



Office of the General Counsel

3211 FOURTH STREET NE • WASHINGTON DC 20017-1194 • 202-541-3300 • FAX 202-541-3337

Submitted Electronically

February 14, 2020

U.S. Department of Health and Human Services
Center for Faith and Opportunity Initiatives
Attention: Equal Treatment NPRM, RIN 0991-AC13
Hubert H. Humphrey Building, Room 747D
200 Independence Ave., SW
Washington, DC 20201

Subj: Ensuring Equal Treatment of Faith-Based Organizations, RIN 0991-AC13

Dear Sir or Madam:

On behalf of the United States Conference of Catholic Bishops (“USCCB”), we submit the following comments on proposed HHS regulations, published at 85 Fed. Reg. 2974 (Jan. 17, 2020), regarding the equal treatment of faith-based organizations in Department programs.

The proposed regulations are intended to eliminate regulatory burdens imposed on faith-based organizations that receive federal funds from HHS. We agree that religious organizations should not be singled out for special regulatory burdens, and that such targeting raises constitutional problems.

Analysis

1. Eliminating the Requirement of Notice of, and Referral to, an Alternative Provider

Existing regulations require religious organizations that receive HHS funds to notify potential beneficiaries of a right to an alternative provider and, upon request, to make such a referral. As HHS notes, this requirement was imposed on faith-based organizations alone, not secular organizations. 85 Fed. Reg. at 2976. We agree with HHS that “[a]pplying the alternative provider requirement categorically to all faith-based providers, but not to other providers of federally funded social services,” is “in tension with the nondiscrimination principle articulated in *Trinity Lutheran*¹ and the Attorney General’s Memorandum on Religious Liberty,”² *Id.* We also agree with HHS that “the alternative provider requirement could in certain circumstances

¹ *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017).

² Memorandum for All Executive Departments and Agencies, “Federal Law Protections for Religious Liberty,” 82 Fed. Reg. 49668 (Oct. 26, 2017).

raise implications under RFRA.” *Id.* “[I]t is far from clear,” as the Department concedes, that referral to an alternative provider “would meet the strict scrutiny that RFRA requires of laws that substantially burden religious practice.” *Id.* at 2977. Indeed, the Department “is not aware of any instance”—nor are we—“in which a beneficiary has actually sought an alternative provider, undermining the suggestion that the interests this requirement serves are in fact important, much less compelling enough to outweigh a substantial burden on religious exercise.” *Id.*

We agree and, for the reasons stated by HHS, we encourage the Department to adopt its proposal to eliminate the notification and referral requirements.

2. Eliminating Other Notice Requirements

The current regulations require that faith-based social service providers give notice of nondiscrimination based on religion, that participation in religious activities must be voluntary and separate in time or space from activities funded with direct federal funds, and that beneficiaries or potential beneficiaries may report violations. As the Department observes, “[t]here is no basis on which to presume that [faith-based providers of social services] are less likely than other social service providers to follow the law.” 85 Fed. Reg. at 2977. “There is, therefore, no need for prophylactic protections that create administrative burdens on faith-based providers that are not imposed on similarly situated secular providers.” *Id.* In addition, as the Department concedes, notice requirements that single out faith-based organizations for particular regulatory requirements that do not apply to secular organizations may run afoul of the Religion Clauses of the First Amendment. *Id.* at 2981.

We agree and, for the reasons HHS has stated, we encourage the Department to adopt its proposal to eliminate these additional notice requirements.

3. Eliminating the Requirement that Indirect Aid Hinge Upon the Availability of at Least One Secular Provider

Existing regulations make eligibility for receiving indirect federal financial assistance depend upon the availability of at least one secular provider. We agree with the Department that requiring the availability of secular providers “is in tension with the Supreme Court’s choice [in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)] not to make the definition of indirect aid hinge on the geographically varying availability of secular providers.” 85 Fed. Reg. at 2977. The Department concludes that it is appropriate to amend the existing regulations to eliminate the requirement that there be at least one secular provider.

For the reasons HHS has stated, we encourage it to adopt its proposal to eliminate the requirement that indirect financial aid be conditioned on the availability of at least one secular provider.

4. Protecting Rights of Autonomy and Expression; Ensuring Equal Treatment

The proposed rule includes language to make clear that in Department-funded programs, faith-based organizations shall retain their autonomy, their right of expression, their religious character, and their independence from federal, state and local governments. 85 Fed. Reg. at 2978. The proposed rule also clarifies that none of the guidance documents used in

administering the programs shall require faith-based organizations to provide assurances or notices that are not imposed on secular organizations. *Id.*

The autonomy and expression of religious organizations is an interest of the highest order. The imposition of administrative requirements that do not apply to secular organization in Department programs would, as HHS concedes, raise constitutional problems. For these reasons, we support the adoption of the proposed language.

