporarily suspended, CUAs and agencies, including the senior leadership of Catholic Social Services (CSS) and Catholic CUA, have reached out to senior DHS leadership to request waivers.

38. Since DHS suspended referrals to CSS, there have been four requests for waivers, including Doe Foster Child #1, discussed below. We have approved a waiver

JA 701

in each [Appx. 1168] instance based on communications from James Amato, the Secretary of CSS, and others at CSS. Except in these four instances, I have not been contacted by James Amato, James Black, or anyone else from CSS regarding waiver requests for children who have been referred to non-CSS placements when a CSS family was in the best interest of the child. However, even when DHS leadership grants a waiver, a family court order is necessary to effectuate the placement unless it is an emergency.

Foster Child #1 and His History with DHS

[REDACTED]



[Appx. 1169]

[REDACTED]



[Appx. 1170]

[REDACTED]



[Appx. 1171]

[REDACTED]



63. Although referrals had been halted to CSS due to its stated refusal to certify prospective LGBTQ foster families, as noted by the above texts, its leadership was well aware that I could make exceptions to this,

and they had contacted me on approximately three other occasions to do so. Each time, I granted the exception.

64. Where a court ordered the move, that was due to the fact that the case was already being heard on that date.

[Appx. 1172]

65. I have reviewed James Amato's statement that there are "multiple additional children who have been referred elsewhere when CSS families should have been the preferred placement for those children as a result of the City's freeze on referrals to CSS." Pltfs. Ex. 1 ¶16. I am not aware of any additional cases where placement with CSS would have been in the best interests of a child but where the child was not moved to one of their homes.

66. As DHS's Deputy Commissioner of Child Welfare Operations, I can unequivocally state that DHS is committed to finding the best placement for children that can meet all of their needs, even if that placement is with CSS.

[Appx. 1173]

I have read the foregoing and declare, under penalty of perjury, that the facts recited are true and corrected, based upon my own knowledge and/or belief.

DATE: June 12, 2018

/s/ Kimberly Ali
Kimberly Ali

JA 704

[Appx. 1175]

From: Jonathan Janiszewski
[mailto:Jonathan.Janiszewski@Phila.gov]

Sent: Tuesday, June 5, 2018 12:13 PM

To: Lori Windham <lwindham@becketlaw.org>

Subject: Catholic Social Services - DHS Continuing
Contract Relations

Dear Ms. Windham:

I am the attorney currently serving as head of the City of Philadelphia Law Department's Finance and Contracts Division. I represent the City of Philadelphia and, in this instance, its Department of Human Services ("DHS"), in business dealings. I understand from my colleague, Benjamin Field, that you have requested any communications from DHS and related to Catholic Social Services ("CSS") flow through you. Consequently, I have copied a message for your client, Mr. Amato, below. Please forward it to him for his urgent review. The message pertains to the maintenance of on-going services for children in the custody of DHS and in the care of CSS.

I look forward to working with you and appreciate your assistance.

Begin Forwarded Message

Dear Mr. Amato:

Throughout our respective histories, Catholic Social Services ("CSS") and the City of Philadelphia Department of Human Services ("DHS") have always agreed on one thing: we are here to nurture, guide, and protect the children and families we serve. Although recent circumstances have highlighted differences in

our respective philosophies regarding certification of same-sex foster and adoptive parents, and while DHS makes no concession regarding its position in that matter, I write to you in our mutual spirit of service to propose interim measures that will enable CSS and DHS to ensure that no child or family suffers while we resolve our differences.

The City's fiscal year 2018 closes on June 30, 2018 and the current contract between CSS and DHS then comes to its natural end. However, when the current contract ends, CSS will still have in its care children placed in the custody of DHS. In order to minimize disruption for those children and families, DHS is prepared to offer CSS a new one-year contract to continue its work on behalf of these children and families. The new contract would: 1) acknowledge our current dispute; 2) enable DHS to continue payment of CSS for the administration and maintenance of existing foster homes where children in DHS's care reside; 3) allow for referrals of new child foster care placements in limited circumstances where a CSS placement is in the best interests of the child, such as when a child shares a prior relationship with the foster or pre-adoptive parents, or when siblings should be placed together; and 4) provide time for the orderly transition of services, should that become necessary.

