

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MELISSA BUCK,
et al.

Plaintiffs,

v.

ROBERT GORDON,
et al.

Defendants.

CASE NO. 1:19-CV-00286

HON. ROBERT J. JONKER
United States District Judge

**BRIEF FOR FEDERAL DEFENDANTS IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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INTRODUCTION

This is a dispute between Plaintiffs and the State of Michigan. Indeed, it is unclear whether Plaintiffs have even stated any claims against the Federal Defendants. And even if Plaintiffs have stated claims against the Federal Defendants, those claims are not ripe and Plaintiffs lack standing to sue the Federal Defendants. For these reasons, and the reasons set forth below, the Court should deny Plaintiffs' motion for a preliminary injunction against the Federal Defendants.

Plaintiffs allege that the State Defendants—the Director of the Michigan Department of Health and Human Services, the Executive Director of the Michigan Children's Services Agency, and the Michigan Attorney General—have threatened to terminate the State's adoption and foster care contracts with child placing agencies that decline to recommend same-sex couples as potential adoptive or foster parents on religious grounds. Plaintiffs have moved for a preliminary injunction to prevent Michigan from terminating its contracts with Plaintiff St. Vincent Catholic Charities, a religiously affiliated agency that declines to recommend same-sex or unmarried couples as potential adoptive or foster parents due to its religious beliefs.

Plaintiffs, however, seek injunctive relief not only against the State of Michigan, but also against the federal government. Specifically, Plaintiffs seek an injunction prohibiting the Federal Defendants from enforcing against the State of Michigan a federal regulation that requires recipients of federal adoption and foster care funds not to discriminate on the basis of sexual orientation in administering programs supported by such funds.

Plaintiffs' request for a preliminary injunction against the Federal Defendants should be denied. Plaintiffs cannot demonstrate a likelihood of success on the merits against the Federal Defendants.

First, Plaintiffs' claims against the Federal Defendants are not ripe. Under applicable Sixth Circuit case law, Plaintiffs have identified no credible threat that the Federal Defendants will enforce the federal non-discrimination regulation against Michigan based on St. Vincent's conduct in this case. To the contrary, no one disputes that the Federal Defendants provided funding to Michigan under the State's prior policy of providing religious accommodations to adoption and foster care agencies. In addition, as Plaintiffs acknowledge, the Federal Defendants have taken the position that, under certain circumstances, religious exceptions from the non-discrimination regulation are required under the federal Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq.* And the Federal Defendants recently granted such an exception to South Carolina for a faith-based foster care agency in that state that uses religious criteria in selecting prospective foster parents.

Second, Plaintiffs lack standing to sue the Federal Defendants for their alleged injuries in this case. Plaintiffs' injuries are not traceable to the Federal Defendants, and injunctive relief against the Federal Defendants would not redress Plaintiffs' injuries. St. Vincent faces the threat of contract termination because of four actions by the State of Michigan: (1) Michigan's inclusion of non-discrimination provisions in its contracts with adoption and foster care agencies; (2) Michigan's decision to enter into a settlement agreement with the ACLU that requires the State to enforce those provisions; (3) Michigan's decision to stop granting religious exemptions to agencies like St. Vincent that decline to recommend same-sex couples as potential adoptive or foster parents on religious grounds; and (4) Michigan's failure to seek an exception from the federal non-discrimination regulation for St. Vincent. The Federal Defendants are not responsible for any of those actions. Plaintiffs also have not shown that an injunction against the Federal Defendants would redress their injuries by causing Michigan to reverse course and begin

accommodating St. Vincent's religious exercise. Indeed, the State's conduct to date, taken together with statements from State officials, strongly suggests that Michigan would follow the same course of action here in the absence of the federal regulation.

Because their claims against the Federal Defendants are not ripe and because they lack standing to sue the Federal Defendants, Plaintiffs cannot demonstrate a likelihood of success on the merits against the Federal Defendants. Nor can they prevail on the other factors required for a preliminary injunction. The Court should therefore deny Plaintiffs' motion as to the Federal Defendants.

BACKGROUND

I. Statutory and Regulatory Background

Title IV-E of the Social Security Act authorizes federal funding to states “[f]or the purpose of enabling each State to provide, in appropriate cases, foster care . . . [and] adoption assistance” for eligible children. 42 U.S.C. § 670.¹ Title IV-E additionally prohibits states and their subgrantees from “deny[ing] to any person the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the person, or of the child, involved.” 42 U.S.C. § 671(a)(18)(A). The statute does not include a prohibition on denials based on sexual orientation. Instead, HHS has promulgated a regulatory provision as part of its Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards (HHS UAR), rooted in an HHS “public policy requirement,” that no person may be

¹ To be eligible for Title IV-E payments, a state must submit a foster care and adoption assistance plan for HHS approval containing certain features. *Id.* § 671(a). States with a compliant plan receive Title IV-E funding for a portion of the state's foster care maintenance and adoption assistance payments made each quarter. *Id.* § 674(a)(1)–(2). A state may also receive reimbursement for administrative expenses necessary for the provision of child placement services and the proper and efficient administration of the Title IV-E state plan. *Id.* § 674(a)(3). These expenses may include activities such as training, case management, and recruitment and licensing of foster homes. 45 C.F.R. § 1356.60(b)–(c). States have discretion to engage third parties to provide many of these services.

“denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on . . . sexual orientation.” 45 C.F.R. § 75.300(c). The provision also prohibits discrimination based on “religion.” *Id.* Another provision in the HHS UAR authorizes HHS to issue “[e]xceptions on a case-by-case basis” from this and other grant regulations except where otherwise required by law. *See* 45 C.F.R. § 75.102(b).

Title IV-E provides states with significant latitude to determine how and under what conditions the state will license or approve prospective foster or adoptive parents. The Act does not prohibit states from establishing additional criteria otherwise allowed by law for licensing foster family homes or approving adoptive families. As such, states have substantial flexibility in establishing licensing criteria for foster families and approval requirements for adoptive families. It is within the authority of each state to determine which entities to contract with and which services or activities the contractor will perform.

Under Michigan law, a child placing agency may not facilitate foster care placements or adoptions for foster children unless it is licensed by the Michigan Department of Health and Human Services (MDHHS). *See* Mich. Comp. Laws Ann. § 722.115 (West 2018). A Michigan statute passed in 2015 protects the religious rights of such agencies by specifying that agencies “shall not be required to provide any services if those services conflict with, or provide any services under circumstances that conflict with, the child placing agency’s sincerely held religious beliefs.” *Id.* § 722.124e(2); *see also id.* § 722.124e(3) (prohibiting state and local government units from “tak[ing] an adverse action against a child placing agency” that declines to provide a service that conflicts with the agency’s “sincerely held religious beliefs”). “[F]oster care management and adoption services provided under a contract with [MDHHS]” do not fall under this protection. *See id.* § 722.124e(7)(b).

According to Plaintiffs, after the 2015 law was passed, MDHHS interpreted the law to mean that MDHHS could not penalize or terminate contracts with religious child placing agencies that decline to work with prospective same-sex or unmarried foster parents. Compl. ¶ 61, ECF No. 1, PageID.24. Plaintiffs further state that, although MDHHS determined the 2015 statute might not apply to certain “child-specific adoption contracts,” MDHHS granted “case-by-case exemptions” that allowed agencies “to continue operating according to their religious beliefs.” *Id.* ¶ 62, PageID.24.

To become a foster or adoptive parent in Michigan, an individual must be recommended for approval and receive a license from the State. *See id.* ¶ 43, PageID.18; Mem. of Law in Supp. of Pls.’ Mot. for a Prelim. Inj. [PI Memo] at 5, ECF No. 6, PageID.175. MDHHS contracts with child placing agencies like St. Vincent to recruit and evaluate prospective foster and adoptive parents. *See* Compl. ¶ 22–23, PageID.10–11; PI Memo at 5–6, PageID.175–176. As part of the evaluation process, the child placing agency conducts a “home study” in which the agency “analyzes the relationships in the home and provides a recommendation [to MDHSS] regarding placing children in that home.” Compl. ¶ 44, PageID.18. MDHHS then makes a final decision regarding approval and licensure. *See* PI Memo at 5, PageID.175.

II. The *Dumont* Litigation and Settlement Agreement

On September 20, 2017, the ACLU filed a lawsuit against MDHHS alleging that MDHHS was violating the Establishment and Equal Protection Clauses of the U.S. Constitution by contracting with child placing agencies that decline on religious grounds to recommend same-sex couples as potential adoptive or foster parents. Compl. ¶ 80, PageID.29; *see also* Compl. *Dumont v. Gordon*, No. 17-cv-13080 (E.D. Mich. Sept. 20, 2017), ECF No. 1, PageID.1. Although MDHHS initially defended the suit, following the election of a new Michigan Attorney General (Defendant Nessel) in November 2018, MDHHS settled with the ACLU on March 22,

2019. Compl. ¶ 89, PageID.32; *see also* Stipulation of Voluntary Dismissal with Prejudice, *Dumont v. Gordon*, No. 17-cv-13080 (E.D. Mich. Mar. 22, 2019), ECF No. 82, PageID.1437.²

In the Settlement Agreement, MDHHS agreed to continue including a “Non-Discrimination Provision” in contracts with child placing agencies. Ex. 1 at 2. This provision, which MDHHS was already including in contracts prior to the settlement, requires child placing agencies that contract with MDHHS to “comply with the Department’s non-discrimination statement prohibiting discrimination ‘against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs, or disability’ in the provision of services under contract with the Department.” *Id.* at 1; *see also* PI Memo Ex. 9, ¶ 2.9.c, ECF No. 6-9, PageID.326. (copy of St. Vincent’s current foster care contract with MDHHS).³ The Settlement Agreement specifies that the Non-Discrimination Provision prohibits, among other things, “turning away or referring to another [child placing agency] an otherwise potentially qualified LGBTQ individual or same-sex couple” and “refusing to perform a home study or process a foster care licensing application or an adoption application for an otherwise potentially qualified LGBTQ individual or same-sex couple.” Ex. 1 at 2. MDHHS further agreed “to enforce the Non-Discrimination Provision . . . against a [child placing agency] that the . . . Department determines is in violation of” the Provision, “up to and including termination of the [c]ontracts” with the agency. *Id.* at 3; *see also id.* (“In the event a [child placing agency] refuses to comply with the Non-Discrimination Provision . . . within a reasonable time after notification by the Department of a Contract

² A copy of the Settlement Agreement, which was attached as Exhibit A to the Stipulation of Voluntary Dismissal with Prejudice in *Dumont*, is attached to this brief as Exhibit 1.

³ Plaintiffs identify Exhibit 9 to their PI Memo as a copy of St. Vincent’s current contract with MDHHS in footnote 37 of their PI Memo. *See* PI Memo at 31, n.37, PageID.201.

Violation, the Department will terminate the [agency's] Contracts.”). The Settlement Agreement does not contain a religious exemption.

In a “Summary Statement” accompanying the Settlement Agreement, Defendant Nessel (the new Michigan Attorney General) explained that under the Agreement, “MDHHS must take action to enforce its existing contracts where an agency has accepted a referral [of a child from MDHHS] and later violates the non-discrimination provision[] by refusing to work with LGBTQ individuals interested in fostering or adopting any of the children it has accepted.” Ex. 2 at 3.⁴ Nessel further stated that MDHHS is required to include the non-discrimination provision in its contracts with child placing agencies as a condition of receiving Title IV-E funds from the federal government. *See id.* at 1 (“As a condition of receiving these federal funds, the United States Department of Health and Human Services requires that states’ Title IV-E-funded programs prohibit discrimination on the basis of sexual orientation or gender identity. In compliance with this federal requirement, MDHHS contracts mandate that, except for an agency’s sole discretion to decide whether to accept a referral from MDHHS, all agencies must comply with MDHHS’s non-discrimination statement when providing state-contracted services.” (citing 45 C.F.R. § 75.300(c)); *see also id.* at 3 (characterizing the non-discrimination provision as “federally required”).

Significantly, Nessel’s statement did not indicate that religious agencies could continue to receive case-by-case exemptions if recommending same-sex couples as potential adoptive or foster parents conflicted with the agencies’ religious beliefs. To the contrary, Nessel took the position that once an agency accepts a child for placement under a contract with MDHHS,

⁴ Plaintiffs cite Defendant Nessel’s summary statement on pages 26 and 49 of their PI Memo. *See* PI Memo at 26 n.36, PageID.196; *id.* at 49, n.50, PageID.219; *see also* Compl. ¶ 91, n.22, PageID.33; *id.* ¶ 99, n.25, PageID.35. For ease of reference, a copy of the summary statement is attached to this brief as Exhibit 2.

Michigan law “does not provide [the] agency with discretion to refuse to provide the accepted child or individual with state-contracted foster care case management or adoption services that conflict with its sincerely held religious beliefs.” *Id.* at 2.

III. Plaintiffs and their Alleged Injuries

Plaintiff St. Vincent Catholic Charities is a religiously affiliated child placing agency that has provided foster care and adoption services in Michigan for over 50 years. Compl. ¶ 69, PageID.26. St. Vincent provides training, supervision, and support for each foster care and adoptive family with which it partners. *Id.* ¶ 70, PageID.26. In accordance with its sincerely held religious beliefs regarding marriage, St. Vincent declines to recommend same-sex or unmarried couples for licensing with MDHHS as potential adoptive or foster parents. *See id.* ¶ 67, PageID.25–26; PI Memo at 2, PageID.172. According to St. Vincent, it does not do so because as part of the licensing recommendation process, an agency must submit to MDHHS “a written approval of the relationships in the home and confirmation that the agency has determined the home is suitable for the placement of children.” Compl. ¶ 44, PageID.18. St. Vincent explains that “as a Catholic organization, St. Vincent cannot provide a written recommendation to the State endorsing an adult relationship that would conflict with St. Vincent’s sincere religious beliefs.” PI Memo at 16, PageID.186. If a same-sex or unmarried couple seeks assistance from St. Vincent in becoming foster or adoptive parents, St. Vincent refers the couple to another agency that can help them. Compl. ¶ 67, PageID.25–26; *see also* PI Memo at 16–17, PageID.186–187. A same-sex or unmarried couple that has been certified for approval by the State through another agency can adopt children in St. Vincent’s care. *See* Compl. ¶¶ 31–32, PageID.14–15; PI Memo at 41, PageID.211. St. Vincent merely declines to provide the recommendation for approval itself based on its religious beliefs and its understanding that

recommending a same-sex or unmarried couple for approval constitutes an endorsement of the couple's relationship.

Plaintiffs Melissa and Chad Buck have adopted five special-needs children through St. Vincent and continue to rely on St. Vincent services for training and support as they raise their children. Compl. ¶¶ 10–11, PageID.6–7. Plaintiff Shamber Flore is a former foster child who was adopted through St. Vincent and who now volunteers with St. Vincent as a mentor for foster children. *Id.* ¶ 12, PageID.7.

According to Plaintiffs, St. Vincent's contract with MDHHS is up for renewal in October 2019. *Id.* ¶ 105, PageID.37. Plaintiffs say that they worry MDHHS will refuse to renew its contract with St. Vincent based on St. Vincent's religiously based policy of declining to recommend same-sex couples as potential adoptive or foster parents and instead referring such couples to another agency. *See id.*, PageID.37; *see also* PI Memo at 26–27, PageID.196–197. Plaintiffs also assert that MDHHS could seek to terminate its contract with St. Vincent prior to October on the ground that St. Vincent is violating the contract's non-discrimination provision. *See* PI Memo at 27, PageID.197; PI Memo at Ex. 9, ¶ 2.9.c, PageID.326. According to Plaintiffs, if St. Vincent loses its contract with MDHHS, St. Vincent will no longer be able to provide foster care or adoption services because the State of Michigan is the only source of public foster care and adoption referrals, and without such referrals, St. Vincent would have to shut down its programs. Compl. ¶ 27, PageID.13–14. Plaintiffs Melissa and Chad Buck and Shamber Flore in turn assert that they would lose the ability to continue receiving support from, and volunteering with, St. Vincent. *Id.* ¶ 118–119, PageID.41.

IV. Plaintiffs' Claims Against the Federal Defendants and Injunctive Relief Sought

Plaintiffs allege that Michigan's threatened termination of St. Vincent's adoption and foster care contracts violates their free exercise and free speech rights and would cause them

irreparable harm. Accordingly, they seek preliminary injunctive relief against the State Defendants.

But Plaintiffs also seek a preliminary injunction against the Federal Defendants. Notably, Plaintiffs do not allege that the Federal Defendants themselves have violated Plaintiffs' rights. Rather, they say that injunctive relief against the Federal Defendants is "necessary" so that "Michigan cannot use the perceived threat of federal enforcement as an excuse to violate Plaintiffs' rights." PI Memo at 48–49, PageID.218–219. As noted above, in her statement accompanying the *Dumont* Settlement Agreement, Defendant Nessel asserted that an HHS regulation, 45 C.F.R. § 75.300(c), mandates inclusion of a non-discrimination provision in MDHHS contracts. *See Ex. 2* at 1. This statement appears to be the basis for Plaintiffs' requested relief against the Federal Defendants. *See Compl.* ¶¶ 94, 97, 99, PageID.34–35; PI Memo at 48–49, PageID.218–219. Plaintiffs thus ask this Court for a preliminary injunction prohibiting the Federal Defendants from "taking any enforcement action under 45 C.F.R. § 75.300(c)" in response to St. Vincent's policy of not recommending same-sex or unmarried couples as potential adoptive or foster parents, or in response to any efforts by Michigan to accommodate St. Vincent's religious beliefs.

STANDARD OF REVIEW

"Preliminary injunctions are extraordinary and drastic remedies never awarded as of right." *O'Toole v. O'Connor*, 802 F.3d 783, 788 (6th Cir. 2015). "[T]hat is why the plaintiff bears the burden to justify relief, even in First Amendment cases." *Id.* Meeting this burden requires "a clear showing that the plaintiff is entitled to such relief." *S. Glazer's Distribs. of Ohio, LLC v. Great Lakes Brewing Co.*, 860 F.3d 844, 848-49 (6th Cir. 2017) (quoting *Winter v. NRDC, Inc.*, 555 U.S. 7, 22 (2008)).

“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter*, 555 U.S. at 20. Of the four factors, likelihood of success on the merits “is the most important,” *Jones v. Caruso*, 569 F.3d 258, 277 (6th Cir. 2009), and “a finding that there is simply no likelihood of success on the merits is usually fatal,” *Gonzales v. Nat’l Bd. of Med. Examiners*, 225 F.3d 620, 625 (6th Cir.2000); *see also Great Lakes Brewing Co.*, 860 F.3d at 849 (“[A] preliminary injunction issued where there is simply no likelihood of success on the merits must be reversed.” (quoting *Winnett v. Caterpillar, Inc.*, 609 F.3d 404, 408 (6th Cir. 2010))).

ARGUMENT

The Court should deny Plaintiffs’ motion for a preliminary injunction against the Federal Defendants. As noted above, Plaintiffs do not allege that the Federal Defendants have violated Plaintiffs’ rights. Rather, they seek injunctive relief against the Federal Defendants to prevent the State Defendants from relying on the federal non-discrimination regulation and the possibility of federal enforcement as justification for their alleged violations of Plaintiffs’ rights. Thus, it is unclear whether Plaintiffs have even stated any claims against the Federal Defendants in the first place.

In any event, Plaintiffs are unlikely to succeed on the merits against the Federal Defendants because their claims against the Federal Defendants (to the extent they raise any) are not ripe and because they lack standing to sue the Federal Defendants. Plaintiffs also will not suffer imminent, irreparable harm in the absence of a preliminary injunction against the Federal Defendants because there is no threat of enforcement by the Federal Defendants. Finally, neither

the balance of the equities nor the public interest warrants an injunction against the Federal Defendants.

I. Plaintiffs Have Not Established That They Are Likely To Succeed on the Merits Against the Federal Defendants.

A. Plaintiffs' Claims Against the Federal Defendants Are Not Ripe.

To invoke the Court's jurisdiction, Plaintiffs must establish that their claims are "ripe for judicial review." *Norton v. Ashcroft*, 298 F.3d 547, 554 (6th Cir. 2002). "If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed." *Bigelow v. Mich. Dep't of Nat. Res.*, 970 F.2d 154, 157 (6th Cir. 1992). The ripeness doctrine rests both on "Article III limitations on judicial power" and on "prudential reasons for refusing to exercise jurisdiction." *Kiser v. Reitz*, 765 F.3d 601, 606 (6th Cir. 2014) (quoting *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993)).

The Sixth Circuit has laid out a three-part test for determining ripeness. Under this test, the court examines: "(1) the likelihood that the harm alleged will ever come to pass; (2) whether the factual record is sufficiently developed to allow for adjudication; and (3) hardship to the parties if judicial review is denied." *Norton*, 298 F.3d at 554. The first factor—the likelihood that the harm alleged will actually come to pass—is the most important. *See United Steelworkers of Am., Local 2116 v. Cyclops Corp.*, 860 F.2d 189, 194 (6th Cir. 1988) ("We pay particular attention to the likelihood that the harm alleged by plaintiffs will ever come to pass.").

Accordingly, "a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Cooley v. Granholm*, 291 F.3d 880, 883–84 (6th Cir. 2002) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted)). Plaintiffs' claims against the Federal Defendants are not ripe under the Sixth Circuit's test.

As noted above, Plaintiffs seek an injunction barring enforcement of 45 C.F.R. § 75.300(c) based on St. Vincent’s religiously motivated practice of declining to recommend same-sex couples as prospective adoptive or foster parents. Of course, section 75.300(c) does not operate directly against St. Vincent. It directly regulates *Michigan*, which is the Federal Defendants’ grantee. The harm that Plaintiffs allege, therefore, is the negative consequences that would result to St. Vincent—loss of funding, loss of contracts, etc.—if HHS enforced section 75.300(c) against Michigan based on St. Vincent’s religiously motivated practice.

Plaintiffs have not shown any likelihood that this alleged harm will come to pass, however, because they have adduced no facts showing that HHS has any intention of enforcing section 75.300(c) against Michigan based on St. Vincent’s religiously motivated practice of declining to recommend same-sex couples as potential adoptive or foster parents.

To begin with, section 75.300(c) had been on the books for over two years before Michigan changed its policy regarding St. Vincent, *see* 81 Fed. Reg. at 89,395 (Dec. 12, 2016) (promulgating section 75.300(c)); PI Memo at 1, PageID.171 (dating Michigan’s policy change to March 2019), and there is no indication that the Federal Defendants took any steps during those two-plus years to enforce the regulation based on St. Vincent’s religiously motivated conduct. There is also no indication that the Federal Defendants would do so now if Michigan reverted to its former policy. It is also not clear that section 75.300(c) would even apply to St. Vincent’s practice of declining to recommend same-sex couples as potential adoptive or foster parents in the first place, given that the regulation applies “in the administration of programs supported by HHS awards,” 45 C.F.R. § 75.300(c), and according to Plaintiffs, St. Vincent pays for recruitment and evaluation of prospective adoptive and foster care parents through private funds rather than money from the State. *See* Compl. ¶¶ 72–76, PageID.27–28; PI Memo at 14–

15, Page ID.184–185.⁵ According to Plaintiffs, “only *after* a child is placed in [a] certified family’s home do St. Vincent and the family begin to receive funding from the State.” Compl. ¶ 72, Page ID.27 (emphasis added); *see also Grove City Coll. v. Bell*, 465 U.S. 555, 570–74 (1984) (reading the phrase “program or activity” for purposes of Title IX’s prohibition on sex discrimination to apply only to the specific education program or activity receiving federal funding and not to the entire school), *superseded by statute*, Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, §3, 102 Stat. 28, 28-29 (1988).

Moreover, HHS recently granted an exception from section 75.300(c) to South Carolina for a faith-based foster care agency, Miracle Hill Ministries, that uses religious criteria in selecting among prospective foster parents.⁶ Miracle Hill limits recruitment of foster parents to individuals of a particular religion because it “believe[s] those who hold certain positions of spiritual influence and leadership—including foster parents—should share [Miracle Hill’s] religious mission and beliefs.” Ex. 3 at 2. Another provision in the HHS UAR, 45 C.F.R. § 75.102(b), authorizes HHS to grant exceptions from program requirements—including section 75.300(c)—on a “case-by-case basis” where not otherwise required by law. Pursuant to this authority, in January of this year, HHS granted South Carolina an exception from section 75.300(c)’s religious non-discrimination requirement⁷ for Miracle Hill because it concluded that

⁵ Plaintiffs acknowledge that in an “exceptional case[.]” involving “foster children being placed with relatives,” the State could enter into a “separate, child-specific contract to directly pay for home study services.” Compl. ¶ 73, Page ID.27–28. However, Plaintiffs state that St. Vincent has “has never been a party to such a contract for the provision of home study services for an LGBTQ couple.” *Id.*, PageID.28.

⁶ Plaintiffs cite HHS’s letter to South Carolina granting the exception on page 49 of their PI Memo. *See* PI Memo at 49, n.51, PageID.219. For ease of reference, a copy of the letter is attached to this brief as Exhibit 3.

⁷ Section 75.300(c) prohibits discrimination on a variety of grounds in addition to sexual orientation, including “religion.”

requiring Miracle Hill to comply would violate RFRA and because of the significant programmatic burden that would attend enforcement of the regulation under the circumstances. *See Ex. 3.* According to HHS, “Miracle Hill’s sincere religious exercise would be substantially burdened by application of the religious nondiscrimination requirement of § 75.300(c),” and “subjecting Miracle Hill to that requirement . . . is not the least restrictive means of advancing a compelling government interest on the part of HHS.” *Id.* at 3. Thus, for the alleged harm Plaintiffs posit to come to pass, HHS would have to take action—enforce section 75.300(c) against Michigan on the ground that St. Vincent is purportedly failing to comply with that section’s sexual orientation non-discrimination requirement due to its religious beliefs—that past HHS practice strongly suggests the agency would not take.

