

# Examining State Oversight, Liability, and Potential Consequences for Social Services Agencies



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## A landmark verdict...

### Verdict: Federal jury awards millions to daughter, father separated by Cherokee County DSS

Jurors respond as closing arguments ask them to stand up for liberty of families against government elites who violate their rights.

by Kate Martin • May 13, 2021



We the jury award compensatory damages to the Plaintiff Brian Hogan in the amount of \$1,500,000.  
[Proceed to Issue No. 21].

We the jury award compensatory damages to the Plaintiff H.H. in the amount of \$3,100,000.

### Grand jury indicts former Cherokee County DSS officials

by Kate Martin and Frank Taylor • May 18, 2020



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....followed by heightened media coverage of alleged misconduct across the state.

**Structure of NC child protective services leads to inequity**  
 Troubled data system, loose compliance with standards, local autonomy, training and pay disparities, and resource imbalances add up to wide variation in child protection policies and outcomes across North Carolina.  
 by Kate Martin and Frank Taylor • June 9, 2021

**Stories recount concerns with DSS agencies across North Carolina**  
 Confidentiality rules intended to protect children present challenges for investigating allegations of DSS misconduct.  
 by Kate Martin, Frank Taylor and Imari Scarbrough • June 8, 2021

**Protection of NC children, families depends on the county**  
 Rates at which local departments of social services remove children from families point to inequity and inconsistency, with extremes of very high and low levels.  
 by Kate Martin, Frank Taylor and Imari Scarbrough • June 7, 2021

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**Our focus for today:**

**LIABILITY**

- What types of lawsuits might your county face?
- What's at stake for your agency?
- What types of immunity may be available?

**STATE INVOLVEMENT**

- How does DHHS provide oversight of county agencies?
- What is the role of DHHS when non-compliance is discovered?
- What does a DHHS takeover of a county DSS agency look like?
- How can DHHS help you to help your client?

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## LOCAL GOVERNMENT AND PUBLIC OFFICIAL/EMPLOYEE LIABILITY



**Bob Hagemann, Poyner Spruill**  
**SOG Senior Fellow**



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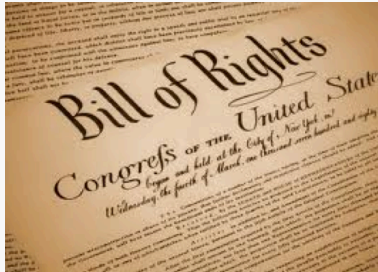
## Sources of Liability

- Federal & State constitutions
- Federal & State statutes
- Tort law



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## Constitutional Rights - Sec. 1983



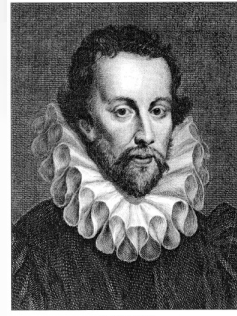
- 1<sup>st</sup> Amendment – free speech
- 4<sup>th</sup> Amendment – unreasonable searches and seizures – excessive force
- 14<sup>th</sup> Amendment – substantive/procedural due process; equal protection

## Statutes (examples)

- Title VII – employment discrimination (Federal)
- Retaliatory Employment Discrimination Act, G.S. 95-240 *et seq.* – whistleblower claims (State)

## Torts

- civil wrongful conduct
- most originate in the common law
- intentional (*e.g.*, assault/battery)  
or  
unintentional (*i.e.*, negligence)



## Constitutional claims against a local government

- no respondeat superior/vicarious liability
- official policy practice, or custom

## Tort claims against a local government

- respondeat superior/vicarious liability
- employee acting within the course and scope of employment
- “official capacity” claims

## Immunities

- Qualified immunity – federal constitutional claims
- Governmental immunity – state tort claims
- Public official immunity – state tort claims

## Qualified Immunity

- available to an official or employee
- “violate clearly established statutory or constitutional rights of which a reasonable person would have known”
- prior judicial decision with substantially similar facts



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## Governmental Immunity

- The King can do no wrong!
- bars tort claims against local gov'ts arising from governmental functions
- does not bar tort claims arising from proprietary functions



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## Governmental v. Proprietary

