May 28, 2013

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

RE: Comments on Homeless Emergency Assistance and Rapid Transition to Housing: Rural Housing Stability Assistance Program and Revisions to the Definition of "Chronically Homeless" Docket No. 5573-P-01

To whom it may concern:

Based on our decades of experience advocating to protect religious liberty and expertise in a complex area of law, we, the undersigned organizations, write to comment on the proposed changes to the "faith-based" regulations for the Rural Housing Stability Assistance Program, found in section 579.416. Our comments include suggestions for improvements to religious liberty protections for program participants and an explanation of why section 579.416(b)(5), which governs structures, violates the United States Constitution.

I. Religious Liberty Protections for Program Participants

This Proposed Rule is the second[1] federal regulation of which we are aware that attempts to incorporate important religious liberty protections mandated by President Obama's Executive Order 13559.[2] The President's Executive Order represents a huge step forward in protecting religious freedom, especially for program participants and prospective participants. These protections are critical, as they help ensure that individuals in need are never faced with the stark choice between essential services and the constitutional and civil rights protections to which they are entitled.

We appreciate the agency's efforts to implement some of the most important changes mandated by the Executive Order. But we have concerns about several areas in which we believe the Proposed Rule may not fulfill the principles set forth in the President's Executive Order and the recommendations made by the President's first Advisory Council on Faith-Based and Neighborhood Partnerships (Council).[3] We also recognize that the Department of Housing and Urban Development (HUD) likely followed the suggestions provided in the report filed by the Interagency Working Group on Faith-Based and Other

[1] The Administration offered a nearly identical interim rule for the Continuum of Care Program in July. Homeless Emergency Assistance and Rapid Transition to Housing: Continuum of Care Program, 77 Fed. Reg. 45,422-01 (July 31, 2012). Many of the undersigned groups also submitted comments raising concerns about the language in that Interim Rule. *See* Comments on Homeless Emergency Assistance and Rapid Transition to Housing Continuum Care Program, 77 Fed. Reg. 45, 4222-01 (July 31, 2012)(June 19, 2012) a*vailable at* https://www.au.org/files/pdf_documents/2012-11-28_HUD-Continuum_Care_Comments.pdf.

[2] Exec. Order No. 13559, 75 Fed. Reg. 71,317 (Nov. 22, 2010).

[3] The President's first Advisory Council on Faith-Based and Neighborhood Partnerships was created by Executive Order. Exec. Order No. 13498, 74 Fed. Reg. 6533 (Feb. 9, 2009). One of the Council's tasks was to make recommendations for "strengthening the constitutional and legal footing of" government partnerships with faith-based and other nonprofit organizations, which it set forth in a report, issued March 2010. President's Advisory Council on Faith-Based and Neighborhood Partnerships, *A New Era of Partnerships: Report of Recommendations to the President*, 119 (Mar. 2010) (Council Report), http://www.whitehouse.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf.

Neighborhood Partnerships—an Executive Order-mandated report that suggested model regulations and guidance.[4] Although we appreciate the many positive recommendations in the Working Group Report and believe that many of the proposed changes properly and effectively implement the Executive Order's mandates, it, unfortunately, suffers from the same flaws we identify in this Proposed Rule.[5]

A. §579.416(b)(4): Alternative Provider

The requirement to create and implement more robust protections for program participants—especially their right to be referred to an alternative provider if they object to the religious character of a social service provider—is one of the most significant and welcome changes made in the President's Executive Order. It represents a crucial step forward in advancing religious liberty and comes directly from recommendations made by the Council: "There is a clear precedent and consensus for the vigorous protection of the religious liberties of beneficiaries of federally funded programs."[6] The Council determined that the "government must take these steps in order to provide adequate protection for the fundamental religious liberty rights of social service beneficiaries."[7]

We appreciate that the Proposed Rule seeks to provide enhanced religious liberty protections for program participants as soon as possible by implementing the alternative-provider requirement even before the Office of Management and Budget guidance is available and HUD undertakes broader changes to its existing faith-based regulations. However, we urge you to make changes to the Proposed Rule to more accurately reflect the principles set forth in the President's Executive Order.

