Proposed RHYA Nondiscrimination Provisions Are Broadly Troublesome for FBOs
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Recommended Action

1. Before considering the addition of a nondiscrimination provision to the RHYA program, Congress should determine whether such a provision is needed—whether there is credible evidence of discriminatory treatment of beneficiaries and potential beneficiaries by current or past grantees. If there is such evidence, it would be appropriate to include a statement of such in the findings of the reauthorization bill, creating a justification for the addition of a nondiscrimination provision.

2. If a nondiscrimination provision does need to be added to the program, Congress should devise language that focuses on ensuring respectful treatment of beneficiaries and potential beneficiaries, without adding unnecessary and harmful restrictions to the other operations and programs of grantees.

3. Congress should be careful not to bar or chill participation by faith-based providers, who bring special qualities to their service and who are especially trusted by various segments of our diverse public. If a grantee wrongly discriminates in providing services, then it ought to be excluded from a grant program, but the government shouldn't prejudge that an organization will mistreat those it serves simply because its internal moral standards are different than the conduct of those it serves. Religious organizations daily serve—with respect and by choice and commitment—people whose conduct differs from that of the organizations themselves. Their religion compels them to serve with respect. Congress should not adopt a nondiscrimination provision that, without proof, simply presumes the opposite.

4. The Institutional Religious Freedom Alliance and its multi-faith allies (church-state experts, faith-based service organizations) stand ready to assist in the drafting of a focused nondiscrimination provision, should Congress determine that such a provision is essential for the RHYA program.

Discussion

A Senate bill to reauthorize services for runaway and homeless youth includes a VAWA-like sweeping nondiscrimination requirement that places at risk the **religious staffing practices** and **privately funded religious activities** of faith-based organizations that receive **any grants from the Administration for Children and Family** (ACF) in the Department of Health and Human Services. If this nondiscrimination requirement becomes law, **every ACF faith-based grantee** will be subject to the same restrictions on religious staffing that are now applied to faith-based contractors and subcontractors due to the LGBT Executive Order for federal contracting. And because of the nondiscrimination provision, it may become illegal for these grantees to offer privately funded services that are religious or have a moral qualification.

(A revised version of the nondiscrimination requirement proffered by its supporters is quoted and analyzed on pp. 5ff, below.)

The bill is *S. 262, the Runaway and Homeless Youth and Trafficking Prevention Act* (RHYA), co-sponsored by Sens. Leahy, Collins, Ayotte, and Booker. The same bill, numbered S.2646, was proposed in the last session of Congress, but did not receive a vote due to pro-life concerns about a part of the bill as well as concerns about the nondiscrimination requirement. However, the RHYA services to be reauthorized have significant support in Congress and a broad external coalition, including faith-based organizations; the bill has a bipartisan set of co-sponsors; and criticism of the nondiscrimination provision is deflected by pointing to the bipartisan vote in 2013 to reauthorize VAWA, despite the concerns raised near the end about that bill's sweeping nondiscrimination requirement.

The nondiscrimination provision is far too sweeping in reach, applying its restrictions to the nearly 80 programs administered by ACF—many of them core social service programs—without any focused discussion about discrimination in those programs; it will hamper or exclude participation by faith-based organizations that maintain a strong religious staffing policy; it may require secularization of even privately funded programs offered by those grantees; and, while the stated aim is to protect the intended beneficiaries of the programs from wrongful discrimination, the provision applies to otherwise legal operations of the grantees themselves, implying that if they maintain conservative religious and moral commitments they are not suitable grantees. Alternative language should focus on protecting the beneficiaries.

Most troubling: this is now a second effort to apply very widely, via a program that serves a sympathetic group of needy people, a sweeping nondiscrimination requirement that is harmful to faith-based partnerships with federal programs. The VAWA provision was written to apply beyond VAWA programs to every program operated by the Office on Violence Against Women. Now, the RHYA provision is written to apply to nearly 80 programs administered by ACF—far beyond the small pool of funding being reauthorized. These ACF programs range from the Compassion Capital Fund, through abstinence education, marriage and fatherhood programs, adoption and foster care services, TANF services, child care funding, and refugee programs, to the Mentoring Children of Prisoners program, and many others. Some of these programs were specifically designed to enlist FBOs! Congress has not had a discussion about prohibiting sexual-orientation and gender-identity discrimination by federal grantees. Nor has it chosen to restrict the religious rights of faith-based grantees—rather the opposite. Yet, via VAWA and the RHYA nondiscrimination provision, Congress will in effect be expanding LGBT protections in a way that harms faith-based services.

