U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
THE DEPUTY SECRETARY
WASHINGTON, DC 20410-0050

Special Attention of:

HUD Regional Administrators
HUD Field Office Directors
HUD Offices of Community Planning and Development (CPD),
Fair Housing and Equal Opportunity (FHEO),
General Counsel,
Housing,
Native American Programs (ONAP),
Lead Hazard Control and Healthy Homes (OLHCHH),
Public and Indian Housing (PIH), and
Policy Development and Research (PD&R)
HUD Grant Administrators, Grant Officers,
Government Technical Monitors (GTMs), and
Government Technical Representatives (GTRs)
Recipients of HUD Federal Financial Assistance

Notice: SD-2016-01

Issued: July 14, 2016

This notice remains effective until amended, superseded or rescinded

Cross References: Executive Order 13559, 24 C.F.R. § 5.109

Subject: Guidance on HUD Regulations Implementing Executive Order 13559—Participation of Faith-Based Organizations in HUD's Programs and Activities, Separation of Explicitly Religious Activities, Nondiscrimination, and Other Related Topics

I. Purpose

The purpose of this Notice is to provide guidance that will assist HUD funding recipients and HUD employees in understanding and ensuring compliance with HUD's regulation at 24 C.F.R. 5.109.

II. Background

On April 4, 2016, HUD joined eight other Federal agencies in publishing a final rule in the *Federal Register* to amend or establish regulations governing the participation of faith-based and other community organizations in programs that the agencies administer. The final rule is published at 81 FR 19355 and available at https://www.gpo.gov/fdsys/pkg/FR-2016-04-

04/pdf/2016-07339.pdf. HUD's portion of the final rule made changes to its existing regulation at 24 C.F.R. 5.109 and conforming regulations to implement Executive Order 13559, "Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations," which President Obama signed on November 17, 2010. Among the changes made by the HUD portion of the final rule, the following provisions now apply to all HUD programs and activities, including all of HUD's Native American Programs, except as may be otherwise noted in the respective program regulations in title 24 of the Code of Federal Regulations (CFR), or unless inconsistent with certain HUD program authorizing statutes:

- Require all decisions about Federal financial assistance to recipient organizations to be free from political interference, or even the appearance of such interference, and be made on the basis of merit, not based on the religious character or affiliation, or lack thereof, of an organization.

- Make clear that faith-based organizations are eligible to participate in HUD programs and activities on the same basis as any other organization.

- Replace the term "inherently religious activities" with the term "explicitly religious activities" in existing regulations as the basis for determining which activities cannot be supported with direct Federal financial assistance.

- Distinguish between "direct" and "indirect" Federal financial assistance.

- Make clear that all organizations that receive Federal financial assistance, whether directly or indirectly, are prohibited from discriminating against beneficiaries in providing services or carrying out activities with such assistance based on religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice, while also noting that organizations that participate in programs only funded by indirect Federal financial assistance need not modify their program or activities to accommodate beneficiaries who choose to expend the indirect aid on those organizations' programs.

- Require faith-based organizations that carry out programs or activities with direct Federal financial assistance from HUD to provide written notice of certain protections to beneficiaries and prospective beneficiaries. Specifically, such organizations are required to give notice to beneficiaries that:

  (1) The organization may not discriminate against a beneficiary or prospective beneficiary based on religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice;

  (2) The organization may not require a beneficiary to attend or participate in any explicitly religious activities that are offered by the organization, and any participation by the beneficiary in such activities must be purely voluntary;

(3) The organization must separate, in time or location, any privately funded explicitly religious activities from activities supported by direct Federal financial assistance;

(4) If a beneficiary objects to the religious character of the organization, the organization must undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no such objection; and

(5) A beneficiary or prospective beneficiary may report an organization's violation of these protections, including any denials of services or benefits by an organization, by contacting or filing a written complaint to HUD or the intermediary administering the program, if applicable.

- Require faith-based organizations to provide this notice to prospective beneficiaries prior to enrollment. In the event of an emergency or exigent circumstances that make it impracticable to provide the written notice in advance, prospective beneficiaries may receive the notice at the earliest available opportunity. Current beneficiaries must receive the notice at the earliest available opportunity.

- Require faith-based organizations that carry out a program or activity with direct Federal financial assistance from HUD to promptly undertake reasonable efforts to identify an alternative provider if a beneficiary or prospective beneficiary objects to the religious character of the organization, and to refer the beneficiary or prospective beneficiary to an alternative provider to which the beneficiary or prospective beneficiary has no such objection.

- Make clear that a faith-based organization that carries out programs or activities only with "indirect Federal financial assistance" is not required to: (1) provide written notice to beneficiaries, (2) make reasonable efforts to refer a beneficiary to an alternative provider if the beneficiary objects to the religious character of the faith-based organization, or (3) separate explicitly religious activities in time or location from programs or activities supported with indirect Federal financial assistance.

This notice is based on model guidance developed by the Interagency Working Group on Faith-Based and Neighborhood Partnerships, established under Executive Order 13559. HUD intends to issue further guidance as necessary, including examples specific to HUD programs.

III. Prohibited Uses of Direct Federal Financial Assistance and Protections for Religious Identity

A. Prohibited Uses of Direct Federal Financial Assistance

HUD's regulation at 24 CFR 5.109(d) prohibits the use of direct Federal financial assistance to support or engage in "explicitly religious activities," which includes "activities that involve overt religious content such as worship, religious instruction, or proselytization."[1] Other

[1] *Direct Federal financial assistance* means Federal financial assistance provided when a Federal Government agency or an intermediary selects the provider and either purchases services from that provider (i.e., via a contract) or awards funds to that provider to carry out an activity (e.g,, via grant, subgrant, subaward, or cooperative

examples of explicitly religious activities include devotional exercises, production or dissemination of devotional guides or other religious materials, or counseling in which counselors introduce religious content. While it is not feasible to develop a comprehensive list of all "explicitly religious activities," each such activity is characterized as not religiously neutral because it promotes or endorses religion to beneficiaries.

