



February 14, 2020

The Honorable Alex Azar

Secretary

United States Department of Health and Human Services

Hubert H. Humphrey Building, Room 509F

200 Independence Avenue, S.W.

Washington, DC 20201

Re: Notice of Proposed Rulemaking “Ensuring Equal Treatment of Faith-Based Organizations,” RIN 0991-AC13

Submitted via www.regulations.gov

Dear Secretary Azar:

The Jewish Federations of North America (JFNA) and the Network of Jewish Human Service Agencies (NJHSA) write to oppose the proposed rules published on January 17, 2020, that would remove key policies protecting against religious-based discrimination in vital social service programs funded by multiple federal agencies. These agencies are the Departments of Agriculture, Education, Justice, Health and Human Services, Homeland Security, Labor, Veterans Affairs, and the Agency for International Development.¹ These proposed rules substantially weaken existing policies and protections adopted in 2016 for programs that provide critical food, senior employment, supportive employment, and more to some of the most vulnerable individuals in our country – particularly older adults and people with disabilities -- leaving them at risk of being denied needed services.

The proposed changes will directly impact Jewish federations and provider agencies across the country that help fund and provide these critical supports to vulnerable beneficiaries. In addition, because Jews are an extremely small religious minority, the

¹ The Departments of Agriculture (AG) (85 Fed. Reg. 2897), Education (ED) (85 Fed. Reg. 3190), Justice (DOJ) (85 Fed. Reg. 2921), Health and Human Services (HHS) (85 Fed. Reg. 2974), Homeland Security (DHS) (85 Fed Reg. 2889), Labor (DOL) (85 Fed. Reg. 2929), Veterans Affairs (VA) (85 Fed. Reg. 2938), and the Agency for International Development (USAID) (85 Fed. Reg. 2916). (The Department of Housing and Development proposed rule was just issued on February 13, 2020, and therefore will not be addressed in this particular comment letter).

proposed changes will impact vulnerable Jewish individuals in need who seek these services and supports from faith-based or faith-sponsored organizations representing other denominations. As faith-sponsored organizations providing these services and as the representatives of Jewish beneficiaries receiving these vital services and supports, we believe that these proposed changes will threaten the social safety net and undermine the provision of critically needed services to some of the most vulnerable, impoverished people in our country. Ultimately, we believe that these changes will sanction and even embolden discrimination against religious minorities, women, LGBTQ, and other marginalized individuals. Accordingly, we strongly object to the Administration’s proposed rule changes and urge their complete withdrawal.

In considering these proposed rules, it is important to emphasize that many faith-sponsored or faith-based entities receiving federal funding to provide social services do so without discriminating against those of other faiths or those who assert no faith at all. The faith-sponsored provider agencies we represent strive to ensure that our clients are not forced to choose between accessing government-funded social services or retaining their religious freedom protections, identity, or other rights. In fact, we believe that the 2016 regulations this Administration now seeks to change struck the right balance. The 2016 regulations ensure the continuation of public-private partnerships with faith-based organizations to provide social services, consistent with the Constitution, the Religious Freedom Restoration Act (RFRA), and Supreme Court precedent, while ensuring that millions of beneficiaries of these programs are not subject to proselytizing by publicly-funded service providers and that viable secular alternatives are available and accessible. In proposing these rules, however, the Administration seeks to bend over backwards, forwards and sideways to accommodate the religious interests of government-funded faith-based providers, putting their interests ahead of and not alongside the needs of the vulnerable beneficiaries of these programs to an extent that we believe is quite wrong and raises serious constitutional issues.

We also object to the Administration’s insistence on a 30-day comment period here, rather than the 60-day or 90-day public comment period that is normally provided in accordance with Executive Orders 13563² and 12866.³ The Administration issued eight related, but separate and distinct, proposed regulations on the same day after months of deliberations. By contrast, the Administration published its proposed rule for the Department of Housing and Development just yesterday, February 13, 2020, but with the requisite 60-day comment period. Given the breadth and complexity of these proposed regulations across programs funded through eight federal agencies, the 30-day comment period clearly does not provide the public with a meaningful opportunity to comment as required under the Administrative Procedure Act.

² 2011.

³ 1993.

I. ***About Us***

A. The Jewish Federations of North America

Jewish communities across the country have a long and highly successful history of charitable giving and philanthropy through Jewish federations. The earliest Jewish federation was founded in Boston in 1895. JFNA, the umbrella organization for all Jewish federations, was founded in 1932, and today represents a network that has grown to include 146 Jewish federations and 300 network communities, serving most major population centers across North America. Together, we raise and distribute more than \$3 billion annually for social welfare, social services, and educational needs, making us one of the largest philanthropies in the nation.

