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THE UNDER SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201



Date: August 2, 1989

To: The Honorable John H. Sununu
Chief of Staff, White House

From: Constance Horner
Under Secretary

Subject: Meeting with Senator Gordon Humphrey and Rabbi Balkany

I understand that you are meeting with Senator Humphrey and Rabbi Balkany today on the question of the Department's decision to require Oakwood Child Development Center, Inc., to return earlier awarded grant funds.

As you know, I previously sent you copies of the correspondence between Senator Humphrey and myself on this matter, and recommended that it would be inadvisable, in my opinion, for action to be taken prior to an imminent ruling from the HHS Departmental Grant Appeals Board.

Since I wrote you, Oakwood's representative Mr. Joe Bobker has made a compromise proposal to pay back the grant over seven years. We believe that this proposal is workable and both sides have agreed to further negotiations. I have attached the latest correspondence from the Department to Mr. Bobker on these negotiations; it is possible that Senator Humphrey and the Rabbi are unaware of them.

I think you should also be made aware that this project has been highly controversial, and our Inspector General is following these negotiations closely. In addition, Representative Henry Waxman, in whose District the project is located, and Senator Alan Cranston, oppose this project strongly. (Waxman's letter to the Secretary is attached. He has also written to all members of the Senate Labor and Human Resources Committee opposing the project).

I would recommend that no final decision on this question be made today pending the outcome of the Department's and Oakwood's negotiations.

Attachments

GORDON J. HUMPHREY
NEW HAMPSHIRE

531 HART SENATE OFFICE BUILDING
(202) 224-2841

FAX NUMBER
(202) 224-1353

NEW HAMPSHIRE TOLL FREE NUMBER
1-800-852-3714

United States Senate

WASHINGTON, DC 20510

August 2, 1989

COMMITTEES
JUDICIARY
FOREIGN RELATIONS
ENVIRONMENT AND PUBLIC
WORKS

The Honorable John H. Sununu
Chief of Staff to the President
The White House
Washington, D.C. 20500

Dear John:

I have enclosed a copy of a letter which I sent to Constance Horner which outlines my intent to seek a GAO investigation of the matter of the Oakwood Center.

Despite my repeated requests of HHS to provide material reasons for its denial of Oakwood's application for extension of its grant, the Department continues to stonewall and has refused to provide me such information. I must conclude, therefore, that HHS has acted improperly in its dealings with Oakwood. The tragedy is, the welfare of 250 children who would be served by the child care center is jeopardized.

My suspicions of impropriety on the part of the HHS are heightened further by the revelation that a Department official sought to intimidate a witness who testified in favor of Oakwood at a recent hearing. According to the transcript of the April 18, 1989 hearing of the HHS Departmental Appeals Board, David Kirker, Deputy Assistant Secretary for the Family Support program at HHS during the last Administration, was advised by an HHS official that if he testified in favor of Oakwood, his pending application for a position at the Department would be jeopardized. An attempt such as this to influence through intimidation a quasi-judicial proceeding is appalling and scandalous.

John, something is very wrong in the Department's dealings with Oakwood. Its stonewalling of my reasonable and legitimate requests that the Department state its material case against the Center, if it has one, and the attempt to intimidate Mr. Kirker smell to high heavens.

With warmest regards, I am

Sincerely yours,



Gordon J. Humphrey, USS

GJH/jm

INDEX

- A. Humphrey letter to Horner (8/2/89).
- B. Horner letter to Humphrey (7/17/89).
- C. Humphrey letter to Sununu (7/13/89).
- D. Humphrey letter to Horner (7/12/89).
- E. Horner letter to Humphrey (6/28/89).
- F. Humphrey letter to Horner (6/19/89).
- G. Horner letter to Humphrey (6/19/89).
- H. Humphrey letter to Horner (5/11/89).
- I. Kirker testimony before HHS Departmental Appeals Board (4/18/89).

GORDON J. HUMPHREY
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United States Senate

WASHINGTON, DC 20510

August 2, 1989

Ms. Constance Horner, Undersecretary
Department of Health and Human Services
200 Independence Avenue SW
Room 614-G, Hubert H. Humphrey Building
Washington, D.C. 20201

Dear Connie:

Because the Department has stonewalled for months my repeated, reasonable and legitimate requests to document a material case for its denial of the application for extension by the the Oakwood Child Development Center, I have decided to ask for a GAO investigation.

The Department's most recent letter, that of July 17, refused again to provide the information, this time claiming to do so would somehow compromise the proceedings of the Appeal Board. This is ridiculous. On the one hand, the Department claims the Board is independent, on the other it claims that providing information to a Senator would compromise the Board's proceedings.

My concern over the Department's conduct is further heigthened by the revelation that a Department official attempted to intimidate a witness who testified in favor of Oakwood. According to the transcript of the April 18, 1989 hearing of the Departmental Appeals Board, David Kirker, former Deputy Assistant Secretary, testified he was advised by an HHS official that if he testified in favor of Oakwood his pending application for a position at HHS would be jeopardized. An attempt such as this to influence by intimidation a quasi-judicial proceeding is apalling and scandalous.

The tragedy of all of this is that 250 innocent children are being denied day care, apparently, for no good reason.

With warmest regards, I am

Sincerely yours,



Gordon J. Humphrey, USS

GJH/jm
cc: John H. Sununu, Chief of Staff

ONE EAGLE SQUARE
CONCORD, NH 03301
(603) 228-0453

157 MAIN STREET
BERLIN, NH 03570
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THE UNDER SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

JUL 17 1989

The Honorable Gordon J. Humphrey
United States Senate
Washington, D.C. 20510

Dear Gordon:

This is to respond to your letter of July 12 regarding the Department's decision not to allow an extension of the grant to the Oakwood Child Development Center in Los Angeles.

