

Recommendations for Universal Pre-K



To Accommodate Religious Communities and Faith-Based Organizations

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Recommendations for Federal Policy for Universal Pre-K That Accommodates Religious Communities and Faith-Based Organizations

Center for Public Justice & Institutional
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Diverse Family Preferences

Many families highly value out-of-home care for their very young children, and policies such as free universal Pre-K and greater access to childcare centers will help them. However, other families prefer that one parent provides care and early education in the home.¹ The federal government's efforts to promote better outcomes for the young and to advance equity for low-income families should support both types of families.

Among the families that prefer care and early education outside the home, many value care and education that is faith-compatible or even faith-infused. The section below, "Snapshots of Faith in American Society," notes Pew Forum data showing that around 75% of white, Black, Hispanic, and Asian Americans,

¹ See, for example, Wendy Wang, Margarita Mooney Suarez, and Patrick T. Brown, "Familia Si, Guarderia No: Hispanics Least Likely to Prefer and Use Paid Child Care," Institute for Family Studies Research Brief, May 26, 2021, <https://ifstudies.org/blog/familia-si-guarderia-no-hispanics-least-likely-to-prefer-and-use-paid-child-care>, and Ajay Chaudry, et al., "Child Care

and 80% of immigrants identify with one or another religious tradition.² Of course, not all religious families seek religious childcare or schooling. But as "Snapshots" illustrates, significant proportions of childcare and educational institutions do include a desired religious element.

The Biden administration's actions to expand access to Pre-K programs by increasing federal funding should ensure that faith-based Pre-K programs can be among the options available to families. While educational programs operated by the federal government or by state governments are constitutionally required to be non-religious, the government can accommodate families and individuals who desire faith-inclusive education by utilizing a **partnership model** in which federal funding supports Pre-K programs offered not only by secular institutions but also by religious ones.

Given the distribution of responsibilities in our federal system, federal support for Pre-K schooling no doubt would be provided via a joint federal-state program. A number of states have a constitutional provision that prohibits government support for religious or sectarian educational institutions or for

Choices of Low-Income Working Families," Urban Institute, January 2011, https://Pre-K.urban.org/research/publication/child-care-choices-low-income-working-families/view/full_report.

² <https://Pre-K.pewforum.org/about-the-religious-landscape-study/>

religious organizations in general (so-called “Blaine amendments”). So that the joint program in these states does not exclude religious organizations, the program statute and regulations should provide that federal funds (and commingled state funds) must be spent in accordance with federal rules, notwithstanding such state restrictions.³

The Federal Commitment to Faith-Hospitable Policies

Many federal policies have been designed specifically to ensure that faith-based organizations may seek and receive federal funding without suppressing their religious character and practices. They simultaneously ensure that beneficiaries are not subjected to unwanted religious content and pressure.

The most prominent federal commitment to funding policies that accommodate the participation of faith-based organizations is undoubtedly the faith-based or partnership initiative, which dates back to the enactment of the Charitable Choice provision in several

laws during the Clinton administration. It has been reinvigorated by the Biden administration.⁴ Yet, notwithstanding several decades following WWII when a “no aid to religion” interpretation of the First Amendment was dominant, the partnership approach has been implemented in multiple additional federal funding programs. Here are some:

- The G.I. Bill, first enacted to help World War II veterans attend college, allows veterans to choose religious higher education institutions, including seminaries.
- The Child Care Development Fund, the main federal program of support for childcare for low-income families, was specifically designed in 1990 to enable families to select faith-based childcare. Federal funding flows to providers predominantly via a voucher mechanism so that childcare programs with a religious emphasis, such as faith-based hiring practices or religious curricula, are eligible to participate.

³ As a precedent, see, for example, the rule providing for federal supremacy in the expenditure of federal and commingled funds in the Charitable Choice provision for the TANF program that was adopted as part of the 1996 welfare reform act. As codified, 42 U.S.C. 604a provides for the equal participation by religious organizations in providing TANF-funded services. Subsection (k), “Preemption,” carefully states that “Nothing in this section shall be construed to preempt any provision of a State constitution or State statute that prohibits or

restricts the expenditure of *State* funds in or by religious organizations” [italics added]—that is, State funds are subject to the limitation, but not federal funds. See the discussion in the Final Rule, 68 Fed. Reg. 56462 (Sept. 30, 2003) at 56463.

