



THE NATIONAL CATHOLIC BIOETHICS CENTER

Upholding the Dignity of the Human Person in Health Care and Biomedical Research since 1972



September 11, 2023

U.S. Department of Health and Human Services
Office for Civil Rights
Attention: HHS Grants Rulemaking (RIN-0945-AA19)
Washington, DC 20201.

Subj: Health and Human Services Grants Regulation, HHS Grants Rulemaking, 45 CFR Parts 75 RIN 0945-AA19; Docket ID number HHS-OCR-2023- 0011.

Dear Sir or Madam:

The Catholic Medical Association, The National Catholic Bioethics Center, and the National Association of Catholic Nurses, USA (NACN-USA) submit the following comments in opposition to significant provisions of the U.S. Department of Health and Human Services (HHS) proposed rule “**Health and Human Services Grants Regulation, HHS Grants Rulemaking**”¹ (Proposal) The Proposal would repromulgate or revise certain purported non-discrimination provisions of the Department of Health and Human Services, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards. We agree that all grants should require non-discrimination toward those served and employed in programs so funded. However, the very non-discriminatory provisions proposed have the grave potential of discriminating against grant recipients for their deeply held moral and religious beliefs protected by the U.S. Constitution’s First Amendment, the *Religious Freedom Restoration Act* (RFRA), Title VII of the *Civil Rights Act* of 1964 (Title VII), Title IX of the *Education Amendments Act* of 1972, the Church Amendments, Section 245 of the *Public Health Service Act*, and the Weldon Amendment of the *Consolidated Appropriations Act*. This final Proposal, when finalized (Final Rule), must assure the religious and conscience protections guaranteed under these aforementioned laws and regulations.

The National Catholic Bioethics Center (NCBC) is a faith-based organization engaged in bioethics publication, education and consultation to thousands of persons seeking its services.

¹ *Federal Register*/Vol. 88, No. 133/Thursday, July 13, 2023/Proposed Rules, 44750-44760.

<https://www.federalregister.gov/documents/2023/07/13/2023-14600/health-and-human-services-grants-regulation>.

It has a membership of 1300 members, representing individuals, dioceses, parishes, health care corporations, educational institutions, among many others. Thus, the impact to membership far exceeds the official number of members. Through our consultation services increasingly we are made aware of challenges to religious freedom faced by individuals and institutions seeking to address the health and human services needs of the very populations served by HHS. These entities often rely on federal grants, partnering with the federal government to meet the needs of residents of the United States, and beyond.

The Catholic Medical Association (CMA) has over 2,400 physicians and allied health members nationwide. CMA members seek to uphold the principles of the Catholic faith in the science and practice of medicine—including the belief that every person’s conscience and religious freedoms should be protected. The CMA’s mission includes defending its members’ right to follow their consciences and Catholic teaching within the physician-patient relationship, based on the patient’s best interest. Members engage in this ministry of health within numerous secular as well as faith-based organizations sponsored by the Catholic Church, the largest provider of non-profit, non-governmental health care in the United States.² There are numerous examples of Catholic sponsored ministries partnering with the federal government to meet critical health and social service needs, e.g., HHS awarding Catholic Charities of Trenton 4 million dollars to expand its Certified Community Behavioral Health Clinic, enhancing their efforts to treat addiction.³

The National Association of Catholic Nurses, USA is a non-profit group of hundreds of nurses of different backgrounds, focusing on promoting moral principles of patient advocacy, professional development, spiritual development, the integration of faith and health, all within the Catholic context in nursing. It provides guidance, support, continuing education, and networking for Catholic nurses and nursing students, as well as other healthcare professionals and non-healthcare professionals who support the mission and objectives of the NACN-USA. It has advocated on numerous occasions for the human rights of vulnerable populations and the rights of health care providers to protect those persons, as well as the rights of health care providers to have protected their own deeply held moral and religious beliefs.

