UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

ALICIA M. PEDREIRA, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 3:00-CV-210-S
	)	
SUNRISE CHILDREN'S SERVICES, INC., F/K/A KENTUCKY BAPTIST HOMES FOR CHILDREN, INC., *et al.*,	)	**Electronically Filed**
	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN RESPONSE TO DEFENDANTS' ARGUMENTS THAT IMPLEMENTATION OF THE AMENDED SETTLEMENT AGREEMENT REQUIRES MODIFICATION OF EXISTING KENTUCKY REGULATIONS

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April 17, 2017

In accordance with the Court's order of March 17, 2017, Plaintiffs Alicia M. Pedreira, Paul Simmons, Johanna W.H. Van Wijk-Bos, and Elwood Sturtevant (collectively, "Plaintiffs") respectfully submit this response to certain arguments made by Sunrise Children's Services, Inc. ("Sunrise") and the Commonwealth Defendants regarding "the legality of the implementation of the Settlement Agreement, as amended, without modification of existing regulations." Mem. Op. & Order at 12 (DN 579) (capitalization omitted).

The Commonwealth Defendants previously told this Court and the Sixth Circuit that they can implement the terms of the Settlement Agreement without enacting any new regulations. This was and is correct. Existing Kentucky law already confers ample authority for the Commonwealth Defendants to implement every term of the Settlement. In fact, to our knowledge, the Commonwealth Defendants have been implementing the Settlement's terms concerning their relationships with child-caring facilities and child-placing agencies, without any legal impediment, since mid-2014. The Court should reject Sunrise's and the Commonwealth Defendants' last-ditch effort to scuttle the Settlement Agreement by arguing—contrary to the Commonwealth Defendants' own longstanding position and course of conduct—that implementation of the Settlement without new regulations is somehow unlawful. It is not.

RELEVANT BACKGROUND

The Court is well-versed in the history of this case. It nevertheless bears emphasis that the Commonwealth Defendants, for years, consistently took the position that they can lawfully implement the terms of the Settlement Agreement without enacting any new regulations. We describe the pertinent history of this issue below solely to demonstrate that the Commonwealth Defendants' current position reflects a transparent and politically driven u-turn.

The Settlement Agreement, which Plaintiffs and the Commonwealth Defendants executed on March 12, 2013, requires the Commonwealth Defendants to make various

modifications to their procedures for providing care to children through private providers. DN 512-2 § 2. The Commonwealth Defendants implemented the required modifications, including agreed-upon changes to the Commonwealth Defendants' PCC Agreements with private providers, in mid-2014. To our knowledge, the Commonwealth Defendants have complied with the terms of the Settlement Agreement concerning their relationships with child-caring facilities and child-placing agencies since then—*i.e.*, for nearly three years.

In September 2013, Plaintiffs moved to voluntarily dismiss this action with prejudice pursuant to the Settlement. DN 512. Sunrise opposed the motion, arguing, among other things, that the Settlement "may be effectuated only by promulgating administrative regulations through the notice-and-comment procedures mandated by statute." DN 514 at 20. According to Sunrise, the Settlement itself "contemplate[d]" that new regulations "would be necessary to implement some or all of the policy or procedure reforms mandated in that document." *Id.* at 30.

In response, the Commonwealth Defendants filed a brief explaining, among other things, that they can lawfully implement the terms of the Settlement without enacting new regulations:

> Upon executing the Settlement Agreement, the Commonwealth determined that ***neither the Settlement Agreement nor any law required it to promulgate regulations to [e]ffect the changes mandated by the settlement***, and that the implementation of any term of the Settlement Agreement was not conditioned upon the successful promulgation of any regulation. This position was conveyed to Plaintiffs, and Plaintiffs agreed and continue to agree.

