



April 13, 2020

Submitted via [www.regulations.gov](http://www.regulations.gov)

Regulations Division,  
Office of General Counsel  
U.S. Department of Housing and Urban Development  
451 7th Street SW, Room 10276,  
Washington, DC 20410-0500

Re: HUD Docket No. FR-6130-P-01, RIN 2501-AD91: Equal Participation of Faith-Based Organizations in HUD Programs and Activities: Implementation of Executive Order 13831

Dear Sir/Madam:

These comments are submitted on behalf of the National Housing Law Project (NHLP) to express our strong opposition to proposed changes outlined in “Implementation of Executive Order 13831,” published in the Federal Register on February 13, 2020 (RIN 2501-AD91; HUD Docket No. FR-6130-P-01). NHLP is a legal advocacy center focused on increasing, preserving, and improving affordable housing; expanding and enforcing rights of low-income tenants and homeowners; and increasing housing opportunities for groups protected by civil rights statutes. Our mission is to advance housing justice for poor people and other marginalized communities, including the protection and support of individuals’ rights to equal housing access regardless of religious affiliation.

People in need should never be faced with the stark choice between accessing essential services and retaining their religious freedom protections, identity, or other rights. The proposed rule would likely lead to religious minorities, nonreligious persons, women, and LGBTQ people not getting the critical services they need. Faith-based organizations can be valuable partners with government agencies, but they do not need the proposed rule changes in order to pursue these partnerships.

Many faith-based organizations provide important social services for people in need and they have been partnering with the government for years. However, this does not mean faith-based organizations should be allowed to take government funds and then use those funds to place religious litmus tests on who they hire, who they serve, or which services they provide. Nor may they include religious content in their programs funded directly by the government. We are not suggesting that faith-based organizations should be prohibited from being partners with the federal government. Instead, we believe that, when a faith-based organization receives government funds, there must be clear safeguards to protect beneficiaries, especially against proselytizing and discrimination. The proposed changes threaten the social safety net and undermine the goals of HUD programs. As such, we strongly urge HUD to withdraw the proposed rule in its entirety and allow HUD’s existing regulations to remain in effect.

## **A. What the HUD Proposed Rule Does:**

The proposed rule makes three major changes to existing HUD regulations that will restrict individuals' access to HUD programs:

1. Removes the requirement that providers take reasonable steps to refer beneficiaries to alternative providers if requested.
2. Strips the requirement that providers give beneficiaries written notice of their religious freedom rights.
3. Eliminates the safeguard that ensures people who obtain services through "indirect aid" have at least one secular option to choose from, and adds language stating that providers can require people in indirect aid programs to participate in religious activities.

## **B. The Proposed Rule Would Eliminate the Alternative Provider and Written Notice Requirements, Which Are Important Beneficiary Protections**

### **a. The Alternative Provider Requirement**

Current regulations ensure that people seeking social services who are uncomfortable at a provider because of its religious character will be referred to an alternative provider. The new regulations strike this alternative provider requirement. Eliminating the alternative provider requirement has the potential to cause beneficiaries significant harm and could result in them not feeling as though they can comfortably participate in a given program (and thus limiting access to that program). Even though social service programs that receive direct aid are supposed to have secular content only, a person may feel uncomfortable and want an alternative provider, as in the following examples:

1. A religious minority or nonreligious person forgoes services because the only program they know of is in a church adorned with Christian iconography;
2. An LGBTQ homeless teen does not seek shelter because the religion of the faith-based provider condemns them for being gay;
3. A single, pregnant mother does not seek services from a provider that disapproves of having children outside of marriage.

Congress included an alternative provider requirement in SAMHSA and TANF.<sup>1</sup> President Bush included this protection in his signature faith-based legislation,<sup>2</sup> and the Obama Administration's President's Advisory Council on Faith-Based and Neighborhood Partnerships unanimously

---

<sup>1</sup> 42 USC § 290kk-1(f); 42 USC § 300x-65(e); 42 USC § 604a(e).

<sup>2</sup> CARE Act of 2002, H.R. 7, 107th Cong. § 201 (2001), *available at* <https://www.congress.gov/bill/107th-congress/house-bill/7>.

recommended adding the alternative provider requirement.<sup>3</sup> Providers (sophisticated enough to offer social services and navigate the grant-making system) are more likely than beneficiaries to know of other providers, and can therefore more easily provide that information than placing the burden on the beneficiary, who often faces a multitude of other barriers to accessing much needed assistance. Removing the alternative provider requirement adds an additional, potentially insurmountable, hurdle for beneficiaries that could prevent them getting the help they need. This undermines the entire purpose of these programs.

