February 18, 2020

U.S. Department of Health and Human Services
Center for Faith and Opportunity Initiatives
Attention: Equal Treatment NPRM, RIN 0991-AC13
Hubert H. Humphrey Building, Room 747D
200 Independence Ave., SW
Washington, DC 20201

Subj: Ensuring Equal Treatment of Faith-Based Organizations, RIN 0991-AC13

Dear Sir or Madam:

The Catholic Medical Association, The National Catholic Bioethics Center, and the National Catholic Partnership on Disability (NCPD) submit the following comments in support of the U.S. Department of Health and Human Services (HHS) proposed rule “Ensuring Equal Treatment of Faith-Based Organizations.”\(^1\) (Proposal) The Proposal would implement President Donald Trump’s executive order #1383 eliminating significant regulatory burdens imposed on faith-based organizations that receive federal funds from HHS. We agree 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.

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. 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 social 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.  

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. Placing regulatory burdens on such providers, not placed on secular providers, is not only discriminatory, but also negatively impacts the wellbeing of the very populations the federal government is entrusted to serve.

The National Catholic Partnership on Disability (NCPD) works collaboratively to ensure meaningful participation of people with disabilities in all aspects of the life of the Church and society. To this end, it sponsors training programs nationally and locally and develops and disseminates resources critical to the local community, which foster integration of persons with disabilities into the life of the Church and the local community. Its outreach is extensive, addressing not only those who are physically challenged, but significant mental health issues, including suicide prevention. If there is an opportunity for federal funding to facilitate this mission NCPD should not be forced to compromise its religious identity, affiliations, and religious exercise to partner with the government in serving persons with disabilities.

A very burdensome concern relates to the fact that existing 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:

1. To receive HHS funds the recipient organization must give notice of a right to an alternative provider, willingness to refer those they serve to providers willing to provide procedures, et al., that violate the religious organization’s ethical standards. This requirement was imposed on faith-based organizations alone, not secular organizations. [85 Fed. Reg. at 2976] This clearly is discriminatory against faith-based providers, and as the proposal states, is inconsistent with applicable U.S. Supreme Court decisions, specifically Trinity Lutheran Church of Columbia, Inc. v. Comer. 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 as to how to not compromise faith-based values while continuing to serve others.

2. The current regulations require that faith-based social service providers give notice of non-discrimination based on religion, that participation in religious activities must be voluntary and separate in time or space from activities funded with direct federal funds, and that beneficiaries or potential beneficiaries may report violations. HHS is correct in noting that notice requirements that single out faith-based organizations for particular regulatory requirements, but do not apply to

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secular organizations, may run afoul of the Religion Clauses of the First Amendment. (See #3, below).

3. The Proposal cites that current regulations require that recipient organizations may not “support or engage in any explicit religious activity,” [85 Fed. Reg. at 2980] as part of a funded service. Faith-based providers never should be prohibited from supporting a religious activity. That is fundamental to a faith-based organization. Furthermore, how often is a hospice provider, secular or faith-based, requested by a patient or family to pray with them? Caregivers of those with developmental disabilities often are asked to accompany a vulnerable person to a worship service of the family’s choice. The proposed revision to delete the phrase “support or” does not go far enough. There are many times, when for the good of the beneficiary, providers of care who are participating in a funded service are called upon to “engage in” such activities. It would be better to indicate that federal funds will not be used to “sponsor” explicit activities. Secular grantees, while not sponsoring an explicit religious activity regularly support, and often engage in, explicit religious activities, and even require caregivers to accompany beneficiaries for the safety of those served. No such regulatory prohibition is placed on secular providers, nor should they be placed on faith-based providers. Furthermore, there is no need to require faith-based health and social service providers to give notice of: non-discrimination based on religion, indicating that participation in religious activities is voluntary, only occurring within a separate time or space from activities funded with direct federal funds (and that beneficiaries or potential beneficiaries may report violations). Not only is this not required of secular providers, it interferes with the obligations to meet the needs of beneficiaries. Many providers, be they faith-based or secular, provide holistic services based on the needs of those served. In drug treatment engaging with a “higher power” is encouraged. This can take many forms. Employers often need to require staff to accompany a beneficiary to services the beneficiary freely chooses, for the safety of those served. This occurs in most settings regardless of the faith or secular base of sponsorship. To single out faith-based organizations for particular regulatory requirements that do not apply to secular recipient organizations may run afoul of the Religion Clauses of the First Amendment.