- **Governmental**
  - discretionary, legislative, or public in nature
  - performed for the public good on behalf of the State
- **Proprietary**
  - commercial or chiefly for the private benefit of the compact community

## Waiver of Governmental Immunity

- purchasing liability insurance
- joining a risk pool
- governing board resolution



## Public Official Immunity

- bars tort claims against “public officials” acting within the course and scope of their duties unless malicious or corrupt
- does not protect public employees

## Public Officials v. Public Employees

- public officials
  - position created by law
  - oath of office
  - exercises discretion
  - sovereign power of state
- public employees
  - perform ministerial tasks
- DSS Director
- Social workers


## Defense of Local Gov't Personnel

- Payment of employee's legal costs
- Payment of judgment against employee




## Questions?

# STATE OVERSIGHT OF COUNTY AGENCIES

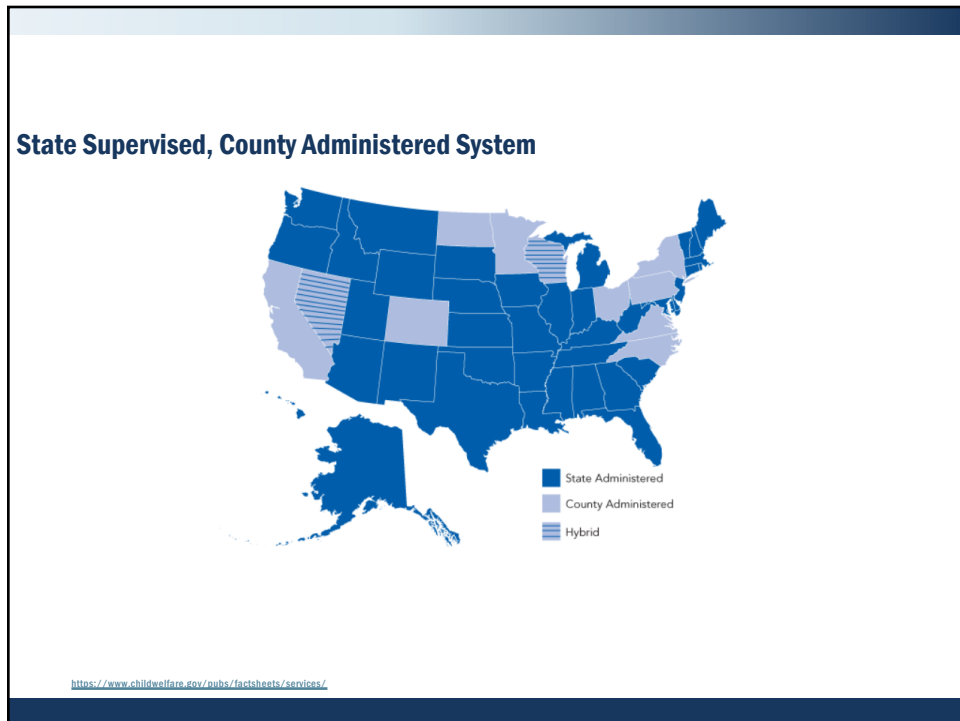


NC DEPARTMENT OF  
**HEALTH AND  
HUMAN SERVICES**

**Julie Cronin**  
Assistant General Counsel, NC DHHS



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### What does this mean?

- The federal government authorizes national programs and a majority of the funding for these programs

- US HHS oversees Work First, Child Welfare, Child Care, Child Support, Adult and Family Services, Low Income Energy Assistance, and Medicaid.
- The USDA oversees Food and Nutrition Services.



ADMINISTRATION FOR  
CHILDREN & FAMILIES



- In North Carolina the single oversight agency is NCDHHS
- The 100 local county departments of social services deliver the services and benefits.



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### Framework in North Carolina

- N.C. Gen. Stat. § 143B-153 “created the Social Services Commission of the Department of Health and Human Services..... The Social Services Commission is authorized and empowered to adopt such rules and regulations that may be necessary and desirable for the programs administered by the Department of Health and Human Services as provided in Chapter 108A of the General Statutes of the State of North Carolina”.
- 10A NCAC Chapters 05, 06, 67, 68, 69, 70\*, 71\*, 72, 97

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### Framework in North Carolina

- N.C. Gen. Stat. § 108A-1 requires every county shall have a board of social services which shall establish county policies for the programs established in conformity with the rules and regulations of the Social Services Commission and under the supervision of the Department of Health and Human Services.
- N.C. Gen. Stat. § 108A-14(a)(5) states the county director of the social services shall “act as agent of the Social Services Commission and Department of Health and Human Services in relation to work required by the Social Services Commission and Department of Health and Human Services in the county.”