As you may know, both the facts in the case, and the reasoning of the Department, are now before the Departmental Appeals Board for review. We expect an answer before the end of this month.

It would be advisable, I believe, for us to await the imminent decision of the Board. Should the Board conclude that the Department was incorrect in denying the extension, Oakwood would be given an additional opportunity to carry out the project as originally proposed.

Sincerely

Constance Horner
Under Secretary

GORDON J. HUMPHREY
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United States Senate

WASHINGTON, DC 20510

July 13, 1989

The Honorable John H. Sununu
Chief of Staff to the President
The White House
Washington, D.C. 20500

Dear John,

This is about the Oakwood case at HHS we discussed at our meeting in your office on June 15.

HHS still refuses either to grant an extension or to make a detailed, material case to justify the denial. Attached is my latest letter to the Department. I am sure you will agree it is reasonable to insist HHS document its case against the grantee, or, if it cannot do that, to grant the extension requested. Frankly, I feel we're being stonewalled.

I would very much like to meet with you upon your return from Europe, along with other Senators interested in the case.

With warm regards, I am

Sincerely yours,


Gordon J. Humphrey, USS

CC: Undersecretary of HHS

United States Senate

WASHINGTON, DC 20510

July 12, 1989

Ms. Constance Horner, Undersecretary
Department of Health and Human Services
200 Independence Avenue SW
Room 614-G, Hubert H. Humphrey Building
Washington, D.C. 20201

Dear Connie:

I want to respond to your letter of June 28 regarding the Department's decision to deny a grant extension to the Oakwood Child Development Center in Los Angeles.

After having reviewed the materials which you sent to me regarding Oakwood, I continue to believe that the facts impel me to conclude that this grant should be allowed to continue, and that service to these 250 children should begin immediately.

Before I address the particular issues which you raise in your letter, I believe that a number of points need to be made clear: (1) HHS has repeatedly failed to demonstrate any improper or unlawful conduct on the part of Oakwood; (2) HHS has failed to demonstrate actions which would objectively demonstrate "bad faith" on the part of Oakwood; (3) Oakwood represents the first time in HHS history that a no cost extension has been denied; (4) the monies returned from this project will go to the Treasury Department, not to HHS for reallocation; (5) the revocation of this grant will seriously jeopardize the community's pledge of \$1 million to pay for the operation of this facility.

In your letter you quoted Ms. Evert as stating that "Oakwood had not made a genuine effort to carry out the grant purposes but rather, had subjugated that goal to the interests of the Yeshiva." According to my understanding of the matter, this is clearly not the case. After Oakwood had purchased the building, HHS took two months to respond that it would be appropriate to use the airspace above the community center for sectarian purposes. Having received this reply, Oakwood, per HHS instructions, then requested drawdown funding to proceed on renovation efforts. Five months after the building was purchased, HHS reversed itself, stating that no construction could occur above first floor of the child care center. Are these the facts, or not?

At no time was Oakwood less than fully committed to building the child care center. Instead, the delays in con-

Ms. Constance Horner
July 12, 1989
Page Two

struction were caused by the delinquent and contradictory instructions which were issued by HHS personnel. Further, Ms. Evert's suggestion that Oakwood had "violated the draw-down condition" simply is not true. These drawdown monies were requested only after approval had been given for construction above the child care center. Are these the facts, or not? And, having received this approval, Oakwood would understandably have concluded that it could begin construction in the 30-60 days as required by HHS.

After HHS reversed its decision to allow construction above the first floor, Oakwood promptly requested a no-cost extension from Mr. Kirker, who felt that such an extension would be granted. Thus, Ms. Evert has improperly concluded that Oakwood failed "to request a no-cost extension in a timely fashion." On the contrary, it appears to me Oakwood has repeatedly demonstrated that despite HHS delays, it was committed to a prompt completion of the child care center.

On a number of occasions in your letter you refer to Ms. Evert's assertions of "bad faith" as well as "false and misleading statements" on the part of Oakwood and its representatives. To date neither I, nor Senator Hatch, nor anyone else who has inquired about the Oakwood case, has been told of one false statement on the part of Oakwood--even though we have repeatedly asked for specific documentation of such allegations.

In her testimony, Ms. Evert asserted the attempt to trade 555 North LaBrea for an alternative site, and the "continual efforts to use the property for religious activities," constituted "bad faith." These are the facts as I understand them: first of all, the suggestion of the alternative site was meant as an effort to speed the completion of the project, and in fact, an independent appraiser determined that the alternative site was of an almost equal value. Second, at no point did Oakwood attempt to use the child care center for sectarian activities. Instead, Oakwood simply asked HHS if it would be proper to use the airspace for sectarian activities. Considering the lack of building space, and the high land values in this area, this would seem to be a reasonable request on the part of Oakwood.

Last of all, your counsel stated that while there was no impropriety or unlawful conduct in the Oakwood case, that

Ms. Constance Horner,
July 12, 1989
Page Three

"this does not mean, however, that the Department believes that Oakwood acted properly in carrying out the terms of the grant." What does this mean? On the one hand your counsel advised Oakwood was guilty of no impropriety, on the other hand you are now saying that Oakwood acted improperly. Which is it? It appears to me Oakwood has offered effective rebuttal to the Department's criticisms. Again, I urge the Department either to grant the extension, or document a specific, material case against Oakwood.