Adult Video Association v. U.S. Department of Justice, 71 F.3d 563 (6th Cir. 1995), is instructive here. In that case, an association of adult video stores sought a declaratory judgment that a sexually explicit film the stores wished to sell was not obscene. *See id.* at 565. The stores claimed they needed the declaratory judgment in order to protect them from prosecution under federal obscenity laws. *See id.* The Sixth Circuit found that the plaintiffs had failed to establish that the alleged harm—federal prosecution—would come to pass because they could “point to no action or statement by the federal government indicating that it intend[ed] to take action with respect to [the film].” *Id.* at 568. Similarly, in this case, Plaintiffs have identified no action or statement by the Federal Defendants indicating that they intend to enforce 45 C.F.R. § 75.300(c) against Michigan because of St. Vincent’s religiously motivated conduct in this case. And indeed, the Federal Defendants’ practice before Michigan changed its policy suggests that any risk of enforcement is entirely speculative. *See also Renne v. Geary*, 501 U.S. 312, 321–22 (1991) (case not ripe for review where there was “no factual record of an actual or imminent

application of” the challenged law); *Ky. Press Ass’n, Inc. v. Ky.*, 454 F.3d 505, 509 (6th Cir. 2006) (plaintiff failed to establish that alleged harm would come to pass where government could “reasonably interpret” applicable laws in way that would avoid alleged harm).

Sixth Circuit case law on First Amendment pre-enforcement challenges buttresses this conclusion. Although the basis for Plaintiffs’ claim against the Federal Defendants is not entirely clear, Plaintiffs assert First Amendment claims against the State Defendants and thus case law in that area is at least instructive.

In the First Amendment context, the Sixth Circuit has said that a pre-enforcement challenge to a law or regulation is ripe “when the threat of enforcement of that law is ‘sufficiently imminent.’” *Miller v. City of Wickliffe*, 852 F.3d 497, 506 (6th Cir. 2017) (quoting *Platt v. Bd. of Comm’rs on Grievances & Discipline of Ohio Supreme Court*, 769 F.3d 447, 451 (6th Cir. 2014)). The threat of enforcement is sufficiently imminent, in turn, when “(1) the plaintiff alleges ‘an intention to engage in a course of conduct’ implicating the Constitution and (2) the threat of enforcement of the challenged law against the plaintiff is ‘credible.’” *Id.* (quoting *Platt*, 769 F.3d at 451–52).

Here, although St. Vincent undoubtedly engages in a course of conduct that implicates the Constitution when it declines to recommend same-sex couples as potential adoptive or foster parents on religious grounds, it does not face a credible threat of enforcement—at least not from the Federal Defendants. “A threat of future enforcement may be ‘credible’ when the same conduct has drawn enforcement actions or threats of enforcement in the past.” *Kiser*, 765 F.3d at 609. Thus, the Sixth Circuit has found a credible threat of enforcement where the plaintiff received a letter from a state agency notifying the plaintiff that the agency had investigated his conduct and determined he had violated state law. *See id.*; *see also Winter v. Wolnitzek*, 834 F.3d

681, 687 (6th Cir. 2016) (letter notifying plaintiff that a complaint had been filed against her and requesting a response in writing constituted credible threat of enforcement); *Berry v. Schmitt*, 688 F.3d 290, 297 (6th Cir. 2012) (letter informing plaintiff that he had violated challenged regulation and cautioning him against future violations constituted credible threat of enforcement). By contrast, the Sixth Circuit has said there is no credible threat of enforcement when there is “no indication” that the plaintiff will be punished. *See Berry*, 688 F.3d at 296–97.

In this case, there is no indication that the Federal Defendants have taken any steps to withhold any portion of Michigan’s federal foster care and adoption grants based on St. Vincent’s religiously motivated conduct. To the contrary, as discussed above, the Federal Defendants did not take any enforcement action based on St. Vincent’s conduct during the two-plus years section 75.300(c) was in effect prior to Michigan’s policy change. And they granted an exception from 75.300(c) to South Carolina so that South Carolina could continue to accommodate the religious practices of a faith-based child placing agency in that state. Under these circumstances, there is no credible threat of enforcement by the Federal Defendants and thus no “sufficiently imminent” threat. *See Miller*, 852 F.3d at 506 (to be sufficiently imminent, threat must be “credible”); *id.* at 507 (no credible threat of enforcement where city “never indicated that it would . . . enforce the [challenged] Ordinance against plaintiffs”); *McKay v. Federspiel* 823 F.3d 862, 870 (6th Cir. 2016) (no credible threat of enforcement in suit challenging court order banning electronic recording devices in county building where there was “simply no evidence in the current record that anyone ha[d] ever been held in contempt—or even subject to contempt proceedings—for violating the challenged order”). Thus, Plaintiffs’ pre-enforcement challenge to section 75.300(c) is not ripe. *See Miller*, 852 F.3d at 506.

The second and third factors of the Sixth Circuit’s ripeness test do not alter this conclusion. As an initial matter, it is doubtful that a case could be ever be ripe for adjudication absent at least some likelihood that the harm alleged will come to pass. *See Cooley*, 291 F.3d at 883–84 (“[A] claim is not ripe for adjudication if it rests upon ‘contingent future events that may not occur as anticipated, or indeed may not occur at all.’” (quoting *Texas*, 523 U.S. at 300)); *see also Texas*, 523 U.S. at 300 (treating the likelihood that future events will come to pass as a threshold question before addressing other ripeness factors).

In any event, it is difficult at this point to know what the factual record would look like were the Federal Defendants to bring an enforcement action against Michigan based on the State’s failure to force St. Vincent to violate its religious beliefs, given that there is no indication that the Federal Defendants would bring such an action. *See Norton*, 298 F.3d at 554 (second ripeness factor is “whether the factual record is sufficiently developed to allow for adjudication”). Similarly, it is difficult to conceive what hardship Plaintiffs would suffer from denying judicial review given that they cannot show there is any imminent risk of an enforcement action by the Federal Defendants. *See id.* (third ripeness factor is “hardship to the parties if judicial review is denied”). Because Plaintiffs have not demonstrated any likelihood that the harm alleged—loss of contracts and funding for St. Vincent based on federal enforcement of 45 C.F.R. § 75.300(c) against Michigan for St. Vincent’s religiously motivated conduct—will come to pass, Plaintiffs’ claims against the Federal Defendants are not ripe.

B. Plaintiffs Lack Standing to Sue the Federal Defendants.

As the parties invoking federal jurisdiction, Plaintiffs bear the burden of establishing the three elements that constitute the “irreducible constitutional minimum of standing.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Namely, Plaintiffs must show that they have “(1)

suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citation omitted). Without standing, Plaintiffs cannot establish the existence of an Article III case or controversy and thus cannot invoke the jurisdiction of the federal courts. *See, e.g., Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 103–04 (1998).

Notably, Plaintiffs do not allege that the Federal Defendants have injured them directly, nor could they. The Federal Defendants do not fund St. Vincent’s services through direct contracts with St. Vincent. Rather, they provide grants to Michigan, which in turn uses those grants to fund various social services within the State. *See* Compl. ¶¶ 55–56, PageID.21–22. Nor do the Federal Defendants directly regulate Plaintiffs. Rather, the Federal Defendants directly regulate the State Defendants, who in turn regulate Plaintiffs.

Plaintiffs’ claim against the Federal Defendants, at base, is that the State Defendants are relying on the federal non-discrimination regulation and the threat of possible federal enforcement *against Michigan* to engage in unconstitutional behavior *against Plaintiffs*. *See* PI Memo at 48–49, PageID.218–219. Plaintiffs allege that Michigan has taken a variety of unconstitutional actions against Plaintiffs, including targeting St. Vincent’s religious beliefs and retaliating against St. Vincent for its religious exercise, in part because of a federal regulation that prohibits discrimination on the basis of sexual orientation in the administration of HHS programs. *See* 45 C.F.R. § 75.300(c). Put differently, it is the Federal Defendants’ direct regulation of a third party—Michigan—that provides the gravamen for Plaintiffs’ complaint against the Federal Defendants.

Where, as here, “a plaintiff’s asserted injury arises from the [federal] government’s allegedly unlawful regulation . . . of someone else,” causation and redressability “ordinarily

hinge on the response of the regulated (or regulable) third party to the government action.” *Lujan*, 504 U.S. at 562 (emphasis omitted). Thus, “it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury.” *Id.* For this reason, “when the plaintiff is not himself the object of the government action or inaction he challenges,” standing “is ordinarily ‘substantially more difficult’ to establish.” *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984), *abrogated on other grounds by Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014)).

Here, Plaintiffs cannot show either traceability or redressability.

1. Plaintiffs’ Asserted Injuries Are Not Traceable to the Federal Defendants.

Traceability requires an injury “that fairly can be traced to the challenged action of the defendant.” *Simon v. E. Ky. Welfare Rights Org. [EKWRO]*, 426 U.S. 26, 41–42 (1976). Put differently, the plaintiff must show that “the asserted injury was the consequence of the defendants’ actions.” *Anderson v. Charter Twp. of Ypsilanti*, 266 F.3d 487, 498 (6th Cir. 2001) (quoting *Warth v. Seldin*, 422 U.S. 490, 505 (1975)).

In *EKWRO*, the plaintiffs, a group of indigent individuals who had been denied hospital services because of inability to pay, alleged that by granting tax-exempt status to hospitals that refused to serve indigent patients, the IRS had “encouraged” such hospitals to deny services to indigent individuals such as themselves. 426 U.S. at 42. The Supreme Court determined that the plaintiffs had not shown that their injuries were traceable to the IRS’s actions because they had failed to demonstrate that the denials of service were due to the hospitals’ favorable tax treatment rather than to “decisions made by the hospitals without regard to the tax implications.” *Id.* at 42–43. Similarly, in *Warth*, the Supreme Court held that the plaintiffs, low-income individuals who

claimed that local zoning ordinances prevented them from being able to afford housing inside town limits, had not established traceability because the record indicated that the absence of low-income housing was the “consequence of the economics of the area housing market,” not zoning laws. 422 U.S. at 506–07. The key in both cases was that the plaintiffs had failed to establish that it was the defendants’ actions, rather than some other reason, that had caused the hospitals in *EKWRO* and the homebuilders in *Warth* to take action harmful to the plaintiffs (or to fail to take action beneficial to the plaintiffs). *See also Crawford v. U.S. Dep’t of Treasury*, 868 F.3d 438, 459 (6th Cir. 2019), *cert. denied*, 138 S. Ct. 1441 (2018) (no traceability where plaintiffs’ injuries were due to third party’s “own independent actions” rather than to requirements of challenged law); *Ammex, Inc. v. United States*, 367 F.3d 530, 534 (6th Cir. 2004) (no traceability against government where fuel purchaser alleged that excise tax resulted in higher fuel prices because it was fuel suppliers’ decision to pass tax on to purchasers that caused injury).

Here, Plaintiffs’ threatened injuries flow from four actions by the State of Michigan: (1) Michigan’s inclusion of non-discrimination provisions in its contracts with adoption and foster care services; (2) Michigan’s decision to enter the *Dumont* Settlement Agreement, which obligates the State to enforce those non-discrimination provisions; (3) Michigan’s decision to stop granting religious accommodations to agencies like St. Vincent that decline to recommend same-sex couples as potential adoptive or foster parents; and (4) Michigan’s failure to seek an exception from 45 C.F.R. § 75.300(c) from HHS to the extent the State believes section 75.300(c) prevents it from accommodating St. Vincent’s religious exercise. All four of these actions by Michigan were necessary for St. Vincent now to be under the threat of contract termination. None is traceable to the Federal Defendants.

First, Michigan’s inclusion of provisions prohibiting discrimination on the basis of sexual orientation in its contracts with St. Vincent is not the consequence of the Federal Defendants’ actions. To the contrary, MDHHS was already including such a provision in its contracts with St. Vincent *before* 45 C.F.R. § 75.300(c) was promulgated. *Compare* Defs. Nick Lyons and Herman McCall’s Mot. to Dismiss Ex. 1 ¶ 2.9.c, *Dumont v. Gordon*, No. 17-cv-13080 (E.D. Mich. Dec. 15, 2017), ECF No. 16-2, PageID.97 (St. Vincent adoption contact, signed by St. Vincent September 12, 2016),⁸ *and id.* Ex. 8 ¶ 2.9.c, ECF No.16-9, PageID.317 (St. Vincent foster care contract amendment 3, signed by St. Vincent June 15, 2016),⁹ *with* Health and Human Services Grants Regulation, 81 Fed. Reg. 89, 393, 89,395 (Dec. 12, 2016) (promulgating 45 C.F.R. § 75.300(c)).¹⁰ Thus, even assuming that inclusion of the non-discrimination provision in St. Vincent’s contracts with MDHHS is *consistent* with 45 C.F.R. § 75.300(c), that regulation is not the reason Michigan began including the provision in its contracts. *See DeBolt v. Espy*, 47 F.3d 777, 782 (6th Cir. 1995) (no traceability where plaintiff would have suffered complained-of injury regardless of challenged government action). Relatedly, even if the Court enjoined enforcement of 45 C.F.R. § 75.300(c), there is no guarantee that MDHHS would remove this preexisting provision from its contracts.

Second, Michigan’s decision to settle the *Dumont* litigation on terms that obligate Michigan to *enforce* the non-discrimination provisions in its contracts with St. Vincent and other

⁸ For ease of reference, a copy of this contract is attached to this brief as Exhibit 4.

⁹ For ease of reference, a copy of this contract is attached to this brief as Exhibit 5.

¹⁰ The notice of proposed rulemaking for the regulation was issued on July 13, 2016. *See* Health and Human Services Grants Regulation, 81 Fed. Reg. 45,270 (July 13, 2016). This was after the date St. Vincent signed amendment 3 to its foster care contract, which included a non-discrimination provision. *See* Ex. 5 ¶ 2.9.c. Thus, Michigan cannot claim it began including the provision in its contracts in the expectation that HHS would finalize the proposed rule.

child placing agencies, *see* Ex. 1 at 2–3, also is not attributable to the Federal Defendants. The Federal Defendants were not parties to the *Dumont* litigation, nor did they compel Michigan to settle the case in the manner it did. Indeed, Plaintiffs themselves assert that Michigan’s decision to settle the *Dumont* litigation on the terms it did was the result of the election of a new Attorney General with different views on religious freedom and non-discrimination laws as opposed to any specific action by the Federal Defendants. *See* PI Memo at 24, PageID.194 (“[S]hortly after taking office, Attorney General Nessel fired the outside counsel who had been defending the laws and . . . entered into settlement discussions with the ACLU.”); *id.* at 36, PageID.206 (“Although [Defendant Nessel] had previously stated that she would not defend the law she disagreed with, she instead decided to remain involved in the case and adopt an absurd interpretation of the law that rendered it meaningless.”).

Third, Michigan’s decision to stop granting religious exemptions to agencies like St. Vincent is not traceable to the Federal Defendants. According to Plaintiffs, MDHHS used to grant “case-by-case exemptions” to religious child placing agencies so that such agencies could “continue operating according to their religious beliefs.” Compl. ¶ 62, PageID.24. But as just noted, Plaintiffs acknowledge that Michigan’s reversal in policy on this issue was the result of Defendant Nessel’s reinterpretation of Michigan law, not any specific action by the Federal Defendants. *See also* Ex. 2 at 2 (statement by Defendant Nessel that Michigan law “does not provide an agency [that has accepted a referral from MDHHS] with discretion to refuse to provide the accepted child or individual with state-contracted foster care case management or adoption services that conflict with its sincerely held religious beliefs”).

Fourth, Michigan’s failure to seek an exception from 45 C.F.R. § 75.300(c) was not caused by the Federal Defendants. As an initial matter, as noted above, the Federal Defendants

did not take any enforcement action based on St. Vincent's religiously motivated practice during the two-plus years section 75.300(c) was on the books before Michigan changed its policy. There is thus reason to doubt that section 75.300(c) was the reason for Michigan's reversal. It is also not clear that section 75.300(c) would even apply to St. Vincent's conduct in this case given that St. Vincent uses private funds to recruit and evaluate prospective adoptive and foster parents.

And even if Michigan did have concerns about section 75.300(c)'s application to St. Vincent's practices, as discussed previously, another provision in the HHS UAR, 45 C.F.R. § 75.102(b), authorizes HHS to grant exceptions from program requirements on a "case-by-case basis" where not otherwise required by law. Pursuant to this authority, in January of this year HHS granted South Carolina an exception from 45 C.F.R. § 75.300(c) for a faith-based child placing agency in that state, Miracle Hill Ministries, that uses religious criteria in selecting among prospective foster care parents. *See* Ex. 3. Michigan's failure to seek a similar exception here—to the extent it believes 45 C.F.R. § 75.300(c) prevents it from accommodating St. Vincent's religious exercise—is not traceable to the Federal Defendants.

In sum, the Federal Defendants did not cause Michigan to take any of the steps that have led to the point where St. Vincent now faces contract termination. To the contrary, the Federal Defendants' most recent regulatory action in this space was to *grant* an exception to another state, South Carolina, that wished to provide religious exemptions to foster care agencies. Plaintiffs offer no reason to think the Federal Defendants would not consider a similar exception for Michigan if the State requested one based on an alleged concern that 45 C.F.R. § 75.300(c) might not allow accommodation of St. Vincent's religious exercise.¹¹ That Michigan has failed

¹¹ Although, as noted above, it is unclear whether Plaintiffs have actually stated any claims against the Federal Defendants given that Plaintiffs do not allege the Federal Defendants have violated Plaintiffs' rights, and in any event have failed to satisfy ripeness and standing

to seek an exception from section 75.300(c) and has, instead, threatened to terminate St.

Vincent's contracts is not traceable to the Federal Defendants. *See Warth*, 422 U.S. at 505 (no traceability where plaintiffs' alleged injuries "depended on the efforts and willingness of third parties" to take actions beneficial to plaintiffs).

2. Preliminary Injunctive Relief Against the Federal Defendants Would Not Redress Plaintiffs' Alleged Injuries.

Redressability requires the plaintiff to show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (citation and internal quotation marks omitted). "[T]here must be a substantial likelihood that the relief requested will redress or prevent the plaintiff's injury." *Coyne ex rel. Ohio v. Am. Tobacco Co.*, 183 F.3d 488, 494 (6th Cir.1999). "An injury is redressable if a judicial decree can provide prospective relief that will remove the harm." *Doe v. DeWine*, 910 F.3d 842, 850 (6th Cir. 2018) (citation and internal quotation marks omitted).

EKWRO is instructive here. In that case, the Supreme Court found that the plaintiffs had failed to show redressability because it was "purely speculative" that "the desired exercise of the court's remedial powers"—denying tax-exempt status to hospitals that refused to serve indigent patients—would give the indigent plaintiffs what they wanted—access to hospital services. 426 U.S. at 42–43. "[I]t is just as plausible," the Court explained, "that the hospitals to which respondents may apply for service would elect to forgo favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services." *Id.* Similarly, in *Warth*, the Court found no redressability where the record was "devoid of any

requirements, the Federal Defendants acknowledge that requiring a child placing agency to recommend same-sex couples as potential adoptive or foster parents in violation of the agency's sincerely held religious beliefs could present a potential issue under RFRA if doing so would substantially burden the agency's exercise of religion and would not be the least restrictive means of furthering a compelling government interest.

indication that . . . were the court to remove the [challenged zoning restrictions], such relief would benefit petitioners.” 422 U.S. at 506. In both cases, the plaintiffs’ failure to establish that granting relief would in fact produce the desired outcome doomed the plaintiffs’ standing. *See also Allen*, 468 U.S. at 758 (no standing in suit by African American parents and children challenging tax exemptions for racially discriminatory private schools where it was “entirely speculative” that withdrawal of tax-exempt status “would lead [a] school to change its policies”); *Rasins Landscape & Assocs., Inc. v. Mich. Dep’t of Transp.*, 528 F. App’x 441, 445 (6th Cir. 2013) (no standing in suit by subcontractor challenging government’s failure to impose sanctions on contractors who had declined to pay subcontractor where it was “unclear that a prime contractor would pay its debts even if sanctioned”).

Here, there is no indication that issuing an injunction against the Federal Defendants would cause Michigan to reverse its decision to stop contracting with agencies like St. Vincent that decline to recommend same-sex couples as potential adoptive or foster parents because of sincerely held religious beliefs. Although Defendant Nessel has said the non-discrimination provisions in Michigan’s contracts with foster care and adoption providers are “federally required,” Ex. 2 at 3, the State has not indicated that it has any intention of changing its policy and allowing St. Vincent to continue serving as a provider in the absence of 45 C.F.R. § 75.300(c). To the contrary, as described above, Michigan was already including non-discrimination provisions in its contracts with St. Vincent *before* section 75.300(c) was even promulgated, indicating that its inclusion of such provisions is not tied to the existence of section 75.300(c). And Michigan did not stop granting case-by-case exemptions until several years *after* section 75.300(c) became effective, suggesting the State’s decision to stop granting such exemptions was not related to the requirements of section 75.300(c). Enjoining enforcement of

section 75.300(c) also would not wipe away the *Dumont* Settlement Agreement, which purports to give Michigan a contractual duty to enforce non-discrimination provisions in contracts with agencies like St. Vincent.

Defendant Nessel also has expressed significant opposition to past efforts to accommodate child placing agencies' religious beliefs. As Plaintiffs note, prior to assuming office as Michigan's Attorney General, Nessel argued, without any reference to the requirements of the First Amendment to the U.S. Constitution, that "there's 'no viable defense'" for the 2015 Michigan religious freedom law for adoption and foster care agencies and that the law's "only purpose is discriminatory animus." *See* Compl. ¶ 92, PageID.33; *see also* PI Memo at 24, PageID.194 (quoting Nessel as saying that the 2015 law's "purpose is to discriminate against people"); PI Memo at 36, PageID.206 (quoting Nessel as saying, "If you are a proponent of this type of bill, you honestly have to concede that you just dislike gay people more than you care about the needs of foster care kids."). Given her past statements on this issue, it is unlikely that Defendant Nessel would change course regarding St. Vincent even if the Federal Defendants were enjoined from enforcing section 75.300(c) against Michigan.

Absent some showing that Michigan would reverse its policy against contracting with agencies like St. Vincent if enforcement of 75.300(c) were enjoined, Plaintiffs cannot show redressability and thus cannot establish standing to sue the Federal Defendants. *See EKWRO*, 426 U.S. at 43 (no redressability where it was "just as plausible" that third party would continue course of action harmful to plaintiff if court granted relief); *Warth*, 422 U.S. at 506 (no redressability where nothing in record suggested requested relief "would benefit petitioners"); *Binno v. Am Bar Ass'n*, 826 F.3d 338, 345 (6th Cir. 2016) (no redressability in suit challenging alleged ABA requirement that law schools use LSAT in admissions decisions because even if

court made LSAT optional, “law schools still could choose to require the LSAT in their admissions process”). And without standing, Plaintiffs cannot succeed on the merits.

II. Plaintiffs Do Not Satisfy the Other Elements of the Preliminary Injunction Analysis.

Because there is no risk of enforcement by the Federal Defendants based on St. Vincent’s religiously motivated conduct in this case, Plaintiffs do not satisfy the other elements of the preliminary injunction analysis.

The second element of the analysis is whether the movant is “likely to suffer irreparable harm in the absence of preliminary relief.” *Winter*, 555 U.S. at 20. Irreparable harm is harm that is “actual and imminent,” not “speculative or unsubstantiated.” *Abney v. Amgen, Inc.*, 443 F.3d 540, 552 (6th Cir. 2006). As described above, the harm Plaintiffs allege from the Federal Defendants is not “imminent” because there is no indication that the Federal Defendants will deny federal funding to Michigan under 45 C.F.R. § 75.300(c) based on St. Vincent’s religiously motivated practice of declining to recommend same-sex couples as potential adoptive or foster parents. Any risk of harm to Plaintiffs from the Federal Defendants is at best “speculative” and “unsubstantiated.” *Abney*, 443 F3d at 552.

The third and fourth elements of the preliminary injunction analysis, the balance of the equities and whether an injunction is in the public interest, “merge when the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009). Here, a preliminary injunction is not in the public interest because there is no threat of enforcement by the Federal Defendants and the only real effect of an injunction would be to validate the State of Michigan’s attempt to use the Federal Defendants as cover for its recent policy change. It is not in the public interest for the federal government to become a tool in state policy disputes.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a preliminary injunction against the Federal Defendants should be denied.

Respectfully submitted,

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Dated: May 29, 2019

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is in compliance with Local Civil Rule 7.2(b)(i). I have used the word count function in Microsoft Word 2016 and obtained a count of 9,063 words, excluding the parts of the brief exempted by the Rule.

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Exhibit 1

SETTLEMENT AGREEMENT

Dumont et al. v. Gordon et al.

USDC EDMI Case No. 2:17-cv-13080-PDB-EAS

This Settlement Agreement (the “Agreement”) between Kristy Dumont, Dana Dumont, Erin Busk-Sutton and Rebecca Busk-Sutton (collectively, the “Plaintiffs”), and Robert Gordon, in his official capacity as the Director of the Michigan Department of Health and Human Services (“MDHHS”), and Jennifer Wrayno, in her official capacity as the Acting Executive Director of the Michigan Children’s Services Agency (“MCSA”) (Gordon, Wrayno, MDHHS and MCSA collectively referred to herein as the “Department”), resolves Plaintiffs’ claims against the Department in the case captioned *Dumont et al. v. Gordon et al.*, Case No. 2:17-cv-13080-PDB-EAS, pending in the United States District Court for the Eastern District of Michigan (the “Litigation”), as stated herein. Throughout this Agreement, Plaintiffs and the Department may be referred to as a “Party” or collectively referred to as “Parties.”

WHEREAS, the Department contracts with licensed child placing agencies (“CPAs”) to provide adoption-related services for permanent wards placed with the Department for care, supervision, and adoption (“Adoption Services Contracts”).

WHEREAS, the Department contracts with licensed CPAs to provide foster care case management related services for children placed with the Department for care, supervision, and foster care placement (“PAFC Services Contracts”). Throughout this Agreement, the Adoption Services Contracts and the PAFC Services Contracts are collectively referred to as “Contracts.”

WHEREAS, the Department may contract with one or more licensed CPAs (“Contractors”) to subcontract with other licensed CPAs to provide adoption related services, in substantial compliance with the terms of the Adoption Services Contract, for permanent wards placed with the Department for care, supervision, and adoption (“Adoption Services Subcontracts”).

WHEREAS, the Department may contract with one or more Contractors to subcontract with other licensed CPAs to provide foster care case management related services, in substantial compliance with the terms of the PAFC Services Contracts, for children placed with the Department for care, supervision, and foster care placement (“PAFC Services Subcontracts”). Throughout this Agreement, Adoption Services Subcontracts and PAFC Services Subcontracts are collectively referred to as “Subcontracts.”

WHEREAS, the Contracts and the Subcontracts include a non-discrimination provision mandating that contracted CPAs comply with the Department’s non-discrimination statement prohibiting discrimination “against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs, or disability” in the provision of services under contract with the Department (the “Non-Discrimination Provision”).