Please know that DHS values its historic relationship with CSS, and if CSS is able to find a way to approve same-sex foster and adoptive parents, consistent with current law and city policy, DHS would offer CSS a new contract that allows CSS to continue to select and recruit new foster parents, and to continue to receive new referrals. However, if CSS is unable to do so, DHS still intends to send you an official award letter to

JA 706

prepare for a new contract under the terms described above. You should anticipate receiving DHS's official award letter later this week. Please contact me if you wish to discuss the matter.

Thank you for your commitment to service, and your understanding.

Sincerely,

Jon

[Appx. 1176]

Jonathan R. Janiszewski, Esq.
Divisional Deputy City Solicitor
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JA 707

[Appx. 1177]

City of Philadelphia
Department of Human
1515 Arch Street, Philadelphia PA 19102
215-683-4DHS (4347)
Commissioner
Cynthia F. Figueroa
First Deputy Commissioner
Jessica S. Shapiro
Deputy Commissioners
Child Welfare Operations
Kimberly Ali
Finance
Christopher Simi
Juvenile Justice Services
Timene Farlow
Administration and Management
Vongvilay Mounelasy
Performance Management and Technology
Liza Rodriguez
Prevention
Waleska Maldonado

June 11, 2018

James Amato, Secretary, Catholic Human Services
Catholic Social Services, Archdiocese of Philadelphia
222 North 17th Street, Room 328
Philadelphia, PA 19103

Re: FY 2019 Award Letter (290) PA
Child Welfare Operations
Placement Services (Foster/Kinship Care),
\$2,400,000.00

Dear Secretary:

JA 708

This letter is to provide you with information on the City of Philadelphia Department of Human Services' (hereinafter referred to as "OHS" or "Department") contract process for Fiscal Year 2019 beginning on July 1, 2018. The funding levels referenced above reflect the Department's budget constraints and priorities.

Consistent with the City's policy of non-discrimination and its prior notices to you to the same effect, the scope of the FY 19 contract will change. DHS will continue to make payment to CSS for the administration and maintenance of existing foster homes where children in DHS's care reside.

Additionally, the FY 19 contract will allow for referrals of new child foster care placements only in limited authorized circumstances where a CSS placement is in the best interests of the child, such as when a child shares a prior relationship with the foster or pre-adoptive parents, or when siblings should be placed together.

The new contract will also provide time for the orderly transition of services, should that become necessary. The contract amount has been adjusted to reflect the volume of services projected under the new scope of the contract.

However, please be advised that the authorized levels of service and the continued funding of contracts is contingent upon the availability of proposed City, State and Federal funds and **this award letter does not guarantee your agency a contract with DHS.**

Starting in FY2019, all Foster Care/Kinship Care services rate sheets will have a different look. The new rate sheet will separate all Foster Care/Kinship Care

JA 709

service rates into maintenance and administrative costs for your reference. Please note that these rates are subject to change.

Please be advised that DHS is not obligated to make any payment to your agency until after the execution and conformance of a formal written contract, containing such terms and conditions as are satisfactory to DHS; and provided that your agency has satisfied any conditions precedent to the start of work (e.g. insurance certificates or licenses) as required by the contract. Please review this letter and its attachments thoroughly as some of the information requested will be used to develop your agency's contract. If you have any questions about the content of this letter or its attachments, please contact your contract Conformance Manager. To obtain your Conformance Manager's contact information, you may call the Director of Contracts & Audit, Robert Hodge, at (215) 683-4200. Please email any questions to dhscontracts@phila.gov.