Instead of adopting this overreaching and harmfully designed nondiscrimination requirement, Congress should first ask whether the nondiscrimination provision is needed. Have any grantees in the RHYA program credibly been shown not to provide respectful services to eligible youth? If a new nondiscrimination requirement is determined to be essential, then it should be carefully designed to prohibit wrongful LGBT and other discrimination **against beneficiaries and potential beneficiaries** of the program being authorized or authorized. Such a provision should preserve and even affirm the legitimate the rights of faith-based and other grantees.

Problems with The Sweeping Nondiscrimination Provision in S. 262

Proposed Nondiscrimination Provision for RHYA

SEC. 386B. NONDISCRIMINATION.

(a) IN GENERAL.—No person in the United States shall, on the basis of actual or perceived race, color, religion, national origin, sex, gender identity (as defined in section 249(c)(4) of title 18, United States Code), sexual orientation, or disability, be excluded from participation in, denied the benefits of, or subjected to discrimination under any program or activity funded in whole or in part with funds made available under this title, or any other program or activity funded in whole or in part with amounts appropriated for grants, cooperative agreements, or other assistance administered by the Administration for Children and Families of the Department of Health and Human Services.

(b) DISQUALIFICATION.—Any State, locality, organization, agency, or entity that violates the requirements of subsection (a) shall not be eligible to receive any grant, assistance, or funding provided under this title.

Background

This language is in substance identical to the nondiscrimination provision added to the Violence Against Women Act (VAWA) when that program was reauthorized with bipartisan support in 2013. In the case of VAWA, the nondiscrimination provision was made to apply not only to VAWA funding but to all of the small number of programs operated by the agency that administers VAWA, namely DOJ's Office on Violence Against Women.

In April, 2014, the Administration issued an FAQ document[1] to explain the new VAWA nondiscrimination requirement. The Administration interprets this broad language to apply **beyond** requiring respectful treatment of beneficiaries and potential beneficiaries—**to extend to apply to all operations of an organization that receives any of the covered funds to pay for any of its services** (see Q and A 3—the rules apply to "all operations" of an entity that receives any of the covered funds).

As such, the provision prohibits, among other things, religious staffing by a religious grantee (involves religious criteria in making hiring and firing decisions). However, in the FAQ document (Q and A 6), the Administration notes that the Religious Freedom Restoration Act (RFRA) applies to such a prohibition, as the DOJ's Office of Legal Counsel determined in a memo in 2007 concerning World Vision participation in a grant program that included a ban on religious job discrimination.[2] The document further indicates a simple certification process provided by DOJ by which an FBO can utilize RFRA to be able to accept a grant while maintaining its religious staffing practices.

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[1] DOJ, Office of Justice Programs, Office for Civil Rights, "Frequently Asked Questions, April 9, 2014, Nondiscrimination Grant Condition in the Violence Against Women Reauthorization Act of 2013," http://www.justice.gov/sites/default/files/ovw/legacy/2014/06/20/faqs-ngc-vawa.pdf.

[2] OLC memo, "Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act," June 29, 2007. Go to that date at this URL: http://www.justice.gov/olc/opinions.

Thus, according to the Administration, while the text of the VAWA nondiscrimination provision prohibits religious staffing, the DOJ maintains a simple certification process that makes it possible for FBOs that staff by religion nonetheless to participate in Office of Violence Against Women programs that are now governed by this nondiscrimination provision.

When the VAWA nondiscrimination provision was (briefly) discussed in 2013, a chief criticism was its ban on religious staffing. Because the Administration readily announced the RFRA override of this ban and even provided the easy certification process, some congressional offices argue that there is no real reason why FBOs should be concerned with either the VAWA provision or the same RHYA provision.

Serious Problems

a. Religious staffing.

• The Administration accepts that RFRA overrides the ban on *religious* discrimination in staffing but not that it overrides the new bans on sexual orientation (SO) and gender identity (GI) discrimination in staffing. That is, with regard to religious staffing, the RFRA protection only puts the FBO in the same uncertain place that FBOs are in with respect to federal contracts since the LGBT Executive Order for federal contracting. Staffing by religion is legal, but how far does this freedom extend when SOGI job discrimination is banned? Does the protection of religious staffing protect an FBO's morally conservative employee conduct code, or does such a code violate the SOGI nondiscrimination requirement?