WHEREAS, on September 20, 2017, Plaintiffs filed a complaint asserting claims against the Department in the Litigation. Thereafter, St. Vincent Catholic Charities, Melissa Buck, Chad Buck, and Shamber Flore intervened as defendants (collectively, “Intervening Defendants”) in the Litigation. Plaintiffs have asserted no claims, and have no current intention to assert any claims,

against Intervening Defendants in the Litigation. Likewise, the named Defendants have asserted no claims, and have no current intention to assert any claims, against Intervening Defendants in the Litigation. Intervening Defendants have not asserted any claims, counter-claims or cross-claims against Plaintiffs, Defendants, or any third party in the Litigation.

WHEREAS, Plaintiffs and the Department wish to resolve the Litigation; the Parties agree that they are entering into this Agreement for that purpose only and it is not to be construed as an admission of any liability or wrongdoing.

THEREFORE, in addition to the foregoing, and in the interest of resolving the Litigation, the Parties agree as follows:

Section 1. Unless prohibited by law or court order:

- a. The Department shall continue including in Contracts, and shall continue requiring all Contractors to include in Subcontracts, the Non-Discrimination Provision, or a materially and substantially similar provision (“Similar Provision”).
- b. For the avoidance of doubt, policies and practices prohibited under the Non-Discrimination Provision include, without limitation,
 - i. turning away or referring to another contracted CPA an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the CPA for services under a Contract or a Subcontract;
 - ii. refusing to provide orientation or training to an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the CPA for services under a Contract or a Subcontract;
 - iii. refusing to perform a home study or process a foster care licensing application or an adoption application for an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the CPA for services under a Contract or a Subcontract; and
 - iv. refusing to place a child accepted by the CPA for services under a Contract or a Subcontract with an otherwise qualified LGBTQ individual or same-sex couple suitable as a foster or adoptive family for the child;

in each case, without regard to whether such individual or couple has identified any particular child for foster placement or adoption.

- c. The Department shall enforce the Non-Discrimination Provision or Similar Provision against a CPA that the Department determines is in violation of, or is unwilling to comply with, such provisions (collectively, a “Contract”).

Violation”), up to and including termination of the Contracts in accordance with the termination provisions therein, including without limitation:

- i. In the event a CPA refuses to comply with the Non-Discrimination Provision or Similar Provision within a reasonable time after notification by the Department of a Contract Violation, the Department will terminate the CPA’s Contracts.
 - ii. The Department will initiate an investigation when made aware of an alleged Contract Violation. In the event the Department determines that a CPA has committed a Contract Violation, the Department will provide the CPA with notice and a reasonable opportunity to implement a Department-approved corrective action plan mandating immediate, regular, and continuous provision of foster care case management services or adoption services, as applicable, in compliance with the Non-Discrimination Provision or Similar Provision; where the CPA fails to demonstrate compliance after a reasonable opportunity to implement the approved corrective action plan, the Department will terminate the CPA’s Contracts.
- d. The Department shall require all Contractors to enforce the Non-Discrimination Provision or Similar Provision against a CPA that the Contractor or the Department determines is in violation of, or is unwilling to comply with, such provisions (collectively, a “Subcontract Violation”), up to and including termination of the Subcontracts in accordance with the termination provisions therein, including without limitation:
- i. In the event a CPA refuses to comply with the Non-Discrimination Provision or Similar Provision within a reasonable time after notification by the Contractor or the Department of a Subcontract Violation, the Department will require the Contractor to terminate the CPA’s Subcontracts.
 - ii. The Department will require a Contractor to initiate an investigation when made aware of an alleged Subcontract Violation. In the event the Contractor or the Department determines that a CPA has committed a Subcontract Violation, the Department will require the Contractor to provide the CPA with notice and a reasonable opportunity to implement a Contractor-approved corrective action plan mandating immediate, regular, and continuous provision of foster care case management services or adoption services, as applicable, in compliance with the Non-Discrimination Provision or Similar Provision; where the CPA fails to demonstrate compliance after a reasonable opportunity to implement the approved corrective action plan, the Department will require the Contractor to terminate the CPA’s Subcontracts.

- e. The Department shall provide ongoing training as part of the Department's existing training programs to Department employees, Contractors, and contracted CPAs with respect to:
 - i. the Litigation and the obligations under this Agreement;
 - ii. the obligations of, and reporting channels available to, the Department's employees and Contractors to report any Contract or Subcontract Violation or suspected Contract or Subcontract Violation by contracted CPAs, including, without limitation, to the Department's Division of Child Welfare Licensing via the "Online Complaint Form" accessible on the Department's website;
 - iii. the Department's obligations to investigate any Contract Violation or suspected Contract Violation reported verbally or in writing to the Department and to enforce the Non-Discrimination Provision or Similar Provision; and
 - iv. a Contractor's obligations to investigate any Subcontract Violation or suspected Subcontract Violation by contracted CPAs reported verbally or in writing to the Contractor, and to enforce the Subcontracts.
- f. The Department shall publish and maintain a hyperlink to the Department's Division of Child Welfare Licensing "Online Complaint Form" in a prominent place on the landing page of the Department's website; and
- g. The Department shall make a public announcement in substantially the following form:

The Department's contracts with child placing agencies prohibit discrimination against any individual or group because of race, religion, age, national origin, color, height, weight, marital status, sex, sexual orientation, gender identity or expression, political beliefs or disability.

Examples of prohibited discriminatory conduct include:

- turning away or referring to another contracted CPA an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the CPA for contracted services;
- refusing to provide orientation or training to an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the CPA for contracted services;

- refusing to perform a home study or process a foster care licensing application or an adoption application for an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the CPA for contracted services; and
- refusing to place a child accepted by the CPA for contracted services with an otherwise qualified LGBTQ individual or same-sex couple suitable as a foster or adoptive family for the child.

If you are aware of a violation or suspected violation of these nondiscrimination provisions, a complaint may be made via the Online Complaint Form accessible on the Department's website.

- Section 2. For the avoidance of doubt, nothing in this Agreement shall require the Department to take adverse action against any CPA on the basis that such CPA has decided to accept or not accept a referral from the Department of a particular child for services under a contract with the Department.
- Section 3. Subject to Section 1, nothing in this Agreement shall affect the Department's obligations, authority, or discretion to audit, train, diligently investigate, or vigorously enforce the terms of the Contracts or Subcontracts in accordance with applicable laws, rules, regulations, policies, court orders, and contract terms.
- Section 4. Subject to Section 1, the Department retains sole authority and sole discretion on all matters pertaining to all Contracts and Subcontracts, including without limitation all training, all aspects of investigating an alleged Contract or Subcontract Violation, determining whether a Contract or Subcontract Violation occurred, and all enforcement measures.
- Section 5. Subject to Section 1, nothing in this Agreement expands the Department's obligation to monitor CPA compliance with Contracts and Subcontracts beyond that which is required under applicable law, rules, regulations, and policies.
- Section 6. This Agreement is intended for the direct benefit of the following individuals injured by a breach of this Agreement: (i) the Parties hereto, (ii) any LGBTQ individual or same-sex couple that seeks to foster a child accepted by a CPA for foster care case management services or adoption services under a Contract or Subcontract and the CPA is alleged to have committed a Contract Violation or Subcontract Violation directly involving the individual or couple, (iii) any LGBTQ individual or married same-sex couple that seeks to adopt a child accepted by a CPA for foster care case management services or adoption services under a Contract or Subcontract and the CPA is alleged to have committed a Contract Violation or Subcontract Violation directly involving the individual or couple, and (iv) any child accepted by a CPA for foster care case management services or adoption services under a Contract or Subcontract and the CPA is alleged to have committed a Contract Violation or Subcontract Violation directly involving the

child. Each person described in subclauses (ii), (iii) and (iv) of the immediately preceding sentence shall be a direct third-party beneficiary of, and may, to the extent of their injury and ability to satisfy standing requirements, independently enforce the terms of this Agreement as if it were a party hereto.

Section 7. In the event any Party or a third-party beneficiary asserts that another Party is not in compliance with one or more of its obligations in this Agreement, the Parties and any third-party beneficiaries shall address such alleged breach in good faith and act promptly in an attempt to resolve it. The asserting Party or third-party beneficiary shall provide the other Party with written notice of such assertion and a ninety (90) day opportunity to cure such noncompliance prior to taking legal action. Notice shall be made via certified mail, return receipt requested as follows:

**Michigan Department of Health
and Human Services
State of Michigan**
Director, Bureau of Legal Affairs
333 South Grand Avenue
Lansing, MI 48909
517.241.0048

**American Civil Liberties Union
Fund of Michigan**
Jay D. Kaplan / Michael J. Steinberg
2966 Woodward Avenue
Detroit, MI 48201
(313) 578-6823
jkaplan@aclumich.org
msteinberg@aclumich.org

Section 8. Specific performance shall be the sole and exclusive remedy available to each Party and each third-party beneficiary asserting any claim relating to the Department's failure to meet its obligations under this Agreement. Each Party and each third-party beneficiary asserting any claim relating to the Department's obligations under this Agreement waives all rights to recover any damage, loss, attorney fees, costs, or any other expense arising out of asserting such claims. The Parties also agree that, regardless of the failure of the sole and exclusive remedy, the Department will not be liable to any Party or third-party beneficiary asserting any claim relating to the Department's obligations under this Agreement for any incidental or consequential damages of whatsoever kind or nature. The Parties intend the exclusion of incidental and consequential damages as an independent agreement apart from the sole and exclusive remedy herein. The limitations of this Section 8 apply only to claims relating to the Department's obligations under this Agreement.

Section 9. Upon signing this Agreement, Plaintiffs shall file a Stipulation of Voluntary Dismissal with Prejudice substantially in the form attached to as Annex A and submit a Proposed Order on Stipulation of Dismissal substantially in the form attached hereto as Annex B. This Agreement becomes effective upon entry of the Proposed Order on Stipulation of Dismissal by the district court.

Section 10. The Parties shall bear their own attorneys' fees and costs associated with the Litigation.

- Section 11. The Parties understand that this Agreement is a public record that may be disclosed in response to a proper request under Michigan’s Freedom of Information Act.
- Section 12. The Parties acknowledge and agree that this Agreement shall be governed by and construed in accordance with the laws of the State of Michigan without giving effect to conflict of laws, rules or statutes.
- Section 13. The Parties acknowledge, understand, and agree that they are entering into this Agreement knowingly, voluntarily, and of their own free will and volition, without coercion or undue influence.
- Section 14. Each Party has been represented by counsel and cooperated in the drafting and preparation of this Agreement. Hence, this Agreement shall not be construed against any Party on the basis that the Party was the drafter.
- Section 15. This Agreement may be executed in any number of counterparts, and each such counterpart shall be deemed to be an original instrument, but all such counterparts shall constitute one Agreement.
- Section 16. The undersigned represent that they are authorized to sign this Agreement.
- Section 17. Each Party represents that they believe there is no state or federal law, rule, regulation, policy, contract term, or other obligation that prevents it from complying with its obligations under this Agreement; *provided*, that solely for purposes of this Section 17, the obligations in Section 1 shall be read without the introductory phrase “Unless prohibited by law or court order.”
- Section 18. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and permitted assigns. No Party may assign this Agreement or any rights or obligations hereunder without the prior written consent of each other Party hereto.
- Section 19. No modification or waivers of any provision of this Agreement shall be valid or binding unless made in writing and signed by each Party or by a person authorized to sign on behalf of such Party.

[Signature Page Follows]

IN WITNESS WHEREOF, this Agreement is executed as of March 22, 2019.

PLAINTIFFS



Kristy Dumont



Dana Dumont

Erin Busk-Sutton

Rebecca Busk-Sutton

DEFENDANTS

Robert Gordon, in his official capacity as
Director, Michigan Department
of Health and Human Services

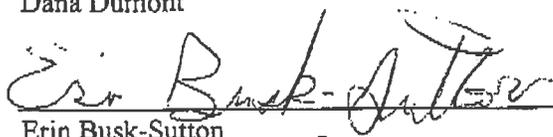
Jennifer Wrayno, in her official capacity
as Acting Executive Director, Michigan
Children's Services Agency

IN WITNESS WHEREOF, this Agreement is executed as of March 22, 2019.

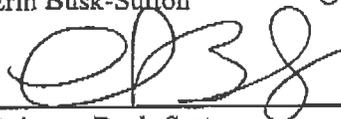
PLAINTIFFS

Kristy Dumont

Dana Dumont



Erin Busk-Sutton



Rebecca Busk-Sutton

DEFENDANTS

Robert Gordon, in his official capacity as
Director, Michigan Department
of Health and Human Services

Jennifer Wrayno, in her official capacity
as Acting Executive Director, Michigan
Children's Services Agency

{Signature Page to Settlement Agreement}

IN WITNESS WHEREOF, this Agreement is executed as of March 22, 2019.

PLAINTIFFS

Kristy Dumont

Dana Dumont

Erin Busk-Sutton

Rebecca Busk-Sutton

DEFENDANTS



Robert Gordon, in his official capacity as
Director, Michigan Department
of Health and Human Services



Jennifer Wrayno, in her official capacity as
Acting Executive Director, Michigan
Children's Services Agency

Exhibit 2

Summary Statement of Dumont v. Gordon Settlement Agreement

The Michigan Department of Health and Human Services (MDHHS) contracts with agencies for foster care case management and adoption services, for which a significant portion of funding comes from the federal Title IV-E program. As a condition of receiving these federal funds, the United States Department of Health and Human Services requires that states' Title IV-E-funded programs prohibit discrimination on the basis of sexual orientation or gender identity. 45 CFR 75.300(c). In compliance with this federal requirement, MDHHS contracts mandate that, except for an agency's sole discretion to decide whether to accept a referral from MDHHS, all agencies must comply with MDHHS's non-discrimination statement when providing state-contracted services. This exception is grounded in the Michigan Legislature's finding in MCL 722.124e(h) that an agency does not receive public funding with respect to a particular child or a particular individual referred by MDHHS unless the agency affirmatively accepts the referral. Otherwise, the contracts prohibit discrimination "against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, *gender identity or expression*, *sexual orientation*, political beliefs, or disability" in the provision of services under contract with MDHHS.

On September 20, 2017, two same-sex couples (Plaintiffs) filed a complaint challenging MDHHS's contracts with taxpayer-funded, state-contracted foster care and adoption agencies that refuse to provide contracted services involving same-sex couples. As alleged in the complaint, Plaintiffs approached St. Vincent Catholic Charities (SVCC) and Bethany Christian Services (Bethany) directly, rather than through a referral from MDHHS, for the purpose of adopting through the State's foster care system, i.e., for children the agency had accepted through referrals from MDHHS. The process of becoming a licensed foster care provider or prospective adoptive parent typically begins with an agency processing an application for licensure as a foster care provider and, if qualified, determining whether placement with the licensed provider and prospective adoptive parent is in the best interest of any child accepted by the agency through an MDHHS referral.

Plaintiffs claimed that, because of their sexual orientation, SVCC and Bethany refused to work with them when providing state-contracted services for children accepted by the agencies, in violation of the federally-mandated non-discrimination provisions in the agencies' contracts with MDHHS. According to MDHHS, on the dates that SVCC and Bethany turned away Plaintiffs, each agency was providing foster care case management services or adoption services for one or more children for whom the agency had accepted an MDHHS referral. Plaintiffs were not seeking direct-placement or private adoption services, and they did not approach the agencies through an MDHHS referral that the agencies could accept or reject under existing state law. Consequently, each agency was contractually prohibited from discriminating against Plaintiffs as potential qualified foster care or adoptive families for any child for whom the agencies were providing services under contract with MDHHS.

MDHHS is represented in this lawsuit by the Michigan Department of Attorney General, led by Attorney General Dana Nessel, who took office on January 1, 2019. After reviewing the facts of this case, MDHHS's contracts with foster care and adoption agencies, and applicable law, the Department of Attorney General determined that MDHHS may be subject to liability on Plaintiffs' claims. To avoid this liability, the Department of Attorney General strongly

recommended resolving the case on terms that are consistent with the law and existing agency contracts and that serve the health, safety, and well-being of children in need of state-contracted foster care case management and adoption services.

Plaintiffs and MDHHS, through counsel, entered into negotiations and, as explained below, agreed to settle the case on terms that satisfy the recommended criteria.

2015 PA 53 added two new sections to the Child Care Organizations Act. Under MCL 722.124e(2), an agency shall not be required to provide “any services” that conflict with its sincerely held religious beliefs. And, MDHHS is prohibited from taking adverse action against an agency that declines to provide “any services” that conflict with its sincerely held religious beliefs. MCL 722.124e(3). For purposes of Section 124e, the term “services” is defined as “includ[ing] any service that a child placing agency provides” but expressly excludes “foster care case management services and adoption services provided under contract with the Department.” MCL 722.124e(7)(b).

Contracted agencies provide state-contracted foster care case management services and adoption services for a particular child or individual upon accepting an MDHHS referral of the child or individual. According to MCL 722.124e(1)(h), agencies do not receive public funding relative to the referred child or individual prior to accepting the referral. And, an agency is not engaged in state action prior to accepting a referral or when performing private-adoption or direct-placement services. MCL 722.124e(1)(i). Under, MCL 722.124f(1) and (2), agencies have sole discretion to decide whether to accept an MDHHS referral to provide foster care case management or adoption services, and the state cannot take adverse action against an agency that rejects a referral based on its sincerely held religious beliefs. Upon accepting a referral, however, the law does not provide an agency with discretion to refuse to provide the accepted child or individual with state-contracted foster care case management or adoption services that conflict with its sincerely held religious beliefs. On the other hand, the terms of the agency’s contract with the State expressly prohibit discrimination in the provision of these contracted services.

When an agency accepts a referral for a child or an individual needing foster care case management or adoption services under contract with MDHHS, MCL 722.124f no longer applies to the agency’s provision of these services to the accepted child or individual. Likewise, because MCL 722.124e(7)(b) exempts foster care case management and adoption services provided under contract with MDHHS from the definition of “services” as used in Section 14e, an agency that accepts a particular child or individual through a referral from MDHHS cannot invoke the statute to refuse to provide contracted services that conflict with the agency’s sincerely held religious beliefs. And, the statute does not prohibit MDHHS from taking adverse action against an agency that refuses to provide state-contracted services for accepted referrals based on its sincerely held religious beliefs. Rather, the statute prohibits MDHHS from taking adverse action against private agencies when they are engaged in “private action” and refuse to provide other non-state-contracted services that conflict with their sincerely held religious beliefs, such as private-adoption or direct-placement services.

The same analysis applies to 2015 Public Acts 54 and 54. Like PA 53, related amendments to the Probate Code, 2015 PA 54, MCL 710.23g, and the Social Welfare Act, 2015 PA 55, MCL 400.5a, prohibit MDHHS from taking adverse action against an agency that refuses to provide “services” that conflict with the agency’s sincerely held religious beliefs. The Probate

Code, MCL 710.23g, also provides that an agency shall not be required to provide adoption services that conflict with its sincerely held religious beliefs. However, each amended statute expressly incorporates the language in MCL 722.124e and 722.124f, i.e., “[i]n accordance with section 14e and 14f of 1973 PA 116, MCL 722.124e and MCL 722.124f.” Thus, these statutes clearly exclude foster care case management and adoption services under contract with MDHHS.

Under the terms of the settlement agreement, MDHHS agrees to maintain federally required non-discrimination provisions in its foster care and adoption agency contracts. And, MDHHS agrees to enforce the non-discrimination provisions, up to and including termination, when a state-contracted agency discriminates against same-sex couples or LGBTQ individuals that may otherwise be qualified foster care or adoptive parents for any child accepted by the agency for services under contract with MDHHS. In essence, MDHHS must take action to enforce its existing contracts where an agency has accepted a referral and later violates the non-discrimination provisions by refusing to work with LGBTQ individuals interested in fostering or adopting any of the children it has accepted. The agreement also specifies that MDHHS is not required to take adverse action against an agency on the basis that the agency has decided to not accept a referral from MDHHS consistent with MCL 722.124f. In return, Plaintiffs agree to dismiss their claims with prejudice and pay their own attorney fees and costs, which eliminates liability for MDHHS on Plaintiffs’ claims.

In summary, resolving this lawsuit on the terms in the settlement agreement allows MDHHS to avoid liability on Plaintiffs’ claims and remain compliant with federal and state law. In addition, the terms of the settlement agreement do not conflict with existing state law, are consistent with federal law and existing agency contracts, and serve the health, safety, and well-being of the State’s most vulnerable children in need of state-contracted foster care case management and adoption services.

As explained above, the Department’s contracts with foster care and adoption agencies prohibit discrimination against any individual or group because of race, religion, age, national origin, color, height, weight, marital status, sex, sexual orientation, gender identity or expression, political beliefs or disability.

Examples of prohibited discriminatory conduct include:

- turning away or referring to another contracted agency an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the agency for contracted services;
- refusing to provide orientation or training to an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the agency for contracted services;
- refusing to perform a home study or process a foster care licensing application or an adoption application for an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the agency for contracted services; and

- refusing to place a child accepted by the agency for contracted services with an otherwise qualified LGBTQ individual or same-sex couple suitable as a foster or adoptive family for the child.

If you are aware of a violation or suspected violation of these nondiscrimination provisions, a complaint may be made via the Online Complaint Form accessible on the Department's website.

Exhibit 3



ADMINISTRATION FOR
CHILDREN & FAMILIES

Office of the Assistant Secretary | 330 C Street, S.W., Suite 4034
Washington, DC 20201 | www.acf.hhs.gov

January 23, 2019

Governor Henry McMaster
State House
1100 Gervais Street
Columbia, SC 29201

Re: Request for Deviation or Exception from HHS Regulations 45 CFR § 75.300(c)

Dear Governor McMaster:

This correspondence responds to your letter of February 27, 2018, to the Acting Assistant Secretary for Children and Families, written “on behalf of South Carolina and faith-based organizations” operating under South Carolina’s Title IV-E Foster Care Program (“the SC Foster Care Program”). As clarified through follow-up telephone calls, your letter requested that the SC Foster Care Program be granted an exception from U.S. Department of Health and Human Services’ (“HHS” or the “Department”) regulations at 45 CFR § 75.300(c), prohibiting subgrantees from selecting among prospective foster parents on the basis of religion, to the extent that such prohibition conflicts with a subgrantee’s religious exercise. We understand that one such faith-based subgrantee, Miracle Hill Ministries (“Miracle Hill”), exclusively recruits foster parents of a particular religion and accounts for up to 15% of your total foster care placements. We also understand that you believe that there are other participating faith-based organizations with similar religious exercise concerns and that other entities in the SC Foster Care Program do not have the same conflicts with § 75.300(c) and would work with prospective foster parents of different faiths or no faith.

Section 75.300(c) says:

(c) It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation. Recipients must comply with this public policy requirement in the administration of programs supported by HHS awards.

These requirements are broader than the nondiscrimination requirements specified in the Foster Care Program Statute, 42 U.S.C. § 671(a)(18), which says:

(a) Requisite features of State plan. In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which—(18) not later than January 1, 1997, provides that neither the State nor any other entity in the State that receives funds from the Federal Government and is involved in adoption or

foster care placements may—(A) deny to any person the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the person, or of the child, involved; or (B) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.

The statutory requirements of § 671(a)(18) are incorporated into the grant for the SC Foster Care Program through 45 CFR § 75.300(a), which requires “that Federal funding is expended and associated programs are implemented in full accordance with U.S. statutory and public policy requirements.” Other federal civil rights statutes may likewise apply to the SC Foster Care Program directly, as a recipient of federal financial assistance, or through 45 CFR § 75.300(a). Your letter did not request an exception from § 75.300(a).

In support of your exception request, you state that South Carolina has more than 4,000 children in foster care, that South Carolina needs more child placing agencies, and that faith-based organizations “are essential” to recruiting more families for child placement. You specifically cite Miracle Hill, a faith-based organization that recruits 15% of the foster care families in the SC Foster Care Program, and you state that, without the participation of such faith-based organizations, South Carolina would have difficulty continuing to place all children in need of foster care. You make the case that, if the SC Foster Care Program is not provided an exception from § 75.300(c) in this regard, certain faith-based organizations operating under your grant would have to abandon their religious beliefs or forego licensure and funding. You contend this would cause hardship to faith-based organizations and to the SC Foster Care Program. Your letter seeking the exception argued that certain requirements in § 75.300(c) and (d) exceed any nondiscrimination requirements or authority imposed by statute, and that § 75.300(c) and (d) limit the free exercise of religion of faith-based organizations in violation of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.* (“RFRA”). In follow-up telephone conversations with your chief legal counsel, the request for an exception was narrowed to the religious nondiscrimination provision in § 75.300(c).

On December 18, 2018, Miracle Hill wrote to HHS stating that, in prohibiting Miracle Hill’s use of religious criteria in selecting prospective foster parents under the SC Foster Care Program, HHS’s regulations substantially burden Miracle Hill’s free exercise of religion (including under RFRA), and are also *ultra vires* because they exceed the scope of the relevant statutes. Miracle Hill notes that the South Carolina Department of Social Services, pursuant to the requirements imposed on it through its grants from HHS, declined to renew Miracle Hill’s license to provide foster services and “instead granted [Miracle Hill] a provisional license that would be revoked if [Miracle Hill] continued [its] ministry consistent with [its] religious beliefs.” It is HHS’s understanding that this provisional license will be revoked in January 2019 unless Miracle Hill agrees to partner with foster parents in accordance with § 75.300(c), which Miracle Hill cannot do, because Miracle Hill “believe[s] those who hold certain positions of spiritual influence and leadership—including foster parents—should share [Miracle Hill’s] religious mission and beliefs.”

The HHS Office for Civil Rights (“OCR”) is the HHS component with delegated authority to ensure compliance with RFRA by the Department, its programs, and the recipients of HHS

federal financial assistance. OCR has reviewed Miracle Hill's letter as part of an ongoing investigation and has determined that subjecting Miracle Hill to the religious nondiscrimination requirement in § 75.300(c) (by requiring South Carolina to require Miracle Hill to comply with § 75.300(c) as a condition of receiving funding) would be inconsistent with RFRA.