DN 521 at 13 (emphasis added). The Commonwealth Defendants' brief explained in detail, with citations to Kentucky statutes and regulations, that "***the Commonwealth is not required to enact additional regulations to implement the terms adopted by the settlement*** because there are already existing statutes and regulations in place which encompass the terms of the settlement." *Id.* at 14 (emphasis added). The Commonwealth Defendants further stated that "[t]he new provisions implemented through the modified PCC agreement do not 'modify or expand' the

Commonwealth's already existing law or policy, which would require promulgation of regulations." *Id.* at 17 (quoting KRS § 13A.130). Rather, "[t]he Settlement Agreement merely sets forth more specific mechanisms to ensure that these already existing standards are being met by the child caring facilities and child placing agencies . . . ." *Id.* The Commonwealth Defendants concluded: "[N]othing in the Settlement Agreement . . . violates the law." *Id.* at 18.

On June 30, 2014, this Court granted Plaintiffs' motion to voluntarily dismiss. DN 527. Key here, the Court expressly considered and rejected Sunrise's argument that "the Commonwealth must engage in notice and rulemaking prior to enacting these changes." *Id.* at 7 n.6. As the Court explained, "[***t***]***he Commonwealth has identified regulations already in place which render additional administrative procedures unnecessary***." *Id.* (emphasis added); *see also id.* at 6 (stating that the Settlement "is legal" and "no[t] contrary to the public interest").

Sunrise appealed. On appeal, Sunrise did not argue that Kentucky law required enactment of any regulations to implement the Settlement. Rather, Sunrise argued, in just one paragraph, that the Settlement itself contemplated new regulations, that the Commonwealth Defendants had not timely enacted any such regulations, and that these circumstances gave Plaintiffs the right to void the Settlement and thereby restart this litigation at their discretion. Brief of Appellant at 32 (DN 30) (App. No. 14-5879, 6th Cir.); *see also* Reply Brief of Appellant at 25 n.10 (DN 37) (App. No. 14-5879, 6th Cir.). In response, Plaintiffs and the Commonwealth Defendants filed a joint brief explaining that they "long ago agreed that ***no new regulations are necessary***." Brief of Appellees at 32 (DN 36) (App. No. 14-5879, 6th Cir.) (emphasis added).

The Sixth Circuit vacated and remanded for this Court to decide in a clear holding whether the Settlement Agreement meets the standards for court approval of a consent decree. *Pedreira v. Sunrise Children's Servs., Inc.*, 802 F.3d 865, 871-72 (6th Cir. 2015). The Sixth

Circuit "flag[ged] one concern" that the Settlement "singles out Sunrise by name for special monitoring," *id.* at 872, but made no mention of any need for new regulations.

On November 18, 2015, Plaintiffs and the Commonwealth Defendants amended the Settlement to eliminate all Sunrise-specific monitoring provisions in response to the Sixth Circuit's one concern. DN 552-2 § 1. Additionally, in light of Sunrise's prior arguments, the Amendment also "clarif[ied] that no new or modified administrative regulations need to be enacted to comply with the Settlement Agreement." *Id.* at p.1. It states: "No regulatory changes needed. Notwithstanding any references in the Settlement Agreement to possible enactment of new or modified administrative regulations, [Plaintiffs and the Commonwealth Defendants] agree that ***the Commonwealth Defendants do not need to enact or modify any administrative regulations to comply with the Settlement Agreement***." *Id.* § 3 (emphasis added).

In June 2016, Plaintiffs moved for approval of the amended Settlement Agreement as a consent decree and voluntary dismissal with prejudice. DN 552. Due to the election of the new Governor, the Commonwealth Defendants reversed course and joined Sunrise in opposing the Settlement. DNs 557, 560. But significantly, neither Sunrise nor the Commonwealth Defendants argued at that time that new regulations are necessary to implement the Settlement.

On December 22, 2016, this Court rejected Sunrise's and the Commonwealth Defendants' arguments urging the Court to deny approval of the amended Settlement, finding that approval must be resolved through notice to affected parties and a fairness hearing. DN 572 at 5-10.

Sunrise moved for reconsideration, asserting that the Court's decision "contains material errors and omissions." DN 573-1. In its reply brief, for the first time on remand, Sunrise set forth specific arguments contending that numerous particular provisions of the amended

Settlement supposedly cannot be implemented absent new regulations. DN 578 at 4-11. The Commonwealth Defendants likewise asserted, for the first time ever in this litigation, that "Sunrise is absolutely correct on this important point." DN 577 at 2.