Specific examples of the impact of this Proposal/Final Rule include the redefinition of “sex” in major federal programs to include Sexual Orientation and Gender Identity (SOGI). A very burdensome concern relates to the fact that existing and proposed regulations often require faith-based organizations receiving HHS funds to violate their religious identity and their own tenets to participate with the government in serving the vulnerable of our society. Specifically, the following programs in which our members participate must make provision for the conscience and religious freedoms of those who collaborate with the federal government in meeting the crucial needs of the populations mutually served:

² Catholic Health Association of the USA, “Facts – Statistics: Catholic Health Care in the United States” (April 2023), Catholic Health Association of the USA. Retrieved from <https://www.chausa.org/about/about/facts-statistics>.

³ Federal Health Official: Community Collaboration Key in Cutting Overdose Deaths and Addiction, Catholic Charities, Diocese of Trenton (September 25, 2018). Retrieved from <https://www.catholiccharitiestrenton.org/community-collaboration-key-cutting-overdose-deaths/>.

- 42 U.S.C.A. § 10406. See also 45 C.F.R. § 1370.31 (West) - HHS, Administration for Children and Families: Family Violence Prevention and Services Programs. Federally funded programs and projects within a state that are designed to: to prevent incidents of family violence, domestic violence, and dating violence; to provide immediate shelter, supportive services, and access to community-based programs for victims; to provide specialized services for children exposed to family violence, etc. Numerous faith-based programs, such as Catholic Charities could be denied the ability to provide their critically needed and very effective services.
- 8 U.S.C.A. § 1522. See also 45 C.F.R. § 400.1 (West) - Public Welfare, Office of Refugee Resettlement, Administration for Children and Families: Refugee Resettlement Program. The services of numerous Catholic agencies are critical to the needs of resettlement of refugees, especially at this time when the need is so great, and their continued services would be threatened.
- 42 U.S.C.A. § 290cc-33. See also 42 U.S.C.A. § 290cc-22, and 42 U.S.C.A. § 290ff-1: Public Health Service, Substance Abuse and Mental Health Services Administration: Projects for Assistance in Transition from Homelessness; and 42 U.S.C.A. § 300x and 42 U.S.C.A. § 300x-57: for federally funding community mental health services for adults with a serious mental illness and children with a serious emotional disturbance (West). There are numerous subdivisions of the State and nonprofit entities that provide services for individuals who are suffering from serious mental illness and from a substance use disorder who also may be homeless or at imminent risk of becoming homeless. Also impacted would be grants made to public entities for the purpose of providing comprehensive community mental health services to children with serious emotional disturbances. These are the very populations served by our members, and numerous Catholic and other faith-based organizations, whose missions and individual and corporate consciences may be jeopardized.
- 42 U.S.C.A. § 295m (West) - Health education programs that receive federal financial assistance. See also: 45 C.F.R. § Pt. 80, App. A (regarding Institutional and special projects grants to schools of nursing), and 42 U.S.C.A. § 296g and 42 U.S.C.A. § 296e-1 (regarding programs that receive federal grants that are for the development, evaluation, and dissemination of research, demonstration projects, and model curricula for cultural competency, prevention, public health proficiency, reducing health disparities, and aptitude for working with individuals with disabilities training for use in health professions schools and continuing education programs). There are hundreds of Catholic and other faith-based professional health care provider preparatory programs that will be impacted by the Proposal/Final Rule. There is a dangerous shortage of health care professionals, and such provisions will only escalate this crisis.⁴
- 42 U.S.C.A. § 300w-7 and 42 U.S.C.A. § 300w-3 (West) - Any preventative health services, comprehensive health services, emergency medical services, and services programs (as well as services to victims of sex offenses and for prevention of sex offenses) funded through the

⁴Jacqueline Howard, "Concern grows around US health-care workforce shortage: 'We don't have enough doctors,'" *CNN* (May 16, 2023). <https://www.cnn.com/2023/05/16/health/health-care-worker-shortage/index.html#:~:text=US%20'not%20prepared'%20to%20fight,for%20another%20pandemic%2C%20Sander%20said.>

U.S. Department of Health and Human Services. Also, 42 U.S.C.A. § 708 and 42 U.S.C.A. § 702 (West) – The following maternal-child health programs critical to the wellbeing of society also will impact: programs for training personnel for health care and related services for mothers and children; public or nonprofit institutions of higher learning engaged in research or in maternal and child health programs for children with special health care needs, for research projects relating to maternal and child health services or services for children with special care needs. Catholic health care is the largest provider of non-governmental, non-profit health care in this country. The impact on the well-being of the United States is significant by this Proposal/Final Rule. The authority of HHS to deny or impede such grants while due process is sought is overwhelming, as will be addressed later. While federal law protecting conscience and religious freedom, as cited earlier, should prevail, the delays and legal challenges that will be caused support no public interest and only will serve to create faith-based discrimination.