1. *Program Participants Must Be Provided a Referral*

The Executive Order states: "If a beneficiary or prospective beneficiary of a social service program supported by Federal financial assistance objects to the religious character of an organization that provides services under the program, that organization *shall*, within a reasonable time after the date of the objection, refer the beneficiary to an alternative provider."[8] This follows the Council recommendations, which called on the agencies to adopt uniform protections that "clearly affirm that a beneficiary who requests an alternative service provider . . . *shall* have his or her objection redressed either by referral to an alternative provider which is religiously acceptable or an alternative provider which is secular."[9]

The Proposed Rule, however, does not make clear that a referral *must* be made. Indeed, the Proposed Rule could easily be read to *not require* an alternative provider at all. It says only that providers "shall . . . *undertake reasonable efforts* to identify and refer the program participant to an alternative provider."[10]

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[4] Report to the President, Recommendations of the Interagency Working Group on Faith-Based and Other Neighborhood Partnerships, submitted pursuant to Executive Order 13559, "Fundamental Principles and Policymaking Criteria for Partnerships With Faith-Based and Other Neighborhood Organizations," Apr. 27, 2012 (Working Group Report), http://www.whitehouse.gov/sites/default/files/uploads/finalfaithbasedworkinggroupreport.pdf.

[5] We, along with other organizations, recently sent an analysis with suggested ways to address these deficiencies to the agency officials who are working to implement the Executive Order reforms. The analysis is attached.

[6] Council Report at 141.

[7] *Id*.

[8] Exec. Order No. 13279, 67 Fed. Reg. 77,141 (Dec. 16, 2002), as amended by Executive Order 13559, at Section 2(h)(i) (emphasis added). *See also id*. at Section 2(h)(ii) (stating that "each agency" has a responsibility to ensure that "appropriate and timely referrals are made to an alternate provider").

[9] Council Report at 140-41 (emphasis added).

[10] Some sections of the Working Group Report do acknowledge that the referral *must* be provided. Working Group Report at 21 (citing the Executive Order); *id*. at Appendix (F)(1), p. 44 (stating that the "organization *must* refer the individual to an alternative provider within a reasonable time.") (emphasis added); *id*. at Appendix (F)(3), p. 46

This language falls short of the Executive Order mandate by failing to guarantee beneficiaries a right to an alternative provider[11] and must be corrected.

2. *Prerequisites for an Alternative Provider*

A referral to an alternative provider lacks meaning to the program participant unless he or she can access those services and they are commensurate to those originally offered. We were pleased, therefore, to see that the Proposed Rule requires that an alternative provider be "in reasonable geographic proximity to the organization making the referral."[12] In order to ensure that program participants receive the services to which they are entitled, however, geographic proximity cannot be the only prerequisite for an alternative provider. Recognizing this, the Council recommended that agencies adopt the Substance Abuse and Mental Health Services Administration Act (SAMHSA) regulations[13] governing beneficiary protections.[14] The SAMHSA regulations state that the alternative provider must be "reasonably accessible," "provide comparable services," offer services that "have a value that is not less" than the services given at the original provider, and "have the capacity" to serve the beneficiary.[15] The Proposed Rule should be revised to reflect these additional prerequisites for alternative providers to better serve program participants and prospective participants.

3. *Roles and Responsibilities for Referrals*

The Executive Order states that "*[e]ach agency*" is responsible for establishing "policies and procedures designed to *ensure that* . . . appropriate and timely referrals are made to an alternative provider."[16] It is logical that, as the Proposed Rule reflects, social service providers take the first step in locating an alternative provider and giving referrals. But, it does not make clear that the ultimate responsibility for referring program participants to alternative services lies with the government. In fact, the language in the Proposed Rule makes it appear as if the government has *no* responsibility in the process, as it does not mention HUD at all, let alone describe its responsibilities. [17]

The Proposed Rule should be revised to reflect that HUD is ultimately responsible for ensuring program participants are referred to an alternative provider. We recognize that this responsibility presents certain challenges, but this is not a sufficient reason to disregard the Executive Order's mandate. The Council explained that it "understands that implementing this recommendation could result in significant costs for the government. Nonetheless, the Council members believe the government must take these steps in order to provide adequate protection for the fundamental religious liberty rights of social service

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(training materials explaining that "faith-based organizations *must refer*") (emphasis added). But the Working Group Report's Model Regulatory Language, like the language chosen for the Proposed Rule, fails to make the mandate clear. *Id*. at 21.

[11] We are aware that some may be concerned that it may not seem possible, in some instances, to ensure the availability of an alternative provider to which a referral can be made. But, one agency, SAMHSA, has demonstrated that this can be done and has successfully provided beneficiaries a "right to services from an alternative provider" since 2003. 42 C.F.R. Parts 54.8 and 54a.8 (2003).

[12] This language is an improvement over the Working Group Report, which states that the provider *should*—rather than *must*—consider the geographic proximity. Working Group Report at 21.

[13] 42 C.F.R. Parts 54 and 54a.

[14] Council Report at 140-41.

