March 14, 2023

Submitted via www.regulations.gov

Re: AACS Comment Opposing the Nine Agency Proposed Rule "Partnerships with Faith-Based and Neighborhood Organizations," RIN 1105-AB64, 1290-AA45, 1840-AD67, 0503-AA73

These public comments are submitted on behalf of the American Association of Christian Schools (AACS), a national organization comprised of 700 member Christian schools across the country that serve approximately 117,000 students. Like other faith-based institutions that offer services to the public, the Christian mission of our schools leads us to provide families with high quality educational services that include both strong academics and teachings that inculcate the values and tenets of our faith into our students' lives. As an organization that partners with local churches and families, we believe that faith-based organizations are uniquely equipped and motivated to serve those in need and should be allowed to participate in social service programs while maintaining their distinctive religious identities and practices.

The agencies have stated two reasons for the necessity of the proposed rule: (1) "it is central to the Agencies' missions that federally funded services and programs . . . reach the widest possible eligible population, including historically marginalized communities"; and (2) "to address and correct inconsistencies and confusion raised by the 2020 Rule."[1] However, we have concerns that the proposed rule will actually limit the availability of services and programs for those in need and will also raise confusion for both the beneficiaries and service partners that are seeking to offer help and aid. Many of the efforts to "address and correct" the 2020 Rule will unnecessarily burden faith-based providers with pressure from the government to alter their religious practices or identity in order to compete fairly with secular organizations.

Several key areas raise significant concerns:

- **Referral and Notice of Referral:** The proposed rule modifies a stipulation from the 2016 Rule, established under the Obama administration (which was eliminated by the 2020 Rule), that required participating providers to inform beneficiaries that "if they were to object to the religious nature of a given provider, the provider would be required to make reasonable efforts to refer them to an alternative provider."[2] The reasoning given is that, without such assistance, "it may be challenging" for beneficiaries to identify other service providers.[3] The referrals would "make it easier for beneficiaries . . . to learn about alternative providers," increase "access to federally funded services," and remove "barriers arising from discrimination."[4] However, the 2020 Rule found that the 2016 "alternative provider notice-and-referral requirements were solutions in search of a problem because . . . there is no indication anyone sought a referral under those provisions."[5] In fact, the conclusion in the 2020 Rule, based on the experience of

[1] 88 Fed. Reg. 2398.
[2] *Id.* at 2399.
[3] *Id*.
[4] *Id.* at 2407.
[5] 85 Fed. Reg. 82037, 82043.

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the agencies, was that "maintaining the referral requirements is not necessary to avoid harm to beneficiaries."[6]

Furthermore, the notice-and-referral requirement under the 2016 Rule encouraged religious discrimination against faith-based providers by the beneficiaries, essentially targeting these providers because of their religious nature. The assumption that beneficiaries might object to the religious character of an organization, especially when the services provided are neutral in nature, demonstrates a religious animus on the part of the government. Additionally, the requirement to provide alternative options applied only to faith-based organizations, again setting up religious organizations as a target simply because of their religious nature. While the proposed rule does offer the remedy that the agencies, rather than the religious organizations, will provide the information for alternative providers, the notice-and-referral policy should apply to ***all*** providers, whether they are secular or religious, in order to maintain a fair and equal field for all providers and beneficiaries.

- **Indirect Financial Assistance:** The proposed rule changes the definition of "indirect financial assistance" to ensure that a secular option must be available for a beneficiary to be able to benefit from the service provided by a religious organization. The 2020 Rule had correctly simplified the definition of "indirect financial assistance" to require that "[t]he service provider receive[ ] the assistance as a result of an independent choice of the beneficiary, not a choice of the Government."[7] However, pointing to the use of the words "wholly," "genuinely," and "private" used in the Supreme Court decision *Zelman v. Simmons-Harris (2002)*, the proposed rule offers an explanation that beneficiaries must have a secular option to the religious providers in order to ensure that a "genuine and private" decision is being made by the beneficiary. However, this implies that the rights of a religious organization to partner in these service programs are dependent on a secular group offering the same service nearby. If this is the case, the rule should also require that secular groups offering the services must have a religious group nearby in order for the choice to be genuine and in keeping with many beneficiaries' desire for a religious provider. Furthermore, multiple Supreme Court cases since *Zelman v. Simmons-Harris*, including *Trinity Lutheran Church v. Comer (2017), Fulton v. City of Philadelphia (2021),* and *Carson v. Makin (2022)* bring into question the validity of the claim that indirect financial assistance requires that a secular option be available. While the proposed rule places the burden of finding a secular option for a beneficiary on the agencies, the premise that a secular option must be available in order for "indirect financial assistance" for a religious provider will cause confusion and could actually hinder the availability of services to beneficiaries. The 2020 Rule ensures that more beneficiaries receive services by not creating a false choice that discriminates against religious providers.