We also count among our partners hundreds of non-profit Jewish communal provider agencies, including 15 leading academic medical centers/health systems, 100 nursing homes and aging communities, 125 family & children's agencies, and more than a dozen group homes, which provide health care, behavioral health care, long-term care services, vocational training, nutrition, transportation, adoption, and other important supports. Through JFNA's network of federations and partner agencies, we now represent one of the largest, strongest, and most enduring networks of social services in North America, committed to ensuring that everyone in our communities can live with dignity and achieve a decent quality of life.

Essential to our work and our success, we are a model of public-private partnership. Public safety net programs like Medicaid, Medicare, and CHIP, as well as federal grant programs, significantly support JFNA's and our non-profit partner agencies' efforts to serve annually the more than one million Jewish and non-Jewish clients who come to our doors seeking help. Through our philanthropy and these public-private partnerships, we fund skilled providers who expertly care for homebound seniors and for people of all ages with disabilities, counselors who help troubled families overcome difficulties, and programs that help struggling adults put food on their tables and pay their rent.

B. The Network of Jewish Human Service Agencies

NJHSA represents 140 non-profit human service organizations in the United States, Canada and Israel. NJHSA's members provide a full range of human services for the Jewish community and beyond, regardless of faith, background, ethnicity, and ability to pay. In addition to behavioral health care, our agencies provide residential care, psycho-social educational programming, supplemental food assistance such as delivered meals, social enterprise services, case management, caregiver support, personal aide services, transportation, emergency financial assistance, supported employment, vocational assessments, and apprenticeship programs. Our programs support the needs of youth, family, seniors, Holocaust survivors, immigrants and

refugees, persons with disabilities, veterans, and caregivers. Many of the services our agencies provide are funded in part through the federal programs subject to the proposed rules.

II. **As Faith-Sponsored Providers, We Object to the Proposed Rules' Sanction of Discrimination Within Critical Publicly-Funded Services**

Taken together, the Administration is proposing an expansive, coordinated plan across much of the federal government to revoke policies that serve to protect vulnerable beneficiaries and employees against religious discrimination by faith-based providers of vital social services. At the same time, the Administration proposes to expand or create religious exemptions for faith-based providers that would allow these entities new opportunities to discriminate on the basis of religion, and even to refuse to provide services. This proposed rollback of key safeguards against religious discrimination in vital government-funded programs and services for highly vulnerable beneficiaries is extremely troubling to us as faith-sponsored providers offering many of these services.

Under current policies adopted in 2016, faith-based entities receiving grants and contracts to provide key social services must take reasonable steps to refer beneficiaries to alternative providers if requested. They also must provide written notice of individuals' religious freedom rights, such as the right not to participate in the faith-based provider's religious activities in order to receive services.⁴ For individuals who receive services through federal voucher programs, known as "indirect aid," the 2016 regulations require there be at least one secular option available from which beneficiaries can receive services. In 2016, the Obama Administration put these safeguards into place after they were unanimously recommended by the President's Advisory Council on Faith-based and Neighborhood Partnerships, a body comprised of religious and community leaders representing a wide range of faiths and organizations.⁵

The Trump Administration now seeks to eliminate these important safeguards that appropriately balance the public-private partnership role of faith-based and faith-sponsored organizations in providing vital social services with beneficiaries' rights to be free from religious proselytizing by service providers receiving government funding. The proposed regulations also seek to expand the existing religious exemption that allows religious organizations to accept grants and discriminate in employment,⁶ and invites faith-based organizations to seek additional religious exemptions by requiring the addition of special notices to grant announcements and awards. Further, the proposed regulations seek to revoke the safeguard of a secular option for beneficiaries who obtain services through federal voucher programs. *Most disturbing of all, the*

⁴ This does not apply to USAID, which never added these requirements in 2016.

⁵ President's Advisory Council on Faith-Based and Neighborhood Partnerships, *A New Era of Partnerships: Report of Recommendations to the President* (2010), retrieved at <https://obamawhitehouse.archives.gov/sites/default/files/docs/ofbnp-council-final-report.pdf>.