Application of the prohibition against explicitly religious activity must be consistent with the First Amendment of the U.S. Constitution, which both prevents the government from promoting or sponsoring religion and protects privately initiated religious expression and activities from government interference and discrimination. This means that staff carrying out programs supported by direct Federal financial assistance, and the materials disseminated by staff persons in those programs, must be neutral in their treatment of religion. Staff and materials used in these programs may not promote, endorse, or favor religious beliefs over nonreligious beliefs or disparage religious beliefs in any way. Further, they may not express a judgment with regard to religious beliefs or nonbelief, or seek to influence the beliefs of participants with respect to religion.

The bar against the use of direct Federal financial assistance for explicitly religious activities applies to activities, speech, and materials that are generated or controlled by the administrators, instructors, or officials of the Federally financed program. The requirement generally does not apply to the activities of persons whose speech is not controlled, encouraged, or approved after the fact by program administrators, instructors, or officials, such as spontaneous comments made by individual beneficiaries. The Supreme Court has repeatedly held that the First Amendment requires that officials and administrators in publicly funded programs be neutral in their treatment of religion, showing neither favoritism toward nor hostility against religious expression.

B. Preserving Faith-Based Organizations' Religious Identity

While faith-based organizations need to ensure that their programs and activities directly supported by HUD are religiously neutral, various protections also exist to ensure that faith-based organizations do not have to change their religious identities after receiving a Federal award. Faith-based organizations that apply for, or participate in, a HUD program or activity supported with Federal financial assistance retain their independence and may continue to carry out their mission, including definition, development, practice, and expression of its religious beliefs. (*See* 24 CFR 5.109(d).) At the same time, a faith-based organization, however, may not use direct Federal financial assistance to support or engage in any explicitly religious activities and, as

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agreement). The recipients of subgrants or subawards that receive Federal financial assistance through State-administered programs (e.g., flow-through programs) are considered recipients of direct Federal financial assistance. In general, Federal financial assistance shall be treated as direct, unless it meets the definition of indirect Federal financial assistance. (*See* 24 CFR 5.109(b).)

For more discussion of the distinction between "direct" and "indirect" Federal financial assistance, see the preamble to "Federal Agency Final Regulations Implementing Executive Order 13559: Fundamental Principles and Policymaking Criteria for Partnerships With Faith-Based and Other Neighborhood Organizations," at 81 FR 19392 (Apr. 4, 2016).

explained below, those activities must be separate in time or location from the Federally funded program or activity and must be voluntary for beneficiaries.

A faith-based organization may also use space (including a sanctuary, chapel, prayer hall, or other space) in its facilities (including a temple, synagogue, church, mosque, or other place of worship) to carry out activities under a HUD program without removing or altering religious art, icons, scriptures, or other symbols from its facilities. Additionally, a faith-based organization that participates in a HUD program or activity may retain religious terms in its name, select its board members on a religious basis, and include religious references in its mission statements and other chartering or governing documents. Faith-based organizations retain these rights, while observing the separation requirements described further below.

C. Separation of Explicitly Religious Activities

HUD's regulation at 24 CFR 5.109(e) provides that explicitly religious activities must be separated from programs and activities supported with direct financial assistance from HUD and must be voluntary for the beneficiaries of the programs or activities that receive direct Federal financial assistance.

In addition to the worship and religious services that faith-based organizations may conduct separately from their HUD-funded programs and activities, faith-based organizations may also carry out separate programs with explicitly religious activities or content after receiving a Federal award. In some cases, an organization may elect to carry out a separate program that is explicitly religious that is similar to the government-funded project. For example, a church may carry out two mentoring programs, one of which is privately funded and overtly religious, while the other is Federally supported directly and is free of explicitly religious content. But where such religious activities or programs are undertaken, it is especially important for it to be clear that they are separate and distinct and that participation in the religious activities is voluntary for participants in the Federal program.

IV. Guidance for Programs Supported by Direct Federal Financial Assistance

A. Separate and Distinct Programs

Recipients of Federal financial assistance must ensure that any program that involves explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) is separate and distinct from the program that receives direct Federal financial assistance, and that the distinction is completely clear to the beneficiary or prospective beneficiary.

Some of the ways in which this may be accomplished include, but are not limited to, the following examples:

- creating separate and distinct names for the programs;
- creating distinct appearances for the materials used to promote each program;

- establishing separate registrations for the programs; and

- promoting only the Federally supported program in materials, websites, or commercials purchased with any portion of direct Federal financial assistance.

Websites with explicitly religious content may include a link to the page promoting the Federally supported program; the page about the Federally supported program may be supported with direct Federal financial assistance, but the explicitly religious page may not. The Federally supported page may link to pages with explicitly religious content; however, such links should be accompanied by statements noting that the linked content is separate from the Federally supported program, privately funded, and purely voluntary for beneficiaries.

1. *Separate Programs or Activities*

Recipients of direct Federal financial assistance must implement measures to separate the delivery of any program that consists of explicitly religious activities from the delivery of the Federally supported program, by time or location, in such a way that it is clear that the two programs are separate and distinct. When separating the two programs by time but delivering them in the same location, the recipient must ensure that one program completely ends before the other program begins. Some of the ways in which separation may be accomplished include the following examples:

- The programs are held in completely different sites or on different days.

