

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

AMERICAN CIVIL LIBERTIES UNION
of MASSACHUSETTS,

Plaintiff,

v.

MIKE LEAVITT, Secretary of U.S. Department
of Health and Human Services, in his official capacity;
WADE HORN, Assistance Secretary for Children and
Families, in his official capacity, and HARRY WILSON,
Associate Commissioner, Administration on Children,
Youth and Families in his official capacity,

Defendants.

Civ. A. No. 05-11000 (JTL)

SETTLEMENT AGREEMENT

I. Definitions

- A. "Defendants" are the Secretary of U.S. Department of Health and Human Services, in his official capacity; Assistant Secretary for Children and Families, in his official capacity; and the Associate Commissioner, Administration on Children, Youth and Families, in his official capacity.
- B. "Department" means the U.S. Department of Health and Human Services.
- C. "Silver Ring Thing" ("SRT") is that organization doing business as Silver Ring Thing currently located at 530 Moon Clinton Road, Moon Twp., Pennsylvania, 15108 or any successors to that entity known to the Defendants.
- D. "Plaintiff" is the American Civil Liberties Union of Massachusetts.

II. Background

- A. On May 16, 2005, Plaintiff filed a complaint in U.S. District Court, District of Massachusetts, alleging that Defendants' funding of Silver Ring Thing ("SRT") violated the Establishment Clause of the First Amendment to the U.S. Constitution.

- B. Under current regulatory requirements of the Department of Health and Human Services, “Organizations that receive direct financial assistance from the Department of Health and Human Services under any Department program may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services funded with direct financial assistance from the Department.” 45 C.F.R. 87.1(c). 69 Fed. Reg. 42586, 42593 (2004). “If an organization conducts [inherently religious] activities, the activities must be offered separately, in time or location, from the programs or services funded with direct financial assistance from the Department” Id.
- C. On August 22, 2005, the Department — through Defendant Harry Wilson, Associate Commissioner, Administration on Children, Youth and Families (“FYSB”) — sent SRT a letter explaining that the Department had reviewed the terms and conditions of the grant and their relation to all applicable federal laws and regulations including, but not limited to, 45 C.F.R. Part 87 (2005). The letter stated in part: “Our review indicates that SRT may not have included adequate safeguards to clearly separate in time or location inherently religious activities from the federally-funded activities. In particular, it appears that the Federal project that is funded under the SRT grant includes both secular and religious components that are not adequately separated. Based on the information received to date, we do not believe that SRT’s actual use of federal funds for its program adequately complies with Federal grant requirements. Accordingly, FYSB is suspending the drawdown of Federal funds until such time as we are confident that the SRT program is in compliance with all relevant federal rules, regulations and policies.” A copy of this document is attached to this agreement as Exhibit 1.
- D. On September 20, 2005, FYSB sent SRT a letter regarding a possible Corrective Action Plan (“CAP”) for SRT. That letter stated in part: “As you know, the Federal government is prohibited from funding ‘inherently religious activities.’ Enclosed with this letter is a listing of safeguards that we believe will provide a general framework for addressing the concerns we have raised with your program. . . . We recommend that SRT consider these safeguards when drafting a CAP, and provide detailed plans for how the SRT specifically plans to make changes to its program.” A copy of that September 20, 2005 letter, with the attached list of “Safeguards Required,” is attached to this agreement at Exhibit 2.
- E. SRT and the Administration for Children and Families (“ACF”) terminated the SRT grant effective January 31, 2006.

III. Terms of Agreement

- A. Defendants agree that, consistent with regulatory requirements in place at the time of this agreement, they will not fund the abstinence education program of SRT as that program was structured and implemented by SRT throughout the term of the FY05 grant.

1. In the event that SRT applies for an abstinence education grant award from Defendants or Defendants fund SRT's abstinence education program during fiscal years 2006 through 2008, and to the extent consistent with then-existing legal requirements administered by the Defendants as to all grantees, Defendants shall undertake the following actions with respect to SRT:
 - a. Defendants shall require SRT to set forth in its grant application a description of the program and activities for which it is seeking federal grant funds. Defendants shall require SRT to state how it plans to spend government funds and to track its spending of government funds.
 - b. Defendants shall ensure that SRT's program, activities, and accounting procedures are consistent with 45 C.F.R. Part 87 (2005), which specifically prohibits the use of federal funds to support inherently religious activities and imposes the requirement that any such activities be conducted separately in time or location from HHS-funded programs or services.