OCR specifically found that Miracle Hill's sincere religious exercise would be substantially burdened by application of the religious nondiscrimination requirement of § 75.300(c), and that subjecting Miracle Hill to that requirement, by denying South Carolina's exception request, is not the least restrictive means of advancing a compelling government interest on the part of HHS. Relevant to this determination is the fact that the religious nondiscrimination provision in § 75.300(c) exceeds the scope of the nondiscrimination provisions found in the federal statutes applicable to the SC Foster Care Program, and provides no exceptions for religious organizations as are found in other statutes prohibiting religious discrimination. *See, e.g.*, 42 U.S.C. § 2000e-1(a) (Title VII); 42 U.S.C. § 3607(a) (Fair Housing Act). In addition, the interest of allowing potential foster parents into the SC Foster Care Program appears capable of being served by other providers in the program, since at least nine other foster care providers in Miracle Hill's area appear available to assist potential foster parents in the event Miracle Hill is unable to partner with certain potential foster parents because of Miracle Hill's religious beliefs. Of additional relevance is the fact that the OMB Uniform Administrative Requirements, located at 2 CFR § 200.300, do not contain provisions analogous to the broad religious nondiscrimination provision in 45 CFR § 75.300(c). As the Supreme Court recognized in *Holt v. Hobbs*, 135 S. Ct. 853, 866 (2015), consideration of analogous programs operated by other governmental entities is relevant in determining whether the government has a compelling interest "of the highest order" in requiring such a burden on religious exercise. Finally, 45 CFR Part 75 provides a mechanism for granting an exception from requirements of that part, including § 75.300(c): namely, as applicable here, case-by-case exceptions available under 45 CFR § 75.102(b). The Supreme Court has emphasized that, where exceptions are available, the government has a difficult burden to meet before refusing an exception under RFRA. *See, e.g., Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 434 (2006). Accordingly, OCR concluded that Miracle Hill (and any other similarly situated religious organization in the SC Foster Care Program) is entitled under RFRA to an exception from the religious nondiscrimination requirements of 45 CFR § 75.300.

Section 75.102(b) of 45 CFR states that "[e]xceptions on a case-by-case basis for individual non-Federal entities may be authorized by the HHS awarding agency or cognizant agency for indirect costs, except where otherwise required by law or where OMB or other approval is expressly required by this part." This provision permits the HHS awarding agency (or the "cognizant agency for indirect costs") to grant exceptions on a case-by-case basis.

After reviewing all of the information you have provided, we have determined that requiring your subgrantee Miracle Hill to comply with the religious non-discrimination provision of 45 CFR § 75.300(c) would cause a burden to religious beliefs that is unacceptable under RFRA. While this determination is sufficient to require the granting of your request for an exception from such provision of the regulation, we also note that the application of the regulatory requirement would also cause a significant programmatic burden for the SC Foster Care Program by impeding the placement of children into foster care.

For these reasons, under 45 CFR § 75.102(b), HHS is hereby conditionally granting the requested exception from the religious non-discrimination requirement of 45 CFR § 75.300(c). The exception applies with respect to Miracle Hill or any other subgrantee in the SC Foster Care Program that uses similar religious criteria in selecting among prospective foster care parents. The exception applies on the condition that Miracle Hill, or any other subgrantee making use of this exception, be required to refer potential foster parents that do not adhere to the subgrantee's religious beliefs to other subgrantees in the SC Foster Care Program, or to refer them to the SC Foster Care Program staff themselves, if the SC Foster Care Program staff is equipped to refer those persons to other willing subgrantees. This condition is added on the understanding that Miracle Hill, and any other subgrantee making use of this exception, does not object on religious grounds to making such referrals and, therefore, the condition does not implicate additional RFRA concerns.

Please note that this exception does not relieve the SC Foster Care Program of its obligation to comply with any other requirements of 45 CFR Part 75.300(c), of other paragraphs of 45 CFR Part 75.300, of 42 U.S.C. § 671(a)(18), or of any provisions of civil rights statutes, including Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, and section 504 of the Rehabilitation Act of 1973 that may apply.¹

If you require any additional information, please contact me at 202.401.1822.

Sincerely,



Steven Wagner
Principal Deputy Assistant Secretary
Administration for Children and Families

¹ 42 U.S.C. § 2000d *et seq.*, 20 U.S.C. § 1681 *et seq.*, 42 U.S.C. § 6101 *et seq.*, and 29 U.S.C. § 794, respectively.

Exhibit 4

State of Michigan
 Department of Health and Human Services
 Bureau of Purchasing (BOP)
 PO Box 30037, Lansing, MI 48909
 Or
 235 S. Grand Avenue, Suite 1201, Lansing, MI 48933



AGREEMENT NUMBER: A17-33001
 Between
THE STATE OF MICHIGAN
DEPARTMENT OF HEALTH AND HUMAN SERVICES
 And

CONTRACTOR		PRIMARY CONTACT	EMAIL
St. Vincent Catholic Charities		Andrea Seyka	seykaa@stvcc.org
CONTRACTOR ADDRESS			TELEPHONE
2800 West Willow, Lansing, MI 48917-1833			517-323-4734
STATE CONTACT	NAME	TELEPHONE	EMAIL
Contract Administrator	Cathe Hoover	517-241-8817	hooverc3@michigan.gov
OCP Analyst	Dawn Akers	517-335-6366	akersd@michigan.gov

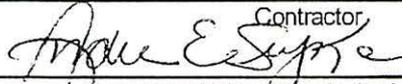
AGREEMENT SUMMARY			
SERVICE DESCRIPTION	Adoption		
GEOGRAPHIC AREA	Statewide		
INITIAL TERM	EFFECTIVE DATE*	EXPIRATION DATE	AVAILABLE OPTION YEARS
3 years	October 1, 2016	September 30, 2019	2, one year options
MISCELLANEOUS INFORMATION			
ESTIMATED AGREEMENT VALUE AT TIME OF EXECUTION	\$1,150,000.00		
AGREEMENT TYPE	Unit Rate		

*The effective date of this Agreement shall be the date listed in the "Effective Date" box above, or the date of Michigan Department of Health and Human Services (MDHHS) signature below, whichever is later.

The undersigned have the lawful authority to bind the Contractor and MDHHS to the terms set forth in this Agreement. Section 291 of the fiscal year 2016 Omnibus Budget, PA 84 of 2015, requires verification that all new employees of the Contractor and all new employees of any approved subcontractor, working under this Agreement, are legally present to work in the United States. The Contractor shall perform this verification using the E-verify system (<http://www.uscis.gov/portal/site/uscis>). The Contractor's signature on this Agreement is the Contractor's certification that verification has and will be performed. The Contractor's signature also certifies that the Contractor is not an Iran linked business as defined in MCL 129.312.

FOR THE CONTRACTOR:

St. Vincent Catholic Charities

 Contractor


 (Signature of Director or Authorized Designee)
 ANDREA E. SEYKA

 Print Name
 9/12/16

 Date

FOR THE STATE:

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES



 Signature of Director or Authorized Designee
 Kim Stephen

 Print Name
 9-27-16

 Date

2019

This Agreement will be in effect from the date of MDHHS signature through September 30, 2019. No service will be provided and no costs to the state will be incurred before October 1, 2016, or the effective date of the Agreement, whichever is later. Throughout this Agreement, the date of MDHHS signature or October 1, 2016, whichever is later, shall be referred to as the begin date.

<u>Agreement Period</u>	<u>Amount</u>
Begin date through September 30, 2019	\$1,150,000.00
Total Amount:	\$1,150,000.00

1. PROGRAM REQUIREMENTS

1.1. Client Eligibility Criteria

a. The Contractor shall perform activities for Michigan permanent wards that are Title IV-E funded and Michigan Children’s Institute (MCI) wards for which adoption is the plan or for children from a participating Inter-State Compact (ICPC) state’s child welfare system that has been referred for adoption services to Michigan through ICPC. Any exceptions to this criteria must be approved by the MDHHS Central Office Adoption Program Manager.

b. Determination of Eligibility

Determination of eligibility will be made by MDHHS.

1.2. Referral Process

a. Adoption referrals are initiated by MDHHS. Contractors may not transfer adoption cases to another child placing agency. After acceptance of an adoption referral, the Contractor may not transfer the case back to the Department, except upon the written approval of the County Director, the Children’s Services Agency Director, or the Deputy Director.

If MDHHS makes a referral to a child placing agency for adoption services pursuant to a contract with the child placing agency, the child placing agency must accept or decline the referral within seven working days of receipt of the referral from foster care. Any reasons given for declining a referral may be documented in MiSACWIS.

b. At the time of referral to a private agency, MDHHS shall provide that agency with a referral packet as prescribed in Section 210 of the Adoption Services Manual (ADM 210).

c. When an eligible child is photo-listed on MARE and the Contractor notifies

the local MDHHS county office that the Contractor has a studied and approved available family, MDHHS shall send a copy of the case file to the Contractor within ten (10) working days of receipt of notification.

2. CONTRACTOR RESPONSIBILITIES

2.1. Email Address

The Contractor authorizes MDHHS to use the contact information below to send Agreement related notifications/information. The Contractor shall provide MDHHS with updated contact information if it changes.

Contact email address: seykaa@stvcc.org

2.2 Requests for Information

The Contractor may be required to meet and communicate with MDHHS representatives and from time to time MDHHS may require that the Contractor create reports or fulfill requests for information as necessary to fulfill the MDHHS' obligations under statute and/or Dwayne B. v. Snyder, et al., 2:06-cv-13548, herein referred to as the Implementation, Sustainability, and Exit Plan (ISEP).

The Contractor shall make available to MDHHS copies of any outside reviews, non-redacted FOIA requests, or audits relating to the contracted program.

2.3 Geographic Area

The Contractor shall provide services described herein in the following geographic area: Statewide

2.4 Licensing Requirements

The MDHHS Division of Child Welfare Licensing (DCWL) is the licensing agency for Child Placing Agencies (CPA). A license is issued to a certain person or organization at a specific location, is non-transferable, and remains the property of the Department. Therefore, a child placing agency must be established at a specific location.

The Contractor shall ensure that, for the duration of this agreement, it shall maintain a license for those program areas and services that are provided for in this Agreement. If the Contractor fails to comply with this section, MDHHS may terminate this Agreement for default.

The Contractor is licensed to provide service under this agreement under the following license number: CB330201019

2.5. Location of Facilities

The Contractor shall provide services described herein at the following location(s):

2800 West Willow, Lansing, MI 48917

2.6 Program Focus and Statement

The Contractor shall perform activities for Michigan permanent wards that are Title IV-E funded and Michigan Children's Institute (MCI) wards for which adoption is the plan or for children from a participating Inter-State Compact (ICPC) state's child welfare system that has been referred for adoption services to Michigan through ICPC.

Reimburse licensed child placing agencies through a current MDHHS adoption contract at specific rates for the legal placement and finalization of an adoption for an eligible child. Per diem payments for cases referred to the contractor by MDHHS for adoption services can be charged a maximum of \$3000.00 per child. The total amount paid for the per diem rate is deducted from the applicable placement rate when the child is placed by the court in an adoptive home. Reimbursement for contract agency staff's successful completion of applicable training provided by the Office of Workforce Development and Training is included.

The Contractor shall provide MDHHS with copies of their Adoption Program Statement. The program statement shall comply with the requirements of MDHHS Division of Child Welfare Licensing standards and MDHHS policy. The Contractor shall inform MDHHS of any changes made to the program statement at any point during the term of this Agreement and provide copies of the new statement to MDHHS within 60 days.

2.7 Reserved

2.8. Credentials

The Contractor shall assure that appropriately credentialed or trained staff under its control, including Contractor employees and/or subcontractors, shall perform functions under this Agreement.

2.9 Compliance Requirements

Except as stated in e. below, the Contractor shall comply with the following requirements:

- a. The Contractor shall comply with all applicable MDHHS policy and MDHHS policy amendments including fingerprint-based criminal history policy. MDHHS policies and MDHHS policy amendments/bulletins are published on the following internet link: <http://www.michigan.gov/mdhhs-manuals>.
- b. Throughout the terms of this Agreement, the Contractor shall ensure that it provides all applicable MDHHS policy and MDHHS policy amendments to social service staff. The Contractor shall ensure that social service staff complies with all applicable requirements.
- c. The Contractor shall comply with the MDHHS non-discrimination statement:

Michigan Department of Health and Human Services (MDHHS) will not discriminate against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs or disability.

The above statement applies to all applications filed for adoption of MDHHS supervised children, including MDHHS supervised children assigned to a contracted agency.

- d. The Contractor accepts a referral from MDHHS under this Agreement by doing either of the following:
 - 1) Submitting to MDHHS a written agreement to perform the services related to the particular child or particular individuals that the Department referred to the Contractor, or
 - 2) Engaging in any other activity that results in MDHHS being obligated to pay the Contractor for the services related to the particular child or particular individuals that the Department referred to the Contractor.
- e. Under 1973 PA 116, as amended by 2015 PA 53, the Contractor has the sole discretion to decide whether to accept or not accept a referral from MDHHS. Nothing in this Agreement limits or expands the application of the Public Act.

Adoption referrals are initiated by MDHHS. Contractors may not transfer adoption cases to another child placing agency. After acceptance of an adoption referral, the Contractor may not transfer the case back to the Department, except upon the written approval of the County Director, the Children’s Services Agency Director, or the Deputy Director.

If MDHHS makes a referral to a child placing agency for adoption services pursuant to a contract with the child placing agency, the child

placing agency must accept or decline the referral within seven working days of receipt of the referral from foster care. Any reasons given for declining a referral may be documented in MISACWIS.

- f. The contractor shall ensure all directives and services ordered by the court are completed to the satisfaction of the court within the timeframes ordered.
- g. The Contractor shall participate in random moment time studies (RMTS). An RMTS is a process where participants are emailed short surveys and asked to indicate what they were doing at an assigned time. The time study is required to determine the amount of time spent on various activities. Based on these results, MDHHS determines the amount that can be charged to various funding sources.
- h. Compliance with MDHHS Implementation, Sustainability, and Exit Plan

The Contractor shall ensure compliance with all applicable provisions and requirements of Dwayne B. v. Snyder, et al., 2:06-cv-13548, Implementation Sustainability and Exit Plan.

i. Additional Compliance Provisions

- 1) 1984 Public Act, 114, as amended, being M.C.L. 3.711 *et seq.*, Interstate Compact on the Placement of Children.
- 2) 1939 Public Act 288, Chapter X, being M.C.L. 710.1 *et seq.*, Michigan Adoption Code.
- 3) 1984 Public Act 203, as amended, being M.C.L. 722.951 *et seq.*, Michigan Foster Care and Adoption Services Act.
- 4) The Social Security Act as amended by the Multiethnic Placement Act of 1994 (MEPA); Public Law 103-382, and as amended by Section 1808 of the Small Business Job Protection, the Interethnic Adoption Provision (IEAP).
- 5) The Indian Child Welfare Act (ICWA); Public Law 95-608 being 25 U.S.C. 1901 *et seq.*
- 6) P.L. 110-351, known as the Fostering Connections to Success and Increasing Adoptions Act of 2008.
- 7) Social Security Act, 42 USC 671(a)(20)
- 8) Federal Bureau of Investigation (FBI), Criminal Justice Information Services (CJIS) Security Policy located on the following link: <https://www.fbi.gov/about-us/cjis/cjis-security-policy-resource-center>

2.10 Services to be Provided

a. General Adoption Responsibilities

- 1) Place the child for adoption under the provisions of this Agreement or

assist in the child's placement by another private agency or MDHHS local office.

- 2) The Contractor that has the identified adoptive family shall be the agency to perform adoptive activities including: placement, case management, supervision and court related requirements.
- 3) When the Contractor has an identified adoptive family for a child under supervision of another agency the Contractor shall work cooperatively with the child's agency in coordinating and sharing responsibility for pre- placement activities and associated costs for transportation and other case services.
- 4) When a placement for adoption disrupts or a finalized adoption dissolves within eighteen (18) months of the date of the order for placement or finalization the Contractor shall be, unless ordered or directed otherwise by the Court or MDHHS, responsible to provide full adoption services for the child/youth as detailed in this contract. The responsible contractor is defined as the Contractor that had adoption planning responsibilities for the child when the initial adoption placement occurred. The exception shall be in a contested case where a child is placed in an adoptive home against the recommendation of the contractor.
- 5) Provide guidance to the child's foster parent in preparation of the child for adoption or in facilitating a transfer of the child's attachment to the adoptive parents.
- 6) In instances where the child's agency has performed pre-placement activities for the adoptive family's agency, the adoptive family's agency shall provide the child's agency with a copy of the court order placing the child in the adoptive home within thirty (30) working days, after receipt of said order.
- 7) The Contractor shall develop plans for the effective use of cross-jurisdictional resources to facilitate timely adoptive or permanent placements for waiting children. This shall include photo listing on the MARE website, networking with other private agencies in determining availability of resource families and other recruitment activities that are statewide and national in nature. The Contractor shall respond to and actively work with, prospective adoptive parents outside of the State of Michigan.
- 8) The Contractor shall maintain documentation of completion of the above listed requirements in the child's adoption case file for review by MDHHS.

b. Adoption, Recruitment, Orientation and Training

- 1) The Contractor shall develop and implement a plan for adoptive home recruitment, retention, and support consistent with the MDHHS DCWL Licensing Standards specific to the Contractor's license specified in Section 2.4.
- 2) The Contractor shall provide adoption recruitment activities in collaboration with other private agencies and MDHHS local offices to focus on children registered on Michigan Adoption Resource Exchange (MARE).
- 3) The Contractor shall work cooperatively with other contracted adoption agencies, MDHHS and trained adoptive parents to provide orientation and training. It is recommended that adoptive parent peer mentors be matched to prospective and new adoptive parents. The Contractor shall retain in the case record verification of training provided to the adoptive family including but not limited to:
 - a. Type of training provided
 - b. Date training provided
 - c. Subject material covered during training
- 4) The Contractor shall involve youth in the planning and organizing of adoption recruitment events.
- 5) The Contractor shall develop supports for children and youth moving to permanency through adoption. Best practice research indicates that support groups, peer mentors, informational sessions and individual counseling are effective tools. Developing appropriate rituals and recognition for the transitions experienced shall be part of the adoption process.
- 6) The Contractor shall be responsible for providing information to the prospective adoptive parent(s) regarding the adoption assistance programs on behalf of all children available for adoption. If the Contractor fails to provide information, fails to apply for adoption assistance or finalizes an adoption prior to the execution of an adoption assistance agreement, and it is later determined that the child was eligible for adoption assistance, the Contractor shall be responsible for providing financial support to the family equal to the adoption assistance amount and eligible Medicaid coverage, from the time the family makes the request for the re-determination of eligibility and the date MDHHS determines that an error occurred based on the Contractor's failure to inform or apply for adoption assistance.

c. MARE Related Responsibilities

The Contractor shall cooperate with MARE related activities and responsibilities, as detailed in this document including but not limited to:

- 1) The Contractor shall appropriately inform and prepare children concerning the process of photo listing. Children shall be adequately attired and well groomed. Adequately attired is defined as that which a parent would provide for their child in a school photo. The Contractor is responsible for securing photography services and may request coupons or assistance from the MARE office. The Contractor is responsible for facilitating transportation to key photo sites and supervision of the child (ren) during the process.
- 2) The Contractor shall, as appropriate to the child's ability, involve youth over age nine (9) in developing individual recruitment materials and narratives for MARE photo listing.
- 3) The Contractor must submit a copy of the Order Placing Child after Consent and the Order of Adoption to the MARE office within ten (10) working days of issuance by the court.
- 4) Upon determination by the Contractor that the MARE potential family 'match' is appropriate, the child and family agencies shall begin the process towards adoption within ten (10) working days.
- 5) The Contractor shall provide a written brochure (developed by MARE) to adoptive families regarding their right to be included in the MARE prospective family registry and provide an explanation of this process during orientation. This brochure and information shall again be provided to the prospective family during the formal training process.
- 6) The Contractor shall ensure all age appropriate youth available for adoption have knowledge of and access to the MARE newsletter for youth.
- 7) The Contractor shall notify MARE no less than quarterly of planned adoption related events, scheduled or tentatively scheduled for the next quarter. These activities shall include but are not limited to orientation, training dates, workshops, adoption fairs, recruitment activities, post adoption support activities and guest speakers. The Contractor will indicate if the events are open to the public or limited to a specific audience and any costs for family participation.
- 8) If the local court is participating, the Contractor shall cooperate with MARE during planning and implementation of National Adoption Day activities and regionally based adoption events.

- 9) The Contractor shall ensure MARE staff has access to case records, the child, child's worker, and other material or persons necessary for the development and updating of the child's MARE file and recruitment material.
- 10) The Contractor shall submit the completed Disruption/Dissolution survey to MARE within thirty (30) days of receipt of the survey from MARE.
- 11) The Contractor shall provide to MARE by October 30th of each year the following:
 - a. The address of all offices.
 - b. Names, telephone numbers and email addresses of all adoption workers and supervisors.
 - c. Types of services provided by the Contractor.
- 12) The Contractor shall ensure that a supervisor attends the regionally based MARE sessions on changes to MARE processes and services. This individual shall then be responsible to disseminate MARE information and material to appropriate agency staff.

d. Caseload Tracking and Reporting

The Contractor shall report to MDHHS caseload ratios for social services supervisors, social service staff and licensing staff in a format and within timeframes as determined by MDHHS.

e. Staff Training

1) Pre-Service Institute: Requirements

The Contractor shall ensure that staff transferring to an adoption social service position from another children's services position that has successfully completed the Office of Workforce Development and Training (OWDT) Pre-Service Institute (PSI) training in that program, shall attend and complete Adoption Program Specific Transfer Training (PSTT) within six months of assuming the adoption position.

2) OWDT Registration Process

- a) The Contractor shall register all staff required to attend training by each individual staff member through the Learning Management System.
- b) The Contractor supervisor and/or the Contractor training facility coordinator can register Contractor staff online for any training. To

cancel or change training registration, the Contractor will need to directly contact OWDT by telephone or email.

- c) Confirmations, with specific details on times and locations, will be emailed to the Contractor/trainee by MDHHS at least seven days before the training commences.

3) Training Documentation

The Contractor shall maintain training documentation which verifies registration and successful completion of training. Additionally, the Contractor shall maintain documentation of the completion of required in-service training for both social service staff and social service supervisory staff.

4) Completion of Security Awareness Training (SAT)

The Contractor shall require each employee, subcontractor, subcontractor employee or volunteer who works directly with clients or who is authorized to have access to client fingerprint-based criminal history record information (CHRI) under this Agreement to successfully complete security awareness training (SAT) within six months of appointment to a position with (CHRI) access and every two years thereafter. Documentation of successful SAT completion is to be located in the personnel record.

Security awareness training is located through the Learning Management System or on the following link:
http://www.michigan.gov/mdhhs/0,5885,7-339-71551_11120_74572---.00.html

2.11 Expected Performance Outcomes

During the Agreement, the Contractor shall demonstrate measurable progress toward the achievement of the outcomes listed below:

- a. Fewer than 5% of placements for adoption will end in disruption.
- b. Fewer than 5% of finalized adoptions will end in dissolution.
- c. By September 30, 2017, not less than 80% of the number of children with a goal of adoption that are legally free for adoption on September 30, 2016 shall have adoptions finalized.
- d. By September 30, 2017, not less than 80% of the number of children with a goal of adoption that are legally free for adoption on September 30, 2016 will have the adoption petition filed with the court.

2.12 Audit Requirements

Contractor/Vendor Relationship

This Agreement constitutes a contractor/vendor relationship with MDHHS..

The Contractor must immediately report to the MDHHS Bureau of Audit, Reimbursement and Quality Assurance accounting irregularities including noncompliance with provisions of this Agreement.

2.13. Financial Audit Requirements

a. Required Audit or Notification Letter

Contractors must submit to the Department either a Single Audit, Financial Statement Audit, or Audit Status Notification Letter as described below. If submitting a Single Audit or Financial Statement Audit, Contractors must also submit a Corrective Action Plan for any audit findings that impact MDHHS-funded programs, and management letter (if issued) with a response.

1) Single Audit

Contractors that are a non-profit organization and that expend \$750,000 or more in federal awards during the Contractor's fiscal year, must submit a Single Audit to the Department, regardless of the amount of funding received from the Department. The Single Audit must comply with the requirements of Title 2 Code of Federal Regulations, Subpart F.

2) Financial Statement Audit

Contractors exempt from the Single Audit requirements with fiscal years that receive \$500,000 or more in **total funding** from the Department in State and Federal grant funding must submit to the Department a Financial Statement Audit prepared in accordance with generally accepted auditing standards (GAAS).

3) Audit Status Notification Letter

Contractors exempt from the Single Audit and Financial Statement Audit requirements (1 and 2 above) must submit an Audit Status Notification Letter that certifies these exemptions. The template Audit Status Notification Letter and further instructions are available at <http://www.michigan.gov/mdhhs> by selecting Inside MDHHS menu, then MDHHS Audit, then Audit Reporting.

b. Due Date and Where to Send

The required audit and any other required submissions (i.e. Corrective Action Plan and management letter with a response), or Audit Status Notification Letter must be submitted to the Department within nine months after the end of the Contractor's fiscal year by e-mail to the Department at MDHHS-

AuditReports@michigan.gov. The required submissions must be in PDF files and compatible with Adobe Acrobat (read only). The subject line must state the agency name and fiscal year end. The Department reserves the right to request a hard copy of the audit materials if for any reason the electronic submission process is not successful.

c. Penalty

Failure to meet reporting responsibilities as identified in this agreement may result in delay or withholding of future payments.

d. Other Audits

The Department or federal agencies may also conduct or arrange for "agreed upon procedures" or additional audits to meet their needs.

2.14. Cost Reporting

The Contractor shall submit annual financial cost reports based on the state's fiscal year which begins October 1 and ends September 30 in the following calendar year. The reports shall contain the actual costs incurred by providers in delivering services required in this agreement to MDHHS clients for the reporting period. Costs for non-MDHHS children are not to be included. Reports will be submitted using a template provided by MDHHS. The financial reports shall be submitted annually, and will be due November 30 of each fiscal year. The Contractor must comply with all other program and fiscal reporting procedures as are or may hereinafter be established by MDHHS. Reports shall be submitted electronically to MDHHS-Foster-Care-Audits@michigan.gov with the subject line: Adoption Actual Cost Report. Failure to meet reporting responsibilities as identified in this agreement may result in delay or withholding of future payments.

2.15. Service Documentation

The Contractor agrees to maintain program records required by MDHHS, program statistical records required by MDHHS, and to produce program narrative and statistical data at times prescribed by, and on forms furnished by, MDHHS.

2.16. Private Agency MiSACWIS

The Contractor shall ensure that private agency staff has access to the Michigan Statewide Automated Child Welfare Information System (MiSACWIS) through a web-based interface, henceforth referred to as the "MiSACWIS application." The contractor shall ensure that staff follow the MiSACWIS requirements for CPA contracts which are found at http://www.michigan.gov/documents/dhs/Private_Agency_MiSACWIS_for_CPA_Contracts_464663_7.pdf

For all agency assigned cases in MiSACWIS, the Contractor shall enter all case management activities, including payments and all required documentation per policy in MiSACWIS.