[Appx. 1178]

On behalf of the Department and the children and families we serve, I would like to express our thanks and appreciation for your commitment to provide high quality and effective services to Philadelphia's children and families. During this changing and challenging time the strength of the public/private partnership is critical as we work together toward the common goal of ensuring the overall safety and well-being of children and families in our City.

JA 710

Sincerely,

/s/ Cynthia F. Figueroa

Cynthia F. Figueroa
Commissioner

cc: Lori Windham, Esquire

Jonathan Janiszewski, Esquire

Kimberly Ali, Deputy Commissioner

Robert Hodge, Director of Contracts and Audit

Rita Cairry, Contracts Administrator

JA 711

[Appx. 1184]

City of Philadelphia
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June 21, 2018

BY HAND DELIVERY AND ECF

The Honorable Petrese B. Tucker
United States District Court for the
Eastern District of Pennsylvania
James A. Byrne U.S. Courthouse
601 Market Street
Philadelphia, PA 10106

RE: Fulton et al. v. City of Philadelphia et al., 18-CV-
2075

Dear Judge Tucker:

The City submits this letter as supplemental briefing based on new evidence adduced at the evidentiary hearing on Plaintiffs' Motion for a Temporary Restraining Order or Preliminary Injunction. This new evidence, adduced from CSS itself, indicates that CSS is engaging in additional

conduct that violates the Establishment Clause, as well as violating contractual and legal guarantees that CSS will not discriminate on the basis of religion. As noted in our summation, this new evidence indicates that if the Court orders relief compelling the City to enter into a full contract with CSS, such relief would be problematic.

James Amato testified that CSS requires a “pastoral reference” from all prospective foster parents, and that CSS will not certify a prospective foster parent (or parents) without that pastoral reference. Mr. Amato testified that the pastoral reference letter does not have to be a letter from the Catholic priest or parish, but that the pastoral reference must show that the prospective foster parent engages in “active participation” in any faith.

A requirement that a prospective foster parent be an active participant in a faith community violates both the Establishment Clause as well as CSS’ contractual and legal guarantees that it will not discriminate on the basis of religion. The Supreme Court has “repeatedly reaffirmed that neither a State nor the Federal Government “can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.” *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (footnote omitted); *see also* [Appx. 1185] *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) (holding that Establishment Clause’s prohibition upon governmental endorsement of religion requires that government maintain its neutrality both “between religion and religion, and between religion and

nonreligion” such that Ten Commandments display on government property violated Establishment Clause because its purpose was to advance religion).

In *Torcaso*, the Supreme Court invalidated Maryland’s requirement that individuals who seek to become notaries public must affirm they believe in God. The Court held that religious tests or requirements violate the Establishment Clause. *Id.* CSS’ requirement of a pastoral reference letter here is no different. If prospective foster parents cannot provide evidence that they are members in good standing of a faith community, CSS refuses to certify them as a foster parents. Therefore, the pastoral reference requirement amounts to a religious test for prospective foster parents.

Even assuming CSS is a private actor, CSS cannot use its taxpayer-funded contract to provide City social services to run a program that expresses a clear preference for religion in this manner. *See Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 126 (1982) (invalidating municipal ordinance that delegated veto power to churches regarding liquor license applications).

Further, in requiring that individuals be active participants in a faith community, CSS is discriminating against nonbelievers on the basis of religion. Pursuant to its contract with the City, CSS agreed not to discriminate in its provision of foster care services based on its religious beliefs. *See* Pltfs. Ex. 1-A (Dkt. 13-4) at 29-30 (§ 4.1 (k)). In addition, anti-discrimination guarantees set forth in the contract, and in the City’s Fair Practice Ordinance, state law, and federal law as incorporated into the contract, require CSS not to discriminate in the

provision of services on the basis of religion. *Id.* at 18-29 (§ 15.1). By requiring that individuals be members of a faith community, CSS is discriminating against individuals who are non-believers. *See Mathis v. Christian Heating & Air Conditioning, Inc.*, 158 F. Supp. 3d 317, 329 (E.D. Pa. 2016) (find that because, “[u]nder Title VII, atheists are entitled to the exact same protection as members of other religions,” employer that required employees to wear ID badge containing religious mission statement violated Title VII when it terminated atheist employee who taped over mission statement).