On March 17, 2017, the Court denied reconsideration "in all respects . . . with the exception of the question as to the legality of the implementation of the settlement, as amended, without modification of existing regulations." DN 579 at 11-12. Because Sunrise and the Commonwealth Defendants did not raise this issue until after Plaintiffs filed their opposition to reconsideration, the Court directed Plaintiffs to file a brief addressing the issue. *Id.* at 12.

ARGUMENT

I. THE COMMONWEALTH DEFENDANTS CAN LAWFULLY IMPLEMENT THE AMENDED SETTLEMENT AGREEMENT WITHOUT ENACTING ANY NEW REGULATIONS

Sunrise and the Commonwealth Defendants argue that new regulations are necessary to implement certain terms of the amended Settlement Agreement. *See* DN 578 at 4-11; DN 577 at 2-4. That view is both wrong and directly contrary to the Commonwealth Defendants' longstanding prior position and practice. As the Commonwealth Defendants previously told this Court and the Sixth Circuit, they can implement the terms of the Settlement without enacting any new regulations. This Court likewise concluded, correctly, that "additional administrative procedures [are] unnecessary" in light of "regulations already in place." DN 527 at 12 n.6. Consistently with this conclusion, the Commonwealth Defendants have been implementing the Settlement, without legal impediment, since mid-2014. They did not violate the law in doing so.

As shown below, each term of the Settlement Agreement is encompassed by—and fully consistent with—existing provisions of Kentucky law. The Settlement does not "modify" or "expand" any existing statute or regulation. KRS § 13A.130(1). In fact, as the Commonwealth Defendants previously explained, "[t]he Settlement Agreement merely sets forth more specific

mechanisms to ensure that these already existing standards are being met by the child caring facilities and child placing agencies with whom the Cabinet contracts." DN 521 at 17.

Sunrise's and the Commonwealth Defendants' current view seems to be that formal notice-and-comment rulemaking procedures are necessary for virtually any action the Commonwealth Defendants wish to take, regardless of how minute or obvious. But state law is to the contrary. *See Seymour v. Colebank*, 179 S.W.3d 886, 890 (Ky. Ct. App. 2005) (holding that agency action "fully consistent" with existing laws did not require a new regulation); *Flaget Fuels, Inc. v. Com., Envtl. & Pub. Prot. Cabinet*, No. 2004-CA-002364, 2005 WL 2574148, at *7 (Ky. Ct. App. Oct. 14, 2005) (holding that agency did not need to enact a new regulation to consider certain "factors" in the agency's exercise of "discretion"). The notion that regulations are necessary to specify every detail of a state agencies policy and procedures would impose enormous administrative burdens on the state government that are not called for by state law.[1]

Accordingly, each of Sunrise's and the Commonwealth Defendants' arguments fails:

First, Sunrise argues that the Commonwealth Defendants must enact new regulations to "modify the PCC agreement to prohibit childcare facilities from discriminating on the basis of religion." DN 578 at 8 (discussing Settlement Agr. § 2(f)). But existing regulations and statutes already prohibit such discrimination. The defendant Cabinet of Health and Family Services

[1] Given the governing philosophy of the current Bevin administration, the Commonwealth Defendants' newfound enthusiasm for extensive and detailed regulations governing day-to-day minutiae should be taken with a grain of salt. As part of his "Red Tape Reduction Initiative," Governor Bevin has roundly criticized the number, detail, and complexity of existing Kentucky regulations. *See* Video of Gov. Bevin, *at* http://www.redtapereduction.com. In fact, he specifically criticized the defendant Cabinet for Health and Family Services for "hav[ing] as many as 18,000 different regulations affecting them and restricting what they do. Some good, but 18,000? Really?" *Id.* The Governor called on all Kentucky citizens to submit "ideas of how we can consolidate, eliminate, or otherwise update some of these regulations. . . . Help us simplify this." *Id.* The Commonwealth Defendants' current position would complicate, rather than simplify, the body of existing administrative regulations.