When originally recommending the alternative provider requirement, the Council recognized that it would likely impose monetary costs on providers, but nonetheless concluded that the government must offer this safeguard, “in order to provide adequate protection for the fundamental religious liberty rights of social service beneficiaries.”<sup>4</sup> In proposing this rule change, HUD ignores the rights of beneficiaries and the value of the protection, even as it acknowledges the de minimis costs of the alternative provider requirement, and still seeks to remove the protection. HUD has estimated that removing the existing beneficiary protection requirements would result in a cost savings of approximately \$50 per referral.<sup>5</sup>

#### **b. The Written Notice Requirement**

The existing regulations also require giving written notice to beneficiaries of their religious freedom rights, including that a provider cannot discriminate against beneficiaries based on their religion, force beneficiaries to participate in religious activities, and that beneficiaries have a right to seek an alternative provider (see above). The proposed rule strips this requirement, leaving beneficiaries at risk.

People using government-funded social services cannot exercise their rights if they are not aware they have them. Refusing to inform beneficiaries of their rights leaves them unaware that providers must not subject them to discrimination, proselytization, or religious coercion in government-funded services.

HUD is aware of the value of notice requirements to provide information about rights: at the same time that HUD is proposing to remove notice for beneficiaries, it seeks to add a notice for providers in the form of Appendix A to NOFAs. If providers, who are capable of applying for and administering federal grants, deserve notice of their rights,<sup>6</sup> so too do the beneficiaries who use HUD programs. HUD says removing the notice requirement will reduce administrative burdens and costs for providers. However, the harm removal causes for beneficiaries clearly outweighs these minor costs: the

---

<sup>3</sup>President’s Advisory Council on Faith-Based and Neighborhood Partnerships, A New Era of Partnerships: Report of Recommendations to the President 141 (2010), <http://bit.ly/2A0yhXA>. Members included: Nathan J. Diament, Director of Public Policy, Union of Orthodox Jewish Congregations of America; Dr. Frank Page, Vice-President of Evangelization, North American Mission Board, and Past President of the Southern Baptist Convention; Anthony R. Picarello, Jr., General Counsel, United States Conference of Catholic Bishops; The Reverend Larry J. Snyder, President and CEO, Catholic Charities USA; and Richard E. Stearns, President, World Vision United States.

<sup>4</sup> *Id.*

<sup>5</sup> HUD, 85 Fed. Reg. at 8222.

<sup>6</sup> HUD, 85 Fed. Reg. at 8220 (noting that “Appendix A adds language to all Notices of Funding Availability that clarifies the rights of faith-based organizations applying for the relevant award, including rights that spring from the First Amendment and RFRA”).

Department estimates that the notice requirement imposes a cost of less than \$200 per organization per year.<sup>7</sup>

### **C. The Proposed Rule Undermines Important Safeguards for Beneficiaries in “Indirect Aid” Programs**

The proposed rule redefines “indirect aid” to eliminate the current requirement established in *Zelman v. Simmons-Harris* that a beneficiary must have the option of a secular provider.<sup>8</sup> In *Zelman*, the Supreme Court held that educational vouchers could be used to fund religious education because the government is not directing the funds to the religious programs; instead the beneficiary has exercised a meaningful choice of whether to receive services from a religious or secular provider.

”Indirect aid” programs that offer true genuine and independent private choices for beneficiaries break the chain between government financial support and concerns about government impermissibly funding religious education. The proposed rule ignores the constitutional requirement that programs must include a secular option. In a serious misreading of *Zelman*, HUD has asserted that the availability of secular providers was unimportant to the decision. This reading is erroneous.

The *Zelman* Court upheld an educational voucher program because it provided beneficiaries genuine and independent choices “among options public and private, secular and religious. The program is therefore a program of true private choice.”<sup>9</sup> The Court repeatedly focused on the true genuine and independent choices of private individuals which led to government educational vouchers being spent at religious schools. In *Zelman*, the Court was unconcerned with the fact that beneficiaries disproportionately chose the single religious option because they had 5 public or secular options as well. To claim that *Zelman* justifies the possibility of a single religious provider as the only option for “indirect aid” is simply incorrect.

By definition, the inability to reject a religious provider in favor of a secular option means that there is no genuine and independent choice of that religious provider. If there is no requirement for an “indirect aid” program to have at least one adequate secular provider for beneficiaries, then the government is in effect adding a religious test to government services. Without requiring a secular option, people in need could be left with no choice and forced into a program that includes explicitly religious content and program requirements. To make the new definition of “indirect” aid worse, HUD proposes allowing organizations that accept “indirect” aid to require beneficiaries to participate in religious activities.<sup>10</sup> This provision would make it even more likely that beneficiaries could be coerced into participating in religious activities.

### **D. The Rationales Provided to Justify the Proposed Rule Changes Do Not Stand Up to Scrutiny**

#### **a. *Trinity Lutheran v. Comer* Does Not Require the Department to Remove Critical Beneficiary Protections**

---

<sup>7</sup> HUD, 85 Fed. Reg. at 8222.

<sup>8</sup> 536 U.S. 639 (2002).

<sup>9</sup> *Zelman*, 536 U.S. at 662.

<sup>10</sup> 85 Fed. Reg. at 8224 (to be codified at 24 CFR pt. 5.109(g)).