4. There should be no requirement prohibiting the selection, within faith-based recipient providers/organizations, of board members and employees on the basis of their adherence to, or acceptance of, the religious tenets of the organizations. Clearly board members define and advance the faith-based mission of the organization and the organization should be protected consistent with the “ministerial exception” [Hosanna-Tabor Lutheran Church and School v. Equal Employment and Opportunity Commission]. The same could be said of the obligation of employees to advance the mission of the recipient organization. The organization should be able to define the role of employees in advancing the religious identity of the organization. That is not for the federal government to determine. Proposed section 87.3(f) clarifies that religious employers may “select[] [their] employees on the basis of their acceptance of or adherence to the religious tenets of the organization,” and states that this freedom applies not just to Title VII but to the Americans with Disabilities Act. [85 Fed. Reg. at 2986]. This proposal should be implemented.

5. We support the expansion of the prohibition that HHS cannot require the removal/concealment/altering of religious art, icons, scriptures, or other religious symbols. This clarifies what would constitute a violation of the First Amendment free expression rights of those

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engaged with the federal government in serving American residents, many of whom find comfort in such artifacts. Meeting the health and social services needs of vulnerable populations is a holistic endeavor of persons, often in search of meaning amid their suffering. There is no proselytizing in the exhibiting of those artifacts that help identify the mission driven nature of the sponsors. This is simply a manner of protected free expression of the sponsor defining its mission. Similarly, there should be no prohibition against houses of worship providing information to their members in bulletins, etc., of federally funded services, deemed as “outreach” in existing Sec. 87.3(d). Such prohibitions also are a violation of the First Amendment free speech provision.

6. The requirement that indirect federal financial assistance requires that in a geographic area beneficiaries have “at least one adequate secular option,” other than the faith-based option puts an unreasonable burden on recipients to control the services in a geography area over which they obviously have no control or authority. The proposal to remove this requirement is welcomed.

7. 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.” There is no need for this conflict to occur. Accommodations consistent with existing federal religious free exercise laws should be implemented. A possible definition of “accommodation” could be: “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.” The Proposal would add a definition of religious exercise consistent with the definition of religious exercise in the Religious Freedom Restoration Act RFRA: to “include any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” [85 Fed. Reg. at 2978] Such a definition prevents the 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.

The Proposal would require that HHS’ notices and announcements include language clarifying that faith-based organizations may apply for awards on the same basis as any other organization; that the Department will not discriminate against faith-based organizations on the basis of religious affiliation or exercise; and that a faith-based organization retains its independence from the government and may carry out its missions consistent with the religious freedom protections of federal law. As the Proposal indicates, religiously affiliated organizations should be able to compete on an equal footing with other recipient organizations for HHS funding without impairing their autonomy, right of free expression, and religious identity. We encourage the Department to adopt its Proposal with the following recommendations: eliminate the notification of a right to an alternative provider and referral requirements; edit the restriction on the use of federal funds, to indicate that federal funds will not be used to “sponsor” (removing the words “support or engage in”) explicit activities; delete the requirement that faith-based health and social service providers give notice of: non-discrimination based on religion, indicating that participation in religious activities is voluntary, only occurring within a separate time or space from activities funded with direct federal funds (and that beneficiaries or potential beneficiaries may report violations); expand the prohibition that HHS cannot require the removal/concealment of religious art, icons, scriptures, or other religious symbols; clarify that there should be no prohibition against houses of worship providing information to their members in bulletins, etc., of federally funded services, deemed as “outreach;” allowing that board members and employees of recipient organizations be selected on the basis of their acceptance of, or adherence to, the religious
tenets of the recipient organizations; eliminating the provision that indirect Federal financial assistance requires that in a geographic area beneficiaries have “at least one adequate secular option;” and providing clarity concern the obligations of the federal government to “accommodate” for an recipient organization’s religious identity, affiliation, and religious exercise.

In conclusion, we agree 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 proposing these significant and necessary revisions to existing regulations.

Sincerely yours,

ELECTRONICALLY SIGNED

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