2. In the event that SRT applies for an abstinence education grant award from ACF or ACF funds SRT's abstinence education program during fiscal years 2006 through 2008, and to the extent consistent with then-existing legal requirements administered by the ACF as to all grantees, ACF shall undertake the following actions with respect to SRT.
 - a. ACF shall ensure that SRT's program, activities, and accounting procedures are consistent with the "Safeguards Required" set forth in the three-page attachment to the September 20, 2005 letter from the FYSB to SRT. A copy of that September 20, 2005 letter, with the attached list of "Safeguards Required," is attached to this agreement at Exhibit 2.
 - b. ACF shall require SRT to sign a certification and grant assurance that it will comply with 45 C.F.R. Part 87 (2005), which specifically prohibits the use of federal funds to support inherently religious activities and imposes the requirement that any such activities be conducted separately in time or location from HHS-funded programs or services.
 - c. ACF shall conduct quarterly monitoring phone calls of SRT that will include discussing key issues, problems, and corrective actions proposed. As necessary and appropriate, should Defendants obtain information that they believe requires further on-site inspection, ACF will undertake a site visit to SRT to inquire as to whether SRT is complying with the conditions and terms set forth in SRT's grant application, the certification described above in Part III.2.b. and 45 C.F.R. Part 87. After reviewing the results of monitoring phone calls and/or site visits, ACF will specifically raise with SRT any issues concerning SRT's compliance with the conditions and terms described above; create a record of those issues; and take any and all actions that

Defendants determine are necessary to ensure SRT's compliance, including by setting a deadline for corrective action and other actions set forth in 45 C.F.R. Part 74 (2005). After reviewing the results of each such monitoring call, and/or reports of site visits, ACF will summarize its findings as to SRT's compliance in an agency record that is subject to the Freedom of Information Act.

- d. During the duration of this agreement, Defendants further agree to provide the Plaintiff (ACLU of Massachusetts) through its counsel (ACLU Reproductive Freedom Project of the ACLU Foundation) with notice that SRT has received a Congressional earmark, or will otherwise be awarded a grant by ACF for abstinence education no later than 30 days after ACF learns of the Congressional earmark or 30 days after SRT has been notified of a grant award. Defendants further agree to provide Plaintiff through its counsel with notice that SRT has applied for a grant from ACF no later than 30 days after ACF receives the grant application.
- B. This agreement shall remain in effect until September 30, 2008, which is the last day of FY08.
 - C. This agreement does not constitute an admission of the correctness of any position taken by any party in this litigation, or an admission by the Defendants that any of their actions at issue in Plaintiffs' Complaint were contrary to law, statute, regulation, or policy.
 - D. This agreement in no way precludes Plaintiff from filing suit against Defendants or their successors for failure to comply with the Constitution, federal law, or the terms of this agreement.
 - E. The parties shall bear their own attorney fees and costs in this action.
 - F. By separate stipulation, the Plaintiff and the Defendants shall stipulate to the dismissal of the above-captioned civil action without prejudice pursuant to Rule 41(a)(1)(ii), Federal Rules of Civil Procedure. If Intervenor the Silver Ring Thing declines to join the stipulated dismissal, Plaintiff and Defendants shall jointly file a motion to dismiss the action without prejudice pursuant to Rule 41(a)(2).

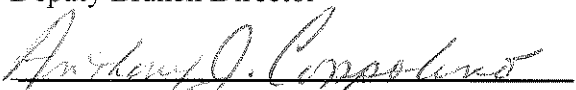
SIGNED AND STIPULATED TO ON BEHALF OF THE PARTIES

FOR THE DEFENDANTS

PETER D. KEISLER
Assistant Attorney General


MICHAEL J. SULLIVAN
United States Attorney

SHEILA M. LIEBER
Deputy Branch Director


ANTHONY J. COPPOLINO
(D.C. Bar No. 417323)
Special Litigation Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW, Room 6102

Dated: February 22, 2006

FOR THE PLAINTIFF


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Dated: February 22, 2006



DEPARTMENT OF HEALTH AND HUMAN SERVICES

ADMINISTRATION FOR CHILDREN AND FAMILIES
Administration on Children, Youth and Families
330 C Street, S.W.
Washington, D.C. 20447

AUG 22 2005

Mr. Denny Pattyn
Silver Ring Thing
530 Moon Clinton Road
Moon Township, PA 15108

Dear Mr. Pattyn:

Thank you for the letter sent by the Alliance Defense Fund to Mr. Onsomu Onchonga, dated June 30, 2005, in response to his request, dated June 13, 2005.