⁴ Stanley Carlson-Thies, “The Biden Partnerships Plan Is Faith-Based Initiative 5.0.” HistPhil blogpost, March 9, 2021, <https://histphil.org/2021/03/09/the-biden-partnerships-plan-is-faith-based-initiative-5-0/>.

- The federal school lunch program has rules that enable many faith-based K-12 schools to participate. This makes it easier for lower-income families to afford the faith-shaped education offered by such schools.

- Federal student loans and other aid provide for the eligibility of students attending religious colleges and universities. The faculty of such institutions are eligible to compete for federal research funding.

- The Paycheck Protection Program of SBA loans for nonprofit organizations, created by Congress in response to the coronavirus pandemic, has rules specifically designed so that faith-based organizations, including houses of worship, are eligible to receive the forgivable loans.

- The CARES Act and other pandemic-response laws included assistance for private K-12 schools, including parochial and other religious schools, while the special funding to assist higher education in the pandemic is also available to religious as well as secular private colleges and universities.

For religious options to be among those available when the government funds the provision of education or other services, the government program needs to be carefully designed to that end, with particular specifications concerning eligibility for funding, particular ways to assess and improve

the quality of the private programs, and program rules that protect the religious identity of faith-based providers. We make recommendations regarding each of these important matters.

Recommendations For How the Government Can Ensure the Eligibility of Faith-Based Providers in a Federal Program to Expand Access to Pre-K Programs

1. Ensuring the eligibility of faith-based programs for government funding.

The government is not permitted to “establish religion” by operating programs of religious instruction or by supporting private organizations to provide such religious instruction at the government’s direction (exceptions include chaplaincy and similar services). Thus, the federal funding rules associated with the faith-based or partnership initiative—the Equal Treatment and Equal Opportunity regulations in various federal agencies—specify that, when the federal government directly selects and funds service providers, the government-funded services cannot include religious teaching or other specifically religious elements (the provider may privately pay for such elements and offer them to participants in the government-funded services on a

voluntary basis). This is called “**direct**” funding.

However, if, instead, the beneficiary of the services is given a choice of services that include one or more services without religious content, and any particular provider is paid only because a beneficiary has chosen to receive services from that provider, then the provider may incorporate religious elements within the government-supported service. This is called “**indirect**” funding.⁵ The government ensures that there are non-religious choices in addition to the religious choices and ensures that information about all of these options is available to the beneficiaries.⁶ In this way, beneficiaries are protected from involuntary participation in religion while the government is able to assist those beneficiaries who desire services that incorporate religion.

⁵ The “direct” vs. “indirect” distinction is discussed in President’s Advisory Council on Faith-Based and Neighborhood Partnerships, *A New Era of Partnerships: Report of Recommendations to the President* (White House Office of Faith-Based and Neighborhood Partnerships, March 2010), pp. 129f, 133f. <https://obamawhitehouse.archives.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf>. See also the distinction in the definitions incorporated in the Equal Treatment regulations; for the HHS regulations, as adopted during the Obama administration, e.g., see 81 Fed. Reg. 19426 (April 4, 2016).

⁶ The requirement that, for funding to be “indirect,” a beneficiary’s choices must include at least one provider of non-religious services, was eliminated by the Trump administration; see the revised definition, e.g., in the HHS regulations:

Accommodating religious education when the funding is “direct.” A current example of how religious organizations and religious teaching can be accommodated with direct funding is illustrated in New York City’s universal free Pre-K program. Because the funding is direct, the City-supported education cannot include religious instruction.⁷ However, participating religious organizations, such as Jewish day schools, are permitted to limit the number of hours of City-funded education and then to supplement the non-religious education with privately funded religious instruction and religious activities in the other hours of the school day.

By accommodating Pre-K education offered by religious organizations, the city government has gained many of the seats in Pre-K classrooms that its universal program needs but otherwise would be unable to offer, and it can better accommodate the range of

85 Fed. Reg. 82147 (Dec. 17, 2020). It seems likely that this change will be reversed by the Biden administration in its recently-announced review of the Trump administration’s changes to the regulations: Office of Management and Budget, Spring 2021 Unified Agenda of Regulatory and Deregulatory Actions, <https://Pre-K.reginfo.gov/public/do/eAgendaMain>.