2.17. Billing

The Contractor shall maintain a record system that documents the total number of units of service as defined in this Agreement and delivered during the term of this Agreement. These records shall also document the specific units billed to MDHHS under this Agreement.

The Contractor shall submit a DHS-1582A to:

Michigan Department of Health and Human Services
Office of Child Welfare Policy and Programs
Suite 514 PO Box 30037
Lansing, MI 48909

The DHS-1582A shall indicate the title of the service provided and the pre adoptive and adoptive name, case number and date of birth of the child served. The DHS-1582A and any subsequent corrections must be completed and received in the Office of Child Welfare Policy and Programs within 120 days of the date of the placement or finalization, whichever is applicable, as those terms are defined in Section I(M)(2-3) of this Agreement.

- a. Billing for all designated services including: per diem, placement, finalization, permanency, and disruptions require a copy of the Order Terminating Parental Rights (Permanent Court Ward/Commitment), the signed DHS3600 for cases referred on or after May 2016, or earlier if applicable, and with the exception of per diems, the signed and dated documentation by the court (DHS 5308 or petition date stamped from the court) verifying the date that the court has accepted the adoption petition and support documentation .
- b. The MARE rates require a copy of the MARE photo listing and the subsequent MARE "Hold" document.
- c. The Residential rate requires a copy of the discharge summary from the residential facility and a copy of the placement record including placement with the prospective adoptive parent prior to filling the petition.
- d. Billing for finalizations requires a copy of the Order of Adoption.
- e. Billing for delayed referrals must include a copy of the Contractors acceptance form with the referral date and statement by MDHHS that includes the child's commitment date. The referral form must be signed

by a MDHHS representative and must have "Delayed Referral" designated on the payment voucher.

- f. Billing for placement requires a copy of the referral/acceptance form (signed DHS 3600 for cases referred on or after May 2016, or earlier if applicable), Order Terminating Parental Rights and the Order Placing Child.
- g. Disruptions require an Ex Parte Order, or order dismissing, a copy of the initial placement order, initial commitment order, documentation verifying the medical condition of the family member if appropriate, a copy of the placement check and agency disruption report.
- h. Legal Risk–Order Placing Child Filed: In cases where a birth parent, individually or through an attorney, has filed a petition to appeal the termination of parental rights, the Contractor shall submit a DHS-1582A requesting payment (placement and finalization). The Contractor must also submit a photocopy of the Claim, filed in conformity with MCR 7.203.
- i. When billing for the per diem, each payment voucher shall be child specific. Attached to the initial payment voucher the following documents must be included: the DHS-3600 (for Adoption Services) with the date of acceptance indicated, the signed agreement of intent to adopt by a relative or identified family (for matched cases only) and verification from MARE that a complete photo listing or a complete "hold" registration was submitted on the case. The Contractor shall identify in Box 13 of the payment voucher the number of days covered, date range, and the number of per diem billings submitted on behalf of the child.
- j. When requesting an exception to the payment rate, it is the responsibility of the Contractor to demonstrate that requests for adoption assistance eligibility determination or MCI consent delayed the adoption placement. If the delay was caused by submission of incomplete paperwork or a lack of response to requests for information, the consideration for exception will be denied. There is a thirty (30) day standard of promptness for adoption assistance eligibility determinations and MCI regular and expedited consent requests and a ninety (90) day standard of promptness for MCI consent requests on competing parties. If information is missing, incomplete, or unclear and needing follow-up, the standard of promptness timeframe will not begin until all needed information is available for review, including legal documents and information needed to fulfill policy requirements. The Adoption Payment Exception Request, DHS 832 form must be submitted with the completed DHS-1582A.
- k. The ICPC rate(s) require copies of the ICPC referral, DHS-3600 (for Adoption Services), adoptive family home study, adoption supervision

reports (if applicable), Order Terminating Parental Rights (Permanent Court Ward/Commitment), Adoption Petition documentation and Order of Adoption, if applicable.

- I. Billings for competing parties, in which the case would be eligible for a rate less than the Baseline rate and the Contractor is requesting the Baseline rate, requires the Contractor to submit a Competing Party Rate Exception Request (DHHS-5445) and copies of the case acceptance documentation, dates of the initial inquiry, adoption application and DHS-4809 from each competing party and copies of the assessment for each competing party.

2.18. Fees and Other Sources of Funding

The Contractor guarantees that any claims made to MDHHS under this Agreement shall not be financed by any source other than MDHHS under the terms of this Agreement. If funding is received through any other source, the Contractor agrees to deduct from the amount billed to MDHHS the greater of either the fee amounts, or the actual costs of the services provided.

The Contractor may not accept reimbursement from a client unless the Agreement specifically authorizes such reimbursement in the "Contractor Responsibility" Section. In such case, a detailed fee scale and criteria for charging the fee must be included. If the Contractor accepts reimbursement from a client in accordance with the terms of the Agreement, the Contractor shall deduct these fees from billings to MDHHS.

Other third party funding sources, e.g., insurance companies, may be billed for contracted client services. Third party reimbursement shall be considered payment in full unless the third party fund source requires a co-pay, in which case MDHHS may be billed for the amount of the co-pay. No supplemental billing is allowed.

2.19. Recoupment of Funding and Repayment of Debts

a. Recoupment of Funding

If the Contractor fails to comply with requirements as set forth in this Agreement, or fails to submit a revised [DHS-3469] payment request within allotted time frames established by MDHHS in consultation with the Contractor, MDHHS may, at its discretion, recoup or require the Contractor to reimburse payments made under this Agreement which MDHHS has determined that the Contractor has been overpaid. The Contractor is liable for any cost incurred by MDHHS in the recoupment of any funding.

Upon notification by MDHHS that repayment is required, the Contractor shall make payment directly to MDHHS within 30 days or MDHHS may withhold

current or future payments made under this or any other agreements, current or future, between MDHHS and the Contractor.

If the Contractor fails to: (1) correct noncompliance activities identified by MDHHS, (2) submit revised billings as requested as part of a corrective action plan when required; or (3) remit overpayments or make arrangements to have the overpayments deducted from future payments within 30 days, such failure shall constitute grounds to terminate immediately any or all of MDHHS' agreements with the Contractor. MDHHS shall also report noncompliance of the Contractor to Michigan's Department of Technology, Management and Budget. Such report may result in the Contractor's debarment from further contracts with the state of Michigan.

b. Repayment of Debts and Other Amounts due MDHHS

By entering into this Agreement, the Contractor agrees to honor all prior repayment agreements established by MDHHS with the Contractor or Contractor's predecessors. If the Contractor has an outstanding debt due to MDHHS but does not have a repayment agreement, the Contractor agrees to make monthly payments to MDHHS at an amount not less than 5% of any outstanding balance and to begin on the date this Agreement is executed.

If the Contractor fails to honor prior repayment agreements, or the Contractor fails to begin repayment on an obligation due MDHHS that is not subject to a repayment agreement, MDHHS will initiate the administrative process to reduce payments to the Contractor under this Agreement to recoup the debt. The payment reduction will be made at the amount originally established in the repayment agreement or at an amount not less than 5% of any outstanding balance effective on the date this Agreement is executed.

2.20. Child Protection Law Reporting Requirements

- a. The Contractor shall ensure that all employees who have reasonable cause to suspect child abuse or neglect shall report any suspected abuse or neglect of a child in care to MDHHS for investigation as required by Public Acts of 1975, Act Number 238.
- b. Failure of the Contractor or its employees to report suspected abuse or neglect of a child to MDHHS shall result in an immediate investigation to determine the appropriate corrective action up to and including termination of the contract.
- c. Failure of the Contractor or its employees to report suspected child abuse or neglect two or more times within a one-year period shall result in a review of the contract agency's violations by a designated

Administrative Review Team, which shall include the Director of CSA and the Director of DCWL or its successor agency, that shall consider mitigating and aggravating circumstances to determine the appropriate corrective action up to and included license revocation and contract termination.

2.21 The Division of Child Welfare Licensing (DCWL)

DCWL shall be responsible for review of the Contractor's compliance with the Agreement and any court orders, via an Annual Compliance Review (ACR) and Special Investigations. DCWL may review, analyze and comment on all activities covered within the terms of the Agreement or court order. If the ACR or Special Investigation reveals that the Contractor has not complied with the requirements of this Agreement or court order, the following procedures shall be implemented:

- a. DCWL shall notify the Contractor of the Agreement or court noncompliance. This notification shall occur verbally during an exit conference, and be followed with a written report of the findings. The Contractor may request a meeting to discuss and examine the identified Agreement or court noncompliance.
- b. Following the identification of the Agreement or court noncompliance, DCWL will request the Contractor submit a Corrective Action Plans (CAP) to DCWL within 15 days of receiving the written report of findings.
- c. After the Contractor's CAP has been reviewed and approved by DCWL, the Contractor's compliance with the CAP shall be reviewed in accordance with time frames established by DCWL in the written notification of acceptance of the CAP.
- d. Based on the severity or repeated nature of cited violations, a recommendation may be made by DCWL at any time to place a moratorium on new placements with the contractor or to cancel the contract. If either recommendation is made, a meeting will be convened with the director of the contracted agency, the division director of DCWL and the CSA director or designee to provide the contractor with the opportunity to provide documented information on why the moratorium or cancellation of the contract should not occur.
- e. If a moratorium on new placements is put into place, it shall be for a minimum of 90 days to allow the contractor to remedy cited violations and comply with any agreed on CAP. If the cited violations are not corrected during the period of the moratorium or additional serious violations are cited, consideration shall be given to cancellation of the agency's contract.

Final decisions regarding the cancellation of a contract shall be made by the CSA director.

2.22 Corrective Action Requirements

If a program review by MDHHS reveals a lack of compliance with the requirements of this Agreement, the Contractor shall:

- a. Meet with MDHHS to discuss the noncompliance.
- b. Prepare a corrective action plan within 30 days of receiving MDHHS' written findings.
- c. Achieve compliance within 60 days of receipt of MDHHS' approval of the corrective action plan (unless other time frames are agreed to in writing by MDHHS) or MDHHS may terminate this Agreement, subject to the standard contract terms.

2.23. Criminal Background Check

As a condition of this Agreement, the Contractor certifies that the Contractor shall, prior to any individual performing work under this Agreement, conduct or cause to be conducted for each new employee, employee, subcontractor, subcontractor employee or volunteer who works directly with:

- a. Clients under this Agreement, or who has access to client information, an Internet Criminal History Access Tool (ICHAT) check and a National and State Sex Offender Registry check.

Information about ICHAT can be found at <http://apps.michigan.gov/ichat>.

The Michigan Public Sex Offender Registry web address is <http://www.mipsor.state.mi.us>.

The National Sex Offender Public Website address is <http://www.nsopw.gov>.

- b. Children under this Agreement, a Central Registry (CR) check.

Information about CR can be found at http://www.mi.gov/MDHHS/0,1607,7-124-5452_7119_48330-180331-.00.html.

The Contractor shall require each employee, subcontractor, subcontractor employee or volunteer who works directly with clients or who has access to client information, under this Agreement to timely notify

the Contractor in writing of criminal convictions (felony or misdemeanor) and/or pending felony charges or placement on the Central Registry as a perpetrator.

Additionally, the Contractor shall require each new employee, employee, subcontractor, subcontractor employee or volunteer who works directly with clients under this Agreement or who has access to client information and who has not resided or lived in Michigan for each of the previous ten (10) years to sign a waiver attesting to the fact that they have never been convicted of a felony or identified as a perpetrator, or if they have, the nature and recency of the felony.

The Contractor further certifies that the Contractor shall not submit claims for or assign to duties under this Agreement, any employee, subcontractor, subcontractor employee, or volunteer based on a determination by the Contractor that the results of a positive ICHAT and/or a CR response or reported criminal felony conviction or perpetrator identification make the individual ineligible to provide the services.

The Contractor must have a written policy describing the criteria on which its determinations shall be made and must document the basis for each determination. The Contractor may consider the recency and type of crime when making a determination. Failure to comply with this provision may be cause for immediate cancellation of this Agreement. In addition, the Contractor must further have a written policy regarding acceptable screening practices of new staff members and volunteers who have direct access to clients and/or client's personal information, which serve to protect the organization and its clients that is clearly defined. The Contractor must also assure that any subcontractors have both of these written policies.

If MDHHS determines that an individual provided services under this Agreement for any period prior to completion of the required checks as described above, MDHHS may require repayment of that individual's salary, fringe benefits, and all related costs of employment for the period that the required checks had not been completed.

3. MDHHS RESPONSIBILITIES

3.1. Payment

MDHHS shall make payments to the Contractor pursuant to MCL 17.51-17.57 and State of Michigan Financial Management Guide, Part II-Accounting and

Financial Reporting, Chapter 25, Section 100, "Prompt Payment for Goods and Services."

a. MDHHS shall make the following payments to the Contractor:

Rate Category	Placement	Finalization	Permanency
Early Adoption Level 2	\$6,900	\$3,450	\$1,150
Early Adoption Level 1	\$6,000	\$3,000	\$1,000
Baseline	\$5,400	\$2,700	\$900
Late Adoption Level 1	\$4,800	\$2,400	\$800
Late Adoption Level 2	\$4,200	\$2,100	\$700
Late Adoption Level 3	\$3,000	\$1,500	\$500
MARE	\$12,240	\$6,120	\$2,040
Residential	\$7,980	\$3,990	\$1,330
In-State Transfer Services	\$3,000		
Inter-State Existing Services	\$3,000		
Inter-State New Services	\$3,500		
Inter-State Transfer from another ICPC participating state through ICPC (non-Michigan ward) – Adoptive Home Study Denial	\$2000		
Inter-State Transfer from another ICPC participating state through ICPC (non-Michigan ward) – Adoptive Home Study Approval	\$2000		
Inter-State Transfer from another ICPC participating state through ICPC (non-Michigan ward) – Adoption Supervision with applicable reports	\$500 at Placement \$500 at Finalization		

b. Per Diem Payments

For each child where the adoption case is referred to the Contractor by MDHHS, the Contractor shall receive payment of \$20.00 per diem for each day of adoptive services from acceptance of the case (DHS 3600 for cases referred on or after October 2016, or earlier if applicable) to the date of the signed documentation from the court (DHS 5308 or petition date stamped by the court) verifying that the court has accepted the petition and support documentation, or for one hundred fifty (150) days, whichever comes first. The maximum per diem payment amount per child is \$3,000.

For adoption cases referred on or after October 2016, the Contractor may bill for the full per diem amount of \$3,000 and must include verification from MARE that either a complete photo listing or a complete hold registration was submitted to MARE on the case. In the event that the Contractor receives the full per diem amount on a case which is not assigned to the Contractor for 150 days, the Contractor will be responsible for repayment of the per diem at a rate of \$20.00 for each day in which they received a per diem payment and were no longer assigned to the case.

Payment of the initial placement rate: the total of all per diem payments for each child shall be deducted from the applicable placement rate to be paid.

c. Adoption Training Payments

The Contractor must submit the following with the completed DHS-1582A to the Office of Child Welfare Policy and Programs in central office:

- 1) A copy of the transcript reflecting the completion of the CWTI pre-service training for each adoption worker.
- 2) A statement confirming that 50% of the adoption worker's caseload will be children in the MDHHS foster care system.

d. Placement Disruption

Payment after Placement for adoptions ending in disruption will only be made in the following cases:

- 1) Disruption Due to Medical Condition of Prospective Family Member: If the adoptive family experiences a documented chronic medical condition requiring long term care or a condition anticipated to result in the death of a family member after the adoptive placement of a child, the Contractor shall be eligible for a per-diem rate. The payment shall be a portion of the appropriate rate for finalization, which shall be established by dividing the duration (number of days) of the adoptive placement until disruption by 182 days. The disruption rate shall not exceed the rate that would have otherwise been paid had finalization occurred.
- 2) Death of an Adoptive Child: In cases where a child dies between order placing in the adoptive home and the final order of adoption, the Contractor shall be eligible for a per-diem from the date of placement to the date of death (unless cause of death is determined to be neglect or abuse) not to exceed the rate that would have otherwise been paid had finalization occurred.
- 3) Disruption after Order Placing Child in the adoptive home: When the

disruption order is issued more than 182 days from the date of the order placing the child in the adoptive home, the Contractor shall be paid the full finalization rate.

- 4) Disruption of Placement Determined by MCI Superintendent: In a case where the child is placed in a home based on the decision of the MCI Superintendent, against the recommendation of the Contractor, the Contractor shall be eligible for a per-diem rate. The payment shall be a portion of the appropriate rate for finalization, which shall be established by dividing the duration (number of days) of the adoptive placement until disruption by 182 days. The disruption rate shall not exceed the rate that would have otherwise been paid had finalization occurred. Payment for subsequent placements will not reflect a disruption.

e. Adoption Dissolution

MDHHS shall recover, from the Contractor, the Permanency Unit Rate for adoptions that end in dissolution within 182 days of issuance of an Order of Adoption.

f. Payment – Re-Placement of Child after Disruption by Same Contractor

Re-placement of child photo listed on MARE or from a Residential facility:

Subsequent adoptive placement and finalization by the same Contractor (that placed the child in the disrupted/dissolved home) for a child previously reimbursed at one of the MARE rates or the Residential rate, shall not exceed the Baseline rate for a second adoptive placement/finalization. The maximum rate for any re-placement of a child photo listed on MARE or from a Residential facility beyond the second placement shall not exceed the Late Adoption Penalty Level 3 rate if paid to the same Contractor.

Re-placement by the same Contractor of a child under any rate other than a MARE or Residential rate shall not exceed the Baseline rate.

Exceptions may be made to the re-placement rate. The Contractor must submit documentation of efforts that were required to prepare a child for subsequent placement and the recruitment of an adoptive family. Submit request for exceptions to the Adoption Analyst in MDHHS Central Office and stipulate the rate requested.

g. Unit Definitions

1) Unit Title: Per Diem Payments

For each child where the adoption case is referred to the Contractor by MDHHS , the Contractor shall receive payment of \$20.00 per diem for

each day of adoptive services from acceptance of the case (signed DHS 3600 for cases referred on or after October 2016, or earlier if applicable) to date of the signed documentation from the court (DHS 5308 or petition date stamped from the court) verifying that the court has accepted the adoption petition and support documentation, or for one hundred fifty (150) days, whichever comes first. The maximum per diem payment amount per child is \$3,000.

The total amount paid for the per diem rate will be deducted from the applicable placement rate when the child is placed for adoption.

The Contractor must submit the Individual Service Agreement (DHS-3600) (for Adoption Services) with the date of acceptance indicated and the completed Adoption Payment Voucher (DHS-1582A).

For adoption cases referred on or after October 2016, the Contractor may bill for the full per diem amount of \$3,000 and must include verification from MARE that either a complete photo listing or a complete hold registration was submitted to MARE on the case. In the event that the Contractor receives the full per diem amount on a case which is not assigned to the Contractor for 150 days, the Contractor will be responsible for repayment of the per diem at a rate of \$20.00 for each day in which they received a per diem payment and were no longer assigned to the case.

2) Unit Title: Placement

All unit definitions below are based on the length of time from the receipt of the written order from the court terminating all parental rights or, the date on which the DHS-3600 is fully executed, whichever is later, to the date of the signed documentation from the court (DHS 5308 or petition or petition date stamped from the court) verifying that the court has accepted the adoption petition and support documentation.

If the child's goal changes from adoption to another goal and then changes back to the goal of adoption, the Contractor must obtain a new DHS-3600 for adoption services for the updated goal of adoption.

The Contractor must submit the Order Terminating Parental Rights, signed and dated documentation from the court (DHS 5308 or petition date stamped from the court) verifying the date that the court has accepted the adoption petition and support documentation, the Adoption Petition documentation and the Acceptance of Case Transfer documents (DHS3600) if applicable. The document indicating the date of acceptance must be signed by a MDHHS representative as verification. If there was a per diem payment for the case prior to

placement the Contractor must note "per diem billed" in box 13 of the DHS-1582A.

- 3) Unit Title: Finalization
Unit Definition: One unit equals receipt of an Order of Adoption for a child for whom a Placement rate was paid.
- 4) Unit Title: Permanency
Unit Definition: One unit equals an adoption that does not end in dissolution within 182 days of the issuance of an Order of Adoption. The Permanency Unit Rate shall be paid at the same time as the Finalization Unit Rate. The Contractor will be responsible for repayment of the Permanency Unit Rate for those cases for which the adoption ended in dissolution.
- 5) Unit Title: Baseline
Unit Definition: The DHS 5308 or Adoption Petition documentation or Order Placing Child is signed and dated by the court more than two hundred ten (210) days, but two hundred forty (240) or fewer days after the date of placement as defined in Subsection 3.1. g. ii above.
- 6) Unit Title: Early Adoption - Level 1
Unit Definition: The DHS 5308 or Adoption Petition documentation or Order Placing Child is signed by the court more than one hundred fifty (150) but two hundred ten (210) or fewer days after the date of placement as defined in Subsection 3.1. g. ii above.
- 7) Unit Title: Early Adoption - Level 2
Unit Definition: The DHS 5308 or Adoption Petition documentation or Order Placing Child is signed and dated by the court one hundred fifty (150) or fewer days after the date of placement as defined in Subsection 3.1. g. ii above.
- 8) Unit Title: Late Adoption - Level 1
Unit Definition: The DHS 5308 or Adoption Petition documentation or Order Placing Child is signed and dated by the court more than two hundred forty (240) days, but three hundred (300) or fewer days after the date of placement as defined in Subsection 3.1. g. ii above.
- 9) Unit Title: Late Adoption - Level 2
Unit Definition: The DHS 5308 or Adoption Petition documentation or Order Placing Child is signed and dated by the court more than three hundred (300) days, but three hundred sixty (365) or fewer days after the date of placement as defined in Subsection 3.1. g. ii above.
- 10) Unit Title: Late Adoption - Level 3

Unit Definition: The Adoption Petition documentation or Order Placing Child is signed and dated by the court more than three hundred sixty (365) days after the date of placement as defined in Subsection 3.1. g. ii above.

11) Unit Title: MARE

Unit Definition: The Order Placing Child is signed and dated by the court for a child who has been registered for photo listing on MARE.

The Contractor is not eligible for the MARE rate if the Contractor photo lists the child. The exception to allow for payment of the MARE rate to the supervising agency requires the Contractor to submit a written request verifying that the child was photo listed for six (6) months and documentation must be provided to demonstrate the family is a newly approved recruited family and the following conditions are true:

- a. The identified family is not a relative or foster parent to the adoptive child.
- b. The identified family has either not previously provided care for the child or has previously provided care and during the time that the child was photo listed had indicated in writing that they were not interested in adopting the child. The written document from the family must be submitted with the MARE payment request.

The Contractor is eligible for the MARE rate if the child's foster care case remains with MDHHS and, at the time of referral, there was no identified adoptive resource. The Contractor must register the child for photo listing within 30 days of acceptance of the case if no adoptive resource has been identified. If the Contractor applies for the MARE rate there must be a written explanation of why the adoptive family was not identified as a potential adoptive resource within the first 30 days after acceptance of the case.

12) Unit Title: Residential

Unit Definition: The Order Placing Child is signed and dated by the court for a child who has been placed in residential care (defined as staffed institutional care, not including foster group homes) and the child is under the Contractor's supervision for Adoption Services.

13) Unit Title: MARE and Residential Rate with Pre-placement

Unit Definition: When a child photo-listed with MARE or in a Residential facility is placed into a prospective adoptive home through a foster care placement to allow for a period of adjustment and supervision (prior to petition to place for adoption), the reimbursement for the appropriate rate shall be calculated based on the date the pre-placement began.

The MARE, and Residential Rate will be applied when the court signs the Order Placing Child within two hundred seventy (270) days of placing the child in the home for foster care services.

14) Unit Title: In-State Transfer Services

Unit Definition: The Contractor completes satisfactory services requested for pre-placement activities for a child under the supervision of the Contractor and referred for adoptive placement to another contractor or MDHHS local office. The MDHHS monitor for the foster care case shall define satisfactory services.

15) Unit Title: Interstate Existing Services

Unit Definition: A child under the adoption services supervision of the Contractor is referred for adoptive placement through a private or public agency in the state where the adoptive family resides and the child has previously been placed with the family through Interstate foster/relative care prior to termination of parental rights and assignment of an adoption worker.

16) Unit Title: Interstate New Services

Unit Definition: A child under the adoption services supervision of the Contractor is referred for adoptive placement through a private or public agency in the state where the adoptive family resides and the child has not been placed with the family through Interstate foster/relative care prior to termination of parental rights and assignment of an adoption worker.

17) Unit Title: ICPC Referred from Other U.S. States

A child under the child welfare system of another ICPC participating state is referred to Michigan for adoption services through ICPC. DHS-3600 (for Adoption Services) is required from the local Michigan county.

18) Unit Title: Competing Parties

More than one party is interested in adopting a particular child or sibling group and is assessed by the contractor in one of the following formats: Preliminary Adoptive Family Assessment, BCAL 3130 Initial Foster Home/Adoption Evaluation, or DHS 612, Adoptive Family Assessment Addendum. The rate paid on a competing parties' case shall not fall below the "Baseline" rate category, unless an agency has failed to act according to the timeframes outlined in policy.

h. Adoption Training Payments

A payment will be made to the Contractor for each staff that completes adoption training and passes competency tests as required:

1) Completion of the Caseworker Training

Payment will be \$6,000 for completion of a MDHHS Pre-Service Institute training that includes a total of nine weeks of competency-based classroom and field training within 16 weeks of hire.

2) Completion of the Child Welfare Certificate (CWC) Training

Payment will be a maximum of \$3,000, calculated on an actual cost reimbursement basis, for completion of the Office of Workforce Development and Training (OWDT)-CWC training. This training includes a minimum of five weeks of competency-based classroom, and field training if the caseworker certificate holder passes the competency evaluation.

3) Completion of the Child Welfare Supervisor Training.

Payment will be a maximum of \$1500, calculated on an actual cost reimbursement basis for completion of the Supervisor Training. This includes a minimum of one week of training within 90 days of hire/promotion if the supervisor passes the competency-based evaluation including the written exam through OWDT.

All supervisors hired on or after January 1, 2017 must complete the Supervisor Training and pass the competency evaluation.

4) Completion of the adoption Program Specific Transfer Training (PSTT) within 6 months of hire.