The Family and Youth Services Bureau (FYSB) has had the opportunity to review the information you provided, as well as additional information and materials we have collected through our site visits to both a Silver Ring Thing (SRT) event and the SRT offices. We have also reviewed the terms and conditions of the grant and their relation to all applicable federal laws and regulations including, but not limited to 45 CFR 87.1(c) (Federal Register Volume 69, No. 136, July 16, 2004). Regulations governing the Community-Based Abstinence Education funding state the following:

Organizations that receive direct financial assistance from the Department may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services funded with direct financial assistance from the Department. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs or services funded with direct financial assistance from the Department, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance.

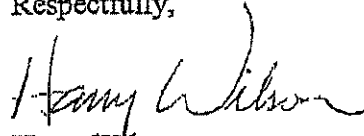
45 CFR 87.1(c).

Our review indicates that the SRT may not have included adequate safeguards to clearly separate in time or location inherently religious activities from the federally-funded activities. In particular, it appears that the Federal project that is funded under the SRT grant includes both secular and religious components that are not adequately separated. Based on the information received to date, we do not believe that SRT's actual use of federal funds for its program adequately complies with Federal grant requirements. Accordingly, FYSB is suspending the drawdown of Federal funds until such time as we are confident that the SRT program is in compliance with all relevant federal rules, regulations and policies.

Page 2 - Mr. Denny Pattyn

In addition, we are requiring that the SRT submit to FYSB a Corrective Action Plan (CAP) that remedies the issues identified above. We further request that this Corrective Action Plan be submitted to this office no later than September 6, 2005. If you have any questions please contact Onsomu Onchonga or me at (202) 205-8102.

Respectfully,



Harry Wilson
Associate Commissioner
Family and Youth Services Bureau



DEPARTMENT OF HEALTH & HUMAN SERVICES

Administration for Children and Families
Administration on Children, Youth and Families
330 C Street, S.W.
Washington, D.C. 20447

September 20, 2005

Mr. Denny Pattyn
Silver Ring Thing
530 Moon Clinton Road
Moon Township, PA 15108
VIA FACSIMILE: 412-264-1103

Dear Mr. Pattyn:

Thank you for taking the time to participate in a technical assistance conference call on Monday September 19, 2005 at 11AM EDT regarding the Silver Ring Thing's (SRT) proposed Corrective Action Plan (CAP) relative to its suspended earmark grant with the Administration for Children and Families. I write to follow up on that call, and to provide additional guidance.

As you know, the Federal government is prohibited from funding "inherently religious activities." Enclosed with this letter is a listing of safeguards that we believe will provide a general framework for addressing the concerns we have raised with your program. You may recognize these safeguards since they formed the bulk of our conference call. We recommend that SRT consider these safeguards when drafting a CAP, and provide detailed plans for how the SRT specifically plans to make changes to its program.

I respectfully request that you submit your CAP to the Family and Youth Services Bureau within 10 days receipt of this letter – by Tuesday October 4, 2005. Should you have any questions, or need any additional information, please feel free to contact Ms Annie Miller, Abstinence Education Program Specialist, at 202-401-9205.

Respectfully,

Jeffrey S. Trimbath, M.Div.
Director, Abstinence Education
Family and Youth Services Bureau

Safeguards Required

1. **Separate and Distinct Programs**

Any abstinence education program with religious content must be a separate and distinct program from the federally funded abstinence education program, and the distinction must be completely clear to the consumer. Some of the ways in which this may be accomplished include, but are not limited to, the following examples:

- Creating separate and distinct names for the programs;
- Creating separate and distinct looks for the promotional materials used to promote each program; and
- Promoting *only* the federally funded abstinence education program in materials, websites, or commercials purchased with *any portion* of the federal funds.

45 CFR 87.1 (c). ("Organizations that receive direct financial assistance from the Department under any Department program may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services funded with direct financial assistance from the Department.")
69 Fed. Reg. 42586, 42593 (2004).

2. **Separate Presentations**

Completely separate the presentation of any abstinence education program with religious content from the presentation of the federally funded abstinence education program by time or location *in such a way that it is clear that the two programs are separate and distinct*. If separating the two programs by time but presenting them in the same location, one program must *completely* end before the other program begins.