⁶ This does not apply to AG, DHS, or DOJ.

proposed regulations would allow faith-based providers to require that individuals receiving services through voucher programs participate in the organizations' religious activities.⁷

In considering the potential impact of the proposed rules, it is essential to understand their reach broad reach given that the federal government awards hundreds of billions of dollars per year in taxpayer-funded grants and contracts – HHS alone administers \$500 billion of taxpayer-funded grants and contracts. These grants and contracts fund an extensive array of vital services and supports for vulnerable, low-income individuals, including food (e.g., through Meals on Wheels and congregate meals), elder care, supported employment, senior employment, transportation, violence prevention, supportive housing, and other important services delivered in our communities throughout the country. Both secular and faith-based organizations receive these federal monies as part of a public-private partnership that enables them to serve millions of vulnerable individuals in need.

Jewish provider agencies, from our hospitals to our nursing homes, and particularly our Jewish family & children's agencies have long partnered with the federal government in this way to bring vital care and supports to people in need in our own communities. However, we strive to do so in a manner that does not proselytize, and we are willing and able to provide our clients with notice of their rights and referrals to alternative providers upon their request as the 2016 regulations require.

Freedom from discrimination and caring for the people in our communities are among our core values. As Jews, we recognize that all people deserve dignity, respect, and our care regardless of their religion, gender, gender identity or sexual orientation. At a time when anti-Semitic incidents and other incidents of hate are on the rise,⁸ the proposed rules are particularly disturbing and likely will embolden rather than deter discrimination. JFNA and NJHSA together stand firmly opposed to this proposed rollback of federal protections against religious-based discrimination. There is simply no place for such discrimination among federally-funded providers of critically needed social services and supports for at-risk individuals. Faith-sponsored and faith-based nonprofit organizations receiving government funding play an essential role in meeting the needs of the people in our communities and providing care that can change lives. However, their identification with their faith is not -- and should not be -- a license to pick and choose who they will serve on the basis of their religion. *Our non-profit agencies provide their services to clients regardless of faith and we believe that federal tax-payer dollars should not be used to deny care and services to the most vulnerable people in our communities.*

⁷ 85 Fed. Reg. at 2906 (AG); 85 Fed Reg. at 3221, 3225 (ED); 85 Fed. Reg. at 2986 (HHS), 85 Fed. Reg. at 2896 (DHS); 85 Fed. Reg. at 2928 (DOJ); 75 Fed. Reg. at 2937 (DOL); 85 Fed. Reg. at 2947 (VA).

⁸ In 2018, the Anti-Defamation League recorded 1,879 anti-Semitic incidents in the United States. The number of incidents of assault, harassment and vandalism remained at near-historic levels. Anti-Defamation League, Anti-Semitic Incidents: U.S. Over the Last Decade (2009-2018), retrieved at <https://www.adl.org/2018-audit-H>.

III. As a Religious Minority, We Object to the Proposed Rules' Sanction of Discrimination Within Critical Publicly-Funded Services

We are also extremely concerned that removing the existing safeguards that protect against religious discrimination by federally-funded, faith-based organizations will harm vulnerable, low-income Jews as a religious minority, as well as women and marginalized populations like LGBTQ. In 2019, there were only 7.5 million Jewish individuals living in the United States, representing approximately two percent of the total U.S. population.⁹ Although the majority of Jews live in areas served by our Jewish provider agencies, many do not. These Jewish individuals will seek services from other service organizations, including faith-based organizations operated by other denominations. If federally-funded, faith-based service organizations provide their services in a discriminatory manner, or fail to provide notice of beneficiaries' religious rights, requested referrals or a secular option in the case of voucher programs, these actions could effectively condition the receipt of critical safety-net services on religious beliefs. Certainly, allowing religious organizations participating in federal voucher programs to require participation in religious activities as a condition to receive services does just this. At a time of widely recognized rising antisemitism, the Administration's efforts to remove the protections against religious discrimination adopted in 2016 will move our country in the wrong direction and, ultimately, will hurt Jewish recipients of these vital social services.

Although the religious freedom of faith-based organizations is important and although we support the public-private partnership as a means to provide vital services to vulnerable, impoverished individuals in our communities, there is no absolute right to a federal grant or contract. Indeed, the religious freedom of the intended beneficiaries of these federal programs must receive equal, if not greater, consideration. No federally-funded child placement agency, foster care agency, transportation service, congregate meal provider, supported employment, or other social service provider covered by these proposed regulations should be permitted to refuse services to Jewish, Muslim, Hindu or other clients because of their religion. Nor should they be permitted to use their religion as a basis for denying the services they would otherwise provide to women or other marginalized populations, like LGBTQ individuals.