With warm regards, I am

Sincerely yours,


Gordon J. Humphrey, USS



THE UNDER SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

June 28, 1989

The Honorable Gordon J. Humphrey
United States Senate
Washington, D.C. 20510

Dear Senator Humphrey:

I want to respond to your letter of June 19 regarding the Department's decision to deny a grant extension to the Oakwood Child Development Center in Los Angeles.

As you know, Wayne Stanton denied the extension for the reasons set forth in his letter of August 6, 1988, a copy of which is enclosed. His denial was based on the recommendation of Mary M. Evert, then Director of the Office of Community Services. The reasoning for Ms. Evert's recommendation is contained in her declaration to the Departmental Appeals Board which I have also enclosed.

In her declaration at paragraph 19, Ms. Evert stated as follows:

I was convinced that Oakwood had not made a genuine effort to carry out the grant purposes but rather, had subjugated that goal to the interests of the Yeshiva. I also took into account several additional factors which underscored Oakwood's lack of reliability, i.e.: its violation of the drawdown condition, its failure to request a no-cost extension in timely fashion and after repeated reminders, its untimely and uninformative progress reports and the evident lack of continuity in staff responsibility.... There is no question, however, that the overriding consideration in my mind was Oakwood's abandonment of the grant purpose....

Ms. Evert's declaration also lists at paragraph 20 reasons which, in her opinion, constituted "bad faith" on Oakwood's part, as follows: "1) the many false and misleading statements made by its representatives; 2) its knowing violation of the drawdown condition in the grant; 3) its attempt to trade 555 North LaBrea for inferior and unsuitable property owned by the Yeshiva; 4) its continual efforts to use the property for religious activities; and 5) the overwhelming evidence of its disinterest in the grant purpose."

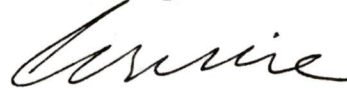
Page 2 - The Honorable Gordon J. Humphrey

In your letter to me of June 16, 1989, you characterized my remarks to you as indicating that the Department had alleged "no impropriety or unlawful conduct" in the Oakwood case. This does not mean, however, that the Department believes that Oakwood acted properly in carrying out the terms and conditions of the grant.

Finally, as per your request, I am also enclosing a copy of the transcript of the June 15, 1989 hearing before the Departmental Appeals Board.

I hope that these documents will provide you the information you need for your review, but if not, we will be glad to fill in where necessary. I would also be happy to have a member of our staff meet with you or your staff to clarify the facts further, if you would like.

Sincerely,

A handwritten signature in cursive script, appearing to read "Constance".

Constance Horner
Under Secretary

Enclosures

List of Enclosures

1. Letter from the Department to Oakwood listing the reasons for denial of extension of application
2. Declaration of former Office of Community Services Director, Mary Evert, before the Grant Appeals Board
3. Transcript of Hearing before the Departmental Appeals Board

DEPARTMENT OF HEALTH & HUMAN SERVICES

Family Support Administration

Office of the Administrator
Washington, D.C. 20201

(213) 931-1643

August 6-1988

Mr. Ira Frankel, CPA
Oakwood Child Development Center, Inc
7372 Beverly Boulevard
Los Angeles, California 90036

Re: 87-1-UR-CA-006 Economic Development

Dear Mr. Frankel:

This is in response to the letter dated June 30 from Mr. Barry J. Weiss requesting a one year no cost extension of the above-referenced grant.

We have reviewed the relevant information relating to your grant and based upon this review it has been decided that your request for a no cost extension cannot be approved. This decision is based upon the following: 1) Even though Oakwood received emergency funding on February 26, 1987 it failed to implement its proposed renovation project in the one year project period; 2) at the time the grant expired, your organization had not achieved any of its proposed goals or provided any other benefits to the proposed low-income beneficiaries of this project; 3) your grant expired on February 25, 1988 and you failed to request an extension until your letter dated June 30, 1988 even though you had been advised by phone and by letter to do this promptly; 4) Oakwood failed to submit any of the required quarterly progress reports on time and those which were submitted were unacceptably brief and uninformative; 5) your organization drew down the \$300,000 for renovations of your building in May 1987 and you had not begun any renovations as of July 6, 1988, the date of your most recent report; and, 6) there appears to be no continuity in staff responsibility since every few months we are asked to direct correspondence to a new person at a new address.

If you wish to appeal this decision, you must do so within thirty (30) days after you receive it. Address your notice of appeal to: Departmental Grant Appeals Board, Department of Health and Human Services, Humphrey Building, Room 451 F, 200 Independence Avenue, S.W., Washington, D. C. 20201.

In order that we may close out this grant, you are directed to return the unobligated balance of \$300,000 plus any interest earned (less \$100). In addition, all program income, including

rental fees on the property located at 555 North La Brea Avenue, not validly expended for program activities as documented in an acceptable audit report, must be returned to the Federal Government. A check in this amount should be made payable to the U. S. Treasury and sent to the following address within 30 days of the date of this letter: Division of Financial Management, Office of Community Services, Family Support Administration, Department of Health and Human Services, 330 "C" Street, S.W., Room 2054, Washington, D. C. 20201

After August 26, 1988, the mailing address will be 370 L'Enfant Promenade, S.W., Washington, D. C. 20447.

The following identifying information should be inscribed on the check: Federal Fiscal Year the funds were granted, grantee name, grantee number and a notation that the amount returned represents a disallowance.