- If the programs are held at the same site at completely different times, the recipient may separate programs through such means as:

  - having sufficient time between the two programs to vacate the room, turn down the lights, leave the stage, etc., in order to conclude the first program before beginning the second; and

  - completely dismissing the participants of the earlier program.

- If the programs are held in different locations at the same site at the same time, the recipient may separate programs through such means as:

  - completely separating registration locations; and

  - completely separating areas where programs are held such as by room, hallway, or floor.

Note: If an organization offers a Federally supported program and a privately funded religious program and both provide the same service, it is especially important that the organization accentuate the separation between the programs. Furthermore, because the law recognizes that

children are particularly susceptible to coercion, if the clients served include children, it is particularly important that the separation between the programs be made clear.

2. *Explicitly Religious and Antireligious Activities*

Recipients of Federal financial assistance must ensure that there are no explicitly religious or antireligious activities in a program supported by direct Federal financial assistance. These include:

- registration procedures that include religious inquiries or references; and
- program activities that include religious outreach or promotion, endorsement, or favoring of religious beliefs, or activities that are intended to dissuade program participants from holding religious beliefs.

B. Cost Allocation

Recipients of Federal financial assistance must be able to demonstrate that direct Federal financial assistance is used for the Federally supported program in accordance with the cost principles under 2 CFR part 200, Subpart E. As provided by § 200.405(a), a cost is allocable to a particular Federal award if the goods or services involved are chargeable or assignable to that Federal award in accordance with relative benefits received.

Some examples of distributing costs in accordance with relative benefits received include:

- If staff in the Federally supported program travel to a site where the organization conducts both a Federally supported program and a privately funded, explicitly religious program, and the staff spend equal time on each program, then one-half of the travel costs (e.g., gas, lodging, and other related expenses) may be charged to the Federal program. If the staff spends one-third of their time on the Federally supported program, and two-thirds of their time on the privately funded religious program, then one-third of the travel costs may be charged to the Federal program.
- If an electronic device is used 30 percent of the time for the Federally supported program and 70 percent of the time for explicitly religious activities and/or other non-Federally supported activities, only 30 percent of the cost of the electronic device may be charged to the Federally supported program.

C. Nondiscrimination, Eligibility, Outreach, and Recruitment

Recipients of Federal financial assistance must ensure that the Federally supported program is open to all qualified beneficiaries, regardless of their religious beliefs or practice. *See* 24 CFR 5.109(h). HUD funding recipients may not establish selection criteria that have the effect of discriminating against beneficiaries based on religion, religious belief, refusal to hold a religious belief, or refusal to attend or participate in a religious practice. This applies with respect to

recipients of direct or indirect Federal financial assistance under a HUD program. Recipients of indirect Federal financial assistance from HUD—for example, an owner of a housing unit that receives HUD assistance because of the true private choice of an individual or family to reside at the owner's housing unit, such as under the Housing Choice Voucher Program or other tenant-based rental assistance activities funded under HUD programs (e.g., HOME Investment Partnerships Program (HOME) or Housing Opportunities for Persons with AIDS (HOPWA))—become subject to the nondiscrimination requirements of 24 CFR 5.109(h) at the time the recipient agrees to receive the HUD assistance in accordance with program regulations.

Additionally, Federally funded programs may not discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice in outreach, recruitment efforts, or advertising.

D. Availability of Separate Religious Programs

After the Federally supported program has ended, a staff person may provide a brief and noncoercive invitation to program participants to attend a separate explicitly religious program. The demarcation between the Federally supported program and the separate religious program must at all times be clear. The invitation must emphasize that the religious program is a separate program from, and not a continuation of, or complementary to, the Federally supported program. It also must be clear that participants are not required to attend the separate religious program, and that participation in Federally supported programs is not contingent on participation in other programs sponsored by the organization. If the beneficiaries are children, then Federally supported programs should obtain parental consent before inviting the children to separate religious activities, in order to ensure that the invitation is noncoercive and that participation is voluntary.

V. Questions and Answers

A. Explicitly Religious Activities

Q1: In addition to worship, religious instruction, and proselytizing, what are some other examples of "explicitly religious activities"?

A1: Other examples of explicitly religious activities include devotional exercises, production or dissemination of devotional guides or other religious materials, and counseling in which counselors introduce religious content. While it is not feasible to develop a comprehensive list of all "explicitly religious activities," each of these is an example of an activity that is not religiously neutral because it promotes or endorses religion to beneficiaries.

Q2: Are there examples of activities in which Federally funded staff may refer to religion without violating the prohibition against engaging in "explicitly religious activities" with direct Federal financial assistance?

A2: Yes. Any reference to religion should be viewed in its full context to determine whether the activity is neutral to religion, and whether there are instances in which religious

references made by program administrators, instructors, or officials are neutral to religion. For example, staff in programs supported by direct Federal financial assistance may not provide devotional religious instruction, but, where consistent with the purposes of the program, they may reference religion in other ways. For example, in Healthy Marriage or Responsible Fatherhood programs, staff may note that some spouses share religious convictions and practice their faith as a family, or that couples who do not share the same faith may need to discuss constructive ways in which to handle their religious differences. Instructors in a juvenile justice program may note that, for some youth, values will spring from religious beliefs and traditions. In conflict mitigation programs, staff may cite the fact that principles of nonviolence are anchored in the teachings of a variety of faiths. Just as public schools may teach about religion, such as the history of religion, comparative religion, literary and other analysis of the Bible and other scripture, and the role of religion in the history of the United States and other countries, staff in Federally supported programs may discuss religion in these ways. In such cases, the aim is not to inculcate faith but to take notice of the fact that religion plays important roles in the lives of some individuals and communities.

B. Program Materials

Q3: What should I do if I have considered whether materials for my Federally supported program are neutral toward religion, but I am still not certain?