[15] *Id*.; 42 C.F.R. §54.8(d).

[16] Exec. Order 13279 at Section 2(h), as amended by Exec. Order 13559 (emphasis added).

[17] The Working Group Report at least seems to acknowledge that the government should take some role in referrals when it states that: "The Working Group did not take the position that the responsibility to provide a referral should rest *solely* with state, local, or Federal government." Working Group Report at 22 (emphasis added). Yet, the Report does not explain what responsibilities agencies do have.

beneficiaries."[18] It is fundamental that whatever the costs, the government cannot justify ignoring the obligation to protect the religious freedom rights of beneficiaries.

4. *Reporting of Referrals*

The Proposed Rule's requirement regarding reporting of objections and referrals is insufficient to adequately protect program participants' religious liberty. It only requires providers to document objections and "any efforts to refer" objecting participants to alternative providers within an already existing recordkeeping requirement. It is unclear whether providers have to report this data to HUD in their Annual Performance Report (APR).[19]

Annual reporting, however, (if these records are in fact part of the APR) is inadequate. The provider, at a minimum, should contact HUD at the time an objection is made, request assistance if needed, and report on referrals that are made. This is necessary not only to ensure that the right to a referral is actually honored, but also to ensure transparency and monitoring of this key religious liberty protection.[20]

HUD should also compile information on how many beneficiaries request alternative providers, how many actually use an alternative provider, how many drop out, how many are denied a referral to an alternative provider, and whether there are problems within the reporting procedures. Without this data, there is no other way to determine whether the referral procedures are being implemented properly and program participants' rights are being fully protected.

B. §579.416(b)(2): Separation of Explicitly Religious Activities

We welcome the Proposed Rule's incorporation of regulatory language required by the Executive Order and recommended by the President's first Advisory Council, such as "explicitly religious" and "overt religious content," which the Overview of the Proposed Rule explained increase "clarity and comprehensibility." Using the new terms is an essential step to ensure that religious organizations completely separate their religious activities from their federally funded programs, which will better protect the religious liberty of beneficiaries and help ensure religious organizations maintain their independence.

The new terms without more detailed explanation, however, may not be sufficient to help funded organizations fulfill this constitutional requirement. The President's first Advisory Council specifically stated that federal aid "should not be used to pay for activities such as religious instruction, devotional exercises, worship, proselytizing or evangelism; production or dissemination of devotional guides or other religious materials; or counseling in which counselors introduce religious content."[21] Nor may it be used "to pay for equipment or supplies to the extent they are allocated to such activities."[22] The Proposed Rule should be revised to further clarify the terms required by the Executive Order and incorporate the Advisory Council's explanation.

[18] Council Report at 141.
[19] This is less protection than even the Working Group Report provides: The Working Group Report's Model Regulatory Language states that service providers need to report objections to the government at the time they are made. Working Group Report at 21. We do not believe the Model Regulatory Language's reporting requirements are sufficient either.
[20] Transparency and monitoring are key principles set forth in the Executive Order. *E.g.*, Exec. Order 13279 at Sections 2(i), 3(b)(v) & 3(b)(viii), as amended by Exec. Order 13559.
[21] Council Report at 129-30.
[22] *Id*. at 130.

C. Fully Implement the Executive Order

One of the main goals of the Executive Order is to reduce confusion and ambiguity in the rules surrounding government partnerships with religious organizations, and—in turn— to reduce constitutional violations. The Executive Order calls for "uniform implementation"; thus, clarity and consistency are integral to any regulations implementing the Executive Order. Neither program participants nor religious institutions are served by rules that do not clearly and adequately delineate the rights and responsibilities for each party.

We appreciate HUD's willingness to begin to implement the critical changes mandated by the Executive Order and hope that the Proposed Rule can be revised to reflect the suggestions set forth in our comments. The Overview of the Proposed Rule states that HUD will subsequently undertake a "rulemaking directed to broader changes to HUD's existing faith-based regulations." Thus, if the Proposed Rule cannot be revised at this point, we trust it will be revised to be consistent with broader changes to the faith-based regulations that will be forthcoming. This will ensure all HUD regulations fully implement the Executive Order and the goal of "uniform implementation" is met.

II. §579.416(b)(5): Structures

Section 579.416(b)(5) of the Proposed Rule would allow taxpayer money to pay for structures used "for both eligible and explicitly religious activities," provided that the taxpayer funds do not "exceed the cost of those portions of the acquisition, new construction, or rehabilitation that are attributable to eligible activities." This is unconstitutional.[23]

More than six decades ago, the Supreme Court explained that "[t]he imposition of taxes to . . . build and maintain churches and church property" was one of the grave harms addressed by the First Amendment.[24] Subsequently, the Court specifically held that the government could not pay to construct or maintain religious buildings and it has never retreated from this bedrock Establishment Clause principle.

