



April 13, 2020

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

The Honorable Benjamin S. Carson, Sr.  
Secretary  
U.S. Department of Housing and Urban Development  
451 7th St SW  
Washington, DC 20410

**Re: Equal Participation of Faith-Based Organizations in HUD Programs and Activities: Implementation of Executive Order 13831 [Docket #: HUD-2020-0017, RIN #: 2501-AD91]**

Dear Secretary Carson,

Thank you for the opportunity to comment on the Equal Participation of Faith-Based Organizations in U.S. Department of Housing and Urban Development (HUD) Programs and Activities: Implementation of Executive Order 13831. The National Disability Rights Network (NDRN) writes in opposition to HUD's proposed rule.

NDRN is the non-profit membership association of Protection and Advocacy (P&A) agencies that are located in all 50 States, the District of Columbia, Puerto Rico, and the United States Territories. In addition, there is a P&A affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Paiute Nations in the Four Corners region of the Southwest. P&A agencies are authorized under various federal statutes to provide legal representation and related advocacy services, and to investigate abuse and neglect of individuals with disabilities in a variety of settings. The P&A Network comprises the nation's largest provider of legally-based advocacy services for persons with disabilities, including advocacy on community integration to ensure people with disabilities who want to live in the community can do so. While NDRN works primarily to protect against forms of discrimination based on disability, people with disabilities have intersectional identities, and an attack on the civil rights of one group is an attack on the civil rights of all.

People with disabilities and their families already face a national shortage of accessible and affordable housing, particularly the lowest-income people with disabilities and this proposed rule could create yet another barrier to important programs. Faith-based organizations should not be permitted to take government funds and then place religious litmus tests on who they hire, who they serve, or which services they provide with those funds. Nor may they include religious content in their programs funded directly by the government. Clear safeguards are still needed to protect beneficiaries,

especially against discrimination.

This rule would, among other troubling changes, end the notice and referral requirements for faith-based social service providers, putting the interests of government-funded religious organizations above the needs of people seeking services, and risking undermining access to these critical services. The rule would put the burden on potential beneficiaries to, as HUD describes it, “investigate alternative providers on their own.” This change has the potential to cause beneficiaries significant harm and could result in receiving no government services at all. Providers are more likely than beneficiaries to know of other providers. Removing the alternative provider requirement adds an additional, potentially insurmountable, hurdle for beneficiaries that could prevent them from getting the help they need. People in need should not be faced with a choice between accessing essential services and programs or retaining their religious freedom protections, identity, or other rights.

HUD must not allow religious organizations to accept grants and then discriminate with taxpayer funds. Instead, HUD should retain the requirement that providers take reasonable steps to refer beneficiaries to alternative providers if requested. HUD should also retain the requirement that providers give beneficiaries written notice of their religious freedom rights. HUD must not finalize regulatory language stating that providers can require people in voucher programs to participate in religious activities. HUD must, instead, retain the safeguard that ensures people who obtain services through a voucher program (or “indirect aid”) have at least one secular option to choose from. Additionally, contrary to the explanation in the preamble, the subsequent case law developments cited in the preamble do not justify the proposed changes.

The existing regulations require 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. 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. HUD should not remove the requirement to share information with beneficiaries about their rights, and that providers must not subject them to discrimination, proselytization, or religious coercion in government-funded services.

The Department adds language throughout the proposed rule that expands or adds new religious exemptions for faith-based providers, supposedly to add clarity. However, the vagueness of the language and the number of references to exemptions only create confusion. As currently written, there is no acknowledgment of the constitutional limits on the government’s ability to grant these exemptions. Any exemption the government grants “must be measured so that it does not override other significant interests”<sup>1</sup> or

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<sup>1</sup> *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005); see also *Estate of Thornton v. Caldor, Inc.* 472 U.S. 703, 709-10 (1985) (“unyielding weighting” of religious interests of those taking exemption “over all other interest” violates Constitution).

“impose unjustified burdens on other[s].”<sup>2</sup>

The government should not award funds to organizations that discriminate against qualified applicants for taxpayer-funded jobs because they cannot meet a religious litmus test, and the proposed rule bolters this possibility. The proposed rule states that a faith-based organization may select its “employees on the basis of their acceptance of or adherence to the religious tenets of the organization.”<sup>3</sup> At the same time, the proposed rule fails to make clear that religious employers do not get a license to discriminate on grounds other than religion, even when motivated by religion.<sup>4</sup>

The proposed rule redefines “indirect aid” to eliminate the current requirement that the beneficiary must have the option of a secular provider. Again, 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. No one should be forced to participate in a religious program, attend worship, or pray in order to get vital services. Yet when people who have to use a voucher to get services have no secular option to choose from, this may be their reality. HUD also proposes allowing organizations that accept “indirect” aid to require beneficiaries to participate in religious activities.<sup>5</sup> This provision would make it even more likely that beneficiaries could be coerced into participating in religious activities.

Please contact Cyrus Huncharek, Public Policy Analyst, at [cyrus.huncharek@ndrn.org](mailto:cyrus.huncharek@ndrn.org) should you have any questions or concerns with these comments.

Sincerely,



Curtis L. Decker  
Executive Director

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<sup>2</sup> *Cutter*, 544 U.S. at 726. See also *Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n. 8 (1989) (religious accommodations may not impose “substantial burdens on nonbeneficiaries”).

<sup>3</sup> HUD, 85 Fed. Reg. at 8224 (to be codified at 24 CFR pt. 5.109(d)(2)).

<sup>4</sup> *Ganzy v. Allen Christian Sch.*, 995 F. Supp 340, 250 (E.D.N.Y. 1998); see also, e.g., *Hamilton v. Southland Christian Sch.*, 680 F.3d 1316 (11th Cir. 2012); *Fremont*, 781 F.2d at 1367 (9th Cir. 1986).

<sup>5</sup> 85 Fed. Reg. at 8224 (to be codified at 24 CFR pt. 5.109(g)).