⁷ “Guidance on Administration of UPK by Religious Schools and Other Faith-Based Organizations,” linked by Kirac Shepherd, “New York City’s Pre-K Program’s Church-State Problem,” The Law, Rights, and Religion Project blog, Sept. 1, 2016. <http://blogs.law.columbia.edu/publicrightsprivateconscience/2016/09/01/new-york-citys-prek-programs-church-state-problem/>

preferences regarding content and context of the wide variety of families with eligible children.

Accommodating religious education via “indirect” funding.

We suggest that while the New York City policy is a creative way to accommodate religious Pre-K schooling, the **direct funding model used in New York City** is not the optimal solution. It requires controversial compromises. For example, some participating religious schools desire to include religion as a topic within the City-paid Pre-K day, given the importance of religion to the schools, in contemporary society, and in history, but church-state watchdogs are concerned that such teaching about religion will too easily become the illegal teaching of religion. Moreover, it is rather artificial to require a religious school that offers education shaped by the perspectives of that religion, located in a physical environment that witnesses to that religion, taught by a staff selected for its suitability to provide instruction and guidance embodying the convictions of that religion, to scrub its religion out of multiple hours of government-funded Pre-K instruction each day.

Nor does such a requirement seem particularly equitable for the families that prefer the religion-shaped teaching of a particular school, whether or not they share the school’s religion. New York City seeks to advance equity by making

Pre-K education available without charge, and yet its direct funding mechanism requires that the education it pays for be non-religious, requiring that precisely the religious elements particularly valued by the families that favor that school be funded by those families themselves, even though they have limited resources. It does not seem particularly equitable that under-resourced families and communities must pay out of their own pockets for what they may regard as the most distinctive and precious element in the education of their young children.

Rather than following the New York City way, we recommend that the federal government choose a modality or mechanism that enables funding of the entire Pre-K education offered by a faith-based organization, such as a Black church, just as it would fund the full secular program offered by a public school district or by a secular private education organization. There are at least two such funding modalities:

Scholarship or voucher funding.

As noted above, when the beneficiaries, not the government, choose the provider of a service--and among the available options are some that do not include religion--then government funding can flow to services that do include religious elements. In such “indirect” funding, the government is supporting the choice of the beneficiary; a beneficiary who chooses religious schooling is engaging in the exercise of religion, which is

protected under the First Amendment. The federal Child Care Development Fund (CCDF) program authorizes states to use grants or contracts (“direct” funding) to support childcare services for low-income families but has a statutory preference for “indirect” funding so that parents have the opportunity to choose faith-based childcare if they wish. The indirect funding mechanism utilizes childcare “certificates” or vouchers; because the funding is indirect, providers can offer care that includes religious activities and may use religious criteria when hiring staff. This modality of funding enables families who want integrally religious full-day care to choose it, even as other families select religion-less care if they so desire.

A federal program to support free universal Pre-K could be modeled on the Child Care Development Fund’s use of certificate funding. Parents would be awarded a Pre-K scholarship for each eligible child and would be authorized to select a Pre-K program that includes, or excludes, a religious emphasis and religious elements. Federal support would flow, via the participating states, to whichever schools the families choose in proportion to the number of children each school educates. As with the federal childcare program, states should operate an informational support

system that provides parents with information about the various available programs, recruits new providers and assists in their development, and promotes quality improvements across the education system.

Beneficiary-choice contracting. In order for funding to be “indirect,” such that providers can offer and parents can choose government-supported childcare or education that incorporates religion, it is essential that the government funding flows to any provider because of the informed choice of a beneficiary and not because an official selected the provider, possibly for a religious—thus impermissible—reason. That is, it is not necessary for the beneficiaries (the families) to be given an actual certificate or scholarship document that they deliver to the provider and which the provider uses to apply for payment from the government.