A3: If staff of a HUD recipient reviewed the materials to be used in its HUD-funded programs, but have remaining concerns as to whether the materials are neutral to religion, they may request further guidance from the relevant HUD program office(s).

C. Statements Made by Beneficiaries in Programs and Class Assignments

Q4: If a staff person in a Federally funded program provides students or other program beneficiaries with an assignment to give an oral or written report, should the instructor also prohibit the participants from endorsing any religious or antireligious views in their response?

A4: No. Students and other beneficiaries may express their beliefs about religion in homework, artwork, and other written and oral assignments free from religious discrimination. Such home and classroom work should be judged by ordinary standards of substance and relevance and against other legitimate pedagogical concerns identified by the provider. Thus, if an instructor assigns a student to write a poem, and the student writes a poem in the form of a prayer (for example, a psalm), the poem should be judged on academic standards (such as literary quality) and neither penalized nor rewarded on account of religious content.

D. Classroom and Similar Discussions

Q5: May staff members lead a discussion in a Federally supported program in which the beneficiaries refer to their religious beliefs?

A5: Yes. The basic principle is that beneficiaries may express their religious beliefs, while staff must remain neutral. When providers permit beneficiaries to express their views and staff neither invite nor endorse specifically religious speech, then the speech is not attributable to the Federal Government, and its expression is both permissible and protected. For example, if, in a group discussion about life experiences that is part of a reentry program for formerly

incarcerated persons, a beneficiary on his own initiative talks about how religion was important in his life, then that would be permissible and protected. On the other hand, if an instructor initiates a discussion about the importance of religion in rehabilitation, deliberately chooses individuals to speak because they would speak about religious issues, or deliberately avoids calling on those who would talk about values from a secular perspective, that would be impermissible.

To take another example, an instructor teaching an abstinence education program may acknowledge a student's religious beliefs in a manner that is neutral to religion. If a student in the class comments on his or her Christian beliefs, the instructor may acknowledge that many faiths have important teachings on sexuality and that an individual's faith may play an important role in making a decision on this matter. It would be inappropriate for the instructor to say or imply that religion is irrelevant to the topic, since such a statement would violate the principles of neutrality with respect to religion. Depending on the time permitted and the level of interest expressed by the student, the instructor may explore a variety of religious and non-religious influences on the subject of premarital sexual activity, provided that he or she does not convey any view as to whether any of the religious teachings are the correct or better view. If the student expresses interest in discussing or questioning with a religious leader or expert, the instructor may suggest that the student speak with a member of the clergy of his or her choice. If a student expresses interest in discussing or questioning a non-religious leader or expert, the instructor may suggest that the student seek out such leaders for guidance.

Q6: If we invite guest speakers to talk to the beneficiaries in our Federally supported program, do we need to prohibit the guest speakers from referring to religion?

A6: There is no general prohibition against a guest speaker referring to religion when talking to beneficiaries. Also, the organization carrying out the program with direct Federal financial assistance must refrain from endorsing or criticizing the religious purpose, activities, or speech of the speakers. It is important to remember that the Federal government, and the programs that it supports, must be neutral toward religion. When a recipient of direct Federal financial assistance invites speakers to address program participants, it should neither favor nor disfavor religion in general, a particular religion, or religious speech. To adhere to the neutrality principle, there are a number of factors that a recipient of direct Federal financial assistance might consider in inviting speakers to a forum that it sponsors — for example, whether to establish at the beginning of the program that the recipient does not necessarily endorse the perspectives of each speaker, whether to invite a panel of speakers rather than a single speaker to offer a variety of viewpoints, and whether the recipient is likely to know in advance the content of a speaker's presentation. In selecting speakers to address program participants who are minors, recipients should be mindful that a family's religious beliefs or practices are a private matter, that parents or guardians might have concerns when a speaker shares a particular religious perspective with their children, and that children may not feel they can assert their own rights – such as removing themselves from a situation that includes religious speech, seeking an alternative provider, or making their own choice about religious practices or beliefs.

E. Prayer

Q7: Are there circumstances in which beneficiaries attending a Federally supported program may choose to pray on their own during the program?

A7: There are no particular circumstances in which beneficiaries are permitted to pray or prohibited from praying. Attending a Federally supported program does not affect an individual's right to pray. As a general matter, program beneficiaries may engage in prayer, subject to the same rules designed to prevent material disruption of the program that are applied to any other privately-initiated speech.

F. Religious Settings or Facilities

Q8: May a provider that is conducting presentations that are neutral toward religion in connection with a HUD-funded program accept an invitation to present at a religious setting such as a church or church-affiliated summer school as a part of that Federal program?

A8: Yes. The provider should handle requests for presentations in an evenhanded fashion that neither favors nor disfavors religion, a particular religious institution, or the religious affiliation of those in attendance. Activities should be carried out in a religiously neutral way, and decisions about where to offer presentations or carry out other activities should be made on criteria that are relevant to the program, such as efficiency, need, public requests, or geographic balance, rather than on any criteria that are related to religion.

Q9: May programs or activities be carried out with Federal financial assistance in a facility that houses a religious library?

A9: Yes. The availability of religious texts in a library would present a legal concern only if the administrators, instructors, or other officials also urged beneficiaries of direct Federally-funded programs or activities to read the material.

G. Availability of Other Programs

Q10: May an organization that receives HUD funding provide applicants and beneficiaries with a list of other available programs that includes programs with explicitly religious content?

A10: Yes. If the organization is a recipient of direct Federal financial assistance and has developed a list of "available programs," rather than recommended programs or referrals, based on religiously neutral criteria such as service providers in the immediate geographic region, then that list may include programs with secular content and programs with explicitly religious content. In addition, although not required, a recipient of indirect assistance may provide a list of alternative providers.