("CHFS") must comply with a host of "federal and state laws prohibiting discrimination . . . [i]n a cabinet program," 920 KAR § 1:090(2)(1), including a Kentucky statute that requires CHFS "[t]o safeguard all individuals within the state from ***discrimination*** because of familial status, race, color, ***religion***," and other characteristics. KRS § 344.020(b) (emphases added). Similarly, facilities governed by the defendant Justice and Public Safety Cabinet must "adopt and enforce written policies and procedures which . . . [p]rovide each juvenile freedom from ***discrimination*** based on race, ***religion***," and other characteristics. 505 KAR § 2:090(1)(1) (emphases added). Beyond that, an existing CHFS regulation requires that child-caring facilities' policy "demonstrate consideration for and sensitivity to . . . [t]he racial, cultural, ethnic, and ***religious background*** of a child in care." 922 KAR § 1:300(6)(7)(a)(1) (emphasis added). Discriminating against a child on the basis of his or her religion demonstrates an utter lack of "consideration for and sensitivity to" the child's "religious background." *Id.*

That is not all. Consistently with these extensive existing statutes and regulations, for more than a decade, CHFS has had an official policy—applicable to both the Cabinet itself and all "[v]endors, agencies and organizations providing services to the Cabinet"—that prohibits "***discriminat***[***ion***] against any person on the basis of political beliefs, race, color, national origin, ***religion***, age, mental or physical disability or sex." CHFS, *Civil Rights* 2 (revised Oct. 2007), goo.gl/zYBh9t (emphases added). Put simply, the Commonwealth Defendants do not need any new regulation to prohibit discrimination on the basis of religion. In fact, the very notion that state-funded religious discrimination against children in the Commonwealth's custody could be a proper subject of debate through notice-and-comment procedures is offensive and absurd.

Second, Sunrise argues that the Commonwealth Defendants must enact new regulations to ask children about their religious affiliation and practices "upon intake." DN 578 at 7

(discussing Settlement Agr. § 2(c)); *see also* DN 514 at 31-32 (Sunrise arguing same in 2013). That could not be more wrong. Existing CHFS regulations already require both CHFS staff and child-caring facilities to obtain information about a child's religion during the intake process. Most notably, a CHFS regulation requires CHFS staff to obtain a child's "[r]eligious background and practices" when completing an intake form called the DPP-886. 922 KAR § 1:360(2)(2)(k). The settlement term about which Sunrise now complains requires a CHFS case worker to collect religious information on this form "or a similar document." Settlement Agr. § 2(c). Another regulation requires, as a part of creating a treatment plan for a child within 21 days after intake, a "[s]ocial assessment that includes . . . . [r]eligion." 922 KAR § 1:300(7)(3)(a)(5). And yet another regulation requires child-caring facilities to collect certain information about a child "during intake," including a "[s]ocial history." *Id.* § 1:300(7)(1)(f)(4). A child's "social history" encompasses the child's religious affiliation and practices. *See* DN 521 at 15 (Commonwealth Defendants explaining that "social history" includes religion); 922 KAR § 1:310(19)(4)(b) (CHFS regulation defining "social history," in a related context, to include "[r]eligion or faith").

Third, Sunrise argues that the Commonwealth Defendants must enact new regulations to advise children and guardians, "before placement," of the terms of the modified PCC Agreement and the ability to raise concerns through the CHFS Ombudsman and the Service Appeal Process. DN 578 at 6-7 (discussing Settlement Agr. § 2(b)(i)). Wrong again. An existing CHFS regulation already provides that "[b]efore admission, the child and custodian shall be informed in writing of their rights and the child-caring facility's responsibilities, including policy pertaining to services offered to the child." 922 KAR § 1:300(7)(1)(h). It further states that "[a] child shall be informed upon admission of the right to file a grievance." *Id.* § 1:300(7)(1)(i). As the Commonwealth Defendants previously explained, "the provisions in the Settlement Agreement