Payment will be a maximum of \$2,800, calculated on an actual cost reimbursement basis for completion of the adoption PSTT training. This training is the same as the Adoption Core Training for adoption caseworkers. If a supervisor has completed this training as a caseworker since April 1, 2006, the training does not need to be repeated. If a supervisor has not completed this training since April 1, 2006, they need to complete this PSTT Training within 6 months of hire.

3.2. Performance Evaluation and Monitoring

The services provided by the Contractor under this Agreement shall be evaluated and assessed at least annually by MDHHS on the basis of the criteria outlined in Section 2.11.

MDHHS shall perform contract monitoring through activities such as:

- a. Auditing expenditure reports.

- b. Conducting on-site monitoring.
- c. Reviewing and analyzing reports.

4. STANDARD TERMS

4.1 Duties of Contractor

Contractor must perform the services and provide the deliverables described in Section 2.10 – Services to be Provided (the “Agreement Activities”). An obligation to provide delivery of any commodity is considered a service and is an Agreement Activity.

Contractor must furnish all labor, equipment, materials, and supplies necessary for the performance of the Agreement Activities, and meet operational standards, unless otherwise specified in Section 2.10 – Services to be Provided.

Contractor must:

- a. Perform the Agreement Activities in a timely, professional, safe, and workmanlike manner consistent with standards in the trade, profession, or industry;
- b. Meet or exceed the performance and operational standards, and specifications of this Agreement;
- c. Provide all Agreement Activities in good quality, with no material defects;
- d. Not interfere with MDHHS’s operations;
- e. Obtain and maintain all necessary licenses, permits or other authorizations necessary for the performance of this Agreement;
- f. Cooperate with MDHHS, including MDHHS’s quality assurance personnel, and any third party to achieve the objectives of this Agreement;
- g. Return to MDHHS any State-furnished equipment or other resources in the same condition as when provided when no longer required for this Agreement;
- h. Not make any media releases without prior written authorization from MDHHS;
- i. Assign to MDHHS any claims resulting from state or federal antitrust violations to the extent that those violations concern materials or services supplied by third parties toward fulfillment of this Agreement;
- j. Comply with all State physical and IT security policies and standards which will be made available upon request; and
- k. Provide MDHHS priority in performance of this Agreement except as mandated by federal disaster response requirements.

Any breach under this provision is considered a material breach.

Contractor must also be clearly identifiable while on State property by wearing identification issued by the State, and clearly identify themselves whenever making contact with the State.

4.2 Notices

All notices and other communications required or permitted under this Agreement must be in writing and will be considered given and received: (a) when verified by written receipt if sent by courier; (b) when actually received if sent by mail without verification of receipt; or (c) when verified by automated receipt or electronic logs if sent by facsimile or email.

4.3 Reserved

4.4 Reserved

4.5 Performance Guarantee

Contractor must at all times have financial resources sufficient, in the opinion of MDHHS, to ensure performance of this Agreement and must provide proof upon request. MDHHS may require a performance bond if, in the opinion of MDHHS, it will ensure performance of this Agreement.

4.6 Insurance Requirements

Contractor must maintain the insurances identified below and is responsible for all deductibles. All required insurance must:

- a. Protect the State from claims that may arise out of, are alleged to arise out of, or result from Contractor's or a subcontractor's performance;
- b. Be primary and non-contributing to any comparable liability insurance (including self-insurance) carried by the State; and
- c. Be provided by a company with an A.M. Best rating of "A" or better and a financial size of VII or better.

Insurance Type	Additional Requirements
Commercial General Liability Insurance	
<p><u>Minimal Limits:</u> \$1,000,000 Each Occurrence Limit \$1,000,000 Personal & Advertising Injury Limit \$2,000,000 General Aggregate Limit \$2,000,000 Products/Completed Operations</p>	<p>Contractor must have their policy endorsed to add "the State of Michigan, its departments, divisions, agencies, offices, commissions, officers, employees, and agents" as additional insureds using endorsement CG 20 10 11 85, or</p>

<p><u>Deductible Maximum:</u> \$50,000 Each Occurrence</p>	<p>both CG 2010 07 04 and CG 2037 07 04.</p> <p>If the contractor will deal with children, schools, or the cognitively impaired, coverage must not have exclusions or limitations related to sexual abuse and molestation liability.</p>
<p>Automobile Liability Insurance</p>	
<p><u>Minimal Limits:</u> \$1,000,000 Per Occurrence</p>	<p>Contractor must have their policy: (1) endorsed to add "the State of Michigan, its departments, divisions, agencies, offices, commissions, officers, employees, and agents" as additional insureds; and (2) include Hired and Non-Owned Automobile coverage.</p>
<p>Workers' Compensation Insurance</p>	
<p><u>Minimal Limits:</u> Coverage according to applicable laws governing work activities.</p>	<p>Waiver of subrogation, except where waiver is prohibited by law.</p>
<p>Employers Liability Insurance</p>	
<p><u>Minimal Limits:</u> \$500,000 Each Accident \$500,000 Each Employee by Disease \$500,000 Aggregate Disease.</p>	
<p>Privacy and Security Liability (Cyber Liability) Liability Insurance</p>	

<p><u>Minimal Limits:</u> \$1,000,000 Each Occurrence \$1,000,000 Annual Aggregate</p>	<p>Contractor must have their policy: (1) endorsed to add "the State of Michigan, its departments, divisions, agencies, offices, commissions, officers, employees, and agents" as additional insureds; and (2) cover information security and privacy liability, privacy notification costs, regulatory defense and penalties, and website media content liability.</p>
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If any of the required policies provide claims-made coverage, the Contractor must:

- a. Provide coverage with a retroactive date before the effective date of the Agreement or the beginning of Agreement Activities;
- b. Maintain coverage and provide evidence of coverage for at least three years after completion of the Agreement Activities; and
- c. If coverage is canceled or not renewed, and not replaced with another claims-made policy form with a retroactive date prior to the Agreement effective date, Contractor must purchase extended reporting coverage for a minimum of three years after completion of work.

Contractor must:

- a. Provide insurance certificates to the Contract Administrator, containing the agreement or purchase order number, at Agreement formation and within 20 calendar days of the expiration date of the applicable policies;
- b. Require that subcontractors maintain the required insurances contained in this Section;
- c. Notify the Contract Administrator within five business days if any insurance is cancelled; and
- d. Waive all rights against the State for damages covered by insurance. Failure to maintain the required insurance does not limit this waiver.

Contractors who are self-insured must provide the following:

- a. Proof of self-insurance from the Michigan Department of Insurance and Financial Services for auto liability.
- b. Proof of self-insurance from the Michigan Department of Licensing and Regulatory Affairs for worker's compensation and employer's liability.
- c. A copy of their most recent, independently audited financial statements.

This Section is not intended to and is not to be construed in any manner as waiving, restricting or limiting the liability of either party for any obligations under this Agreement (including any provisions hereof requiring Contractor to indemnify, defend and hold harmless the State).

4.7 Reserved

4.8 Extended Purchasing Program

Upon written agreement between MDHHS and the Contractor, this Agreement may be extended to: (a) MiDEAL members, (b) other states (including governmental subdivisions and authorized entities), or (c) State of Michigan employees. MiDEAL members include local units of government, school districts, universities, community colleges, and nonprofit hospitals. A current list of MiDEAL members is available at www.michigan.gov/mideal.

If extended, Contractor must supply all Agreement Activities at the established Agreement prices and terms, and MDHHS reserves the right to impose an administrative fee and negotiate additional discounts based on any increased volume generated by such extensions.

Contractor must submit invoices to, and receive payment from, extended purchasing program members on a direct and individual basis.

4.9 Independent Contractor

Contractor is an independent contractor and assumes all rights, obligations and liabilities set forth in this Agreement. Contractor, its employees, and agents will not be considered employees of MDHHS. No partnership or joint venture relationship is created by virtue of this Agreement. Contractor, and not MDHHS, is responsible for the payment of wages, benefits and taxes of Contractor's employees and any subcontractors. Prior performance does not modify Contractor's status as an independent contractor.

4.10 Subcontracting

Contractor may not delegate any of its obligations under this Agreement without the prior written approval of MDHHS. Contractor must notify MDHHS prior to the proposed delegation, and provide MDHHS any information it requests to determine whether the delegation is in its best interest. If approved, Contractor must:

- a. Be the sole point of contact regarding all contractual matters, including payment and charges for all Agreement Activities;
- b. Make all payments to the subcontractor; and

c. Incorporate the terms and conditions contained in this Agreement in any subcontract with a subcontractor.

Contractor remains responsible for the completion of the Agreement Activities, compliance with the terms of this Agreement, and the acts and omissions of the subcontractor. MDHHS, in its sole discretion, may require the replacement of any subcontractor.

4.11 Staffing

MDHHS's Contract Administrator may require Contractor to remove or reassign personnel by providing a notice to Contractor.

4.12 Reserved

4.13 Assignment

Contractor may not assign this Agreement to any other party without the prior approval of MDHHS. Upon notice to Contractor, MDHHS, in its sole discretion, may assign in whole or in part, its rights or responsibilities under this Agreement to any other party. If MDHHS determines that a novation of this Agreement to a third party is necessary, Contractor will agree to the novation and provide all necessary documentation and signatures.

4.14 Change of Control

Contractor will notify, at least 90 calendar days before the effective date, MDHHS of a change in Contractor's organizational structure or ownership. For purposes of this Agreement, a change in control means any of the following:

- a. A sale of more than 50% of Contractor's stock;
- b. A sale of substantially all of Contractor's assets;
- c. A change in a majority of Contractor's board members;
- d. Consummation of a merger or consolidation of Contractor with any other entity;
- e. A change in ownership through a transaction or series of transactions; or
- f. The board (or the stockholders) approves a plan of complete liquidation.

A change of control does not include any consolidation or merger effected exclusively to change the domicile of Contractor, or any transaction or series of transactions principally for bona fide equity financing purposes.

In the event of a change of control, Contractor must require the successor to assume this Agreement and all of its obligations under this Agreement.

4.15 Reserved

4.16 Acceptance

Agreement Activities are subject to inspection and testing by MDHHS within 30 calendar days of MDHHS's receipt of them ("State Review Period"), unless otherwise provided in Section 2.10 – Services to be Provided. If the Agreement Activities are not fully accepted by MDHHS, MDHHS will notify Contractor by the end of the State Review Period that either: (a) the Agreement Activities are accepted, but noted deficiencies must be corrected; or (b) the Agreement Activities are rejected. If MDHHS finds material deficiencies, it may: (i) reject the Agreement Activities without performing any further inspections; (ii) demand performance at no additional cost; or (iii) terminate this Agreement in accordance with Section 4.23, Termination for Cause.

Within 10 business days from the date of Contractor's receipt of notification of acceptance with deficiencies or rejection of any Agreement Activities, Contractor must cure, at no additional cost, the deficiency and deliver unequivocally acceptable Agreement Activities to MDHHS. If acceptance with deficiencies or rejection of the Agreement Activities impacts the content or delivery of other non-completed Agreement Activities, the parties' respective Program Managers must determine an agreed to number of days for re-submission that minimizes the overall impact to this Agreement. However, nothing herein affects, alters, or relieves Contractor of its obligations to correct deficiencies in accordance with the time response standards set forth in this Agreement.

If Contractor is unable or refuses to correct the deficiency within the time response standards set forth in this Agreement, MDHHS may cancel the order in whole or in part. MDHHS, or a third party identified by MDHHS, may perform the Agreement Activities and recover the difference between the cost to cure and the Agreement price plus an additional 10% administrative fee.

4.17 Reserved

4.18 Reserved

4.19 Reserved

4.20 Terms of Payment

Invoices must conform to the requirements communicated from time-to-time by MDHHS. All undisputed amounts are payable within 45 days of MDHHS's receipt. Contractor may only charge for Agreement Activities performed as

specified in Section 2.10 – Services to be Provided. Invoices must include an itemized statement of all charges. MDHHS is exempt from State sales tax for direct purchases and may be exempt from federal excise tax, if Services purchased under this Agreement are for MDHHS’s exclusive use. Notwithstanding the foregoing, all prices are inclusive of taxes, and Contractor is responsible for all sales, use and excise taxes, and any other similar taxes, duties and charges of any kind imposed by any federal, state, or local governmental entity on any amounts payable by MDHHS under this Agreement.

MDHHS has the right to withhold payment of any disputed amounts until the parties agree as to the validity of the disputed amount. MDHHS will notify Contractor of any dispute within a reasonable time. Payment by MDHHS will not constitute a waiver of any rights as to Contractor’s continuing obligations, including claims for deficiencies or substandard Agreement Activities. Contractor’s acceptance of final payment by MDHHS constitutes a waiver of all claims by Contractor against MDHHS for payment under this Agreement, other than those claims previously filed in writing on a timely basis and still disputed.

MDHHS will only disburse payments under this Agreement through Electronic Funds Transfer (EFT). Contractor must register with the State at <http://www.michigan.gov/cpexpress> to receive electronic fund transfer payments. If Contractor does not register, MDHHS is not liable for failure to provide payment.

Without prejudice to any other right or remedy it may have, MDHHS reserves the right to set off at any time any amount then due and owing to it by Contractor against any amount payable by MDHHS to Contractor under this Agreement.

4.21 Reserved

4.22 Stop Work Order

MDHHS may suspend any or all activities under this Agreement at any time. MDHHS will provide Contractor a written stop work order detailing the suspension. Contractor must comply with the stop work order upon receipt. Within 90 calendar days, or any longer period agreed to by Contractor, MDHHS will either: (a) issue a notice authorizing Contractor to resume work, or (b) terminate this Agreement or purchase order. MDHHS will not pay for Agreement Activities, Contractor’s lost profits, or any additional compensation during a stop work period.

4.23 Termination for Cause

MDHHS may terminate this Agreement for cause, in whole or in part, if Contractor, as determined by MDHHS:

- a. Endangers the value, integrity, or security of any location, data, or personnel;
- b. Becomes insolvent, petitions for bankruptcy court proceedings, or has an involuntary bankruptcy proceeding filed against it by any creditor;
- c. Engages in any conduct that may expose MDHHS to liability;
- d. Breaches any of its material duties or obligations; or
- e. Fails to cure a breach within the time stated in a notice of breach.

Any reference to specific breaches being material breaches within this Agreement will not be construed to mean that other breaches are not material.

If MDHHS terminates this Agreement under this Section, MDHHS will issue a termination notice specifying whether Contractor must: (a) cease performance immediately, or (b) continue to perform for a specified period. If it is later determined that Contractor was not in breach of this Agreement, the termination will be deemed to have been a Termination for Convenience, effective as of the same date, and the rights and obligations of the parties will be limited to those provided in Section 4.24, Termination for Convenience.

MDHHS will only pay for amounts due to Contractor for Agreement Activities accepted by MDHHS on or before the date of termination, subject to MDHHS's right to set off any amounts owed by the Contractor for MDHHS's reasonable costs in terminating this Agreement. The Contractor must pay all reasonable costs incurred by MDHHS in terminating this Agreement for cause, including administrative costs, attorneys' fees, court costs, transition costs, and any costs MDHHS incurs to procure the Agreement Activities from other sources.

4.24 Termination for Convenience

MDHHS may immediately terminate this Agreement in whole or in part without penalty and for any reason, including but not limited to, appropriation or budget shortfalls. The termination notice will specify whether Contractor must: (a) cease performance of the Agreement Activities immediately, or (b) continue to perform the Agreement Activities in accordance with Section 4.25, Transition Responsibilities. If MDHHS terminates this Agreement for convenience, MDHHS will pay all reasonable costs, as determined by MDHHS, for MDHHS approved Transition Responsibilities.

The Contractor may terminate this Agreement upon 30 days written notice to MDHHS at any time prior to the completion of the Agreement period.

4.25 Transition Responsibilities

Upon termination or expiration of this Agreement for any reason, Contractor must, for a period of time specified by MDHHS (not to exceed 90 calendar days), provide all reasonable transition assistance requested by MDHHS, to allow for the expired or terminated portion of the Agreement Activities to continue without interruption or adverse effect, and to facilitate the orderly transfer of such Agreement Activities to MDHHS or its designees. Such transition assistance may include, but is not limited to:

- a. Continuing to perform the Agreement Activities at the established Agreement rates;
- b. Taking all reasonable and necessary measures to transition performance of the work, including all applicable Agreement Activities, training, equipment, software, leases, reports and other documentation, to MDHHS or MDHHS's designee;
- c. Taking all necessary and appropriate steps, or such other action as MDHHS may direct, to preserve, maintain, protect, or return to MDHHS all materials, data, property, and confidential information provided directly or indirectly to Contractor by any entity, agent, vendor, or employee of MDHHS;
- d. Transferring title in and delivering to MDHHS, at MDHHS's discretion, all completed or partially completed deliverables prepared under this Agreement as of the Agreement termination date; and
- e. Preparing an accurate accounting from which MDHHS and Contractor may reconcile all outstanding accounts (collectively, "Transition Responsibilities").

This Agreement will automatically be extended through the end of the transition period.

4.26 General Indemnification

Contractor must defend, indemnify and hold the State, its departments, divisions, agencies, offices, commissions, officers, and employees harmless, without limitation, from and against any and all actions, claims, losses, liabilities, damages, costs, attorney fees, and expenses (including those required to establish the right to indemnification), arising out of or relating to:

- a. Any breach by Contractor (or any of Contractor's employees, agents, subcontractors, or by anyone else for whose acts any of them may be liable) of any of the promises, agreements, representations, warranties, or insurance requirements contained in this Agreement;
- b. Any infringement, misappropriation, or other violation of any intellectual property right or other right of any third party;

- c. Any bodily injury, death, or damage to real or tangible personal property occurring wholly or in part due to action or inaction by Contractor (or any of Contractor's employees, agents, subcontractors, or by anyone else for whose acts any of them may be liable); and
- d. Any acts or omissions of Contractor (or any of Contractor's employees, agents, subcontractors, or by anyone else for whose acts any of them may be liable).

MDHHS will notify Contractor in writing if indemnification is sought; however, failure to do so will not relieve Contractor, except to the extent that Contractor is materially prejudiced. Contractor must, to the satisfaction of MDHHS, demonstrate its financial ability to carry out these obligations.

MDHHS is entitled to: (i) regular updates on proceeding status; (ii) participate in the defense of the proceeding; (iii) employ its own counsel; and to (iv) retain control of the defense if MDHHS deems necessary. Contractor will not, without MDHHS's written consent (not to be unreasonably withheld), settle, compromise, or consent to the entry of any judgment in or otherwise seek to terminate any claim, action, or proceeding. To the extent that any State employee, official, or law may be involved or challenged, MDHHS may, at its own expense, control the defense of that portion of the claim.

Any litigation activity on behalf of the State, or any of its subdivisions under this Section, must be coordinated with the Department of Attorney General. An attorney designated to represent MDHHS may not do so until approved by the Michigan Attorney General and appointed as a Special Assistant Attorney General.

4.27 Infringement Remedies

If, in either party's opinion, any piece of equipment, software, commodity, or service supplied by Contractor or its subcontractors, or its operation, use or reproduction, is likely to become the subject of a copyright, patent, trademark, or trade secret infringement claim, Contractor must, at its expense:

- a. Procure for MDHHS the right to continue using the equipment, software, commodity, or service, or if this option is not reasonably available to Contractor,
- b. Replace or modify the same so that it becomes non-infringing; or
- c. Accept its return by MDHHS with appropriate credits to MDHHS against Contractor's charges and reimburse MDHHS for any losses or costs incurred as a consequence of MDHHS ceasing its use and returning it.

4.28 Limitation of Liability

MDHHS is not liable for consequential, incidental, indirect, or special damages, regardless of the nature of the action.

4.29 Disclosure of Litigation, or Other Proceeding

Contractor must notify MDHHS within 14 calendar days of receiving notice of any litigation, investigation, arbitration, or other proceeding (collectively, "Proceeding") involving Contractor, a subcontractor, or an officer or director of Contractor or subcontractor, that arises during the term of this Agreement, including:

- a. A criminal Proceeding;
- b. A parole or probation Proceeding;
- c. A Proceeding under the Sarbanes-Oxley Act;
- d. A civil Proceeding involving:
 - 1) A claim that might reasonably be expected to adversely affect Contractor's viability or financial stability; or
 - 2) A governmental or public entity's claim or written allegation of fraud; or
- e. A Proceeding involving any license that Contractor is required to possess in order to perform under this Agreement.

4.30 Reserved

4.31 State Data

a. Ownership. MDHHS's data ("**State Data**," which will be treated by Contractor as Confidential Information) includes:

- 1) MDHHS's data collected, used, processed, stored, or generated as the result of the Agreement Activities;
- 2) Personally identifiable information ("PII") collected, used, processed, stored, or generated as the result of the Agreement Activities, including, without limitation, any information that identifies an individual, such as an individual's social security number or other government-issued identification number, date of birth, address, telephone number, biometric data, mother's maiden name, email address, credit card information, or an individual's name in combination with any other of the elements here listed; and,
- 3) Personal health information ("PHI") collected, used, processed, stored, or generated as the result of the Agreement Activities, which is defined under the Health Insurance Portability and Accountability Act (HIPAA) and its related rules and regulations. State Data is and will remain the sole and exclusive property of MDHHS and all right, title, and interest in the same is reserved by MDHHS.

This Section survives the termination of this Agreement.

b. Contractor Use of State Data. Contractor is provided a limited license to State Data for the sole and exclusive purpose of providing the Agreement Activities, including a license to collect, process, store, generate, and display State Data only to the extent necessary in the provision of the Agreement Activities. Contractor must:

- 1) Keep and maintain State Data in strict confidence, using such degree of care as is appropriate and consistent with its obligations as further described in this Agreement and applicable law to avoid unauthorized access, use, disclosure, or loss;
- 2) Use and disclose State Data solely and exclusively for the purpose of providing the Agreement Activities, such use and disclosure being in accordance with this Agreement, any applicable Statement of Work, and applicable law; and
- 3) Not use, sell, rent, transfer, distribute, or otherwise disclose or make available State Data for Contractor's own purposes or for the benefit of anyone other than MDHHS without MDHHS's prior written consent.

This Section survives the termination of this Agreement.

c. Extraction of State Data. Contractor must, within five business days of MDHHS's request, provide MDHHS, without charge and without any conditions or contingencies whatsoever (including but not limited to the payment of any fees due to Contractor), an extract of the State Data in the format specified by MDHHS.

d. Backup and Recovery of State Data. Unless otherwise specified in Section 2.5 – Services to be Delivered, Contractor is responsible for maintaining a backup of State Data and for an orderly and timely recovery of such data. Unless otherwise described in Section 2.10 – Services to be Provided, Contractor must maintain a contemporaneous backup of State Data that can be recovered within two hours at any point in time.

e. Loss of Data. In the event of any act, error or omission, negligence, misconduct, or breach that compromises or is suspected to compromise the security, confidentiality, or integrity of State Data or the physical, technical, administrative, or organizational safeguards put in place by Contractor that relate to the protection of the security, confidentiality, or integrity of State Data, Contractor must, as applicable:

- 1) Notify MDHHS as soon as practicable but no later than 24 hours of becoming aware of such occurrence;
- 2) Cooperate with MDHHS in investigating the occurrence, including making available all relevant records, logs, files, data reporting, and other materials required to comply with applicable law or as otherwise required by MDHHS;

- 3) In the case of PII or PHI, at MDHHS's sole election, (i) notify the affected individuals who comprise the PII or PHI as soon as practicable but no later than is required to comply with applicable law, or, in the absence of any legally required notification period, within five calendar days of the occurrence; or (ii) reimburse MDHHS for any costs in notifying the affected individuals;
- 4) In the case of PII, provide third-party credit and identity monitoring services to each of the affected individuals who comprise the PII for the period required to comply with applicable law, or, in the absence of any legally required monitoring services, for no less than 24 months following the date of notification to such individuals;
- 5) Perform or take any other actions required to comply with applicable law as a result of the occurrence;
- 6) Without limiting Contractor's obligations of indemnification as further described in this Agreement, indemnify, defend, and hold harmless MDHHS for any and all claims, including reasonable attorneys' fees, costs, and expenses incidental thereto, which may be suffered by, accrued against, charged to, or recoverable from MDHHS in connection with the occurrence;
- 7) Be responsible for recreating lost State Data in the manner and on the schedule set by MDHHS without charge to MDHHS; and,
- 8) Provide to MDHHS a detailed plan within 10 calendar days of the occurrence describing the measures Contractor will undertake to prevent a future occurrence.

Notification to affected individuals, as described above, must comply with applicable law, be written in plain language, and contain, at a minimum: name and contact information of Contractor's representative; a description of the nature of the loss; a list of the types of data involved; the known or approximate date of the loss; how such loss may affect the affected individual; what steps Contractor has taken to protect the affected individual; what steps the affected individual can take to protect himself or herself; contact information for major credit card reporting agencies; and, information regarding the credit and identity monitoring services to be provided by Contractor.

This Section survives the termination of this Agreement.

4.32 Non-Disclosure of Confidential Information

The parties acknowledge that each party may be exposed to or acquire communication or data of the other party that is confidential, privileged communication not intended to be disclosed to third parties. The provisions of this Section survive the termination of this Agreement.

a. Meaning of Confidential Information. For the purposes of this Agreement, the term “Confidential Information” means all information and documentation of a party that:

- 1) Has been marked “confidential” or with words of similar meaning, at the time of disclosure by such party;
- 2) If disclosed orally or not marked “confidential” or with words of similar meaning, was subsequently summarized in writing by the disclosing party and marked “confidential” or with words of similar meaning; and,
- 3) Should reasonably be recognized as confidential information of the disclosing party.

The term “Confidential Information” does not include any information or documentation that was:

- 1) Subject to disclosure under the Michigan Freedom of Information Act (FOIA);
- 2) Already in the possession of the receiving party without an obligation of confidentiality;
- 3) Developed independently by the receiving party, as demonstrated by the receiving party, without violating the disclosing party’s proprietary rights;
- 4) Obtained from a source other than the disclosing party without an obligation of confidentiality; or,
- 5) Publicly available when received, or thereafter became publicly available (other than through any unauthorized disclosure by, through, or on behalf of, the receiving party).