H. Separate and Distinct Programs

Q11: May a provider that carries out a program or activity with direct Federal financial assistance make religious counseling available to beneficiaries if they request it?

A11: The answer depends on what "make available" means. The recipient may not provide religious counseling as a part of the program supported with direct Federal financial assistance. However, the recipient may provide information about religious counseling services

that are separate and distinct from the Federally-assisted program. As long as the religious counseling is requested voluntarily by the beneficiaries, the counselors are not paid with direct Federal financial assistance, and their counseling services are separated by time or location from the Federally supported program, then the service provider may provide religious counseling to the beneficiary – including religious counseling that the recipient may provide in a separate, non-Federally-assisted program. The demarcation between the Federally supported program and religious counseling must at all times be clear. Beneficiaries must be aware that they are not required to attend religious counseling. Where the beneficiaries are minors, the provider should obtain parental consent to invite the youth to religious counseling.

I. Outreach and Recruitment

Q12: Does the prohibition against using religious criteria to select beneficiaries in Federally supported programs mean that Federally-financed service providers must ensure that program participants represent a variety of faith traditions?

A12: No. Federally supported programs need to be accessible to applicants and participants irrespective of religion, religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

Q13: If my Federally supported program has a separate and distinct religious component, and the program serves youth, does my program need to obtain parental consent to invite the youth to the religious activities?

A13: Yes. If a Federally- supported program serves youth, parental consent to invite the youth to any separate and distinct religious activities is necessary to ensure that any participation is voluntary. If a parent does not provide consent, the program should ensure that those youth are not present when any invitation to an explicitly religious activity is extended.

Note: "Parental consent" does not require that the beneficiary have a parent, per se, but someone or some entity that is authorized to make a parental decision *in loco parentis.*

Q14: May a Federally supported program for youth initiate loudspeaker invitations to attend separate explicitly religious activities that will be held in another room of the facility?

A14: Yes, so long as the invitations are brief and non-coercive and it is clear that the explicitly religious activities are separate, privately funded, and voluntary for beneficiaries. The demarcation between the Federally supported program and the religious program must at all times be clear. Participants must be aware that they are not required to attend the religious program. As participants are minors in this case, the program should obtain parental consent to invite the youth to the religious activities, because parental consent will help ensure that any participation is voluntary. If a parent fails to provide consent, the program should ensure that those youth are not present when an invitation to an explicitly religious activity is extended.

The service provider may not pay for the cost of religious services or any invitations to attend those services with Federal financial assistance.

J. Beneficiary Protections

Q15: What does it mean for a beneficiary to object to the "religious character" of an organization?

A15: Some protections afforded to beneficiaries and prospective beneficiaries arise when a beneficiary or prospective beneficiary objects to the "religious character" of an organization that carries out a program or activity with direct Federal financial assistance. The option for a beneficiary or prospective beneficiary to be referred to another organization to provide the service is limited to programs or activities with direct Federal financial assistance, and begins with a complaint to the organization carrying out the program or activity with direct Federal financial assistance objecting to that organization's religious character. It should be noted that the organization's religious character is protected under 24 CFR 5.109, although beneficiaries of its Federally-funded programs and activities are not compelled to receive such services based on the organization's religious character.

An objection to "religious character" is wholly distinguishable from an objection to explicitly religious activities that an organization conducts without separation in either time or location from activities that are supported with direct Federal financial assistance. As explained above, the integration of explicitly religious activities into a program supported with direct Federal financial assistance is prohibited.

Q16: If a beneficiary or prospective beneficiary objects to the religious character of an organization, in what form must the objection be made?

A16: HUD requirements on beneficiary objection and referral are located at 24 CFR 5.109(g). HUD does not require beneficiaries to follow any specific format, though a model written notice of beneficiary rights and beneficiary referral request form has been published at Appendix E to the agencies' final regulations implementing Executive Order 13559, at 81 FR 19428-29, and is reproduced below at Section VI.

Q17: What content is required for the written notice to beneficiaries of certain protections available to them?

A17: The written notice to beneficiaries must provide the content listed in 24 CFR 5.109(g)(1), which states:

(i) The organization may not discriminate against a beneficiary or prospective beneficiary on the basis of religion, religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice;

(ii) The organization may not require beneficiaries to attend or participate in any explicitly religious activities that are offered by the organization, and any participation by beneficiaries in such activities must be purely voluntary;

(iii) The organization must separate, in time or location, any privately funded explicitly religious activities from activities supported by direct Federal financial assistance;

(iv) If a beneficiary objects to the religious character of the organization, the organization must undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no such objection; and

(v) Beneficiaries or prospective beneficiaries may report an organization's violation of these protections, including any denial of services or benefits by an organization, by contacting or filing a written complaint to HUD or the intermediary[2], if applicable.

Recipients and subrecipients must take reasonable steps to ensure that individuals with limited English proficiency (LEP) have meaningful access to their programs and activities in accordance with 24 CFR Part 1, as well as Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d through 2000d-7. Providing meaningful access to LEP persons may include providing language assistance services, such as translation of the written notice. HUD issued guidance to recipients on their responsibilities with respect to providing meaningful access to LEP persons pursuant to Executive Order 13166. That guidance is published at 72 FR 2732 and is available at: https://www.lep.gov/guidance/HUD_guidance_Jan07.pdf.

Recipients and subrecipients must also ensure that individuals with disabilities are provided effective communication, in accordance with section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and HUD's implementing regulations at 24 CFR part 8, and the Americans with Disabilities Act, 42 U.S.C. 12101, *et seq*. Effective communication may include providing the written notice to beneficiaries in an accessible format.