- 42 U.S.C.A. § 5151 (West) – Funds programs that provide federal assistance functions at sites of major disasters or emergencies. The largest provider of non-governmental human and social services in this country is the Catholic Church which will be prevented from carrying out its mission by coercive policies that will violate its religious freedom. The provisions to challenge denials of funding will cause serious delays in critically needed services.
- 42 U.S.C.A. § 8625 and 42 U.S.C.A. § 8621 (West) - Federal grants given to States to assist low-income households, particularly those with the lowest incomes; also, 42 U.S.C.A. § 9849 and 42 U.S.C.A. § 9833 (West) - Head Start programs, especially those focused upon children from low-income families who have not reached the age of compulsory school attendance; and 42 U.S.C.A. § 9901 (West) and 42 U.S.C.A. § 9918 (West) - Community service programs. States and local communities that receive federal funding in their work for reduction of poverty, revitalization of low-income communities, and empowerment of low-income families and individuals in rural and urban areas to become self-sufficient. This includes federally funded programs in provision of services for: private, religious, charitable, and neighborhood-based organizations. The largest provider of non-governmental human and social services in this country is the Catholic Church which will be prevented from carrying out its mission by coercive policies that will violate its religious freedom. The provisions to challenge denials of funding will cause serious delays in critically needed services. Communities will suffer.

The Proposal states that HHS will follow all applicable U. S. Supreme Court decisions in administering its award programs, and that that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services, to the extent doing so is prohibited by federal statute: “The Department takes seriously its obligations to comply with Federal religious freedom laws, including the First Amendment and RFRA, and it will continue to comply with these legal obligations.” [Proposal, I.C.3.] However, the Proposal states HHS will make decisions upon assertions to the right to the protections of the *Religious Freedom and Restoration Act* on a Case-by-case basis. [Proposal, II.A.]

“[O]nce the awarding agency, working jointly with ASFR or OCR (in the course of investigating a civil rights complaint or compliance review), receives a notification from a recipient seeking a religious exemption, the awarding agency, working jointly with either ASFR or OCR, would promptly consider the recipient's views that they are entitled to an exemption in (1) responding to any complaints or (2) otherwise determining whether to proceed with any investigation or enforcement activity regarding that recipient's compliance with the relevant provisions of this regulation, in legal consultation with the Office of the General Counsel (OGC).” [Proposal, I.C.3.]

Clearly, HHS must demonstrate a compelling government interest, using the least restrictive means to invoke an exception to this right to religious freedom. However, the very issue of determining whether HHS is violating the First Amendment or the RFRA is placed in the hands of HHS, essentially creating the potential for coercing sincerely religious organizations into complying with HHS' agenda, violative of any due process in the delays in services that it will effect, as protections from such violations are sought.

Furthermore, since the Proposal holds the non-Federal entity responsible for compliance with requirements of the federal award, this places the onus unjustly on human service agencies, hospitals, doctors, nurses, etc., in making a legal determination on the spot which they are unlikely to be able to make in the moment—which forces them to err on the side of caution and which only further coerces them to work against their consciences.

Sometimes seen as a solution to these violations is the provision of referrals of those served to providers willing to provide procedures, et al., that violate the religious organization's ethical standards. Bioethical principles of “cooperation in evil,” similar to secular law, would indicate that to ask another person to provide something that one holds to be morally or legally illicit does not exempt the referrer from culpability. It is often for this very issue that social service and health care providers seek ethical advice from our organizations as to how to not compromise faith-based values while continuing to serve others. Furthermore, such a requirement imposed on faith-based organizations alone clearly is discriminatory against faith-based providers, and is inconsistent with applicable U.S. Supreme Court decisions, specifically *Trinity Lutheran Church of Columbia, Inc. v. Comer*.⁵