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“Based on the clear statutory scheme, along with the mandatory administrative regulations and the Family Services Manual, the Department of Human Resources had substantial and official control over the provisions of child protective services and designated the county director as the person responsible for carrying out the policies formulated by the Department.”

*Gammons v. North Carolina Department of Human Resources*, 344 N.C. 51, 63, 472 S.E.2d 722, 729 (1996)

**\*\*Department of Human Resources is the predecessor agency to NCDHHS**

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### Child Welfare Litigation – In the past 24 months....

- \$220,000
- \$850,000
- \$250,000
- \$1,000,000\*
- \$230,000
- \$230,000

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### In addition....

- Local Agency Decisions → State Agency Decisions → APA
  - Example: Special Children's Adoption Incentive Fund
    - \$50,000 (50-50 split with County)
    - \$8,632 plus \$38,268 in retroactive payments
- Compliance Penalties to Federal Agencies
  - \$430,000 reinvestment plan
  - Compromised \$1.9M in overpayments
- Corrective Action with Federal Agencies

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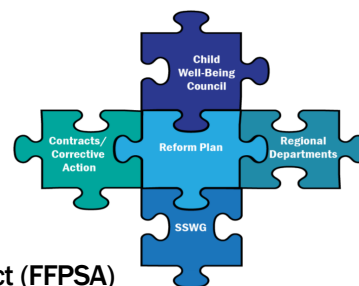


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## Social Services Reform and Ongoing Work

- **Rylan's Law – 2017**
  - Social Services Working Group
  - Third-Party Vendor/Reform Plan
  - MOUs
  - Child Wellbeing Transformation Council
  - Regional Oversight
- **Families First Services Prevention Act (FFPSA)**
- **2020-2024 Child and Family Services Plan**
- **State Plans for Federal Programs (IV-E, SNAP, TANF, LIHEAP)**



<https://files.nc.gov/ncdhhs/documents/files/dss/statistics/2020-2024-Child-and-Family-Services-Plan-FINAL-2-2020.pdf>  
<https://www.ncdhhs.gov/divisions/social-services/child-welfare-services/family-first-prevention-services-act>

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## County Performance

- **"The MOU"**
  - Required by law
  - First issued in 2018
  - Current MOU period is January 2021 - July 2022 (18-months)
    - 99 Counties have signed
  - Establishes performance metrics for child welfare, adult services and economic assistance programs.
- **Withhold Funding?**



NC DEPARTMENT OF  
HEALTH AND  
HUMAN SERVICES

ROY COOPER • Governor  
MANDY COHEN, MD, MPH • Secretary  
SUSAN OSBORNE • Assistant Secretary for County Operations for  
Human Services

May 26, 2021

SUBJECT: County MOU Agreements  
REQUIRED ACTION: Information Only

Dear DSS Directors,

First let me thank you for your ongoing commitment to serve the individuals, children and families in our state both in your regular duties and thru your work on the COVID-19 front. Your hard work and dedication to ensuring that everyone, from your team members to your constituents, remain safe and healthy is evident.

COVID-19 has changed our world and had an impact on the work of human services. You are experiencing significant increases in requests for the safety net services you provide. NC DHHS recognizes that during a declaration of emergency, there are barriers difficult to overcome in meeting the performance measures outlined in the 2021-2022 MOU.

As we discussed on the 100 County Director Call on May 25<sup>th</sup>, the Division is formalizing ongoing criteria for when a pause of Corrective/Development Plans is implemented. At this time, we are not issuing any corrective or development plans during the months of the emergency declaration. While we will continue to monitor performance and share data with you and provide your team support, there will be no formal performance improvement or corrective actions taken related to MOU performance.

We will be in discussion with you about developing a joint plan for reinstating these measures once the declaration is lifted.

Thank you once again for all that you do for all our citizens!