Recipients and subrecipients may seek additional guidance on compliance responsibilities from the appropriate HUD program office, or intermediary, as appropriate, under the particular Federal financial assistance program.

Q18: When a beneficiary objects to the religious character of a Federally supported provider and requests referral to an alternative, can the provider discharge its referral obligation by notifying the beneficiary that it is not aware of any alternatives without having first engaged in affirmative efforts to identify alternatives?

A18: No. If the provider is not already aware of a suitable alternative, the provider must undertake reasonable efforts to identify a suitable alternative provider for the beneficiary at a minimum, an organization should attempt to identify an alternative provider in reasonable geographic proximity, determine what services the alternative provider offers, and determine whether the alternative provider is accepting new referrals. If the provider is unable to identify an alternative after reasonable efforts, the provider must promptly notify the intermediary, or if there is no intermediary, HUD which shall promptly determine whether there is any other suitable alternative provider to which the beneficiary may be referred.

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[2] "Intermediary" refers to an entity, including a nongovernmental organization, acting under a contract, grant, or other agreement with the Federal Government, or with a State, tribal or local government that accepts Federal financial assistance and distributes that assistance to other entities that, in turn, carry out activities under HUD programs. Intermediaries are responsible for ensuring that subrecipients to which they provide Federal financial assistance comply with HUD's requirements, including civil rights related program requirements.

In making the referral, the organization must comply with all applicable privacy laws and regulations. The organization must maintain a record of the referral and must follow up to determine whether the beneficiary or the prospective beneficiary contacted the alternative provider, unless the beneficiary or prospective beneficiary requests no follow up. Recipients must ensure that all sub-recipient agreements make organizations receiving HUD funds aware of these requirements.

In most cases, HUD anticipates that the process of making a referral will require much less than two hours of staff time. Further, as stated in the preamble to the final rule, a provider need not spend more than approximately two hours of staff time in order to fulfill the "reasonable efforts" requirement.

Q19: For circumstances in which services are provided in person, what is an organization's responsibility to identify appropriate alternative providers to which a referral can be made?

A19: In all cases in which services are provided in person, the organization must undertake reasonable efforts to identify any alternative provider available that is in reasonable geographic proximity to the referring organization and that carries out activities that are similar in substance and quality to those offered by the organization making the referral. The definition of "reasonable geographic proximity" is not just a measure of distance but will depend on the circumstances, the services provided, and the transportation options available to the prospective beneficiary. The alternative provider also must have the capacity to accept additional clients.

Q20: In the case of a faith-based organization, must the referral to an alternative provider be to a secular or non- religious provider?

A20. No. The alternative provider need not be a secular provider. However, if the beneficiary requests a secular provider, and a secular provider is available that offers services similar in substance and quality, then the referral must be made to that provider. In attempting to determine an appropriate alternative, a faith-based organization may ask a prospective beneficiary if he or she would prefer or not prefer another faith-based provider and may make a referral based on the prospective beneficiary's stated preference. However, a faith-based organization may not steer a potential beneficiary to or away from other faith-based organizations because the faith-based organization itself favors or disfavors the religious character of those organizations.

Q21: Is the referring organization responsible for any additional costs that the beneficiary incurs as a consequence of being referred to an alternative provider?

A21: No. The referring organization is not under an obligation to subsidize transportation costs or other increased cost burdens that the beneficiary incurs as a consequence of pursuing a referral to an alternative provider. However, to the extent that various alternative providers are available, referring organizations are encouraged to take into account the cost to the beneficiary in determining which provider is most appropriate for referral.

Q22: What considerations must be made when assessing whether a provider has satisfied the referral requirement? What other considerations may be made?

A22: The rule at 24 CFR 5.109(g) requires the alternative provider to be in reasonable geographic proximity to the referring provider, carry out activities that are similar in substance and quality to those offered by the referring provider, and to have the capacity to accept new clients. Factors that may be considered in assessing whether the alternative provider meets these criteria include – for example, distance from the location of services by the referring organization, available transportation options and cost, comparability of the content, quality, and cost of the alternative services, waiting time and other queuing requirements prior to service. When services are offered by telephone, long distance fees should be considered as a potential cost and, when services are offered by internet, the prospective beneficiary's internet access should be considered.

Q23: Does an organization that makes a referral need to inform HUD, or, if applicable, the intermediary?

A23: No. When an organization makes a referral to an alternative provider, the organization is not required to inform HUD (or the intermediary). The referring organization must maintain a record of the referral, which is subject to a HUD or intermediary review, depending on the nature and requirements of the HUD program. HUD encourages organizations to use the sample form that it issued as part of the final rule, which is included at Section VI of this notice. If an organization is unable to make a referral after reasonable efforts, the organization must promptly notify HUD or, if applicable, the intermediary, upon which HUD or the intermediary will promptly determine whether there is any other suitable alternative provider to which the beneficiary or prospective beneficiary may be referred.

Q24: What obligation does a referring organization have to follow up on the beneficiary?

A24: The precise obligations of the referring organization depend on the underlying HUD program funding the program or activity that the organization is carrying out. At a minimum, to satisfy record-keeping requirements, the organization that refers an objecting beneficiary to an alternative service provider is required to retain information on whether the referral was made and whether beneficiary contacted the alternative provider. It is reasonable for service providers to have a consistent procedure for keeping track of referrals, follow-up contacts, and whether the beneficiary is receiving services from the alternative provider. Under no circumstances, however, may an organization violate applicable privacy laws and regulations in following up with beneficiaries. A beneficiary may always opt out of follow-up—which may be particularly important for victims of certain crimes such as domestic violence, dating violence, sexual assault, or stalking. In such cases, the provider should not follow-up on the beneficiary.