In *Tilton v. Richardson*,[25] the Court held that a government subsidy used to construct buildings at sectarian academic institutions was constitutional only if the buildings were subject to a permanent prohibition on religious use. Similarly, in *Committee for Public Education v. Nyquist*,[26] the Court recognized that because religious schools perform not just "secular, educational functions" but also "religious functions,"[27] no public funds could be used for maintenance and repair of sectarian school facilities.[28] The Court explained that "[i]f the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair."[29] The Court explicitly rejected as unconstitutional the argument the use of taxpayer funds to maintain the

[23] The President's Executive Order makes a commitment to "promote compliance with constitutional and other applicable legal principles" (Exec. Order 13559 at Intro.) and requires that the government "implement Federal programs in accordance with the Establishment Clause . . . ." (Exec. Order 13279 at Section (2)(e), as amended by Exec. Order 13559.) Perpetuating a regulation first put in place by the George W. Bush Administration, which through executive orders and regulations eliminated the traditional safeguards that protect civil rights and religious liberty when government partners with faith-based organizations, however, would contravene this mandate.
[24] *Everson v. Bd. of Educ.*, 330 U.S. 1, 11 (1947).
[25] 403 U.S. 672 (1971).
[26] 413 U.S. 756 (1973).
[27] *Id*. at 775.
[28] *Id*. at 777.
[29] *Id*.

proportion of "purely secular facility[ies]" in religious schools, finding that "a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education."[30]

This standard remains controlling law and has never been undermined or seriously questioned in any subsequent Supreme Court decision regarding taxpayer funding directly provided to religious institutions. Thus, under *Tilton* and *Nyquist*, it is unconstitutional for the federal government to provide funds to pay for any part of the structure for a religious organization in which explicitly religious activities take place as would be permitted by section 579.416(b)(5).

These decisions remain valid and binding. This was confirmed by the Supreme Court in *Bowen v. Kendrick*: "[T]he constitutional limitations on use of federal funds, as embodied in the statutory restriction, could not simply 'expire' at some point during the economic life of the benefit that the grantee received from the Government."[31] And recent federal court decisions,[32] including *Community House v. Boise*,[33] apply *Tilton*'s holding that "to avoid an Establishment Clause violation, a publicly financed government building may not be diverted to religious use."

Furthermore, this aspect of the Proposed Rule is illogical (an organization cannot use only one portion of the ceiling or the walls of a room during a religious activity) and impossible to enforce (at the time the building is constructed or refurbished, it is impossible to know the ratio of religious to secular activities that will take place in the future).

Based on the existence of valid and binding Supreme Court precedent holding that funding arrangements as envisioned under section 579.416(b)(5) of the Proposed Rule are unconstitutional, the Proposed Rule must be revised.

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We hope these comments are useful in your continued review of the Proposed Rule. Please contact Maggie Garrett with Americans United at (202) 466-3234, ext. 226, or garrett@au.org, if you have questions about our comments.

Sincerely,

African American Ministers In Action
American Civil Liberties Union (ACLU)
American Humanist Association
American Jewish Committee (AJC)
American Association of University Women (AAUW)
Americans for Religious Liberty
Americans United for Separation of Church and State
Anti-Defamation League
Baptists Joint Committee for Religious Liberty

[30] *Id*. at 777-78.
[31] 487 U.S. 589, 614 (1988).
[32] Only one case, American Atheists v. City of Detroit Downtown Development Auth., 567 F.3d 278, 298-99 (6th Cir. 2009), —an appellate court, not the Supreme Court—has diverted from this precedent. Yet, this case does not in any way support the proposed rule's deletion of the prohibition on religious use of buildings constructed with taxpayer funds. The grant program in that case was a "one-time grant" for "exterior cosmetic repairs" and "surface-level improvements," rather than grants to construct buildings as in *Tilton*.
[33] 490 F.3d 1041, 1059 (9th Cir. 2007).

Catholics for Choice
Center for Inquiry
Council for Secular Humanism
Disciples Justice Action Network
Equal Partners in Faith
Hindu American Foundation
Human Rights Campaign
Institute for Science and Human Values, Inc.
Interfaith Alliance
Jewish Council for Public Affairs
Military Association of Atheists & Freethinkers
National Center for Lesbian Rights
National Council of Jewish Women
People For the American Way
Protestant Justice Action
Secular Coalition for America
Union for Reform Judaism
Women of Reform Judaism