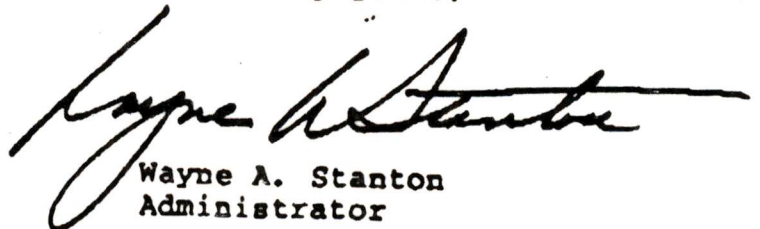
We have furthermore noted that the real property acquired with grant funds is not being used for the purposes authorized by the grant, as is required by 45 CFR 74.134. You are therefore directed to dispose of that property in accordance with the provision of 45 CFR 74.134(c)(1) which reads as follows:

"(1) The property shall be sold and the Federal Government shall be paid in an amount computed by multiplying the Federal share of the property (see §74.142) times the proceeds from sale (after deducting actual and reasonable selling and fix-up expenses, if any, from the sales proceeds). Proper sales procedures shall be used that provide for competition to the extent practicable and result in the highest possible return."

Enclosed is a complete copy of Part 74 Subpart 0 for your information in connection with these disposition instructions.

If you have any questions concerning the issues addressed above, please contact Mr. Spencer Lott of my staff at (202) 475-0418.

Very truly yours,


Wayne A. Stanton
Administrator

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES
DEPARTMENTAL APPEALS BOARD

IN RE APPEAL OF OAKWOOD CHILD)
DEVELOPMENT CENTER, INC.)
)
)
)
)

Board Docket No. 88-151

Declaration of Mary M. Evert

I, Mary M. Evert, declare under penalty of perjury that the following is true and correct:

1. I am the Director of the Office of Community Services (OCS) in the Family Support Administration (FSA), U.S. Department of Health and Human Services. I became the Acting Director on April 4, 1988 and the Director on May 8, 1988. I consider it my responsibility, among other things, to ensure that OCS discretionary grant funds are awarded and used to advance the purposes of the Community Services Block Grant (CSBG) Act.

2. Beginning on April 4, 1988, my first day at OCS, the Oakwood grant commanded a significant amount of my attention. I then learned that FSA had recently received for comment a draft report on that grant written by the Office of the Inspector General. As the new Director of OCS, I was to have significant responsibility for preparing FSA's comments on the draft report. Accordingly, it was necessary for me to familiarize myself with the Oakwood grant immediately.

3. During the week of April 4, I asked my predecessor, David Kirker, a number of questions about the Oakwood grant in

order to acquaint myself with the facts as quickly as possible. I did this in order to prepare appropriate comments on the Inspector General's draft report. During those conversations, Mr. Kirker was consistently vague about the details of the Oakwood grant. He was unable to recall general facts or specific details and kept looking for facts in the grant file. By the end of my first week at OCS, it seemed to me that Mr. Kirker could not provide me with any detailed information about the Oakwood grant. For example, he had little or no recall of telephone conversations with the grantee or its representatives. I was surprised by his inability or unwillingness to remember significant milestones, particularly in light of the then-recent description of events in the Office of Inspector General draft report. Furthermore, there was no program analyst, other staff person, or supervisory person familiar with the grant; unlike most other grants, the Oakwood grant had been solely administered by Mr. Kirker personally, without input or other assistance from OCS staff. The staff informed me that they were not in a position to advise Mr. Kirker since they had not been kept informed and their expertise was not sought in relation to this grant. Therefore, I relied principally on the documents in the grant file in learning about Oakwood.

4. During my initial review of the documents, two facts were very apparent. The first was that the grant had expired on February 25, 1988 and there was neither an extension of the grant period nor any request for such an extension. The second thing

that I noticed almost immediately was that the grantee had started out in an extremely favorable position, with a building available for a stated price at the outset of the project and that OCS had provided the grantee, in an expedited manner, with funds to acquire and renovate the building; nonetheless the grantee had otherwise done nothing that I could see toward carrying out the grant purpose. No low-income jobs had been created and no low-income population had been served.

5. On April 4 and several other occasions during my first week at OCS, I discussed with David Kirker my concern about the fact that the Oakwood grant had expired and there had been no extension requests or actions. Mr. Kirker agreed that it was necessary for Oakwood to request an extension in writing and to clearly state its intended plans since so many alterations to the project had been proposed. He agreed that we should seek specific project plans in writing along with a request for no-cost extension. Mr. Kirker offered to contact the grantee and ask that it send such a letter. We never discussed the question of what action OCS should take if and when it received Oakwood's request. He never mentioned that he had made or communicated to anyone a decision or recommendation about a no-cost extension.

6. In reviewing the correspondence in the file, I noted that Oakwood had not answered Mr. Kirker's letter of March 10 (Oakwood 14), in which he reminded the grantee that the grant had expired and also requested specific information as to how and when the grant purposes would be accomplished. That March 10

letter requested a response "within 30 days from the date of this letter so that we may take the appropriate action to extend your grant's project period." (Id.) I did not understand that letter to reflect a decision on a no-cost extension and obviously, neither did Mr. Kirker, since he not only agreed with me that it was necessary for Oakwood to submit a request and provide us with specific information before OCS could make a decision, but volunteered to ask Oakwood to submit such a request and provide such information. Mr. Kirker agreed that we needed to know all the specific details on how Oakwood intended to proceed because its plans had changed on several occasions. Consequently, I know of no basis for the statement in Oakwood's Brief (at page 20) that Mr. Kirker "directed" that Oakwood be granted a no-cost extension prior to his departure from OCS. Mr. Kirker certainly gave me no such "direction," nor did he have the opportunity to grant such an extension himself, inasmuch as Oakwood never submitted a request during his tenure as Director. He never told me nor, so far as I know, anyone else that he had made a decision, nor did he prepare any document reflecting such a decision. On the contrary - as explained in paragraph 7, below - Mr. Kirker's letter to Oakwood of April 27, which he signed as the Acting Director of FSA and not the Director of OCS, clearly reflects his understanding that he had not granted an extension.