HUD mistakenly relies on *Trinity Lutheran Church of Columbia, Inc. v. Comer*<sup>11</sup> to argue the government cannot require faith-based organizations to provide alternative providers or notice safeguards if it does not require the same of secular organizations. The holding of *Trinity Lutheran* is extraordinarily narrow, as the decision was limited to the specific facts of the case: “This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.”<sup>12</sup> *Trinity Lutheran* says only that the government cannot disqualify a religious entity from competing for a grant “solely because of its religious character.”<sup>13</sup>

The existing regulations already make clear that religious organizations can compete for grants that fund social service programs.<sup>14</sup> *Trinity Lutheran* does not bar the government from requiring faith-based providers operating under a grant to follow appropriate religious freedom safeguards. The safeguards do not categorically exclude religious organizations from applying for and receiving grants.

Both the written notice and the alternative provider requirements further the compelling interest of protecting the religious freedom rights of people using Department-funded programs. These protections also further the compelling interest of getting that beneficiaries the services they need. The notice and alternative provider safeguards are also narrowly tailored. The current rule requires a simple written notification requirement that the providers can copy and paste from an example provided in the existing rule,<sup>15</sup> one that the agency says has minimal costs (see above).<sup>16</sup>

#### **b. The Religious Freedom Restoration Act (RFRA) Does Not Require HUD to Remove the Alternative Provider Requirement**

The proposed rule’s preamble wrongly claims that RFRA prevents the government from imposing the alternative provider requirement because it “could in certain circumstances raise concerns under RFRA.”<sup>17</sup> RFRA 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

---

<sup>11</sup> 137 S. Ct. 2012 (2017).

<sup>12</sup> *Id.* at 2024 n.3 (2017) (Chief Justice Roberts delivered the opinion of the Court, except as to footnote 3. Justices Kennedy, Alito and Kagan joined the opinion in full, and Justices Thomas and Gorsuch joined except as to footnote 3.).

<sup>13</sup> *Id.* at 2021.

<sup>14</sup> 24 CFR 5.109(c)

<sup>15</sup> Federal Agency Final Regulations Implementing Executive Order 13559: Fundamental Principles and Policymaking Criteria for Partnerships With Faith-Based and Other Neighborhood Organizations, 81 Fed. Reg. 19,355,19,428-29 (Apr. 4, 2016) (Appendix E).

<sup>16</sup> The Department has estimated that removing the existing beneficiary protection requirements would result in a cost savings of approximately \$50 per referral, and that the notice requirement could impose a cost of less than \$200 per organization per year. 85 Fed. Reg. at 8222.

<sup>17</sup> Equal Participation of Faith-Based Organizations in HUD Programs and Activities: Implementation of Executive Order 13831, 85 Fed. Reg. 2815 (proposed Feb. 13, 2020) (to be codified at 24 C.F.R. pts. 5, 92, 578).

restrictive means.”<sup>18</sup> Minimal burdens do not trigger RFRA protection<sup>19</sup> and even substantial burdens on religious exercise must be permitted where the countervailing interest is significant.

The Department’s own RFRA analysis does not even assert with confidence there is a violation: it claims only that requiring faith-based organizations to comply with the alternative provider requirement “*could* impose such a burden” ... “[a]nd it is far from clear that” the alternative provider requirement would meet the strict scrutiny that RFRA requires of laws that substantially burden religious practice.”<sup>20</sup> A policy that requires a government-funded entity to take reasonable steps to refer a beneficiary to another provider is not a “substantial burden” on government-funded providers.<sup>21</sup>

Faith-based organizations voluntarily partner with the government. If faith-based organizations do not wish to fulfill grant responsibilities clearly tied to program objectives, they can decline the funding. Even if the alternative provider did impose a “substantial burden” on a faith-based organization’s religious exercise, the government clearly has a compelling interest in protecting beneficiaries’ religious freedom rights and in ensuring those who most need services are provided them.

## **E. Conclusion**

No one should be forced to participate in a religious program, attend worship, or pray in order to access shelter. But as a result of the proposed rule changes, many people will be forced to choose between abandoning their most closely held beliefs or going without critical life-saving services. This is an untenable choice, and we strongly urge HUD to withdraw the proposed rule in its entirety and allow HUD’s existing regulations to remain in effect.

Thank you for the opportunity to submit comments on the proposed rule-making. If you have questions, please do not hesitate to contact Arianna Cook-Thajudeen at [acooktha@nhlp.org](mailto:acooktha@nhlp.org).

Sincerely,

/s/

Arianna Cook-Thajudeen

Legal Fellow, National Housing Law Project

---

<sup>18</sup> The Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-2000bb-4.

<sup>19</sup> See *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) (interpreting parallel statute, Religious Land Use and Institutionalized Persons Act (RLUIPA)); see also *Goehring v. Brophy*, 94 F.3d 1294, 1299 n.5 (9th Cir. 1996) (Even if a plaintiff’s beliefs “are sincerely held, it does not logically follow . . . that any governmental action at odds with these beliefs constitutes a substantial burden on their right to free exercise of religion.”).

<sup>20</sup> 85 Fed. Reg. at 8219 (emphasis added).

<sup>21</sup> 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”).