• The Administration might not extend to ACF programs the easy RFRA certification process that was already present in DOJ before being extended to VAWA-affected funding. It is even possible that it will end the certification process in DOJ, as it is being constantly urged to do by its LGBT and civil rights allies.

• The Administration may withdraw the 2007 OLC memo or succeed in obtaining a new OLC memo with the opposite conclusions. Its LGBT and civil rights allies are continually pressing to undermine the 2007 OLC memo.

• Among the congressional and outside voices that say FBOs need not worry that the nondiscrimination provision extends to their own operations because the Administration's VAWA FAQ documents the preservation of religious staffing are many bitter critics of the use of RFRA to override religious staffing in government-funded programs, of the OLC memo, and of the DOJ certification process. To concerned FBOs they say: don't worry, there is the OLC memo, the certification process, RFRA. To the Administration and Congress they say: RFRA shouldn't protect discrimination, the OLC memo must be withdrawn, the certification process simply gives a pass to discrimination on the government dime.

b. Selecting beneficiaries for *privately funded* services.

The sweeping nondiscrimination requirement applies, according to the Administration, to all operations of the grantee, and thus must apply to decisions an FBO grantee makes about who to

admit to services it funds solely with private funds. It would thus become illegal discrimination for the grantee, e.g., to operate a summer camp only for children of church members (violates religious nondiscrimination requirement) or to offer free marriage-strengthening classes open only to man-woman couples (violates the SO nondiscrimination requirement).

c. Operating *privately funded* services in an allegedly discriminatory way.

Because the nondiscrimination requirements apply to all operations of a grantee that receives any of the money covered by the nondiscrimination provision, a grantee that, in a privately funded program, offers drug treatment services that utilize religious worship and other religious activities, could well be charged with religious discrimination by a person who desires help to kick an addiction but who rejects religion and thus is excluded from the program.

Note: The Equal Treatment regulations that govern HHS and other federal grant programs specifically protect religious activities of grantees when those activities are privately funded, offered separately from the federally funded services, and voluntary for beneficiaries of the federally funded services. These regulations have been maintained by the Obama Administration and validated by President Obama's Executive Order 13559, Fundamental Principles and Policymaking Criteria for Partnerships With Faith-Based and Other Neighborhood Organizations (Nov. 17, 2010). *The VAWA and RHYA nondiscrimination requirement, as to religion, facially violates this provision of the Equal Treatment regulations*.

d. Illicit assumptions about religious and morally conservative grantees.

The sweeping RHYA nondiscrimination provision, like the VAWA provision before it, is justified by the need to protect at-risk beneficiaries and potential beneficiaries. In the case of RHYA, promoters of the nondiscrimination provision note that a large proportion of the eligible youth are LGBT and that it is especially important that grantees not subject them to additional discrimination when they seek shelter and services. But the nondiscrimination requirement is not limited to how beneficiaries and potential beneficiaries are treated by grantees but extends into every operation of the grantee itself: in all of its operations, it is forbidden to discriminate based on religion, sexual orientation, gender identity, race, etc. Why should protections for beneficiaries be applied to the grantee organizations themselves? Three reasons, all deeply problematical, suggest themselves:

• There may be a presumption that organizations that staff by religion, offer privately funded and voluntary religious activities, and maintain a morally conservative view of sexual relations—that is, organizations that are not LGBT-affirming—are for just such reasons unsuitable organizations, not to be trusted to treat LGBT youth with dignity and respect. Such a presumption goes against the reality of current religious grantees in a wide range of federal programs who compassionately and respectfully serve those unlike themselves in religion and morals. They do so because of their religious values, not despite those values. In fact, if they did not serve respectfully, they would not be awarded program funds. The government is not permitted to assume that one or another theology or ethical system makes a person or organization automatically homophobic or certain not to be respectful to beneficiaries who are different.

• The intent may be to get the federal government to symbolically state that no organization that takes religious seriously and that has a conservative moral stance on sexual matters is worthy to receive federal funds—to label such organizations as unsuitable partners, not to be trusted to serve the common good. That is an illicit judgment for the government to make.