IV. Alternative Provider and Written Notice Requirements Are Important Beneficiary Protections and Should be Maintained, While Expanding Religious Exemptions for Faith-Based Organizations Even Further Is Unnecessary and Could Cause Harm

⁹ Brandeis University Steinhardt Research Institute, American Jewish Population Project at 1 (2019), retrieved at <https://ajpp.brandeis.edu/documents/2019/JewishPopulationDataBrief2019.pdf>.

The current regulations ensure that individuals in need of social services who are uncomfortable receiving these services from a provider because of its religious character, or who are being denied the service because do not subscribe to that religion or adhere to its tenets, will receive a referral to an alternative provider if they wish. For example, a Jewish person receiving a congregate meal at a church might feel uncomfortable or coerced if encouraged to join a Christian prayer service. If uncomfortable enough, the person might even forego the meal. By allowing the beneficiary the opportunity to be referred elsewhere, the current regulations maintain the appropriate balance between utilizing federal funding to expand service delivery through faith-based organizations while protecting the religious freedom of individual beneficiaries.

Similarly, the current regulations ensure that individuals seeking social services from faith-based service providers receive written notice of their religious freedom rights, including that providers cannot discriminate against them based on their religion, that they cannot be forced to participate in religious activities, and that they have the right to seek an alternative provider. In this manner, the current regulations ensure that individuals who are uncomfortable receiving services from a faith-based provider are made aware of their rights under the law. The proposed regulations eliminate these important protections, leaving religious minority beneficiaries at increased risk of discrimination, proselytization, or religious coercion in critical government-funded government services.

Quite ironically, at the same time that the Administration seeks to strip away beneficiaries' notification of their rights, it is proposing to require that the federal government, e.g., HHS and DOL, provide additional notice to faith-based organizations of their rights to seek and receive federal funding for these services. The Administration proposes to add new notice requirements in grant announcements and awards "to ensure that faith-based organizations are aware of their legal protections so that they will not fail to participate in government programs."¹⁰ The Administration thus itself acknowledges the importance of notice, but seeks to revoke beneficiaries' right to notice while elevating notice for faith-based organizations applying for these federal grants and contracts.

The importance of requiring referral to alternative providers and providing written notice to beneficiaries of their right not to be discriminated against or coerced is crucial for beneficiaries and is a minimal burden on the faith-based service organizations. With respect to notice, beneficiaries receiving government-funded social services cannot exercise rights that they do not know exist. With respect to the alternative provider requirement, providers administering social services as a result of receiving federal grants are far more likely than beneficiaries to know about the existence and availability of other providers in their communities. Programs administered by the Substance Abuse and Mental Health Services Administration, for example,

¹⁰ HHS, 85 fed. Reg. at 2979; DOL, 85 Fed. Reg. at 2932.

require that faith-based providers make referrals to alternative providers if requested, as does the Temporary Assistance for Needy Families program.¹¹

The Administration argues that the current regulations' notice and alternative provider requirements impose a burden for faith-based service organizations that is not imposed on other service organizations. Although true, the burden of referring to an alternative provider and providing written notice of religious rights is minimal, a fact the Administration readily admits. HHS, for example, classifies the notice requirement as "deminimis" and estimates that the notice requirement could impose "a cost of no more than \$100 per organization per year[.]"¹² In addition, if the Administration is concerned about the differential burden being imposed on faith-based service organizations, rather than revoking these important safeguards in their entirety, it could simply require the same efforts of non-faith-based organizations receiving federal funding. The Administration attempts to justify these proposed changes by wrongly claiming that RFRA prohibits the government from imposing these requirements solely on government-funded faith-based organizations.¹³ RFRA, in fact, asks whether the law places a "substantial burden" on religious exercise. If yes, the government regulation must "further a compelling government interest" by using the "least restrictive means."¹⁴ It is difficult to see how a "deminimis" requirement qualifies as a "substantial burden." For the sake of argument, however, even if it does impose a substantial burden, the burden in this instance is lawfully permitted because the countervailing government interest is so compelling. Providing critical services to millions of the most vulnerable, impoverished individuals in the country and doing so in a manner that protects them from religious discrimination, proselytizing, and coercion is – and should be -- a countervailing and compelling government interest that justifies this minimal burden.