There is a need to provide clarity concerning the obligations of the federal government to “accommodate” for a recipient organization's religious identity, affiliation, and religious exercise. It has been demonstrated that Americans are “uncomfortable with the idea of government penalizing groups and individuals for living out their religious beliefs.”⁶ There is no need for this conflict to occur. Accommodations consistent with existing federal religious free exercise laws should be identified and implemented. A possible definition of “accommodation” should be included, such as: “a provision made by the federal government for the free exercise of religion of a federal-funded recipient, who collaborates with the federal government in meeting the health or social service needs of a specific population, but the intent for which federal dollars are not explicitly allocated and expended.” Such a provision would prevent the

⁵ *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019S (2017).

⁶ Becket Law, *Religious Freedom Index: American Perspectives on the First Amendment*, First Edition (2019). www.Becketlaw.org/Index.

federal government from exceeding its authority to define for a faith-based entity its own tenets, thus violating the Establishment Clause of the First Amendment, as well as provisions of Title VII. Furthermore, precedents in the protection of religious freedom need to be invoked in this Proposal:

- *Trinity Lutheran and Espinoza v. Montana Dept. of Revenue* both hold that “disqualifying otherwise eligible recipients from a public benefit solely because of their religious character imposes a penalty on the free exercise of religion and triggers the most exact scrutiny.”⁷
- Title IX explicitly provides for a federally funded entity to address the obligation not to discriminate on the basis of “sex” consistent with “biological sex,” indicative of Congressional intent. To assert this freedom under Title IX, unlike under this Proposal, does not require administrative approval.
- In *Bear Creek Bible Church and Braidwood Management v. Equal Employment Opportunity Commission* the decision to apply RFRA in Title VII holds that the federal government must demonstrate very specific compelling interest when forcing a religious organization to violate its understanding of sex.⁸ And *Fulton* calls for strict scrutiny when there is a threat to religious freedom by the federal government.⁹

None of these aforementioned protections, and the applicable criteria they cite, are being included in this Proposal to assure the protections of: the U.S. Constitution’s First Amendment, the *Religious Freedom Restoration Act* (RFRA), Title VII of the *Civil Rights Act* of 1964 (Title VII), Title IX of the *Education Amendments Act* of 1972, the Church Amendments, Section 245 of the *Public Health Service Act*, and the Weldon Amendment of the *Consolidated Appropriations Act*.

This far-reaching regulation will prevent or delay critical services provided by faith-based providers whose consciences will be violated by this new definition of “sex.” Congress never authorized this interpretation of “sex” in prohibiting sex discrimination. It ties federal government funding to a legally false redefinition concerning human identity and sexuality, which will force health care providers and other human service professionals to violate, not only their consciences and deeply held religious beliefs, but also the Hippocratic tradition of integrity and non-maleficence when attempting to meet the best interests of those served. Any faith-based grant recipient committed to upholding traditional beliefs about sexuality and respect for human life would trigger a federal enforcement review process that could turn the shield of religious liberty into a sword of liability.

In conclusion, we hold that religious organizations should not be singled out for special regulatory burdens, inconsistent with federal law, including the First Amendment of the U.S. Constitution and the Religious Freedom Restoration Act. We thank you for the opportunity to

⁷ *Espinoza v. Montana Dept. of Revenue* (2020), citing *Trinity*: “In *Trinity Lutheran*, this Court held that disqualifying otherwise eligible recipients from a public benefit “solely because of their religious character” imposes “a penalty on the free exercise of religion that triggers the most exacting scrutiny.” <https://constitutioncenter.org/the-constitution/supreme-court-case-library/espinoza-v-montana-dept-of-revenue>

⁸ *Bear Creek Bible Church and Braidwood Management v. Equal Employment Opportunity Commission*, Civil Action 4:18-cv-00824-O, (N.D. Tex. Nov. 1, 2021), <https://bit.ly/3mhezjg>. 29 *Ibid.*, 45-50.

⁹ *Fulton v. City of Philadelphia*, 593 U.S. ____ (2021).

provide public comment on this significant issue of the private sector partnering with the federal government in meeting the health and human services needs of the people we mutually serve.

Sincerely yours,



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