7. On April 11, Oakwood sent a letter addressed to Mr. Kirker, stating that it was "now proceeding under the original terms and conditions of the grant and hope[d] to have the child

care facility open by August/September of this year" (Oakwood 12). However, there was no response to Mr. Kirker's letter of March 10. Accordingly, Mr. Kirker (then the Deputy Administrator of FSA) sent Oakwood another letter on April 27 (Oakwood 15). He there noted that Oakwood's April 11 letter "did not adequately respond to the currently relevant issues raised in my earlier letter" (id.). He went on to remind Oakwood that no additional Federal funds could be obligated or expended until OCS approved an extension (thus underscoring the fact that no extension had been granted) and added that: "If you intend to request an extension, the period requested should be sufficient to complete the total project, including all renovations." Mr. Kirker's letter of April 27 set a deadline of fourteen days for a response. (Id.)

8. On May 10, I received a letter dated May 6 from Oakwood. It included as an attachment a cost estimate of \$322,800.00 for "Building at Approximately 8000 Sq. Ft.," (Oakwood 16, second page), a far cry from the 25,000 square feet of space described in the original Oakwood application (FSA 9, page numbered 1) and the original cost estimate of \$801,000 (id., page numbered 31). The May 6 letter also anticipated the creation of thirty-four jobs in year one at the Oakwood facility with a total annual payroll of \$540,000 (FSA 29, fourth page), an unexplained difference from the original proposal, which referred to a total of forty-two jobs in the first year with a payroll of \$756,000 (FSA 9, pages numbered 39-40). Both of these factors suggested

that the original project had been scaled back substantially. The May 6 letter continued to refer to a Head Start Administrator (FSA 29, fourth page), despite the fact that no Head Start program had been or would be approved (see Mr. Kirker's question in Oakwood 14, his letter of March 10, as to what would be substituted for a Head Start program). I also found it troubling that the original application contemplated a renovation period of six months (FSA 9, pages numbered 37-38), whereas the May 6 letter suggested that renovations would take no more than four months (FSA 29, fourth page). There was no mention in the May 6 letter of an intent to focus on low income jobs or children, which had been the underlying justification for the grant. These and other discrepancies between the original application and the May 6 letter raised serious doubts in my mind as to Oakwood's intent and ability to carry out the grant purpose.

9. As of June 21, 1988 Oakwood still had not requested an extension and I therefore sent yet another letter reminding Oakwood that it was necessary to submit such a request. (I have noted that a copy of my June 21 letter was included in Oakwood's Appeal File at 17 although it was incorrectly referenced in the Table of Contents as having been sent to me by Joseph Bobker rather than from me to Barry Weiss.) I then believed and I continue to believe that my insistence on a request for extension as well as a clear project plan from Oakwood was appropriate and necessary to protect Federal interests. Oakwood's letter of April 11 (Oakwood 12) implied great dissatisfaction with the

necessity for proceeding in accordance with the original grant terms and conditions and David Kirker's letter of April 27 (Oakwood 15) called for a written request "[i]f Oakwood intended to submit such a request." In light of these facts and the disturbing submission of May 6, I believed that I should not decide whether an extension was warranted unless and until Oakwood made a request for an extension of specific purpose and duration.

10. We did not receive Oakwood's July 6 "Status Report for Period Ending June 26, 1988" until July 22 (FSA 30) and it reinforced my doubts about the propriety of an extension. In particular, it: 1) again extended the projected completion date - this time, to November/December 1988; 2) attributed the delay in renovations to "failure of the engineering firm to complete seismic testing for earthquakes safety," a factor that had never been mentioned and 3) perhaps most important, revealed that no renovations had begun - sixteen months after funds were awarded.

11. In considering Oakwood's request for an extension, I reviewed the documentation thoroughly. It was and is my view that a no cost extension is appropriate if the grantee has genuinely attempted to carry out the grant program but has not succeeded through no fault of its own, if there is a reasonable chance that the grant purpose can be accomplished. In my judgment, however, Oakwood's "efforts" fell far short of that standard. As I indicated earlier, OCS had provided the resources for Oakwood to acquire and renovate 555 North La Brea Avenue.

However, Oakwood itself precluded the accomplishment of the project by holding it hostage to its desire for changes which were not part of nor supportive of the project, i.e., establishment of an early childhood program, but rather were totally and exclusively for the benefit of the Yeshiva Rav Isacsohn.

12. According to Oakwood's application, it was to acquire and renovate a building in order to open an early childhood center in a low-income area, geared to a low-income population. The application described a two-story building with 25,000 square feet of space for the program (FSA 9, pages numbered 1 and 32) and included a detailed time line showing the completion of renovations within six months (*id.*, pages numbered 37 and 38). There was no suggestion in the application that the success of the project was contingent on development of the building for purposes other than the Oakwood center; in fact, the second story was designated for the use of the center in the original application. The April 8, 1987 letter from Oakwood's architect (FSA 14), consistent with the application (FSA 9, page numbered 41), referred to an estimate of \$800,000.00 for renovation.