Q25: Do the obligations of this rule apply to sub-grantees (also called sub-recipients or subawardees)?

A25: Yes. Grantees must ensure that all subgrantees to which they provide funds comply with the requirements of 24 CFR 5.109.

Q26: Must the notice to beneficiaries always be given in writing?

A26: No. When services are provided by telephone, the provider may read the beneficiary a brief statement regarding beneficiary protections. For example, the awardee may briefly inform each beneficiary or prospective beneficiary that there are certain protections for beneficiaries due to the fact that the program is funded in whole in or in part by the Federal Government and ask whether the beneficiary would like to know those protections. If the beneficiary or prospective beneficiary responds affirmatively, then the provider must read the full notice over the telephone.

Q27: Must the alternative provider be one that receives direct Federal financial assistance?

A27: No, although it is preferable to make a referral to a provider that receives direct Federal financial assistance. If no such alternative provider exists, however, or if such a provider does exist but is also objectionable to the beneficiary due to the alternative provider's religious character, the original provider may make a referral to another alternate provider that does not receive Federal financial assistance if it is in reasonable geographic proximity to the location where the beneficiary is receiving or would receive services (except for services provided by telephone, Internet, or similar means), offers services that are similar in substance and quality to those offered by the organization, and has the capacity to accept additional clients.

Q28: Must the provider always give notice to beneficiaries immediately and to prospective beneficiaries prior to the delivery of services?

A28: No. HUD's regulation at 24 CFR 5.109(g)(2) states: "The written notice must be given to prospective beneficiaries before they enroll in any HUD program or activity. When the nature of the program or activity or exigent circumstances make it impracticable to provide the written notice in advance, the organization must provide written notice to beneficiaries of their protections at the earliest available opportunity." Therefore, notice must be provided to beneficiaries at the earliest available opportunity, and the notice must be provided to prospective beneficiaries prior to enrollment in a HUD-assisted program or activity unless there is an emergency or exigent circumstance, in which case, notice must be provided at the earliest available opportunity. An emergency or exigent circumstance could be one in which the provision of notice would constitute an interruption in enrollment and service delivery that would pose a risk to health or safety. For example, consider a domestic abuse hotline in which the caller needs immediate advice to ensure his or her safety. Benefits could be delivered first, in the form of the information needed. Then the notice requirements could be met at the first opportunity after immediate health or safety needs are addressed.

Q29: If an organization considers itself to be of religious character or faith-based but does not offer any explicitly religious activities, must it provide the written notice to beneficiaries?

A29: Yes. Some beneficiaries may object to receiving services from an organization of religious character (whether the organization refers to itself as "religious" or "faith-based"), so beneficiaries should be notified about their ability to register such objections.

Q30: Should a provider's religious affiliation be taken into account in the awards decision-making process in an effort to ensure that beneficiaries do not object to the religious character of a provider? In other words, would it be better for awards decision-makers to make an award to a secular provider over a religious provider in order to avoid such objections?

A30: No. The decision to award Federal financial assistance must be based on merit, not based on the religious character or affiliation, or lack thereof, of an organization.

Q31: Do intermediaries have an obligation to fund a secular alternative if they fund a faith-based organization?

A31: No. Intermediaries have no obligation to fund a secular alternative when they fund a faith-based-organization. In the grant-making process, an intermediary may not consider the religious character or affiliation, or lack thereof, of an applicant organization in making a grant award.

VI. Model Written Notice of Beneficiary Rights and Beneficiary Referral Request

HUD's final rule was accompanied by a Model Written Notice of Beneficiary Rights that faith-based organizations may use to satisfy their responsibilities to provide written notice to beneficiaries under 24 CFR 5.109(g). The use of the beneficiary referral request portion of this model written notice is voluntary for beneficiaries and prospective beneficiaries, whose objection is not required to follow any specific format provided that it is reasonably clear under the circumstances that the objection to the organization is because of its religious character.

MODEL WRITTEN NOTICE OF BENEFICIARY RIGHTS

Name of Organization:

Name of Program:

Contact information for Program Staff (name, phone number, and e-mail address, if appropriate):

Because this program is supported in whole or in part by direct Federal financial assistance from the Federal Government, we are required to let you know that:

- We may not discriminate against you on the basis of religion, religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice;
- We may not require you to attend or participate in any explicitly religious activities that are offered by us and any participation by you in these activities must be purely voluntary;

- We must separate, in time or location, any privately funded explicitly religious activities from activities supported by direct Federal financial assistance;

- If you object to the religious character of our organization, we must make reasonable efforts to identify and refer you to an alternative provider to which you have no such objection; and

- You may report an organization's violations of these protections, including any denial of services or benefits, by contacting or filing a written complaint to HUD [or the intermediary, if applicable].

We must give you this written notice before you enroll in our program or activity, as required by 24 CFR 5.109.

OMB Control Number: 2535-0122
Expiration Date: 07-31-2019

The information collection requirements contained in this document have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520) and assigned OMB control number 2535-0122. There is no personal information contained in this application. Information on activities and expenditures of grant funds is public information and is generally available for disclosure. Recipients are responsible for ensuring confidentiality when disclosure is not required. In accordance with the Paperwork Reduction Act, HUD may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number.

Public reporting burden for this collection of information is estimated to average 0.03 hours for beneficiaries or prospective beneficiaries and no more than 2 hours for service providers. For beneficiaries or prospective beneficiaries, this includes the time for reviewing and responding to the form. For service providers, this includes collecting the form, reviewing the request, making the referral, follow-up (if required) and recordkeeping. This collection of information is authorized under Executive Order 13559 (75 FR 71319). The information is used to register beneficiary objections to the religious character of a service provider and to allow the service provider to undertake reasonable efforts to refer a beneficiary to an alternative provider. Response to this request for information is voluntary for beneficiaries or prospective beneficiaries and mandatory for service providers in cases where a beneficiary or prospective beneficiary requests a referral. This service provider may not collect this information, and you are not required to complete this form unless it displays a currently valid OMB control number. No confidentiality is assured.