Respectfully,

/s/ Eleanor N. Ewing

Eleanor N. Ewing

Chief Deputy City Solicitor

JA 715

[Appx. 1186]

Becket, Religious Liberty for All
1200 New Hampshire Ave., NW
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202-955-0095/ @Becketlaw
www.becketlaw.org

June 25, 2018

The Honorable Petrese B. Tucker
United States District Court for the
Eastern District of Pennsylvania
U.S. Courthouse
601 Market Street
Philadelphia, PA 10106

Re: Fulton v. City of Philadelphia, 18- 2075

Dear Judge Tucker:

The City contends that Catholic's use of pastoral reference letters as a means of evaluating prospective foster families is unconstitutional and in breach of contract. The City does not claim that the reference letters had anything to do with the intake closure at issue in this case. Letter at 1 (citing "new evidence"). But it argues that granting Catholic relief "would be problematic" now because of the pastoral letters.

The City's concern about relief is misplaced. However, in order to eliminate any potential issue regarding how the parties would operate under a preliminary injunction, Catholic will agree not to require pastoral letters. While such letters have been helpful in the past, the letters are not necessary for Catholic to provide foster care services consistent with its religious mission.

The City's legal arguments are incorrect. As Commissioner Figueroa testified at the hearing last week, the City has "nothing to do" with the process and policies private agencies use to perform home studies and certify prospective foster families. Preliminary Injunction Hearing Transcript ("Tr."), Day 3, Figueroa, pp. 53-54. Certification of foster families occurs under standards provided by the State, not the City. If anything, the City's apparent ignorance of how Catholic performs home studies just confirms that the City has never scrutinized the ways in which private agencies perform this work. Surely the City cannot have a [Appx. 1187] compelling interest now in a process it has utterly ignored, apparently for decades.

Second, Catholic is a religious non-profit; it is not the government. Indeed, the City's contract emphasizes in no uncertain terms that Catholic shall not "in any way or for any purpose be deemed or intended to be an employee or agent of the City." PL Ex. 15 at 86 (paragraph 9.1). Neither the Establishment Clause nor federal law forbids Catholic from having a religious nature. *See, e.g., Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 337 (1987) (upholding Title VII's exemption for religious organizations against an Establishment Clause challenge); 42 U.S.C. § 604a(c) ("[N] either the Federal Government nor a State receiving funds under such programs shall discriminate against an organization which is or applies to be a contractor . . . on the basis that the organization has a religious character.").

Third, the City's witnesses testified that they were unaware of a single person who had ever raised a concern or been unable to foster because of Catholic's

use of religious criteria. Tr., Day 1, Ali, pg. 114; Tr., Day 3, Figueroa, pg. 18-19, 145.

As with the rest of its case, the City's concerns are entirely speculative, and ignore the fact that people will readily "recognize and accept" that, even when churches are engaged in activities which have both religious and civil effects, churches do not surrender their religious nature. *Cf Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, No. No. 16-111, 2018 WL 2465172, at *7 (U.S. June 4, 2018) (noting that a church's decision not to perform a same-sex wedding ceremony "would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment of their own dignity and worth.").

Nevertheless, since Catholic will agree to cease requiring pastoral letters going forward, these issues should not impact the ability of this Court to issue a preliminary injunction.

[Appx. 1188]

Respectfully submitted,

/s/ Mark Rienzi

Mark Rienzi

Counsel for Plaintiffs

[Appx. 1189]

Certificate of Service

I hereby certify that this letter has been served electronically via ECF and is available for viewing and downloading from the ECF system.

/s/ Mark Rienzi

Mark Rienzi