providing that children and their legal guardians shall be advised of their rights and of the grievance process is nothing new." DN 521 at 17. Sunrise's argument that the disclosures should not be provided to children because a child "cannot serve as a possible appellant" (DN 578 at 7) ignores the existing requirement to inform children of "the right to file a grievance." 922 KAR § 1:300(7)(1)(i)). It also ignores another CHFS regulation that permits any CHFS client to file a discrimination complaint with any "federal, state, or local agency with jurisdiction over the cabinet program involved in the alleged discrimination." 920 KAR § 1:090(9)(1)(g). In any event, nothing in the Settlement Agreement purports to give children any procedural rights that are available only to parents, guardians, or other adults; the Settlement simply requires that children and parents be informed of what rights are available to each of them. *See* Settlement Agr. § 2(b)(i).

Sunrise's related contention that the Commonwealth Defendants cannot require child-caring facilities to post these same disclosures on the wall is equally meritless. DN 578 at 7 (discussing Settlement Agr. § 2(b)(ii)). Posting these disclosures is consistent with both the regulation that requires that "[a] child shall be informed upon admission of the right to file a grievance" concerning protection of "their rights and the child-caring facility's responsibilities," 922 KAR § 1:300(7)(1)(h)-(i), and the substantive regulations discussed above and below that protect children's religious freedom. The regulation that Sunrise cites, entitled "Physical Plant," is wholly inapt, as it addresses issues like "construction," "sanitation," "building maintenance," and the "climate control system." 922 KAR § 1:300(4). Kentucky agencies will be paralyzed by red tape if they are required to enact regulations to authorize actions as specific as displaying posters informing children, "YOU HAVE THE RIGHT TO BE FREE FROM RELIGIOUS PRESSURE OR COERCION IN THE HOME OR FACILITY WHERE YOU ARE PLACED."

Ex. A (poster pamphlet agreed to by Plaintiffs and Commonwealth Defendants; attached). Indeed, even before the Settlement Agreement, the prior PCC agreements required child-caring facilities to "post in conspicuous places . . . notices setting forth the provisions of [a] non-discrimination clause" related to employment. Ex. B (modified PCC Agreement agreed to by Plaintiffs and the Commonwealth Defendants; attached).

Fourth, Sunrise argues that the Commonwealth Defendants must enact new regulations to consider a child-caring facility's or foster home's religious affiliation during the placement process. DN 578 at 6 (discussing Settlement Agr. §§ 2(a)(i), 2(a)(ii)). That, too, is incorrect. An existing Kentucky statute directs CHFS to "determine the *appropriate* type of placement according to *the child's circumstances and needs* . . . ." KRS § 199.801 (emphases added). Another statute provides that, upon the issuance of a temporary custody order, "[t]he child may also be placed in a facility or program operated or approved by [CHFS], including a foster home, or any other *appropriate* available placement" that is the least restrictive. KRS § 620.090(2) (emphasis added). In accordance with these statutes, an existing CHFS regulation already provides that placement for a child removed from his or her home "shall be . . . selected according to the least restrictive *appropriate* placement available." 922 KAR § 1:140(3)(3)(a). And another statute provides that placement of removed children should "consider[] the wishes of the parent or other person exercising custodial control or supervision." KRS § 620.140(1)(c).

As the Commonwealth Defendants previously explained, "these statutes and regulations clearly leave to the Cabinet's discretion the factors to consider in determining the *appropriateness* of a child's placement." DN 521 at 14 (emphasis by Commonwealth Defendants). In fact, even before the Settlement Agreement, "[t]he Commonwealth already made placement decisions based upon 'promoting continued contact with the child's family,

friends, community, and other primary connections,' which could reasonably include religious connections." *Id.* (citing CHFS Placement Matrix) (bracketing omitted). In sum, "[t]he Commonwealth was not previously ham-strung in making determinations of 'appropriateness' beyond certain limiting factors, and it is certainly entitled, without promulgating a regulation, to include a child's religion as a component of 'appropriateness' at its discretion." *Id.*