For purposes of this Agreement, in all cases and for all matters, State Data is deemed to be Confidential Information.

b. Obligation of Confidentiality. The parties agree to hold all Confidential Information in strict confidence and not to copy, reproduce, sell, transfer, or otherwise dispose of, give or disclose such Confidential Information to third parties other than employees, agents, or subcontractors of a party who have a need to know in connection with this Agreement or to use such Confidential Information for any purposes whatsoever other than the performance of this Agreement. The parties agree to advise and require their respective employees, agents, and subcontractors of their obligations to keep all Confidential Information confidential. Disclosure to a subcontractor is permissible where:

- 1) Use of a subcontractor is authorized under this Agreement;
- 2) The disclosure is necessary or otherwise naturally occurs in connection with work that is within the subcontractor’s responsibilities; and
- 3) Contractor obligates the subcontractor in a written contract to maintain MDHHS’s Confidential Information in confidence.

At MDHHS's request, any employee of Contractor or any subcontractor may be required to execute a separate agreement to be bound by the provisions of this Section.

- c. Cooperation to Prevent Disclosure of Confidential Information. Each party must use its best efforts to assist the other party in identifying and preventing any unauthorized use or disclosure of any Confidential Information. Without limiting the foregoing, each party must advise the other party immediately in the event either party learns or has reason to believe that any person who has had access to Confidential Information has violated or intends to violate the terms of this Agreement and each party will cooperate with the other party in seeking injunctive or other equitable relief against any such person.
- d. Remedies for Breach of Obligation of Confidentiality. Each party acknowledges that breach of its obligation of confidentiality may give rise to irreparable injury to the other party, which damage may be inadequately compensable in the form of monetary damages. Accordingly, a party may seek and obtain injunctive relief against the breach or threatened breach of the foregoing undertakings, in addition to any other legal remedies which may be available, to include, in the case of MDHHS, at the sole election of MDHHS, the immediate termination, without liability to MDHHS, of this Agreement or any Statement of Work corresponding to the breach or threatened breach.
- e. Surrender of Confidential Information upon Termination. Upon termination of this Agreement or a Statement of Work, in whole or in part, each party must, within five calendar days from the date of termination, return to the other party any and all Confidential Information received from the other party, or created or received by a party on behalf of the other party, which are in such party's possession, custody, or control; provided, however, that Contractor must return State Data to MDHHS following the timeframe and procedure described further in this Agreement. Should Contractor or MDHHS determine that the return of any Confidential Information is not feasible, such party must destroy the Confidential Information and must certify the same in writing within five calendar days from the date of termination to the other party. However, MDHHS's legal ability to destroy Contractor data may be restricted by its retention and disposal schedule, in which case Contractor's Confidential Information will be destroyed after the retention period expires.

4.33 Data Privacy and Information Security

- a. Undertaking by Contractor. Without limiting Contractor's obligation of confidentiality as further described, Contractor is responsible for

establishing and maintaining a data privacy and information security program, including physical, technical, administrative, and organizational safeguards, that is designed to:

- 1) Ensure the security and confidentiality of the State Data;
- 2) Protect against any anticipated threats or hazards to the security or integrity of the State Data;
- 3) Protect against unauthorized disclosure, access to, or use of the State Data;
- 4) Ensure the proper disposal of State Data; and
- 5) Ensure that all employees, agents, and subcontractors of Contractor, if any, comply with all of the foregoing. In no case will the safeguards of Contractor's data privacy and information security program be less stringent than the safeguards used by MDHHS, and Contractor must at all times comply with all applicable State IT policies and standards, which are available to Contractor upon request.

b. Audit by Contractor. No less than annually, Contractor must conduct a comprehensive independent third-party audit of its data privacy and information security program and provide such audit findings to MDHHS.

c. Right of Audit by the State. Without limiting any other audit rights of MDHHS, MDHHS has the right to review Contractor's data privacy and information security program prior to the commencement of Agreement Activities and from time to time during the term of this Agreement. During the providing of the Agreement Activities, on an ongoing basis from time to time and without notice, MDHHS, at its own expense, is entitled to perform, or to have performed, an on-site audit of Contractor's data privacy and information security program. In lieu of an on-site audit, upon request by MDHHS, Contractor agrees to complete, within 45 calendar days of receipt, an audit questionnaire provided by MDHHS regarding Contractor's data privacy and information security program.

d. Audit Findings. Contractor must implement any required safeguards as identified by MDHHS or by any audit of Contractor's data privacy and information security program.

e. State's Right to Termination for Deficiencies. MDHHS reserves the right, at its sole election, to immediately terminate this Agreement or a Statement of Work without limitation and without liability if MDHHS determines that Contractor fails or has failed to meet its obligations under this Section.

4.34 Reserved

4.35 Reserved

4.36 Records Maintenance, Inspection, Examination, and Audit

MDHHS or its designee may audit Contractor to verify compliance with this Agreement. Contractor must retain, and provide to MDHHS or its designee and the auditor general upon request, all financial and accounting records related to this Agreement through the term of this Agreement and for four years after the latter of termination, expiration, or final payment under this Agreement or any extension ("Audit Period"). If an audit, litigation, or other action involving the records is initiated before the end of the Audit Period, Contractor must retain the records until all issues are resolved.

Within 10 calendar days of providing notice, MDHHS and its authorized representatives or designees have the right to enter and inspect Contractor's premises or any other places where Agreement Activities are being performed, and examine, copy, and audit all records related to this Agreement. Contractor must cooperate and provide reasonable assistance. If any financial errors are revealed, the amount in error must be reflected as a credit or debit on subsequent invoices until the amount is paid or refunded. Any remaining balance at the end of this Agreement must be paid or refunded within 45 calendar days.

This Section applies to Contractor, any parent, affiliate, or subsidiary organization of Contractor, and any subcontractor that performs Agreement Activities in connection with this Agreement.

4.37 Warranties and Representations

Contractor represents and warrants:

- a. Contractor is the owner or licensee of any Agreement Activities that it licenses, sells, or develops and Contractor has the rights necessary to convey title, ownership rights, or licensed use;
- b. All Agreement Activities are delivered free from any security interest, lien, or encumbrance and will continue in that respect;
- c. The Agreement Activities will not infringe the patent, trademark, copyright, trade secret, or other proprietary rights of any third party;
- d. Contractor must assign or otherwise transfer to MDHHS or its designee any manufacturer's warranty for the Agreement Activities;
- e. The Agreement Activities are merchantable and fit for the specific purposes identified in this Agreement;
- f. The Agreement signatory has the authority to enter into this Agreement;
- g. All information furnished by Contractor in connection with this Agreement fairly and accurately represents Contractor's business, properties, finances, and operations as of the dates covered by the information, and Contractor will inform MDHHS of any material adverse changes; and

h. All information furnished and representations made in connection with the award of this Agreement is true, accurate, and complete, and contains no false statements or omits any fact that would make the information misleading.

A breach of this Section is considered a material breach of this Agreement, which entitles MDHHS to terminate this Agreement under Section 4.23, Termination for Cause.

4.38 Conflicts and Ethics

Contractor will uphold high ethical standards and is prohibited from:

- a. Holding or acquiring an interest that would conflict with this Agreement;
- b. Doing anything that creates an appearance of impropriety with respect to the award or performance of this Agreement;
- c. Attempting to influence or appearing to influence any State employee by the direct or indirect offer of anything of value; or
- d. Paying or agreeing to pay any person, other than employees and consultants working for Contractor, any consideration contingent upon the award of this Agreement.

Contractor must immediately notify MDHHS of any violation or potential violation of these standards. This Section applies to Contractor, any parent, affiliate, or subsidiary organization of Contractor, and any subcontractor that performs Agreement Activities in connection with this Agreement.

4.39 Compliance with Laws

Contractor must comply with all federal, state and local laws, rules and regulations.

4.40 Reserved

4.41 Reserved

4.42 Nondiscrimination

Under the Elliott-Larsen Civil Rights Act, 1976 PA 453, MCL 37.2101, et seq., and the Persons with Disabilities Civil Rights Act, 1976 PA 220, MCL 37.1101, et seq., Contractor and its subcontractors agree not to discriminate against an employee or applicant for employment with respect to hire, tenure, terms, conditions, or privileges of employment, or a matter directly or indirectly related to employment, because of race, color, religion, national origin, age, sex, height, weight, marital status, or mental or physical disability. Breach of this covenant is a material breach of this Agreement.

resolution is unlikely, or fails to respond within 15 business days. The parties are not prohibited from instituting formal proceedings: (a) to avoid the expiration of statute of limitations period; (b) to preserve a superior position with respect to creditors; or (c) where a party makes a determination that a temporary restraining order or other injunctive relief is the only adequate remedy. This Section does not limit MDHHS's right to terminate this Agreement.

4.48 Media Releases

News releases (including promotional literature and commercial advertisements) pertaining to the Agreement or project to which it relates must not be made without prior written MDHHS approval, and then only in accordance with the explicit written instructions of MDHHS.

4.49 Website Incorporation

MDHHS is not bound by any content on Contractor's website unless expressly incorporated directly into this Agreement.

4.50 Entire Agreement

This Agreement is the entire agreement of the parties related to the Agreement Activities. This Agreement supersedes and replaces all previous understandings and agreements between the parties for the Agreement Activities.

4.51 Severability

If any part of this Agreement is held invalid or unenforceable, by any court of competent jurisdiction, that part will be deemed deleted from this Agreement and the severed part will be replaced by agreed upon language that achieves the same or similar objectives. The remaining Agreement will continue in full force and effect.

4.52 Waiver

Failure to enforce any provision of this Agreement will not constitute a waiver.

4.53 Survival

The provisions of this Agreement that impose continuing obligations, including warranties and representations, termination, transition, insurance coverage, indemnification, and confidentiality, will survive the expiration or termination of this Agreement.

4.54 Agreement Modification

This Agreement may not be amended except by signed agreement between the parties. Notwithstanding the foregoing, no subsequent Statement of Work or amendment executed after the effective date will be construed to amend this Agreement unless it specifically states its intent to do so and cites the section or sections amended.

The Contractor shall, upon request of MDHHS and receipt of a proposed amendment, amend this Agreement, if and when required in the opinion of MDHHS, due to the revision of federal or state laws or regulations.

4.55 Options to Renew

At the discretion of MDHHS, this Agreement may be renewed in writing by an amendment not less than 30 days before its expiration. This Agreement may be renewed for up to two additional one-year periods.

4.56 Certification Regarding Debarment, Suspension, and Other Responsibility Matters

Assurance is hereby given to MDHHS that the Contractor will comply with Federal Regulation, 2 CFR part 180 and certifies to the best of its knowledge and belief that it, its employees and its subcontractors:

- a. Are not presently debarred, suspended, proposed for debarment, declared ineligible, sentenced to a denial of federal benefits by a state or federal court, or voluntarily excluded from covered transactions by any federal or state department or agency;
- b. Have not within a three-year period preceding this Agreement been convicted of or had civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (federal, state, or local) transaction or contract under a public transaction; violation of federal or state antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;
- c. Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (federal, state, or local) with commission of any of the offenses enumerated in section 2, and;
- d. Have not within a three-year period preceding this Agreement had one or more public transactions (federal, state or local) terminated for cause or default.

Where the parties are unable to certify to any of the statements in this certification, the Contractor shall attach an explanation to this Agreement.

The Contractor certifies to the best of its knowledge that within the past three years, the Contractor has not;

- a. Failed to substantially perform a state contract, agreement, or subcontract according to its terms, conditions, and specifications within specified time limits.
- b. Refused to provide information or documents required by a contract or agreement including, but not limited to information or documents necessary for monitoring contract performance.
- c. Failed to respond to requests for information regarding contract or agreement compliance, or accumulated repeated substantiated complaints regarding performance of a contract or agreement.
- d. Failed to perform a state contract, agreement, or subcontract in a manner consistent with any applicable state or federal law, rule, regulation, order, or decree.

The Contractor shall include Section 4.56 (Certification Regarding Debarment, Suspension, and Other Responsibility Matters) language as written above in all subcontracts with other parties.

The Contractor shall require each primary subcontractor, whose subcontract will exceed \$25,000, to disclose to the Contractor, in writing, whether at the time of the award of the subcontract, the subcontractor, or its principals, is or is not debarred, suspended, or proposed for debarment by the state of Michigan. The Contractor shall then inform MDHHS of the subcontractor's status and reasons for the Contractor's decision to use such subcontractor, if the Contractor so decides.

If it is determined that the Contractor knowingly rendered an erroneous certification under this provision, in addition to the other remedies available to the state, MDHHS may immediately terminate this Agreement.

If the state finds that grounds to debar exist, it shall send notice to the Contractor of proposed debarment indicating the grounds for proposed debarment and the procedures for requesting a hearing. If the Contractor does not respond with a written request for a hearing within 20 calendar days, the state shall issue the decision to debar without a hearing. The debarment period may be of any length up to eight years. After the debarment period expires, the Contractor may reapply for inclusion on bidder lists through the regular application process by authority of Executive Order 2003-1.

Exhibit 5

AGREEMENT NUMBER: PAFC15-33001
AMENDMENT NUMBER: 3
 Between
THE STATE OF MICHIGAN
DEPARTMENT OF HEALTH AND HUMAN SERVICES
 And



CONTRACTOR	St. Vincent Catholic Charities
CONTRACTOR ADDRESS	2800 W. Willow Street, Lansing, Michigan 48917-1833
CONTRACTOR EMAIL	seykaa@stvcc.org

CONTRACT ADMINISTRATOR	EMAIL
Sarah Goad	GoadS@michigan.gov

AGREEMENT SUMMARY			
SERVICE DESCRIPTION	Placing Agency Foster Care		
GEOGRAPHIC AREA	Statewide		
INITIAL EFFECTIVE DATE	October 1, 2014	CURRENT EXPIRATION DATE	September 30, 2016
CURRENT AGREEMENT VALUE	\$1,790,000.00		
AGREEMENT TYPE	Unit Rate/Per Diem		

AMENDMENT DESCRIPTION			
EXTEND EXPIRATION DATE	<input checked="" type="checkbox"/> YES	NEW EXPIRATION DATE	September 30, 2017
AMENDMENT AMOUNT		ESTIMATED REVISED AGGREGATE AGREEMENT VALUE	
\$895,000.00	<input checked="" type="checkbox"/> INCREASE	\$2,685,000.00	
NATURE OF CHANGE	This amendment extends this Agreement for one year, adds money, changes the Agreement format and changes Agreement language that pertains to MDHHS organizational name changes, Cost Accounting, Financial Audit Requirements and Modified Settlement Agreement.		

The undersigned have the lawful authority to bind the Contractor and the Michigan Department of Health and Human Services (MDHHS) to the terms set forth in this Agreement.

FOR THE CONTRACTOR:

St. Vincent Catholic Charities
 Contractor

 Signature of Director or Authorized Designee
 ANDREA E. SEYKA
 Print Name
 6/15/16
 Date

FOR THE STATE:

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES

 Signature of Director or Authorized Designee
 Kim Stephen
 Print Name
 7/8/16
 Date

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	<u>Agreement Period</u>	<u>Amount</u>
Year 1	October 1, 2014 through September 30, 2015	\$895,000.00
Year 2	October 1, 2015 through September 30, 2016	\$895,000.00
Year 3	October 1, 2016 through September 30, 2017	\$895,000.00
Total Amount:		\$2,685,000.00

Check all agreement years affected by this amendment:

Year 1 Year 2 Year 3
 Year 4 Year 5 Year 6

**STATE OF MICHIGAN
DEPARTMENT OF HEALTH & HUMAN SERVICES**

WHEREAS, the Department of Health & Human Services of the state of Michigan (hereinafter referred to as "MDHHS") entered into a contractual Agreement effective October 1, 2014, with St. Vincent Catholic Charities (hereinafter referred to as "Contractor"), having a mailing address of 2800 W. Willow Street, Lansing, Michigan 48917-1833, for the provision of certain services as set forth therein; and,

WHEREAS, it is mutually desirable to MDHHS and to the Contractor to amend the aforesaid Agreement.

THEREFORE, in consideration of the promises and mutual covenants hereinabove and hereinafter contained, the parties hereto agree to the following amendment of said Agreement. This amendment shall be attached to the Agreement, said Agreement being hereby reaffirmed and made a part hereof.

Article I

This amendment shall be effective on the date of MDHHS signature.

Article II

MDHHS will exercise the first of two, one-year options to extend. Therefore, the end date of the Agreement shall be changed from September 30, 2016 to September 30, 2017.

Article III

The maximum dollar amount of the Agreement shall be increased by \$895,000.00 from \$1,790,000.00 to \$2,685,000.00 for the period October 1, 2014, through September 30, 2017.

Article IV

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The following are major language changes in this amendment:

1. The amendment contains updates to the general formatting of the contract, and reflects MDHHS organizational name changes and small programmatic changes.
2. The amendment reflects necessary changes related to Dwayne B. v. Snyder, et al., 2:06-cv-13548. Language containing the term Modified Settlement Agreement is replaced with the term Implementation, Sustainability, and Exit Plan (ISEP).
3. The amendment reflects necessary changes related to the Cost Reporting and Financial Audit Requirements.

Article V

Section I., CONTRACTOR RESPONSIBILITIES, and Section II., MDHHS RESPONSIBILITIES shall be deleted and replaced with Number 1., PROGRAM REQUIREMENTS, Number 2., CONTRACTOR RESPONSIBILITIES, and Number 3., MDHHS RESPONSIBILITIES as follows:

1. PROGRAM REQUIREMENTS

1.1. Client Eligibility Criteria

a. Eligible Clients

Children for whom the family court has issued an order which makes the Michigan Department of Health and Human Services responsible for the child's placement, care and supervision.

OR

Children for whom the family court has authorized a placement in the parental home in a Trial Reunification living arrangement.

The period of time eligible for a Trial Reunification shall not exceed 180 days from the date of the child(ren)'s placement in a parental home. Child(ren) must enter Trial Reunification directly from foster care and the family court must retain jurisdiction with care and custody continuing with MDHHS.

b. Determination of Eligibility

If MDHHS makes a referral to a child placing agency for foster care case management services pursuant to a contract with the child placing agency, the child placing agency must accept or decline the referral within one hour of

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The Contractor may be required to meet and communicate with MDHHS representatives and from time to time MDHHS may require that the Contractor create reports or fulfill requests for information as necessary to fulfill the MDHHS' obligations under statute and/or Dwayne B. v. Snyder, et al., 2:06-cv-13548, herein referred to as the Implementation, Sustainability, and Exit Plan (ISEP).

The Contractor shall make available to MDHHS copies of any outside reviews, non-redacted FOIA requests, or audits relating to the contracted program.

2.3. Geographic Area

The Contractor shall provide services described herein in the following geographic area: Statewide

2.4. Licensing Requirements

The MDHHS Division of Child Welfare Licensing (DCWL) is the licensing agency for Child Placing Agencies (CPA). A license is issued to a certain person or organization at a specific location, is non-transferable, and remains the property of the Department. Therefore, a child placing agency must be established at a specific location.

The Contractor shall ensure that, for the duration of this agreement, it shall maintain a license for those program areas and services that are provided for in this Agreement. If the Contractor fails to comply with this section, MDHHS may terminate this Agreement for default.

The Contractor is licensed to provide service under this agreement under the following license number: CB330201019

2.5. Location of Facilities

The Contractor shall provide services described herein at the following location(s):

2800 West Willow
Lansing, MI 48917

Direct foster care services shall be provided in client, relative caregiver, and foster parent homes.

2.6. Program Focus and Name

Placement Agency Foster Care (PAFC) is a program that provides a comprehensive and coordinated set of activities designed to place and supervise children in out of home placement.

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Foster care supervision includes the provision of services as throughout this Agreement and when necessary the referral for additional services that will enhance the child’s and the family’s functioning and ameliorate the conditions that caused the child’s removal from parental custody.

Foster care supervision includes developing and implementing a treatment plan and service agreement to comply with the Foster Care Manual which facilitates permanency planning according to the following guidelines:

- . Reunification
- . Adoption
- . Guardianship
- . Permanent Placement with a Fit and Willing Relative.
- . Another Planned Permanent Living Arrangement (AAPLA)

2.7. Provider Numbers

MISACWIS Provider Number: 10400303

Bridges Provider Number: 6356725

2.8. Credentials

The Contractor shall assure that all staff performing functions under this Agreement, including contractor employees, volunteers and/or subcontractors, are appropriately screened, credentialed, and trained in accordance with licensing rule. Additional staff requirements are identified in Section 2.10 d. of this Agreement.

2.9. Compliance Requirements

Except in subsection (h), the Contractor shall comply with the following requirements:

- a. The Contractor shall comply with all applicable MDHHS policy in the Children’s Foster Care (FOM), Guardianship (GDM), Confidentiality (SRM 131), Interstate Compact (ICM), and Adoption (ADM) Manuals and MDHHS policy amendments (including interim policy bulletins).
- b. Throughout the term of this Agreement, the Contractor shall ensure that it provides all applicable MDHHS policy and MDHHS policy amendments (including interim policy bulletins) and applicable Administrative Codes to social service staff. The Contractor shall ensure that social service staff complies with all applicable requirements.

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MDHHS policies, amendments and policy bulletins, are published on the following internet link: <http://www.michigan.gov/dhs>. Administrative Codes are published at on the following internet link: http://michigan.gov/lara/0,4601,7-154-35738_5698-118524-,00.html

- c. The Contractor shall comply with the MDHHS non-discrimination statement:

Michigan Department of Health and Human Services (MDHHS) will not discriminate against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs, or disability.

The above statement applies to all licensed and unlicensed caregivers and families and/or relatives that could potentially provide care or are currently providing care for MDHHS supervised children, including MDHHS supervised children assigned to a contracted agency.

- d. The Contractor shall provide services within the framework of Michigan's Child Welfare Practice Model, MiTEAM. The Contractor shall utilize the skills of engagement, assessment, teaming and mentoring in partnering and building relationships with families and children by exhibiting empathy, professionalism, genuineness and respect. Treatment planning shall be from the perspective of family/child centered practice.
- e. The contractor shall ensure all directives and services ordered by the court are completed to the satisfaction of the court within the timeframes ordered.
- f. The Contractor shall participate in random moment time studies (RMTS). An RMTS is a process where participants are emailed short surveys and asked to indicate what they were doing at an assigned time. The time study is required to determine the amount of time spent on various activities. Based on these results, MDHHS determines the amount that can be charged to various funding sources.
- g. The Contractor shall assure the coordination of all services based on an assessment of the parent's needs. The Contractor shall assure the coordination and provision of all treatment services required based on an assessment of each child's needs. Treatment services include, but are not limited to the provision of counseling/therapy for each child. The Contractor shall ensure the provision of all medical, dental and behavioral health services required based on an assessment of each child's needs. The Contractor may utilize Medicaid (or private insurance) reimbursable services to comply with this requirement. If a counseling or therapy service is not available or accessible for each child, the Contractor is responsible for the direct provision of the service.

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h. Under 1973, PA 116, as amended by 2015 PA 53, the Contractor has the sole discretion to decide whether to accept or not accept a referral from MDHHS. Nothing in this Agreement limits or expands the application of this Public Act.

i. Compliance with MDHHS Implementation, Sustainability, and Exit Plan

The Contractor shall ensure compliance with all applicable provisions and requirements of Dwayne B. v. Snyder, et al., 2:06-cv-13548, Implementation Sustainability and Exit Plan.

j. Prudent Parent Expectations

The Contractor shall ensure prudent parent expectations are followed as outlined in FOM 722-11, Prudent Parent Standard & Delegation of Parental Consent.

Additional Compliance Provisions

The Contractor shall comply with the provisions of:

- a. 1984 Public Act, 114, as amended being M.C.L. 3.711 *et seq.*, Interstate Compact on the Placement of Children.
- a. 1975 Public Act 238, as amended, being M.C.L. 722.621 *et seq.*, Child Protection Law.
- c. 1982 Public Act 162, as amended, being M.C.L. 450.2101 *et seq.*, Michigan Nonprofit Corporation Act.
- d. 1994 Public Act 204, as amended, being M.C.L. 722.921 *et seq.*, Michigan Children's Ombudsman Act.
- e. 1973 Public Act 116, as amended, being M.C.L. 722.111 *et seq.*, Michigan Child Care Organization Act.
- f. 1939 Public Act 288, Chapter X, being M.C.L. 710.1 *et seq.*, Michigan Adoption Code.
- g. 1984 Public Act 203, as amended, being M.C.L. 722.951 *et seq.*, Michigan Foster Care and Adoption Services Act.
- h. The Social Security Act as amended by the Multiethnic Placement Act of 1994 (MEPA); Public Law 103-382, and as amended by Section 1808 of the Small Business Job Protection, the Interethnic Adoption Provision (IEAP).
- i. The Indian Child Welfare Act (ICWA); Public Law 95-608 being 25 U.S.C. 1901 *et seq.*
- j. 1976 Public Act 453, as amended, being M.C.L. 37.2101 *et seq.*, Elliott-Larsen Civil Rights Act.
- k. Fostering Connections to Success Act of 2008
- l. Preventing Sex Trafficking and Strengthening Families Act, Federal PL 113-183

Compliance with ICWA Requirements

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The Contractor shall provide case management services in accordance with the "Active Efforts" requirements established in the ICWA; Public Law 95-608 being 25 U.S.C 1901 *et seq.* These requirements include but are not limited to the following:

- a. Establish an American Indian child as a member of a Tribe in accordance with ICWA and as defined in the MDHHS Native American Affairs (NAA) manual.
- b. Provide "Active Efforts" case management services in with in accordance with ICWA and as defined in the NAA manual.
- c. Provide placement of American Indian children in accordance with "Placement Priorities" as established in ICWA and defined in the NAA manual.
- d. Provide "Expert Witness" testimony in accordance with ICWA and as defined in the NAA manual.
- e. Provide services to American Indian families within the context of their culture and ethnicity. Maintaining knowledge in the following:
 - 1) How culture and rituals influence parenting decisions.
 - 2) Determine what services and supports will be most effective.
 - 3) Knowledge and respect of tribal practices.