5. Protecting Rights and Obligations of Faith-Based Organizations

The proposed rule would require that Department notices and announcements include language clarifying that faith-based organizations may apply for awards on the same basis as any other organization; that the Department will not discriminate against faith-based organizations on the basis of religious exercise or affiliation; and that a faith-based organization retains its independence from the government and may carry out its missions consistent with the religious freedom protections of federal law. 85 Fed. Reg. at 2978.

We agree with these laudable objectives and support adoption of the proposed language.

6. Other Proposed Changes

The proposed regulations make several other helpful changes.

The proposed regulations would add a definition of religious exercise that mirrors the definition of religious exercise in RFRA and the Religious Land Use and Institutionalized Persons Act. 85 Fed. Reg. at 2978; *see* 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A) (defining religious exercise to “include[] any exercise of religion, whether or not compelled by, or central to, a system of religious belief”).

The proposed section 87.3(a) clarifies that the eligibility of a faith-based organization for participation in any program or service should consider “any permissible accommodation.” 85 Fed. Reg. at 2979, 2986.³ The same proposed provision would also change the terms “religious character or affiliation” to “religious affiliation or *exercise*,” *id.*, thus clarifying that it is not only an organization’s religious identity, but the exercise of its religious convictions, that is protected under federal law.

The proposed section 87.3(b) clarifies that the prohibition on use of direct aid to engage in any explicitly religious activity applies only to those organizations that *receive* federal financial assistance, not to those who *apply* for such assistance. 85 Fed. Reg. at 2979-80. We agree that conditions on government funding only apply to those who receive such funding, not to the broader universe of all who apply for it. Because the prohibition on *engaging* in explicitly religious activity with direct federal funding is sufficiently clear, the proposed section 87.3(b)

³ Proposed section 87.3(e) includes a similar reference, noting that program requirements may be modified or exempted by any required or appropriate religious accommodation. 85 Fed. Reg. at 2986. As the Department notes, “the inclusion of an explicit recognition of this legal protection ensures that protected organizations are aware that such legal protections exist.” *Id.* at 2981.

The Department asks whether the regulation should define the term “religious accommodation.” *Id.* We think they should not, as the term has an accepted legal usage and its meaning which would be difficult to capture in a single definition.

would also eliminate what the Department correctly acknowledges to be the “vague and overly broad” prohibition on *supporting* religious activity. *Id.* at 2980.

The existing section 87.3(c) states that a faith-based organization receiving federal financial assistance from HHS is not required to remove religious art, icons, scriptures, or other religious symbols. The proposed section 87.3(c) helpfully clarifies that this rule protects against not only the removal of such items, but also their alteration or concealment. 85 Fed. Reg. at 2980, 2986. The proposed section 87.3(c) also clarifies that religious organizations may select their board members “on the basis of their acceptance of or adherence to the religious tenets of the organization.” *Id.* In this regard, the Department is correct that religious faith involves more than mere self-identification as a member of a particular religion or denomination; it involves the actual acceptance and practice of that faith.

The proposed religious non-discrimination provisions of section 87.3(d), by eliminating the word “outreach,” clarify that nothing in the regulation prevents a religious organization from engaging in outreach to its co-religionists. 85 Fed. Reg. at 2980-81. We agree that this helps avoid potential constitutional problems with respect to both speech and religious freedom. The proposed section 87.3(d) also clarifies that a beneficiary of indirect federal financial assistance may choose to participate in a program that includes a mandatory religious element. *Id.* at 2986.

Proposed section 87.3(f) likewise clarifies that religious employers may “select[] [their] employees on the basis of their acceptance of or adherence to the religious tenets of the organization,” and states that this freedom applies not just to Title VII but to the Americans with Disabilities Act. *Id.* at 2986. Again, the Department is correct to recognize that religion is more than mere self-identification as a member of a particular religious faith.

Proposed section 87.3(g) provides for an accommodation for those religious nonprofits whose sincerely-held religious beliefs impede or bar their application for a determination of nonprofit status. 85 Fed. Reg. at 2987.

All these clarifications are appropriate and commendable and we encourage their adoption.

Conclusion

The proposed regulations would helpfully eliminate regulatory burdens on faith-based providers of social services that receive HHS funds. We commend the Department for the proposed changes discussed in this letter, and urge their adoption on the final rule.

Thank you for the opportunity to comment.

Sincerely,

Anthony R. Picarello, Jr.
Associate General Secretary &
General Counsel

Michael F. Moses
Associate General Counsel