13. The architect's April 8, 1987 assurance was apparently intended to satisfy the grant condition that the \$300,000.00 earmarked for renovation not be drawn down until OCS had received an architect's certification of the work contemplated or completed (Oakwood 2, "Page 9"); based on that representation, the funds had been released. Mr. Bobker's letter of December 7,

1987 (Oakwood 13) later stated that Oakwood had the opportunity to receive matching funds from a private donor who insisted that Oakwood be in receipt of the Federal money before he committed his own funds. However, those Federal funds - and the matching funds, if any - were not used for the renovation work described in the application. Instead of proceeding with the grant project, Oakwood proposed to add a second story "[s]ince our service, financial and space needs were greater than the amount of the FSA/OCS grant," noting that it would "be used for education and community purposes, some of which might be sectarian in nature" (Oakwood 4). The June 22 letter shows that the representation made in the architect's April 8 letter were not made in good faith, since the April letter had requested funds for renovations under the original proposal while Oakwood was contemplating a vastly different project which had not been approved.

14. Oakwood's letter of June 22 impressed me as being remarkably ambiguous. In referring to "service" and "space" needs, it implied that the second floor was needed for the non-sectarian Oakwood center. This was puzzling in itself inasmuch as the original application expressly contemplated use of the second floor as part of the Oakwood child development center. Thus, a second floor operation for purposes of the original project would not have been a change nor would it have required approval. In referring to "financial" needs, the June 22 letter implied that the second floor would be made available for use by

other parties in order to raise funds for the grant project. However, Oakwood's subsequent communications, such as its letter of December 7, 1987 (Oakwood 13) made clear that the private funds were to be used for the sectarian expansion, not the original project. (Mr. Bobker's August 18, 1988 letter (attached to his Affidavit, Oakwood 20) later confirmed that \$500,000 in private funds raised from private sources "was to be used for the sectarian portion of the development" (at p. 2).) In stating that there "might" be sectarian activities, the letter suggested that there was not a fixed plan for the use of the space - otherwise, presumably, the author would have known whether or not there were to be religious activities. Oakwood's subsequent activities, however, convinced me that its objective was the acquisition of space for religious purposes, not the creation of a non-sectarian early childhood center as required by the terms of the grant. Thus, the June 22 letter proved to have been a disingenuous attempt to conceal a fixed purpose of using the property for religious activities with no benefit to the original project. In addition, the statements that the Federal funds "have been expended for the approved purposes ... and all special conditions of the grant have been met" (id.) were simply untrue.

15. Following Mr. Kirker's letter of July 29, 1987 (Oakwood 6) Oakwood made a sophisticated proposal to sell the air rights to the building in order to secure permission to conduct religious activities in the building purchased with Federal funds (Oakwood 7). This was an objective unrelated to the achievement

of the grant purpose: If expanded space for the non-sectarian Oakwood center had been the consideration, there would have been no necessity for permission to conduct religious activities in that space; if, on the other hand, the expansion had been a means of raising funds for the Oakwood center, there was likewise no necessity for religious activity - Oakwood has emphasized that property in the area is both scarce and expensive, suggesting a strong likelihood that funds could have been raised by arranging for non-religious educational and community use of the expanded space. Accordingly, I could see no explanation of Oakwood's seemingly continuous pursuit of permission to conduct religious activities, other than its effort to use Federally funded property for sectarian objectives.

16. I understand Oakwood's position to be that its activities in carrying out the grant were delayed pending a Federal decision about the use of the building. In my view, however, the fundamental cause of the delay was Oakwood's pursuit of an agenda other than the grant objectives, namely, the use of the building for religious purposes.

17. If there were any possibility of doubt about Oakwood's overriding objective it was laid to rest, in my view, by the January 28, 1988 proposed exchange of the property purchased with \$1.5 million in Federal funds for three properties of lesser value owned by the Yeshiva Rav Isacsohn (FSA 28). As noted in the March 31 letter from David Kirker, the total cost of purchasing the land and replacing the three properties would have

amounted to less than \$1,000,000 - more than one third less than the purchase price of the property originally acquired (Oakwood 11, p.2). As further noted in Mr. Kirker's letter, the three properties occupied less than half the square footage as the building at 555 North La Brea Avenue, were marginally equipped and were located on opposite sides of a busy street - hardly a suitable location for an early childhood center. In my judgment the January 28 proposal, together with the other available information, confirmed Oakwood's disinterest in a non-sectarian program geared toward the CSBG Act goals of low-income employment and services to low income populations, and its overriding goal of using Federal support to advance the interests of the Yeshiva. The January 28 proposal also called into question Oakwood's original claim that emergency funding was needed because 555 North La Brea would otherwise be sold and there were no alternatives sites in the area (FSA 9, pages numbered 27 and 28); the Yeshiva's willingness to trade its buildings suggested that there may well have been other property available.

18. I have previously described, in paragraphs 2-10 above, the events that occurred after I became the Acting Director of OCS on April 4, 1988. I understand that Mr. Kirker has stated for the record in this case that he recommended that Oakwood be granted a no-cost extension. I do not understand the basis for that statement since he never made such a recommendation to me or my staff. In fact, David Kirker never discussed this matter with me after his April 27 letter to Oakwood. Thus, my conclusions

were based on my review of the facts in the file.