A federal court has approved a modified form of government contracting as being “indirect,” thus enabling faith-integrated services to be offered within the array of choices.⁸ In this modality, the government contracts with a number of providers, but a provider is paid only when and to the extent that a beneficiary chooses that provider and receives services from it. Beneficiaries are informed of the options available to

⁸ *Freedom from Religion Foundation, Inc. v. McCallum*, 179 F. Supp. 2d 950; *Freedom from Religion Foundation, Inc. v. McCallum and Faith Works, Milwaukee, Inc.*, 324 F. 3d 880 (7th Cir.

2003). For an analysis, see Ira C. Lupu, and Robert PRE-K. Tuttle, “Zelman’s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles.” *Notre Dame Law Review* 78 (May 2003): 917-94.

them, including which of the providers offer faith-integrated services and which offer religion-less services. As a form of contracting, the government provides more governance over the network of options than with a pure voucher system, more effectively matches supply and demand, and offers the providers more financial security. Because it is a modified form of contracting, which is a familiar mode of government funding, this form of indirect funding does not require the ground-up construction of a new mechanism of payment and a new system of providers.

The U.S. Department of Labor has piloted this form of indirect funding to provide job-training services to ex-prisoners. It also funded a guide to the logic of the funding mechanism and to its implementation.⁹

Additional funding issues. The CCDF program reaches less than 5% of U.S. children. A universal Pre-K program would have to be much larger in scope, even if only half of eligible families chose to participate. Just as in New York City's program, the need to engage many organizations beyond public schools to be able to offer a sufficient volume of Pre-K slots is in and of itself a compelling reason to enable broad participation by religious organizations—houses of worship, schools, and other community-serving faith-based

organizations—along with a wide range of secular non-public schools and other secular community organizations. Many of these organizations, both faith-based and secular, will need significant support both financially and in other ways if they are to be able to participate.

First, reimbursement rates need to be sufficient to cover the direct costs of providing the Pre-K programming; some percentage of faith-based organizations and some of their secular counterparts will choose to participate even if they have to subsidize the participation costs out of their own funds. However, many have no ability to do so. To promote broad participation, the reimbursement rates need to be adequate.

Second, many potentially usable facilities will need modifications or additions in order to be suitable. A church with classrooms currently used only on Sunday mornings may be unable to participate unless the floor coverings and furniture in the rooms are significantly upgraded. It may need to install fencing and playground equipment. Facilities may need to be made ADA-compliant. The list continues with any number of needs.

Here are some ways the federal government could assist these faith-based and secular organizations:

⁹ Stanley Carlson-Thies, Stephen Lazarus, Bernard Antkowiak, and James Callahan. *Beneficiary-Choice Contracting Implementation*

Guide. Prepared for the U.S. Department of Labor. Contract DOLJ061A20365, Task Order #18, 2009.

- (a) Create a program of low-cost (perhaps forgivable) loans for making facilities suitable for Pre-K schooling. The conditions attached to loan eligibility must not have the effect of excluding houses of worship and other religious organizations (e.g., by mandating that an assisted facility can never be used for worship activities or sex-segregated activities or by requiring that every assisted facility is thenceforward subject to a sexual-orientation and gender-identity nondiscrimination requirement).
- (b) Create a social bond program as an alternative; again, the conditions attached to eligibility to receive the funding must not exclude religious organizations.
- (c) Subsidize the health-insurance costs of the staff involved in providing the Pre-K education. The subsidies should be provided to the employees, not the employer, thus obviating church-state concerns.
- (d) Subsidize the training and skills-upgrading of Pre-K teachers. It is vital that this support be available to teachers in all of the participating Pre-K schools, both faith-based and secular, and that teachers can select a training program compatible with the beliefs and values of the Pre-K school where they teach (e.g.,

Montessori, Islamic, Catholic, secular).

In addition, state and regional early-education support centers should be financially incentivized to outreach to and support faith-based Pre-K providers.

Many of the Pre-K teachers and staff, in both existing and new faith-based and non-religious community-based organizations will come from minority (racial, ethnic, religious) communities. Ensuring the broad participation of diverse schools and sponsoring organizations and providing adequate funding for salaries and facilities will promote the administration's equity goals for both improving educational outcomes and reducing income inequalities.