Fifth, Sunrise argues that the Commonwealth Defendants must enact new regulations to require the creation of a "written policy requiring the use of best efforts to allow children to attend different church services based on the child's preferences or a comparable non-religious alternative," and the documentation of "religious services and activities (or non-religious alternatives)" that children attend. DN 578 at 7, 8 (discussing Settlement Agr. §§ 2(d)(ii), 2(d)(iii)). Wrong yet again. An existing CHFS regulation, entitled "Religion, culture, and ethnic origin," already provides: "With the exception of a religious practice that is destructive or places a child in physical danger, an opportunity shall be provided for a child to: [1] [p]ractice the religious belief and faith of the child's individual or family preference; and [2] [p]articipate in a religious activity without coercion." 922 KAR § 1:300(6)(7)(b). It also states that "[***f***]***acility policy*** shall demonstrate consideration for and sensitivity to: [1] [t]he racial, cultural, ethnic, and ***religious background*** of a child in care; and [2] [a]vailability of activities appropriate to the child's cultural or ethnic origin." *Id.* § 1:300(6)(7)(a) (emphases added). As the Commonwealth Defendants previously explained, "clearly the existing regulations already establish that providers must reasonably accommodate and consider each child's religious affiliation, and that each child must be provided with opportunities to participate freely in religious activities without coercion. The Settlement Agreement merely specifies, in further detail, how the providers must accomplish the already-existing requirements." DN 521 at 16-17.

For similar reasons, Sunrise is wrong that new regulations are necessary to prohibit child-caring facilities from "providing religious articles, symbols, texts, and materials" to the children in their care, unless requested, and to direct child-caring agencies to inform foster parents about this restriction. DN 578 at 8 (discussing Settlement Agr. §§ 2(e)(i)-(ii)). Forcibly providing religious materials to a child, without the child's request or consent, constitutes impermissible "coercion," and does not "demonstrate consideration for and sensitivity to" the child's "religious background." 922 KAR §§ 1:300(6)(7)(a), (b). And if a foster home were to do so, that would conflict with a CHFS regulation that requires foster homes to provide "[o]pportunities for development consistent with the child's religious, ethnic, and cultural heritage." *Id.* § 1:310(12)(1)(h). The Settlement Agreement merely ensures that child-caring facilities and child-placing agencies meet the requirements of the existing CHFS regulations.

Sixth, Sunrise argues that the Commonwealth Defendants must enact new regulations to require that child-caring facilities provide training materials to employees concerning the religious rights of children in their care. DN 578 at 9 (discussing Settlement Agr. § 2(g)). Not so. An existing CHFS regulation already requires child-caring facilities to provide 40 hours of training to full-time staff and 24 hours to part-time staff on, among other things, "the tasks to be performed" and "[p]rinciple[s] and practice[s] of child residential care." 922 KAR § 1:300(3)(6)(o). Sunrise argues that this regulation does not "require any sort of training materials," DN 578 at 9, but a regulation requiring employee training surely authorizes the creation and dissemination of written training materials to the employees. No separate regulation is necessary to confirm that training employees includes giving them training materials.

Finally, Sunrise argues that the Commonwealth Defendants must enact new regulations to conduct surveys of children's religious experiences at child-caring facilities, including during

annual "home visits" by Commonwealth case workers and during a child's last week in a child-caring facility. DN 578 at 9 (discussing Settlement Agr. § 2(h)-(i)). This provision, too, is consistent with existing laws. A Kentucky statute provides that "[e]ach licensed facility or agency shall be visited and inspected at least one (1) time each year by a person authorized by the cabinet" and that "[a] complete report of the visit and inspection shall be filed with the cabinet." KRS § 199.640(3). A CHFS regulation entitled "Inspection" provides that "[a] human services surveyor or other representative of [CHFS] shall have access to the child-caring facility or child-placing agency at any time." 922 KAR § 1:305(6)(1). And another CHFS regulation provides that, after placing a child with a child-caring agency, a CHFS staff member must:

> (3) Conduct *a utilization review for a child*:
>
> > (a) Six (6) months from the initial placement or reassignment and placement in a child-caring facility and child-placing agency; and
> >
> > (b)1. Every three (3) months thereafter if the child is in a private child care residential placement; . . . .
>
> (4) Reassign a child's level of care after the previous level has expired;
>
> (5) *Monitor* each child-caring facility and child-placing agency;
>
> (6) *Maintain a confidential information system for each child* served that shall include:
>
> > (a) Placement history;
> >
> > (b) Level of care assignments;
> >
> > (c) Length of treatment; and
> >
> > (d) Discharge outcomes[.]