2.10. Services to be Provided

a. Foster Home Licensing Data Entry

The Contractor shall document all recruitment and licensing activities into the tracking system identified by MDHHS.

b. Caseload Tracking and Reporting

The Contractor shall report to MDHHS caseload ratios for social services supervisors, social service staff and licensing staff in a format and within timeframes as determined by MDHHS.

c. Service Standards for Trial Reunification

Trial Reunification is a court-ordered placement where the child is returned from an out-of-home placement to the care of the parent or guardian from whom he or she was removed. The child remains under court supervision during the Trial Reunification period with the MDHHS retaining placement care and custody

- 1) The Contractor shall provide the following services to children in trial reunification:

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- a) Assist in preparing the parent, child, and caregiver for the transition to trial reunification. See FOM 722-7B.
- b) A Family Team Meeting prior to placement of a child in the parental home to develop a transition plan with the parent, caregiver and child, if age appropriate. The Contractor shall have Family Team Meetings quarterly until case closure. See FOM 722-06B.
- c) Complete a new Family Assessment of Needs and Strengths, Child Assessment of Needs and Strengths, and Safety Assessment and Safety Plan. See FOM 722-8A, 722-8B and 722-9B.
- d) Continue case worker visit expectations as required in FOM 722-6H.
- e) Maintain support services until case closure. The Contractor shall document services needed to continue to meet the child's needs and identified providers for such services to provide continuity of services. See FOM 722-7B.
- f) Continue assessing and monitoring of the case plan and safety plan.

d. Staff Training

1) Child Welfare Training Institute: Requirements

The Contractor shall ensure that staff transferring to a foster care social service position from another children's services position that has successfully completed the Child Welfare Training Institute (CWTI) Pre-Service Institute (PSI) training in that program, shall attend and complete CWTI-Foster Care Private Agency Program Specific Transfer Training (PSTT) within six months of assuming the foster care position.

2) Child Welfare Training Institute: Registration Process

- a) The Contractor shall register all staff required to attend CWTI training by each individual staff member using the preferred method of CWTI by going directly to the CWTI web site at <http://www.michiganchildwelfaretraining.com/>.
- b) The Contractor supervisor and/or the Contractor training facility coordinator can register Contractor staff online for any training. To cancel or change training registration, the Contractor will need to directly contact CWTI by telephone or email.
- c) Confirmations, with specific details on times and locations, will be emailed to the Contractor/trainee by MDHHS at least seven days before the training commences.

3) Foster Home Certification Supervisory Staff: Training Requirements

The Contractor shall ensure that all foster home certification supervisors successfully complete certification training, prior to assuming supervisory

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responsibility for social service workers who perform foster home licensing functions.

4) Training Documentation

The Contractor shall maintain training documentation which verifies registration and successful completion of CWTI training and DCWL Certification Training. Additionally, the Contractor shall maintain documentation of the completion of required in-service training for both social service staff and social service supervisory staff.

e. Relative Licensing

The Contractor may elect to facilitate the licensure of relative caregivers providing care to children in out-of-home placements that are under the direct care and supervision of MDHHS. Facilitation of licensure includes but is not limited to the following activities:

- 1) Accept referrals of unlicensed relative caregivers from MDHHS, for possible licensure as a foster family home, based on the Contractor's capacity to complete the licensing process as outlined in foster care policy.
- 2) On forms provided by MDHHS, and when requested by MDHHS, the Contractor shall report to MDHHS monthly on the number and characteristics of unlicensed relative homes and the children in those homes, and on progress in licensing the homes.

f. Adoption and Foster Care Analysis Reporting System Requirements

The Contractor shall enter all child and family information into the Michigan Statewide Automated Child Welfare System (MiSACWIS) to enable MDHHS to comply with Federal Adoption and Foster Care Analysis and Reporting System (AFCARS) reporting requirements. Failure to comply with this reporting requirement shall result in a penalty for the Contractor as specified in Section 3.1 f. of this Agreement.

2.11. Expected Program Performance Outcomes

During the period of this Agreement, the Contractor shall work toward the achievement of the performance measures listed below.

MDHHS shall obtain data from its systems on a quarterly basis to be determined by MDHHS, in the format specified by MDHHS. If, based on an evaluation of submitted data, there is a gap between the performance of a Contractor and the

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performance objective, the Contractor shall within 90 days of receiving the data from MDHHS develop a plan to eliminate the performance gap.

a. Placement Stability

Children supervised by the Contractor shall have no more than two placement settings while supervised by the individual Contractor's program, using the following minimum acceptable standards:

- 1) 0-365 days = 86% or more will have no more than two placement settings.
- 2) 366-730 days = 73% or more will have no more than two placement settings.
- 3) 731 + days = 45% or more will have no more than two placement settings.

b. Timeliness of Reunification

No fewer than 43% of children supervised by the Contractor for 30 days or more shall be discharged from foster care to the home of a parent or legal guardian within 12 months of removal.

c. Permanency of Reunification

No more than 4% of children supervised by the Contractor who were discharged from foster care to the home of a parent or legal guardian within 12 months of removal.

d. Timeliness of Adoptions

No fewer than 36.6% of children supervised by the Contractor for 30 days or more shall be discharged from foster care to a finalized adoption within 24 months of removal.

e. Discharge to Permanency for Children in Foster Care for Long Periods of Time

No fewer than 29.1% of children supervised by the Contractor for the most recent 24 months shall be discharged to a permanent placement prior to their 18th birthday. Permanent placement is defined as Adoption, Guardianship or Reunification.

f. Legally-Free Children in Foster Care for Long Period of Time Who Are Discharged to Permanency

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No fewer than 98% of children supervised by the Contractor for the most recent 12 months and legally free for adoption shall be discharged to a permanent placement prior to their 18th birthday. Permanent placement is defined as Adoption, Guardianship or Reunification. (A discharge to Reunification for children "legally free" occurs when they are placed with a relative for 6 months or longer. This is for AFCARS reporting purposes by MDHHS.).

g. Sibling Placement

No fewer than 90% of children supervised by the Contractor shall be placed with all members of their sibling group (out of home minor siblings only) unless it has been determined that the placement with the siblings is contrary to the best interests of the children. Contrary to the best interests of the children is defined as:

- 1) Placement together is harmful to one or more of the siblings; or
- 2) One of the siblings has exceptional needs that can only be met in a specialized program or facility; or
- 3) The size of the sibling group makes such placement impractical, notwithstanding diligent efforts to place the group together.

2.12. Audit Requirements

Contractor/Vendor Relationship

This Agreement constitutes a contractor/vendor relationship with MDHHS. The Contractor must immediately report to the MDHHS Bureau of Audit any audit findings of a Going Concern or accounting irregularities, including noncompliance with provisions of this Agreement.

2.13. Financial Audit Requirements

a. Required Audit or Notification Letter

Contractors must submit to the Department either a Single Audit, Financial Statement Audit, or Audit Status Notification Letter as described below. If submitting a Single Audit or Financial Statement Audit, Contractors must also submit a Corrective Action Plan for any audit findings that impact MDHHS-funded programs, and management letter (if issued) with a response.

1) Single Audit

Contractors that are a non-profit organization and that expend \$750,000 or more in federal awards during the Contractor's fiscal year, must submit a Single Audit to the Department, regardless of the amount of funding received from the Department. The Single Audit must comply with the requirements of Title 2 Code of Federal Regulations, Subpart F.

2) Financial Statement Audit

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Contractors exempt from the Single Audit requirements with fiscal years that receive \$500,000 or more in **total funding** from the Department in State and Federal grant funding must submit to the Department a Financial Statement Audit prepared in accordance with generally accepted auditing standards (GAAS).

3) Audit Status Notification Letter

Contractors exempt from the Single Audit and Financial Statement Audit requirements (1 and 2 above) must submit an Audit Status Notification Letter that certifies these exemptions. The template Audit Status Notification Letter and further instructions are available at <http://www.michigan.gov/mdhhs> by selecting Inside MDHHS menu, then MDHHS Audit, then Audit Reporting.

b. Due Date and Where to Send

The required audit and any other required submissions (i.e. Corrective Action Plan and management letter with a response), or Audit Status Notification Letter must be submitted to the Department within nine months after the end of the Contractor's fiscal year by e-mail to the Department at MDHHS-AuditReports@michigan.gov. The required submissions must be in PDF files and compatible with Adobe Acrobat (read only). The subject line must state the agency name and fiscal year end. The Department reserves the right to request a hard copy of the audit materials if for any reason the electronic submission process is not successful.

c. Penalty

Failure to meet reporting responsibilities as identified in this agreement may result in delay or withholding of future payments.

d. Other Audits

The Department or federal agencies may also conduct or arrange for "agreed upon procedures" or additional audits to meet their needs.

2.14. Cost Reporting

The Contractor shall submit annual financial cost reports based on the state's fiscal year which begins October 1 and ends September 30 in the following calendar year. The reports shall contain the actual costs incurred by providers in delivering services required in this agreement to MDHHS clients for the reporting period. Costs for non-MDHHS children are not to be included. Reports will be submitted using a template provided by MDHHS. The financial reports shall be submitted annually, and will be due November 30 of each fiscal year. The Contractor must comply with all other program and fiscal reporting procedures as are or may hereinafter be established by MDHHS. Reports shall be submitted electronically to MDHHS-Foster-Care-Audits@michigan.gov with the subject line: PAFC Actual Cost Report. Failure to meet reporting responsibilities as identified in this agreement may result in delay or withholding of future payments.

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2.15. Service Documentation

The Contractor agrees to maintain program records required by MDHHS, program statistical records required by MDHHS, and to produce program narrative and statistical data at times prescribed by, and on forms furnished by, MDHHS.

2.16. Private Agency MiSACWIS

The Contractor shall ensure that private agency payment staff has access to the Michigan Statewide Automated Child Welfare Information System (MiSACWIS) through a web-based interface, henceforth referred to as the "MiSACWIS application." Requirements for MiSACWIS for CPA contracts may be found at http://www.michigan.gov/mdhhs/0,5885,7-339-71551_7199--,00.html

For all agency assigned cases in MiSACWIS, the Contractor shall enter all case management activities, including payments and all required documentation per policy in MiSACWIS.

2.17. Billing

The Contractor shall submit through the MiSACWIS system the bi-weekly roster for any child in the Contractors care per the instructions within the MiSACWIS system. The billing shall indicate the units of service provided by the Contractor and shall be submitted to MDHHS within 30 days from the end of the billing period.

No original request for payment submitted by the Contractor more than three years after the close of the two week billing period during which services were provided shall be honored for payment.

When the Contractor's financial records reveal that payment for a child has not been provided by MDHHS within 90 days of the date of service, the Contractor will seek payment resolution by contacting the direct supervisor of the assigned MDHHS worker in writing. Any concerns over a payment authorization or issuance that cannot be resolved within 60 days of the written notice must be reported to the MDHHS County Director for immediate resolution. The Contractor will apprise MDHHS of any ongoing, unresolved payment concerns.

2.18. Fees and Other Sources of Funding

The Contractor guarantees that any claims made to MDHHS under this Agreement shall not be financed by any source other than MDHHS under the terms of this Agreement. If funding is received through any other source, the Contractor agrees to deduct from the amount billed to MDHHS the greater of either the fee amounts, or the actual costs of the services provided.

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The Contractor may not accept reimbursement from a client unless the Agreement specifically authorizes such reimbursement in the "Contractor Responsibility" Section. In such case, a detailed fee scale and criteria for charging the fee must be included. If the Contractor accepts reimbursement from a client in accordance with the terms of the Agreement, the Contractor shall deduct these fees from billings to MDHHS.

Other third party funding sources, e.g., insurance companies, may be billed for contracted client services. Third party reimbursement shall be considered payment in full unless the third party fund source requires a co-pay, in which case MDHHS may be billed for the amount of the co-pay. No supplemental billing is allowed.

2.19. Recoupment of Funding and Repayment of Debts

a. Recoupment of Funding

If the Contractor fails to comply with requirements as set forth in this Agreement, or fails to submit a revised payment request within allotted time frames established by MDHHS in consultation with the Contractor, MDHHS may, at its discretion, recoup or require the Contractor to reimburse payments made under this Agreement which MDHHS has determined that the Contractor has been overpaid. The Contractor is liable for any cost incurred by MDHHS in the recoupment of any funding.

Upon notification by MDHHS that repayment is required, the Contractor shall make payment directly to MDHHS within 30 days or MDHHS may withhold current or future payments made under this or any other agreements, current or future, between MDHHS and the Contractor.

If the Contractor fails to: (1) correct noncompliance activities identified by MDHHS, (2) submit revised billings as requested as part of a Corrective Action Plan when required; or (3) remit overpayments or make arrangements to have the overpayments deducted from future payments within 30 days, such failure shall constitute grounds to terminate immediately any or all of MDHHS' agreements with the Contractor. MDHHS shall also report noncompliance of the Contractor to Michigan's Department of Technology, Management and Budget. Such report may result in the Contractor's debarment from further contracts with the state of Michigan.

b. Repayment of Debts and Other Amounts due MDHHS

By entering into this Agreement, the Contractor agrees to honor all prior repayment agreements established by MDHHS with the Contractor or Contractor's predecessors. If the Contractor has an outstanding debt due to MDHHS but does not have a repayment agreement, the Contractor agrees to

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make monthly payments to MDHHS at an amount not less than 5% of any outstanding balance and to begin on the date this Agreement is executed.

If the Contractor fails to honor prior repayment agreements, or the Contractor fails to begin repayment on an obligation due MDHHS that is not subject to a repayment agreement, MDHHS will initiate the administrative process to reduce payments to the Contractor under this Agreement to recoup the debt. The payment reduction will be made at the amount originally established in the repayment agreement or at an amount not less than 5% of any outstanding balance effective on the date this Agreement is executed.

2.20 Child Protection Law Reporting Requirements

- a. The Contractor shall ensure that all employees who have reasonable cause to suspect child abuse or neglect shall report any suspected abuse or neglect of a child in care to MDHHS for investigation as required by Public Acts of 1975, Act Number 238.
- b. Failure of the Contractor or its employees to report suspected abuse or neglect of a child to MDHHS shall result in an immediate investigation to determine the appropriate corrective action up to and including termination of the contract.
- c. Failure of the Contractor or its employees to report suspected child abuse or neglect two or more times within a one-year period shall result in a review of the contract agency's violations by a designated Administrative Review Team, which shall include the Director of CSA and the Director of DCWL or its successor agency, that shall consider mitigating and aggravating circumstances to determine the appropriate corrective action up to and included license revocation and contract termination.

2.21 The Division of Child Welfare Licensing (DCWL)

DCWL shall be responsible for review of the Contractor's compliance with the Agreement and any court orders, via an Annual Compliance Review (ACR) and Special Investigations. DCWL may review, analyze and comment on all activities covered within the terms of the Agreement or court order. If the ACR or Special Investigation reveals that the Contractor has not complied with the requirements of this Agreement or court order, the following procedures shall be implemented:

- a. DCWL shall notify the Contractor of the Agreement or court noncompliance. This notification shall occur verbally during an exit conference, and be followed with a written report of the findings. The Contractor may request a meeting to discuss and examine the identified Agreement or court noncompliance.

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- b. Following the identification of the Agreement or court noncompliance, DCWL will request the Contractor submit a Corrective Action Plans (CAP) to DCWL within 15 days of receiving the written report of findings.
- c. After the Contractor's CAP has been reviewed and approved by DCWL, the Contractor's compliance with the CAP shall be reviewed in accordance with time frames established by DCWL in the written notification of acceptance of the CAP.
- d. Based on the severity or repeated nature of cited violations, a recommendation may be made by DCWL at any time to place a moratorium on new placements with the contractor or to cancel the contract. If either recommendation is made, a meeting will be convened with the director of the contracted agency, the division director of DCWL and the CSA director or designee to provide the contractor with the opportunity to provide documented information on why the moratorium or cancellation of the contract should not occur.
- e. If a moratorium on new placements is put into place, it shall be for a minimum of 90 days to allow the contractor to remedy cited violations and comply with any agreed on CAP. If the cited violations are not corrected during the period of the moratorium or additional serious violations are cited, consideration shall be given to cancellation of the agency's contract. Final decisions regarding the cancellation of a contract shall be made by the CSA director.

2.22 Corrective Action Requirements

If a program review by MDHHS reveals a lack of compliance with the requirements of this Agreement, the Contractor shall:

- a. Meet with MDHHS to discuss the noncompliance.
- b. Prepare a corrective action plan within 30 days of receiving MDHHS' written findings.
- c. Achieve compliance within 60 days of receipt of MDHHS' approval of the corrective action plan (unless other time frames are agreed to in writing by MDHHS) or MDHHS may terminate this Agreement, subject to the standard contract terms.

3. MDHHS RESPONSIBILITIES

3.1. Payments

MDHHS shall open and process payment within 30 days of placement, with payment authorization effective the date of the child's placement with the Contractor.

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- a. The entire rate paid to the Contractor for board and care, clothing and allowance shall be paid by the Contractor to the foster families providing the family foster care.
- b. The Contractor's administrative rate(s) for services provided under this Agreement shall be:

Bridges Provider Number 6356725
 MiSACWIS Provider Number 10400303

<u>Service Code</u>	<u>Per Diem Rate</u>	<u>Effective Date</u>
780	\$40.00	06/01/15
782	\$28.00	10/01/13
TR	\$37.00	10/01/13
0838	*\$2.50	10/01/13

*The above rate is only to be used for American Indian Children

If the Contractor has an adoption agreement with MDHHS and fails to register a child on the Michigan Adoption Resource Exchange (MARE) as required in that agreement, the Contractor's Foster Care administrative rate for that child shall be reduced by 20% until the child is registered.

The contractor will receive reimbursement subject to appropriations for relative licensure as outlined in that years State fiscal appropriation.

If a Contractor does not submit the financial cost reports as described in Section 2., CONTRACTOR RESPONSIBILITIES, the per diem administrative rate shall be reduced by \$3.00 until contractor becomes compliant with the reporting requirements.

- c. The Contractor shall be paid for family foster care services specified in this Agreement at a board and care rate established by MDHHS. A determination of care rate may be established by MDHHS in accordance with the FOM when extraordinary care or expense is required of the foster parent. Special rates must have the approval of the Director of MDHHS' local office responsible for the supervision of the child for whom foster care is provided.
- d. Payment for additional service costs not included in the per diem rate may be authorized in accordance with the FOM.

When the Contractor's financial records reveal that a payment for a child has not been provided by MDHHS within 90 days of their acceptance of the child for case management services, the Contractor will contact the MDHHS County Director in writing seeking payment resolution. The Contractor shall

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apprise MDHHS of any concerns over a payment amount that cannot be reconciled at the staff level within 90 days.

- e. Upon placement, MDHHS shall ensure that the child(ren) has adequate clothing as defined by the Clothing Inventory Checklist (DHS-3377) or shall reimburse the Contractor up to the approved limit allowed for clothing.
- f. Inability of MDHHS to comply with the federal reporting requirements of AFCARS due to failure of the Contractor to fulfill AFCARS related reporting requirements shall result in a three percent reduction in the Contractor's administrative rate for the six month period subsequent to the due date of the AFCARS report to the Federal government.
- g. Foster Care Training Payments

Payments will be made for eligible training which commenced after January 1, 2012.

A payment will be made to the Contractor for each staff that completes training and passes competency tests as required in the Implementation, Sustainability and Exit Plan according to the following schedule:

1) Completion of the Child Welfare Caseworker Training

Payment will be \$6,000.00 total, calculated on a per diem basis, for completion of CWTI-PSI that includes a minimum of 9 weeks of competency-based classroom and field training if the caseworker passes the competency evaluation within 16 weeks of hire.

2) Completion of the Child Welfare Certificate (CWC) Training

Payment will be \$3,000.00 total, calculated on a per diem basis, for completion of the CWTI-CWC that includes a minimum of five weeks of competency-based classroom and field training if the caseworker certified certificate holder passes the competency evaluation.

3) Completion of the Child Welfare Supervisor Training

Payment will be \$1,500.00 total, calculated on a per diem basis, for completion of the Supervisor Training that includes a minimum of one week within 90 days of hire/promotion, if the supervisor passes the competency evaluation.

4) Completion of the Child Welfare Transfer Training

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The two week foster care PSTT shall be completed within six months of hire.

Payment will be \$2,800.00 for the completion of the foster care PSTT training. The training is the same as the Foster Care Core Training for Foster Care caseworkers. If a supervisor has completed this training as a caseworker since April 1, 2006, the training does not need to be repeated.

h. For all Contractor staff hired on or after May 1, 1998 attending required CWTI-PSI, PSTT, and supervisor training, MDHHS-CWTI shall reimburse the Contractor at the Contractor's normal rate of reimbursement or State rates, whichever is less for staff trainee expenditures incurred as part of CWTI attendance. MDHHS-CWTI does not cover travel reimbursement for in-service training. Travel reimbursement shall be limited to lodging, mileage and parking with the following conditions:

- 1) For each trainee who attends the training session, MDHHS shall reimburse the Contractor up to five nights lodging per week if lodging expense is incurred. If training continues for two consecutive weeks or longer and the cost of lodging is less than the mileage cost to travel to and from the Contractor's facility over the intervening weekend, the Contractor may request the director of Office of Workforce Development and Training in advance for a travel exception for weekend lodging.
- 2) For each mile of travel to a CWTI training session closest to the Contractor's site, MDHHS shall reimburse the Contractor for mileage to and from the training and the trainee's assigned work location or home, whichever is closer. The applicable State rate for mileage shall be the lesser of the Contractor's prevailing rate or the State's standard rate.
- 3) Parking shall be reimbursed at actual cost, documented with a receipt.
- 4) MDHHS shall not reimburse travel costs for Contractor staff who attend more than one session (i.e., are required to repeat attendance due to absence or failure to successfully complete a session) without prior approval from DCWL. Refer to the CWTI web site for current reimbursement information for CWTI training at <http://www.michiganchildwelfaretraining.com/Training/Travel.aspx>

Classroom Training Payment

- 1) The Contractor must submit a signed and dated agency letterhead memo attached to the DHS-1582 Payment Voucher that includes the following information:

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- a) Worker name
 - b) Training, type, i.e. PSST, PSI etc.
 - c) Training dates (time span in training)
 - d) Amount of reimbursement requested.
 - e) A copy of the transcript reflecting the completion of the training for each foster care worker and supervisor covered by the payment voucher. This is required before accounting will issue payment.
 - f) Memo signed by senior management; not the individual who attended training.
- 2) The information must be submitted electronically to: MDHHS-FederalComplianceDivision@michigan.gov. The subject line shall read: Training Payment.

Training Travel Reimbursement

- 1) The Contractor must submit:
- a) Certification letter on agency letterhead signed and dated by senior management to include:
 - Agency Federal ID Number
 - Exact trainee name as registered in OmniTrack Plus (formerly JJOLT)
 - Exact class name
 - Beginning and ending travel dates
 - Amount of reimbursement requested
 - b) DHS-1582 Payment Voucher.
 - c) DHS-1582 TV-NSE for each trainee.
 - d) MapQuest (or equivalent) printouts for each travel route.
 - e) All original receipts.
 - f) Transcripts showing the training completed.
- 2) Please submit the above information to:

Ingham County MDHHS/OWDT
Attention: Travel Reimbursement
PO Box 30088
5303 S. Cedar Street
Lansing, MI 48911

- i. The Contractor shall be paid for Trial Reunifications services specified in the agreement not to exceed 180 days from the child's placement in the parental home.
 - 1) The Contractor must submit the following on a monthly basis:
 - a) A completed DHS-1582 CS Payment Voucher

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- b) A case listing that contains the following child identifying information:
 - Placing Agency Provider ID
 - Agency Name
 - MiSACWIS log ID if known
 - Child last name
 - Child first name
 - Recipient ID
 - Foster Care case number
 - Billing start date
 - Billing end date
 - Number of days to pay
 - American Indian Y/N
 - Date of court order commencing the Trial Reunification
 - Date the foster care case was dismissed by the court and/or
 - Date the child reentered a foster care placement

2) The information must be submitted electronically to: MDHHS-trialreunificationpayments@michigan.gov.

j. The costs of all services provided under this Agreement are included in the above rate(s) unless otherwise noted in this Agreement.

3.2. Performance Evaluation and Monitoring

The services provided by the Contractor under this Agreement shall be evaluated and assessed at least annually by MDHHS on the basis of the criteria outlined in Section 2.11.

MDHHS shall perform contract monitoring through activities such as:

- a. Auditing expenditure reports.
- b. Conducting on-site monitoring.
- c. Reviewing and analyzing reports.

Article VI

In Section III GENERAL PROVISIONS – PRIVATE, NON-PROFIT AND PRIVATE PROPRIETARY, shall be renamed Section 4 and C., Subcontracts and W., Indemnification, shall be deleted and replaced with:

C. Subcontracts

Contractor may not delegate any of its obligations or subcontract under this Agreement without the prior written approval of MDHHS. Contractor must

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notify MDHHS prior to the proposed delegation, and provide MDHHS any information it requests to determine whether the delegation is in its best interest. If approved, Contractor must:

- a. Be the sole point of contact regarding all contractual matters, including payment and charges for all Agreement Activities;
- b. Make all payments to the subcontractor; and
- c. Incorporate the terms and conditions contained in this Agreement in any subcontract with a subcontractor.

Contractor remains responsible for the completion of the Agreement Activities, compliance with the terms of this Agreement, and the acts and omissions of the subcontractor. MDHHS, in its sole discretion, may require the replacement of any subcontractor.

W. General Indemnification

Contractor must defend, indemnify and hold the State, its departments, divisions, agencies, offices, commissions, officers, and employees harmless, without limitation, from and against any and all actions, claims, losses, liabilities, damages, costs, attorney fees, and expenses (including those required to establish the right to indemnification), arising out of or relating to:

- a. Any breach by Contractor (or any of Contractor's employees, agents, subcontractors, or by anyone else for whose acts any of them may be liable) of any of the promises, agreements, representations, warranties, or insurance requirements contained in this Agreement;
- b. Any infringement, misappropriation, or other violation of any intellectual property right or other right of any third party;
- c. Any bodily injury, death, or damage to real or tangible personal property occurring wholly or in part due to action or inaction by Contractor (or any of Contractor's employees, agents, subcontractors, or by anyone else for whose acts any of them may be liable); and
- d. Any acts or omissions of Contractor (or any of Contractor's employees, agents, subcontractors, or by anyone else for whose acts any of them may be liable).

MDHHS will notify Contractor in writing if indemnification is sought; however, failure to do so will not relieve Contractor, except to the extent that Contractor is materially prejudiced. Contractor must, to the satisfaction of MDHHS, demonstrate its financial ability to carry out these obligations.

MDHHS is entitled to: (i) regular updates on proceeding status; (ii) participate in the defense of the proceeding; (iii) employ its own counsel; and to (iv) retain control of the defense if MDHHS deems necessary. Contractor will not, without

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MDHHS's written consent (not to be unreasonably withheld), settle, compromise, or consent to the entry of any judgment in or otherwise seek to terminate any claim, action, or proceeding. To the extent that any State employee, official, or law may be involved or challenged, MDHHS may, at its own expense, control the defense of that portion of the claim.

Any litigation activity on behalf of the State, or any of its subdivisions under this Section, must be coordinated with the Department of Attorney General. An attorney designated to represent MDHHS may not do so until approved by the Michigan Attorney General and appointed as a Special Assistant Attorney General.