In partnership,  
Susan  
Susan G. Osborne  
Assistant Secretary

NC DEPARTMENT OF HEALTH AND HUMAN SERVICES • DIVISION OF SOCIAL SERVICES

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## The Dashboard

Click to Return to Landing Page

### North Carolina Social Services System Transparency and Wellness Dashboard

Profile - Child Welfare Services

#### What Are The Performance Measures?

The North Carolina General Assembly passed the Child Accountability and Protect Act/Ryan's Law requiring performance measures for each service area. To learn more, visit <https://www.ncdhhs.gov/>.

#### Child Welfare

These performance measures address the immediate safety, the ongoing protection of children from abuse and neglect, and the long-term security and well-being for children entering the state's child welfare system. Additional visuals below provide a better understanding of service needs and county performance.

#### How to use this page:

- Select a characteristic to view it on the map.
- Click on a single county to view its measure data below.
- To reset the map, click anywhere within the map area.

#### Characteristic Selection

☐ NONE  
☐ DSS REGION  
☐ CONGR. DISTRICT  
☐ POPULATION  
☐ URBAN/RURAL

Not sure where a specific county is located? Click here.

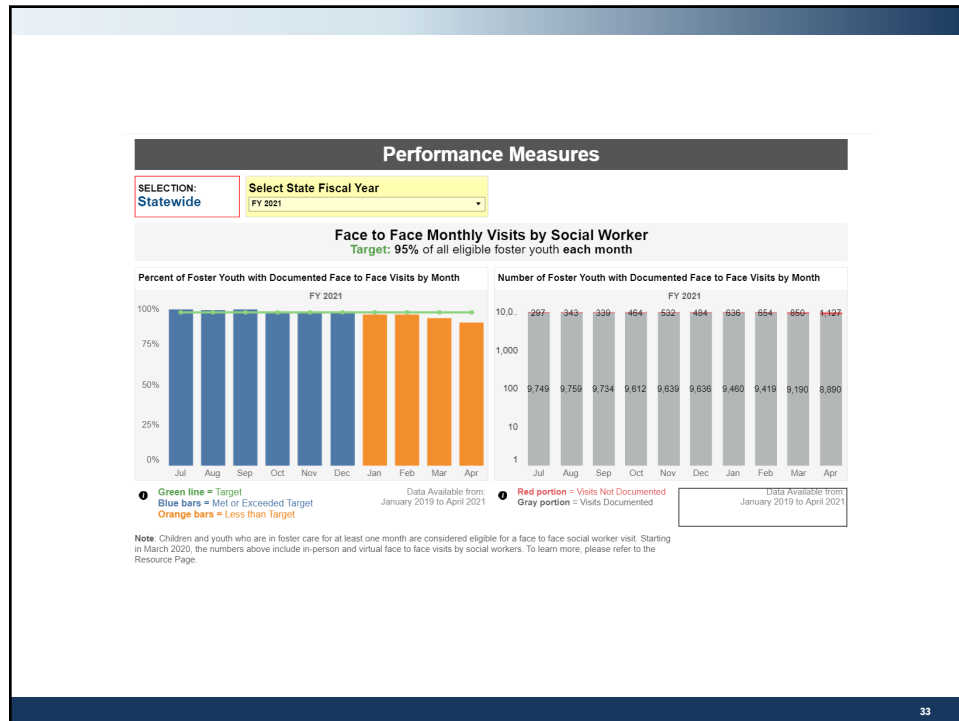
#### COUNTY SELECTED:

— No County Selected —

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### Food & Nutrition

These Performance Measures ensure that all Food and Nutrition Services application, recertifications, and Program Integrity Claims are processed in a timely manner so that families have access to the healthy and nutritious food they need for a nutritionally adequate diet.

**Select a Primary County**  

Wake

**COUNTY PROFILE:**  
 Name: **Wake**  
 Congressional District: **4**  
 Court District: **10**  
 DSS Region: **5**  
 Population: **1,111,761** (Very High)  
 Urban/Rural Designation: **Urban**

**Select Characteristic(s)**  
Select characteristic(s) to create a group of comparison counties. If no characteristics are selected, statewide data (all counties) are represented.