• The intent may be simply to apply, by a stealth process, a sweeping new federal nondiscrimination requirement to grantees, first to a set of DOJ programs via VAWA reauthorization, here to the very large set of ACF programs via RHYA reauthorization, next via some other program that brings federal help to another at-risk population . . . . However, if Congress intends to expand the current nondiscrimination requirements that apply to the treatment of beneficiaries, or to apply a broad new set of nondiscrimination requirements to the operations of grantees, then it ought to have discussions and votes on just such expanded requirements, keeping in mind that such measures will diminish the involvement of FBOs in federal grant programs.

The Revised Nondiscrimination Provision Is Also Unacceptable

Criticism of the sweeping original nondiscrimination provision in S. 262 has prompted some supporters of the bill to offer a revised version of the provision:

> "No person in the United States shall, on the basis of actual or perceived race, color, religion, national origin, sex, gender identity (as defined in section 249(c)(4) of title 18, United States Code), sexual orientation, or disability, be excluded from participation in, denied the benefits of or subjected to discrimination under any program or activity funded in whole or in part with funds made available under this title.
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> "With funds not authorized under this title, each church and religious organization has exclusive control over the hiring or termination of individuals whose duties are ministerial, in that they consist of teaching or spreading theological doctrine or belief, religious governance, supervision of a religious order, supervision of persons teaching or spreading theological doctrine or belief, or supervision or participation in religious ritual or worship."

Problems with this revised language

Scope of application

What is the "this title" to which the restrictions will be applied? If confined to the RHYA program, that is an important improvement over the original language. However, this revision leaves two important matters: (1) Is the nondiscrimination provision needed in this program: has credible evidence of discriminatory practices by current or past grantees been presented? (2) Changing the scope of application of the provision does not by itself resolve the problems of the provision itself.

Wrongful reach into grantee operations

Paragraph 2 shows that paragraph 1—the nondiscrimination requirements—reaches into the operations and programs of the grantee itself, going beyond targeted protections for beneficiaries. As discussed above, reaching into the grantee in this way will wrongly prohibit grantee practices and programs that ought not to be interfered with. Moreover, reaching into grantees in this fashion wrongly presumes that grantees that value religion and maintain conservative sexual moral standards somehow are likely to harm beneficiaries or are in principle unworthy to be entrusted with federal funds. These are mistaken presumptions that ought not to be made by Congress.

The pseudo-exemption for religious staffing

One criticism of the original language (and of the identical language in VAWA 2013) is that it seemingly prohibits religious staffing by religious grantees—even though RFRA, as acknowledged by an OLC memo and VAWA FAQ memo, overrides such a prohibition (see discussion earlier in this memo). Congress ought not to prohibit in RHYA a practice that RFRA supports. At best, this is confusing to potential religious applicants for grants.

The revised language quoted above is a wholly inadequate response to these concerns about religious staffing.

1) The proffered exemption only applies to religious staffing decisions outside of services funded by "this title." Hiring and firing decisions with regard to jobs funded by "this title" remain fully subject to the broad nondiscrimination requirements. Religious staffing decisions with regard to those jobs would still only be possible because of RFRA. And recall that, as discussed above, RFRA is being interpreted by the Administration to permit only "religious" discrimination in staffing. A religious grantee's religious staffing decisions would still be subject to second-guessing as having involved illegal sexual orientation discrimination, even though the grantee insists it is only assessing the faithfulness of an applicant or employee to the religious beliefs of the grantee.

2) Paragraph 2 purports to create a "ministerial exemption" to the ban on religious staffing in paragraph 1, for jobs not funded under "this title." However, the US Supreme Court pointed out in its unanimous ruling in Hosanna-Tabor, 2012, that it is the First Amendment that provides a ministerial exception to employment nondiscrimination laws. *Those proposing this revised nondiscrimination provision are making a (poor) showing of creating a freedom that already exists.*

3) That actual First Amendment "ministerial exemption" is far broader than the narrowly cabined exemption specified in this paragraph (consult Hosanna-Tabor, where it was a math teacher, albeit "commissioned" and with certain religious duties, who was declared to be a "minister"). The extensive qualifications strung together make this a ministerial exemption that is *narrower than the ministerial exception that the Supreme Court has declared exists because of the First Amendment*, notwithstanding narrower statutory language.

This alternative language ought to be rejected as unacceptable.

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