Privacy Act Statement: The information collected on this form is considered sensitive and is protected by the Privacy Act. The Privacy Act requires that these records be maintained with appropriate administrative, technical, and physical safeguards to ensure their security and confidentiality. In addition, these records should be protected against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom the information is maintained.

BENEFICIARY REFERRAL REQUEST

If you object to receiving services from us based on the religious character of our organization, please complete this form and return it to the program contact identified above. Your use of this form is voluntary.

If you object to the religious character of our organization, we must make reasonable efforts to identify and refer you to an alternative provider to which you have no such objection. We cannot guarantee, however, that in every instance, an alternative provider will be available. With your consent, we will follow up with you or the organization to which you are referred to determine whether you have contacted that organization.

( ) Please check if you want to be referred to another provider.

Please provide the following information if you want us to follow up with you:

Your Name:

Best way to reach you (phone/address/email):

Please provide the following information if you want us to follow up with the provider only.

Your Name:

( ) Please check if you do not want follow-up.

FOR STAFF USE ONLY

Date of Objection:

Referral (check one):

( ) Individual was referred to (name of alternative provider and contact information):

( ) Individual left without a referral

( ) No alternative provider is available—summarize below what efforts you made to identify an alternative (including reaching out to HUD or the intermediary, if applicable):

1. Follow-up date:

( ) Individual contacted alternative provider

( ) Individual did not contact alternative provider

2. Staff name and initials:

– End of Form –

VII. Protections for and Obligations of Organizations that Administer Programs or Activities with Federal Financial Assistance from HUD

A. Protections

- In the administration or distribution of Federal financial assistance, HUD and intermediaries must not discriminate against organizations based on their religious character or affiliation, or lack thereof.

• Organizations must be permitted to apply for and participate in HUD programs and activities supported with Federal financial assistance without political interference or the appearance of political interference, and without HUD impairing their independence, autonomy, expression outside the HUD-funded programs or activities, or religious character.

• Organizations may retain their independence and may carry out their missions, including the definition, development, practice, and expression of their religious beliefs, provided that organizations do not use direct Federal financial assistance to support or engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytizing) or in any other manner prohibited by law.

• Organizations may conduct privately funded explicitly religious activities that are separated in time or location from programs or activities funded by direct Federal financial assistance from HUD and that are purely voluntary for beneficiaries of such HUD-funded programs or activities.

• Organizations may use space (including a sanctuary, chapel, prayer hall, or other space) in their facilities to carry out activities under a HUD program, without removing or altering religious art, icons, scriptures, or other symbols from these facilities.

• Organizations may retain religious terms in organizational names, select board members on a religious basis, and include religious references in organizational mission statements and other chartering or governing documents.

• Organizations must not be subjected to regulation or monitoring that would create excessive entanglement between the government and religious entities.

• A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1), is not forfeited when the organization participates in a HUD program. Some HUD programs, however, contain independent statutory provisions that impose certain nondiscrimination requirements on all grantees. Accordingly, grantees should consult with the appropriate HUD program office to determine the scope of applicable requirements.

B. Obligations

• Organizations that receive Federal financial assistance under a HUD program, whether such assistance is direct or indirect, must not discriminate against beneficiaries or prospective beneficiaries on the basis of religion, religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

• Organizations must conduct their outreach activities in ways that do not favor or disfavor prospective beneficiaries based on their religion, religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

• Organizations must provide beneficiaries with written notice of their rights at the earliest available opportunity and provide prospective beneficiaries with written notice of

their rights prior to the time they enroll in a program or activity supported by direct Federal financial assistance from HUD, except in emergency or exigent situations, in which the organization must provide prospective beneficiaries with written notice of their rights at the earliest available opportunity.

- Organizations that offer activities that are supported by direct Federal financial assistance as well as privately funded explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction or proselytization) must separate, in time or location, these privately funded explicitly religious activities from any programs or activities supported with direct Federal financial assistance and ensure that beneficiaries' participation in such programs is voluntary.

- If a beneficiary or prospective beneficiary of a program or activity that receives direct Federal financial assistance from HUD objects to the religious character of an organization that carries out the program or activity, the organization must promptly undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary or prospective beneficiary has no objection. If the organization is unable to identify an alternative provider, the organization must promptly notify the intermediary, or if there is no intermediary, HUD.

- Organizations that receive Federal financial assistance must comply with applicable laws and regulation. By virtue of their acceptance of such assistance, organizations also agree to appropriate monitoring and enforcement of these standards.

- Direct Federal financial assistance may be used for the acquisition, construction, or rehabilitation of structures only to the extent that those structures are used for conducting eligible activities under a HUD program or activity. Where a structure is used for both eligible and explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization), direct Federal financial assistance may not exceed the cost of the share of acquisition, construction, or rehabilitation attributable to eligible activities in accordance with the cost accounting requirements applicable to the HUD program or activity. However, acquisition, construction, or rehabilitation of sanctuaries, chapels, or other rooms that a HUD-funded faith-based organization uses as its principal place of worship, may not be paid with direct Federal financial assistance.

VIII. For Further Information

Additional questions regarding the requirements of 24 CFR 5.109 or this Notice may be directed to the relevant HUD program office or to PartnershipsGuidance@hud.gov.

Nani A. Coloretti, Deputy Secretary