Congressional District  
All Congressional Districts

Court District  
All Court Districts

DSS Region  
All DSS Regions

Population Size  
All Population Sizes

Urban/Rural Designation  
Urban & Rural Counties

Counties in selected group: 100  
 HOVER TO VIEW COUNTIES IN GROUP

**Select a Month**  

May 2021

**Select a Comparison County**  

Clay

**COUNTY PROFILE:**  
 Name: **Clay**  
 Congressional District: **11**  
 Court District: **30**  
 DSS Region: **1**  
 Population: **11,231** (Very Low)  
 Urban/Rural Designation: **Rural**

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## Monitoring and Corrective Action – Child Welfare

- NCDHHS/DSS is conducting monthly reviews and provides oversight more frequently when corrective action has been required. Monthly reviews includes data reviews as well as targeted case record reviews.
- NCDSS looks at child welfare programs by reviewing program components that impact child and family outcomes as well as those mandated by law.
- Constituent concern cases may be reviewed and NCDSS may intervene in situations.

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## Monitoring and Corrective Action – Child Welfare

- Many sources of both qualitative and quantitative data are considered in determining a program's performance.
- Corrective action plans may be required when poor practice or lack of adherence to law and policy have resulted in poor outcomes.
- When a corrective action plan is required, NCDSS works with the County to develop the plan, and assists the county in its correction through TA and on-site visits.
- Typically, the entire program is fully examined with all issues being addressed.

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### 108A-74 (Prior to March 1, 2020)

- Secretary must ensure delivery of Child Welfare in accordance with law and rule
  - CPS, Foster Care, Adoption
- Steps for 60-day intervention plan
  - Send Staff for TA
  - Corrective Action
  - Advise staff
- Emergency Takeover
  - Divest the Director of all service delivery powers under 108A-14
  - DHHS takes control of funding and County must pay non-federal share to come into compliance

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### 108A-74 (as of March 1, 2020)

- MOU Requirements
  - Child welfare, FNS, Work First, Child Support, SA, Guardianship, Energy
- Corrective Action Process for MOU
  - 3 consecutive months or 5/12 months
  - Can lead to takeover
- Emergency Takeover Authority
  - Still applies only to Child Welfare (CPS, Foster Care, Adoption)

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## Taking Control of Child Welfare – A Timeline

- **Tuesday March 13, 2018**
  - Issued notice of Corrective Action
- **Wednesday March 14, 2018**
  - Call with Judge who issued Order
- **Friday March 16, 2018**
  - Issued notice letter to DSS Director, DSS Board and County Commissioners of intent to takeover delivery of Child Welfare Services in County
  - Secretary determined that the County was “not providing child protective, foster care, or adoption services in accordance with State law and with applicable rules .... and the failure to provide the services poses a substantial threat to the safety and welfare of children in the county who receive or are eligible to receive the services”



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## Taking Control of Child Welfare – A Timeline

- **Monday March 19, 2018**
  - Team from NCDHHS arrived at County DSS Offices
  - Meetings with DSS Child Welfare Staff, DSS Attorney, County Manager, District Court Judges, District Court Clerk, GAL Attorney and Program Staff, County Commissioners, DSS Board
- **March 30, 2018**
  - Issued full assessment and findings of County Child Welfare operations
- **April 2018 – September 2018**
  - NCDHHS operated Child Welfare in County
  - \*\*September 20, 2018 – County Commissioners dissolved DSS Board

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## Taking Control of Child Welfare – A Timeline

- **October 15, 2018**
  - Issued “Exit Letter” setting October 29, 2018 as date NCDHHS would begin to transfer control back to County
- **November 2018 – January 2019**
  - Enhanced Technical Assistance Plan implemented in County