922 KAR § 1:360(3) (emphases added). Because making any changes to a child's level of care or placement requires current information about the child's "[r]eligious background and practices" (*id.* § 1:360(2)(2)(k); *see also id.* § 1:300(7)(3)(a)(5)), including questions about

religious issues in interviews with children at child-caring facilities is already called for by the existing regulations.

Indeed, the Commonwealth Defendants have long included interviews with children as part of the inspections authorized by these statutes and regulations. As the Settlement itself reflects, CHFS case workers already conducted semi-annual "home visits" to inquire about children's experiences and documented children's responses in CHFS's "TWIST" database. Settlement Agr. § 2(i). The Settlement merely clarified that, during these home visits, case workers should also ask about the child's religious experiences and document the responses in TWIST. *Id.* Likewise, even before the Settlement, the Commonwealth Defendants for years provided for exit interviews to be conducted with children leaving child-caring facilities or foster homes. DNs 274-3, 274-4. They did not—and still do not—need new regulations to do so.

It is understandable that Sunrise would resist any inquiry into the religious experiences of children in its care. Over the five-year period for which Plaintiffs received exit-interview results through discovery in this litigation, at least 85 children—including children at every Sunrise residential facility and in every foster-care region statewide—complained of religious misconduct. *See id.* By way of example only, children complained that Sunrise "tried to more or less force me to become a Christian"; that children "have to do some type of Bible study . . . or get consequences"; that children were "forced to go to church [or] would be dropped to level 1 and sit in a chair"; that children "got in trouble" or "had sat out in the van" if they refused to attend church services. *Id.* The Commonwealth Defendants do not need new regulations to re-institute such monitoring as a critical check against impermissible religious discrimination, proselytization, and coercion by private providers with whom the Commonwealth contracts.

II. IN ANY EVENT, THE AMENDED SETTLEMENT DOES NOT PROHIBIT THE COMMONWEALTH DEFENDANTS FROM ENACTING NEW REGULATIONS TO IMPLEMENT CERTAIN OF ITS TERMS

For the reasons described above, the Commonwealth Defendants can lawfully implement the terms of the amended Settlement Agreement without enacting any new regulations. Importantly, however, nothing in the amended Settlement prohibits the Commonwealth Defendants from enacting new regulations to implement it, if the Commonwealth Defendants decide to do so as a matter of administrative practice or out of an abundance of caution. Nor is there any colorable argument that there is any legal impediment to the Commonwealth Defendants doing so if they wish—Sunrise's arguments are contentions that the provisions of the Settlement are more specific than the provisions of existing regulations, not that existing regulations prohibit the substantive terms of the Settlement.

The Amendment to the Settlement clarifies that the Agreement itself does not *require* the enactment of any new or modified regulations. *See* DN 552-2 § 3. The Amendment thus avoids imposing any federal-court mandate on Kentucky that Kentucky engage in any particular rule-making. In this manner, the Amendment helps address Sunrise's previous concerns about the risk of excessive federal-court involvement in state administrative processes. *See, e.g.*, DN 514 at 33-36.

CONCLUSION

For the foregoing reasons, the Court should reject Sunrise's and the Commonwealth Defendants' arguments that the Settlement Agreement cannot be lawfully implemented without the enactment of new regulations. And the Court should set a date for a fairness hearing and direct the Commonwealth Defendants in the interim to give notice to affected parties, advising of their opportunity to heard.

Dated: April 17, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2017, I electronically filed this document with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

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