The Administration also seeks to add changes throughout the regulations that appear to expand or add new religious exemptions for faith-based providers. In so doing, the Administration invites additional discrimination, fails to recognize how these changes could harm beneficiaries, and fails to include corresponding language to protect beneficiaries' own religious freedom rights or to ensure that access to services is maintained for beneficiaries. New, broad religious exemptions for service providers could lead to more discrimination and even the denial of vital services. Accordingly, we oppose these changes as well.

¹¹ 42 U.S.C. §290kk-1(f) (SAMHSA); 42 U.S.C. 300x-65(e) (Mental Health and Substance Use Block Grant); 42 U.S.C. §604a(e) (TANF).

¹² E.g., HHS, 85 Fed. Reg. at 2984.

¹³ E.g., HHS, 85 Fed. Reg. at 2923.

¹⁴ 42 U.S.C. §2000bb; *see Locke v. Davey*, 540 U.S. 712 (2004) (distinguishing between coercive actions that substantially burden free exercise and a condition on funding that was a "relatively minor burden.")

V. The Proposed Rules Regarding “Indirect” Aid Will Increase Religious-Based Discrimination

Some federally-funded programs provide “indirect” financial assistance to beneficiaries in the form of vouchers. Beneficiaries then take these vouchers to providers of their choosing to receive services. The proposed rules seek to redefine the phrase “indirect Federal financial assistance” to eliminate the current requirement that beneficiaries in these programs must be able to access a secular provider if they choose. We oppose this change as it could harm beneficiaries by leaving them no choice but to rely on faith-based providers to receive vital social services.

Eliminating the secular provider option also raises constitutional issues under the Establishment Clause of the First Amendment, conflicting with the U.S. Supreme Court’s requirement in *Zelman v. Simmons-Harris* that “indirect aid” programs must permit “individuals to exercise genuine choice among options public and private, secular and religious.”¹⁵ To qualify as an indirect aid program that does not violate the Establishment Clause, there must be genuine and independent choice.

Even worse, under the proposed regulations, the Administration would allow organizations accepting this “indirect” federal government aid to condition it on a beneficiary’s participation in their religious activities. We can well imagine a situation where a faith-based entity, such as Christian church, might seek to condition the receipt of services (e.g., a congregate meal, older adult employment training, or transportation for an individual with a disability) on attending the church’s Christian services. For many Jewish beneficiaries and other religious minorities, this would be untenable. We also believe that it raises serious constitutional questions under the Establishment Clause of the Constitution’s First Amendment. The Supreme Court clearly and repeatedly has acknowledged the tension between the Establishment Clause and the Free Exercise Clause in its religious freedom jurisprudence. As the Court recognized in the leading case of *Corp. of Presiding Bishop v. Amos*, the “government may (and sometimes must) accommodate religious practices[,]” but also cautioned that “[a]t some point, accommodation may devolve into an unlawful fostering of religion.”¹⁶ *We believe that forcing beneficiaries to participate in a religious program, attend worship, pray, or be forced to adhere to the tenets, practices or requirements of a particular faith to receive vital services from government-funded providers crosses that line.*

VI. Conclusions

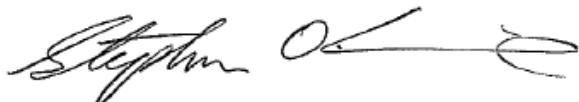
In proposing these rule changes, the Administration seeks to strip away key safeguards against religious discrimination in the administration of critical social services for highly vulnerable,

¹⁵ 536 U.S. 662 (2002).

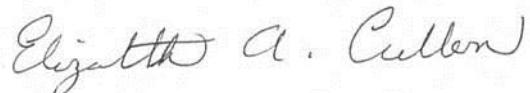
¹⁶ 483 U.S. 327, 334-35 (1987).

impoverished beneficiaries throughout the country. These safeguards balance the right of private faith-based organizations to partner with the federal government for the purpose of providing vital social services while ensuring that beneficiaries are not forced to choose between accessing critically needed services or retaining their religious freedom protections, identity, or other rights. Changing this balance to permit, and in some cases invite, religious discrimination against program beneficiaries will harm older adults and people with disabilities who are religious minorities, such as Jews, women, and other marginalized populations. Without the safeguards put into place in 2016, these beneficiaries will be at greater risk of being denied needed services or forced to comply with religious practices to which they object in order to obtain needed services. We believe that the Administration's efforts to change the 2016 regulations in this manner is wrong on its face, lacks adequate explanation or reason as to why a system that is not broken needs to be "fixed", and raises serious constitutional concerns. Accordingly, our organizations oppose these proposed changes.

Sincerely,



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