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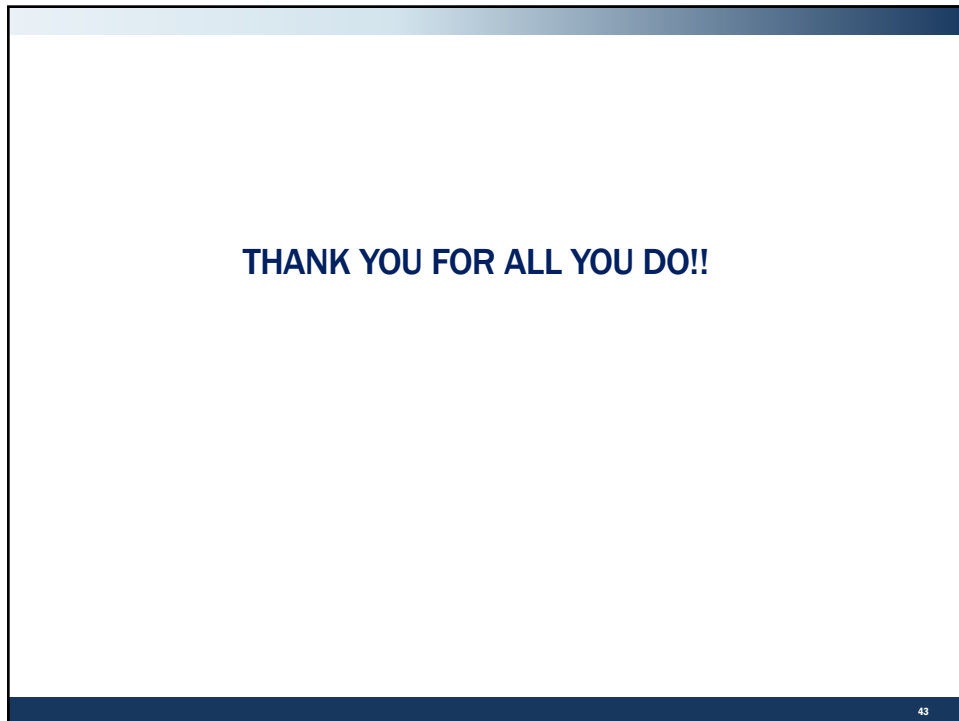
## DSS-DHHS “Coffee Break”?

- Once per month – days and times?
- Open to DSS attorneys only (no Directors or DSS staff)
- Discuss general policy concerns (not case specific questions)
- Highlight DCDLs or other communications of interest
- Upcoming Changes (State or Federal)
- Legislation
- Get to know each other

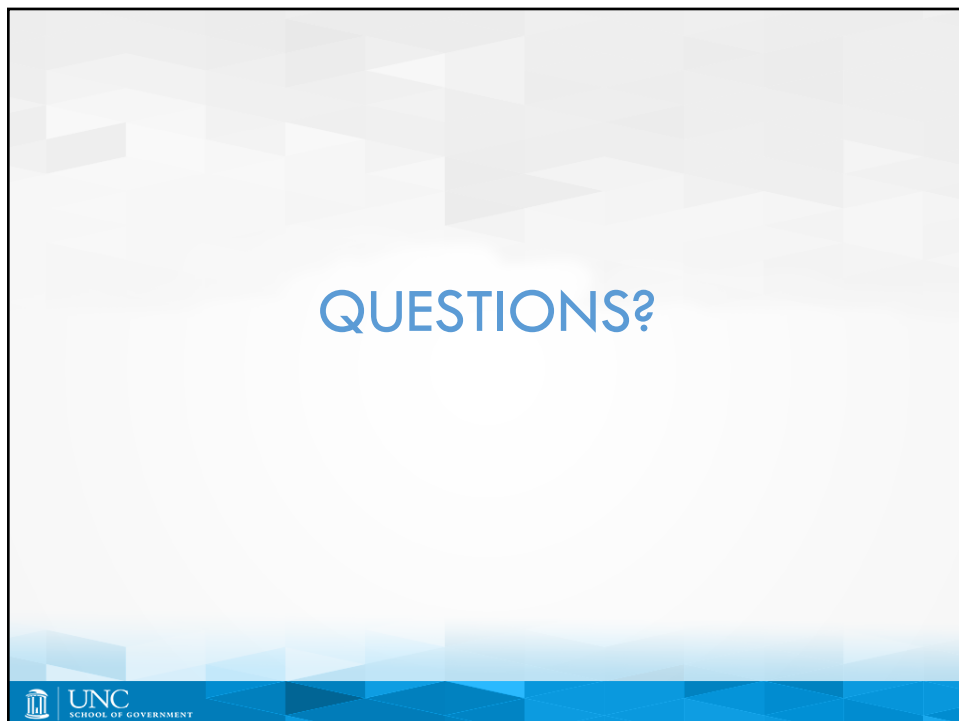


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