INSTITUTIONAL
RELIGIOUS FREEDOM ALLIANCE
SAFEGUARDING THE FAITH OF FAITH-BASED ORGANIZATIONS

national association of Evangelicals

January 27, 2011

Eric Treene
Civil Rights Division
Department of Justice
950 Pennsylvania Avenue, NW
Washington DC 20530-0001

Dear Eric:

The Institutional Religious Freedom Alliance, a multi-faith coalition of religious organizations, and the National Association of Evangelicals, wish to bring to your attention a number of concerns and questions regarding President Obama's November 17th Executive Order setting out "Fundamental Principles and Policymaking Criteria for Partnerships With Faith-Based and Other Neighborhood Organziations."

We understand that the Department of Justice is represented on the Interagency Working Group that is reviewing pertinent federal policies, regulations, and documents in light of the Executive Order and will make recommendations. We propose that the following comments and questions should be kept in mind in this process. We ask that you bring this letter to the attention of the DOJ officials involved in the Working Group review.

AREAS OF CONCERN IN EXECUTIVE ORDER 13559: FUNDAMENTAL PRINCIPLES AND POLICYMAKING CRITERIA FOR PARTNERSHIPS WITH FAITH-BASED AND OTHER NEIGHBORHOOD ORGANIZATIONS

These questions and comments reference E.O. 13559 as it modifies E.O. 13279 (Dec. 12, 2002).

Sec. 2 (d). The prohibition of discrimination against beneficiaries applies differently when the funding is "indirect" (this is the current practice, notwithstanding the nearly identical language of E.O. 13279). With indirect funding there is a choice of providers and types of service. If secular services are among the choices, then the other indirectly funded services may include religious activities (*Zelman* v. *Simmons-Harris*). Beneficiaries' religious rights are guaranteed by this choice of diverse providers and services. An indirectly funded provider that offers faith-integrated services should not be required to accept or actively reach out to beneficiaries and potential beneficiaries who object to its religion. And beneficiaries who choose such a provider should not be allowed to refuse to "attend or participate in a religious practice"—since the religious practice is part of the funded service.

(This is a different circumstance than in directly funded services, where religious activities must be offered separately, and where, as subsec. (f) rightly states, participation by beneficiaries must be voluntary.)

Sec. 2 (e). The revision adds "other applicable law" to the First Amendment requirements that the federal government must respect. What does that phrase mean? Is it simply a reference to RFRA, applicable OMB Circulars, terms of the RFP, and the like? That is not problematic, but left undefined as it is, the reference to "other applicable law" is so indeterminate it is likely to deter participation by faith-based organizations.

Sec. 2 (f). The language arguably clarifies what kind of expression and activities must be kept separate from a directly funded program. The "Safeguards Required" settlement document ought not to be used when developing guidance and regulations. That document was developed for a persistently misbehaving grantee. Its micromanaging requirements should not be imposed on providers where there is no prior evidence of such rule breaking.

Sec. 2 (g). This subsection on protecting a provider's religious character no longer references the Free Speech and Free Exercise clauses as constitutional bases (although subsec. (e) maintains the reference to the latter clause as well as the Establishment Clause as providing constitutional guidance). The deletion of the Free Speech Clause is troubling given the weakness of Free Exercise claims in current jurisprudence when these are not accompanied by other constitutional principles—often Freedom of Speech and Association.

Sec. 2 (g). This subsection now limits the protection of a religious grantee's "expression" of its mission and character to what is manifested "outside" the federally funded programs it operates. The new qualification may be intended only to acknowledge that "explicitly religious activities" must remain outside a directly funded program. If so, it should be understood to apply only when the government funding is direct, not indirect (*Zelman* v. *Simmons-Harris*). And when the funding is direct, the phrase should not be interpreted to undermine protection for an organization's religious character when it is legitimately manifest in operating the directly funded services—for example, an organization's practice of hiring co-religionists as presently permitted by law.

Sec. 2 (g). For a faith-based organization that receives federal funds to be able to "retain its independence and continue to carry out its mission," it must according to the revised text not only refrain from using direct federal funding to support explicitly religious activities but also not use those funds "in any other manner prohibited by law." What does that phrase mean? If that additional phrase is not empty (are not all grantees already required to follow all applicable law?), what is its intended content and effect? The subsection begins with a promise to faith-based organizations that participation will not mean the loss of their independence and religious character. But the reference to "any other manner prohibited by law" is so indeterminate it likely will discourage participation by these organizations. Grassroots organizations are risk averse and will be worried by promised protections that include this vague phrase. Regulations and other products that implement the E.O. must specify the applicable prohibitions.

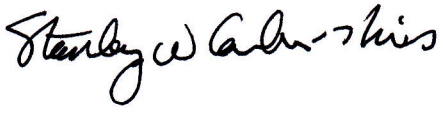
Sec. 2 (h). Providers that receive federal funds now have a new duty to refer a beneficiary who objects to their religious character to another provider, and to give to beneficiaries notice of this right. The government here shifts an open-ended duty from itself to participating providers. The referral duty is a very heavy one—the organization must know about suitable alternative providers, make a timely referral, comply with privacy requirements when referring the beneficiary, notify the government agency about the referral, and be able to determine whether or not the beneficiary has contacted the alternative provider (the burdensomeness of the requirement to give notice to beneficiaries of the referral right will be minimal if government agencies provide model language). The duty must be shared.

- The government agency involved needs to facilitate the referral process by making available a list of acceptable alternative providers, defining what a timely referral is, providing training in complying with the privacy requirements, assisting providers in devising a process by which they will know whether the beneficiary has contacted the alternative provider, and by establishing a clear and easily used way for the initial provider to inform the agency about the referral.
- The government agency involved should devise a method by which the alternative provider is paid for providing the service without unduly burdening the initial provider (who may have already expended considerable funds to serve the beneficiary and must expend more funds and effort to operate the referral mechanism).
- The regulations implementing the alternative provider should specify that the alternative must be religiously non-objectionable to the beneficiary and need not be secular. This is how the Charitable Choice alternative is interpreted in current law.
- How will the Federal government ensure that no government agency discriminates against a faith-based organization that applies to provide a service because the agency wants to avoid the expense and effort involved with the alternative provider requirement?

Do the freedom principles—the provider's independence and retention of religious character—of the new Executive Order accompany the federal funds to state and local governments that award the funds to private organizations? If not, then the promised "retention" of the religious character and independence of participating faith-based organizations rings hollow.

Thank you for considering these observations and questions.

Sincerely,



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