Some of the ways in which separation of presentations may be accomplished include, but are not limited to, the following examples:

- **The programs are held in completely different sites or on completely different days.**
- **The programs are held at the same site at completely different times.**
Separation may be accomplished through such means as:
 - Have sufficient time between the two programs to vacate the room, turn down the lights, leave the stage, etc. in order to reasonably conclude the first program before beginning the second;
 - Completely dismiss the participants of the first program;
 - The second program could follow in the same room or, where feasible, in a different room to further distinguish the difference between the programs.
- **The programs are held in different locations of the same site at the same time.**
Separation may be accomplished through such means as:
 - Completely separate registration locations; and
 - Completely separate areas where programs are held such as by room, hallway, or floor, etc.

45 CFR 87.1. (c). ("If an organization conducts [inherently religious] activities, the activities must be offered separately, in time or location, from the programs or services funded with direct financial assistance from the Department . . ."). 69 Fed. Reg. 42586, 42593 (2004).

Note: federal guidelines that have been drafted for situations where a federal grantee also provides religious programming use examples where an organization offered programs that are completely different from each other such as a soup kitchen and a prayer meeting. Because the SRT organization offers two programs that both promote abstinence until marriage and because the clients served are children, it is very important that the separation between the programs be accentuated.

3. Religious Materials

Eliminate all religious materials from the presentation of the federally funded abstinence education program. This includes:

- Rings with religious messages;
- Bibles;
- Abstinence vows with religious references;
- Registration materials that include religious inquiries or references;
- Follow up activities that include or lead to religious outreach; and
- Religious content in parent materials.

45 CFR 87.1. (c). ("If an organization conducts [inherently religious] activities, the activities must be offered separately, in time or location, from the programs or services funded with direct financial assistance from the Department . . ."). 69 Fed. Reg. 42586, 42593 (2004).

4. Cost Allocation

Demonstrate that federal funds are only being used for the federally funded abstinence education program. Some of the ways in which separation of funds may be accomplished include, but are not limited to, the following examples:

- Implement the use of time sheets that keep track of all staff hours charged to the federally funded grant, whether the staff work in other programs or not.
- Require any staff working in both federally funded programs and other programs to clearly indicate how many hours are spent on each program.
- If any staff work on both a federally funded program and a non-federally funded program at the same site on the same day, require the staff to clearly indicate not only how many hours are spent on the federal program but also which specific hours are spent on the federal program. The hours should reflect that time spent on any abstinence education program with religious content have been completely separated from hours spent on the federally funded abstinence education program.
- Show cost allocations for all items and activities that involve both programs such as staff time, equipment, or other expenses such as travel to event sites.

This may be accomplished through such means as:

- Example: if transportation is used to go to a site where a federally funded abstinence education program is conducted and a religious or non-religious program funded through other means is also conducted by the grantee at the same site, one half of the travel costs (gas, lodging, etc.) should be charged

to the federal program. If *three* separate and distinct programs are conducted at a site by a federally funded grantee and one of them is the federally funded program, only one third of the travel costs should be charged to the federal program, etc.

- Example: if an electronic device is used 30% of the time for the federally funded abstinence education program, this should be demonstrated through clear record keeping. Only 30% of the cost of the electronic device should be charged to the program.

OMB Circular A-122, Attachment A. § A.4.a.(2); 45 C.F.R. 87.1.

5. **Advertisements**

Federally funded programs cannot limit advertising the grant program services to only religious target populations.

45 CFR 87.1 (e). ("An organization that participates in programs funded by direct financial assistance from the department shall not, in providing services, discriminate against a program beneficiary or prospective beneficiary on the basis of religion or religious belief.")

6. **Invitation to Religious Program**

At the end of the federally funded abstinence education program, grantee may provide a brief and non-coercive invitation to attend the religious abstinence education program.

The invitation should make it very clear that this is a separate program from the federally funded abstinence education program, that participants are not required to attend, and that participation in federally funded programs are not contingent on participation in other programs sponsored by the grantee organization.

Religious materials, such as the Silver Ring Thing Bible, a ring with religious elements, and registration that includes religious follow-up may only be provided in the privately funded program rather than the federally funded program.

45 CFR 87.1 (c). ("participation [in any privately funded inherently religious activities] must be voluntary for beneficiaries of the programs or services funded with [direct federal financial] assistance"). 69 Fed. Reg. 42586, 42593 (2004).