19. After reviewing all of the foregoing facts thoroughly, I concluded that it would be completely improper to grant Oakwood a no-cost extension. I was convinced that Oakwood had not made a genuine effort to carry out the grant purposes but rather, had subjugated that goal to the interests of the Yeshiva. I also took into account several additional factors which underscored Oakwood's lack of reliability, i.e.: its violation of the drawdown condition, its failure to request a no-cost extension in timely fashion and after repeated reminders, its untimely and uninformative progress reports and the evident lack of continuity in staff responsibility. I have been informed by my counsel that these matters are documented in the record of this case and discussed in the memorandum to be filed on behalf of FSA. There is no question, however, that the overriding consideration in my mind was Oakwood's abandonment of the grant purpose in its effort to use a large Federal grant for religious purposes.

20. I understand that Mr. Kirker has provided Oakwood's attorneys with a statement that OCS policy, during his tenure as Director, was to grant no-cost extensions when grantees proceeded in good faith. I have consulted with my staff and with FSA's Office of Grants Management and have been informed that there was no such policy in effect. Rather, each case was reviewed individually. That is, a written request for an extension was required in each case and reviewed by staff - without written or oral general guidance from Mr. Kirker and with the final decision

being made by Mr. Kirker. This case-by-case approach accords with the provision in section 1-85-80 of the Department's Grants Administration Manual that limited, noncompetitive extensions may be granted to provide for orderly phase-out of Federal support. My staff has informed me that Mr. Kirker did not prescribe any additional standards for the review of no-cost extensions. In any event, however, Oakwood did not even come close to acting in good faith. In my judgment, Oakwood's bad faith was demonstrated by: 1) the many false and misleading statements made by its representatives; 2) its knowing violation of the drawdown condition in the grant; 3) its attempt to trade 555 North LaBrea for inferior and unsuitable property owned by the Yeshiva; 4) its continual efforts to use the property for religious activities; and 5) the overwhelming evidence of its disinterest in the grant purpose. For all of the foregoing reasons, i.e.: 1) the Grants Administration Manual provision for consideration of extensions in individual cases, 2) the lack of any prescribed OCS standard for granting such extensions, and 3) Oakwood's bad faith, I do not believe that the decision to deny a no-cost extension effected any change in agency policy.

21. Although, as the Director of OCS, I had the authority to deny the no-cost extension, I suggested that a final decision be made by Wayne Stanton, the FSA Administrator. Accordingly, I briefed Mr. Stanton on the facts which are set forth in this statement and he agreed with my recommendation to deny a no-cost extension.

Pursuant to 28 U.S.C. section 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 5th day of January 1989.


Mary M. Evert

GORDON J. HUMPHREY
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COMMITTEES
JUDICIARY
FOREIGN RELATIONS
ENVIRONMENT AND PUBLIC
WORKS

United States Senate

WASHINGTON, DC 20510

June 19, 1989

Ms. Constance Horner, Undersecretary
Department of Health and Human Services
200 Independence Avenue SW
Room 614-G, Hubert H. Humphrey Building
Washington, D.C. 20201

Dear Connie:

You were right about the attached letter when, in our phone conversation last week, you acknowledged it does not contain details. Nonetheless, thanks for sending it along at my request.

The frustrating thing about the Oakwood case, from my point of view, is that I can't find out precisely why HHS finds Oakwood unworthy of an extension. I understand that Mary Everetts, former Director of the Office of Community Services, at a hearing on Oakwood last Thursday, stated under examination by Oakwood's attorney that she recommended against Oakwood in order to protect her bosses politically. I am paraphrasing this information, and I would suggest that you obtain the precise statement from the transcript. When you obtain the transcript I ask that the Department provide an explanation of Ms. Everetts statement. I also ask to be informed specifically and in detail why Oakwood's application for extension cannot be granted. Frankly, I don't think that HHS has a case. If the department has one, please tell me explicitly what it is. I have urged John Sununu to make the same request of the Department.

Has Oakwood been denied on the basis of politics? If so, this is scandalous.

Having thought about our conversation, having been informed through you that the Department does not allege an impropriety or unlawful conduct on the part of the grantee, having read the attached letter (which is the same kind of boilerplate response we have been getting from HHS for months), and especially in light of the Everett statement, I request that the Department grant an extension to this project, or explain to me in detail what material problem exists.

With warm regards, I am

Sincerely yours,



Gordon J. Humphrey, USS

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THE UNDER SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

JUN 19 1989

The Honorable Gordon J. Humphrey
United States Senate
Washington, D.C. 20510

Dear Senator Humphrey:

This is to respond to your recent letter concerning the request by the Oakwood Child Development Center in Los Angeles for a no-cost extension for a grant made to it by the Department's Family Support Administration, Office of Community Services.

Oakwood received a one-year, \$1.8 million grant on an "urgent" basis. The purpose of the grant was to acquire and renovate a building for the purpose of opening an early childhood center within six months. The funds provided under that grant had been appropriated under Section 681(a)(2)(A) of the Community Services Block Grant Act which authorizes the Secretary to make grants to provide employment and business development opportunities for low-income residents of communities.

When the grant expired, Oakwood had not achieved its proposed goals nor provided any benefits to the proposed low-income beneficiaries of the project. The grantee also had failed to comply with numerous other grant conditions. For these and other reasons, the responsible DHHS official exercised her discretion to deny a no-cost extension.

Oakwood has been provided with an opportunity to appeal that decision to the Departmental Appeals Board where its appeal is currently being heard. The Appeals Board procedures have entailed extensive briefing and presentation of evidence. I have been informed that the Presiding Board Member did not "direct" either of the parties to settle the case. Rather, he suggested to the attorneys for both parties that they explore the possibility of settlement and settlement discussions have taken place.

I hope that this letter clarifies the facts of this matter.