- **Religious Accommodation Rights for Faith-Based Organizations:** The proposed rule claims "the 2020 Rule introduced confusion regarding the protections the law affords to faith-based organizations and others" by creating "the misimpression" that the agencies would be required to make religious accommodations to program requirements for faith-based organizations.[8] However, the 2020 Rule only affirmed what is already required under federal law regarding protection for religious liberty. The proposed rule fails to show the specific language from the

[6] 88 Fed. Reg. 82044.
[7] 85 Fed. Reg. 82138
[8] 88 Fed. Reg. 2401.

2020 Rule that caused a "misimpression" and further gives no evidence of any actual "misimpression" that occurred by an agency, individual, or organization. Furthermore, the proposed rule also removes language from the regulations that clarifies which laws require an accommodation, such as the First Amendment, the Religious Freedom Restoration Act, the Weldon Amendment, and other conscience protection laws.

Regarding accommodation requests from faith-based organizations, the proposed rule states that the agencies "will continue to consider requests for accommodations, on a case-by-case basis," in accordance with the law.[9] However, since the proposed rule deletes the specific references to these laws which provide religious liberty protections, no explanation is offered as to how the determinations will be made regarding a request for a religious accommodation. While the proposed rule explains that this change ensures that faith-based organizations will be treated the same as any other organization, the lack of references for the specific laws opens the door for arbitrary and capricious decisions to deny an accommodation rather than decisions based on legal and careful analysis of religious nondiscrimination laws.

- **Religious Exercise Protection:** The proposed rule would remove from regulations any references to "religious exercise" and the requirement that the agencies will not disqualify a faith-based organization "because such organizations are motivated or influenced by religious faith to provide social services, because of their religious character or affiliation, or on grounds that discriminate against organizations on the basis of the organizations' religious exercise."[10] In place of this language, the proposed rule instead states that agencies will not "discriminate on the basis of an organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to disfavor a similarly situated secular organization such as one that has the same capacity to effectively provide services."[11] Rather than offer clarification for religious accommodations, this change will effectively gut religious nondiscrimination and accommodation protections for faith-based organizations. To ignore a religious organization's free exercise rights and merely view such organizations' conduct in the same light as secular organizations' is to ignore the very foundational principles of liberty and free exercise of religion on which our country was founded and our Constitution protects.

- **Misinterpretation of Title VII's religious organization exemption:** The proposed rule limits the scope of the Title VII religious exemption by claiming that it merely allows religious organizations "to hire only people of a particular religion in the absence of any inconsistent statutes."[12] The proposed rule further states that the Title VII exemption "does not permit such organizations to discriminate against workers on the basis of another protected classification, even when an employer takes such action for sincere reasons related to its religious tenets (such as those that might amount to discrimination on the basis of employees' sex)."[13] The proposed rule also removes the language from the 2020 Rule which affirms the rights of a religious organization to make employment decisions based on the religious tenets of the organization. However, the Title VII religious exemption is clear in its protection of religious organizations'

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[9] *Id*. at 2402.
[10] *Id*. at 2412.
[11] *Id*. at 2402.
[12] *Id*.
[13] *Id*.

rights to make employment decisions based on religious tenets. Even in the Supreme Court's ruling in *Bostock v. Clayton County (2020)*—a decision which held that Title VII's prohibition against sex discrimination means an employer cannot make employment decisions based on an individual's homosexuality or transgender status—the Court recognized that Title VII's religious organization exemption (and also the First Amendment's exception and the Religious Freedom Restoration Act protection) was applicable in appropriate cases. This indicates that Title VII's religious organization exemption should serve as a valid defense to a sex discrimination claim, and, therefore, the rights of religious organizations to make employment decisions based on religious tenets are protected under the Title VII religious organization exemption.

The proposed rule limits the scope to which faith-based organizations can practice their religious beliefs and still participate in service programs. These limitations and requirements essentially place the government in the role of determining how a faith-based organization should operate, regardless of any religious tenets which guide and direct that organization. This is a dangerous precedent, the effects of which will greatly hinder the participation of religious organizations, and thereby effect the number of providers available to meet the needs of so many who are needing help. This will ultimately hurt the American people.

We urge the withdrawal of the proposed rule. The 2020 Rule should remain in place, ensuring that faith-based organizations are able to participate in service programs on an equal footing with secular organizations. When this happens with the full protection of the Constitution, federal law, and Supreme Court precedent, the American people benefit.

Thank you for your consideration of our concerns.

Sincerely,

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