Sincerely,

Constance Horner
Under Secretary

Gordon -

*Please let me know if you'd like
further information*

Constance

United States Senate

WASHINGTON, DC 20510

May 11, 1989

Ms. Constance Horner, Undersecretary
Department of Health and Human Services
200 Independence Avenue SW
Room 614-G, Hubert H. Humphrey Building
Washington, D.C. 20201

Dear Undersecretary Horner:

I am writing to request that you grant a 12 month building extension to the Oakwood Child Center in Los Angeles, California.

As you may know, in February of 1987, the Department of Health and Human Services granted \$1.5 million in funding to Oakwood Child Development to purchase a building for a child center. Subsequently, a grant of \$300,000 was made in June of 1987 for the costs of renovating the building. At that time, Oakwood asked HHS to rule on a request to build an addition to the building which would be dedicated to sectarian uses. HHS did not act upon this request for 8 months, and although an initial approval was given for this use, a revocation was made 3 months thereafter.

Due to the fact that Oakwood Child Development could not continue construction pending the HHS decision, they were not able to complete construction within the one-year deadline of the grant. Consequently, HHS asked Oakwood to return the \$1.8 million in grant funding. While HHS has routinely given 12 month extensions under circumstances such as this, Oakwood's request for an extension was denied.

On April 18, 1989, during the appeal of this denial, Administrative Judge Teitz instructed the parties to meet to work out a mutually acceptable resolution to this problem. Judge Teitz also directed Madeline Ness, the HHS counsel, to settle this matter with Oakwood.

Due to the extenuating circumstances of this revocation, I urge you strongly to allow an extension of this grant.

With warmest regards, I am

Sincerely yours,


Gordon J. Humphrey, USS

GJH/jm

DAY 4

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BEFORE THE
DEPARTMENT OF HEALTH AND HUMAN SERVICES

April 18, 1989

- - - - -x

In the Matter of: :
OAKWOOD CHILD DEVELOPMENT : DOCKET NO. 88-151
CENTER :

- - - - -x

The above-entitled matter came on for hearing,
pursuant to notice, before ALEXANDER G. TEITZ, Presiding
Board Member, at 451 7th Street, N.W., Room Number 2155,
Washington, D.C.

APPEARANCES:

On Behalf of Oakwood Child Development Center:

LEO FISHMAN, ESQ.
NEAL L. THOMAS, ESQ.
1990 M Street, N.W.
Washington, D.C. 20036

On Behalf of Family Support Administration (FSA):

MADELINE NEESE, ESQ.
Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

1 A. This particular section on the timely
2 submission of reports?

3 Q. Uh huh.

4 A. Yes.

5 Q. Does it have a future implication?

6 *Kirker* A. It does for future funding, yes.
Testimony

7 Q. Thank you. Now, let me ask you another
8 question. Has anybody from the Department of Health and
9 Human Services cast negative aspersions on the fact that
10 you are a witness in this proceeding?

11 MS. NESSE: Objection. I don't know what
12 "cast negative aspersions" is. If somebody had a
13 conversation, let's hear about it.

14 Q. Has anyone talked to you about your testimony
15 before the Departmental Appeals Board?

16 A. Yes, they have.

17 Q. Could you relate the circumstances and the
18 nature of that conversation?

19 A. Yes. I inquired as to the availability of a
20 position in the Department and that I was considering
21 applying for it and wanted to establish the environment
22 under which my application would be considered. And one
23 of the reasons I was given that it would not be looked
24 on favorably was my alleged testimony against the
25 Department in this case.

1 Q. Who, with whom did you discuss this issue?
2 Who told you this?

3 A. Do I have to answer?

4 MR. TEITZ: Well, your counsel has asked you
5 the question. I --

6 MR. FISHMAN: I'm not his counsel. He's --

7 MR. TEITZ: Well, --

8 MR. FISHMAN: A witness.

9 MR. TEITZ: For this purpose, you're his
10 counsel. You're -- you've been asked a question and
11 there's been ^{no} objection to it. I would say unless it's ^{MN}
12 privileged in some way, you have to answer.

13 A. All right. Catherine Bertini.

14 Q. Who is Catherine Bertini?

15 A. She's the Acting Assistant Secretary for
16 Family Support.

17 Q. An acting assistant secretary for Family
18 Support, how does that relate to your role or the former
19 role in OCS? Is this a supervisory or a higher position
20 or --

21 A. This is the authority for this particular
22 program and this particular grant.

23 Q. And when did this conversation take place?

24 A. About a week ago.

25 Q. Let me ask you a frank question. Are you

1 comfortable testifying?

2 MS. NESSE: Objection.

3 MR. TEITZ: Well, I think that's, I think
4 that's an objectionable question the way it's phrased.
5 I'll sustain your objection.

6 Q. What did Ms. Bertini, Assistant Secretary --

7 MR. TEITZ: How do you spell it so we get it
8 for the record; we don't have the name. Do you know how
9 she spells her name?

10 A. B-E-R-T-I-N-I.

11 Q. What did she tell you?

12 A. I expressed an interest in applying for a
13 position and one of the limitations that was brought to
14 my attention could be the fact that I am testifying
15 allegedly against the Department in this case.

16 Q. That could be brought?

17 A. That could be viewed as a negative factor.

18 Q. What is your specific reaction to this?

19 A. I withdrew my application.

20 MR. TEITZ: Do you have any other questions?

21 MS. NESSE: Just one or two.

22 RECROSS-EXAMINATION

23 BY MS. NESSE:

24 Q. Mr. Kirker, are you still holding Oakwood 2,
25 the notice of grant award?