2. Quality assurance that accommodates diverse program designs.

A universal Pre-K program should include a means for assessing and improving the quality of the education offered. However, if parents are to have choices of religious options along with secular Pre-K programs, then the quality assurance mechanisms such as accreditation requirements must be designed in a way that accommodates varied kinds of Pre-K programs. They must accommodate different ways to provide the educational content, such as varied curricula and teaching practices,

including those shaped by religion as well as those not shaped by religion. Quality assurance regimes in U.S. education provide precedents.

Accreditation options in higher education. The Higher Education Opportunity Act requires accreditation agencies to “respect the stated mission of the institution of higher education, including religious missions” in the standards they enforce (20 U.S.C. 1099b(a)(4)(A)). Accreditation agencies are private organizations; however, the federal government relies on their rulings for its own policy decisions, such as determining which colleges and universities a student may attend with the aid of federal student loans. Thus, the federal government must ensure both that accreditors’ quality assurance activities generate reliable information and that their standards conform to constitutional requirements, including the requirement that government protect religious exercise, such as religious education.

Liberal arts or general higher education. Religious liberal arts colleges and universities, which offer a general education with a religious focus or with additional religion-oriented classes and activities, are typically accredited by regional accreditation agencies that also accredit non-religious liberal arts

institutions. These accreditors require all of the institutions to meet a range of standards, including standardized content (e.g., subjects, majors). However, the accreditors must not evaluate the religious institutions in a way that requires those institutions to suppress or eliminate their religious nature. They may not refuse to accredit a religious institution because it teaches its liberal arts content from its religious perspective or because it offers additional religious content.

Specialized varieties of education. Other types of higher education institutions, including religious institutions offering instruction in religion, are assessed by one or another of many specialized accrediting agencies recognized by the U.S. Department of Education.¹⁰ For example, colleges preparing students for an occupational, trade, or technical career are evaluated by the Accrediting Commission of Career Schools and Colleges. There is a Commission on Accreditation associated with the National Association of Schools of Dance and a Commission for institutions preparing students for careers in funeral services or mortuary science.¹¹ The Association of Advanced Rabbinical and Talmudic Schools operates an Accreditation Commission, while some other theological schools and seminaries come under the Commission

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https://www2.ed.gov/admins/finaid/accred/accreditation_pg5.html#Nationally_Recognized

¹¹ Not only are funeral and mortuary services themselves distinct areas of professional

competence, but also various religious communities require distinct practices in dealing with death, such that religion-specific accreditation is also needed.

on Accrediting that is operated by the Association of Theological Schools. Montessori teachers are accredited by yet another body.

Other pluralist ways to assess quality in schooling. State governments, which bear the primary responsibility for education through high school, have devised a wide range of ways to promote educational quality despite the many ways the education is provided—via public schools; private schools, including religious schools; magnet schools and charter schools (both of which are types of public schools); home schooling; online learning; correspondence schooling. States cannot require that school-age children attend a public school (see *Pierce v. Society of Sisters*, 1925: children are not “the mere creature[s] of the state”) but through truancy laws, states do require that children be educated. Thus states must have and enforce a diverse set of standards for what counts as “being educated.”

Education systems across the globe have devised multiple ways to assess and promote quality while also accommodating the diverse preferences of families and respecting the autonomy of the schools themselves. Charles Glenn and Jan de Groof have pioneered

research to document, categorize, and assess these diverse systems. See the four-volume report they edited, *Balancing Freedom, Autonomy and Accountability in Education* (Wolf Legal Publishers, 2012). The content of these volumes is also available in the [Global Pluralism section](#) of the website of the Institute for Education Policy of the Johns Hopkins University School of Education.¹²

Pluralist quality assurance in Pre-K education. Florida’s free universal Pre-K program, the Voluntary Pre-Kindergarten Program (VPK), is specifically designed to accommodate a variety of approaches in Pre-K education. Participating providers include public and charter schools, private secular and religious schools, and childcare centers. Programs and providers can be accredited by a variety of authorized accreditors.¹³ Providers can design their own programs or choose pre-existing curricula, the quality of which ultimately is assessed by each provider’s kindergarten readiness rate. Providers on probationary status because their rate has fallen below the minimum must choose from a list of VPK-approved curricula, which notably includes one that is specifically faith-based (the Wee Learn Curriculum).¹⁴

¹² Experts on pluralist quality assurance methods in schooling are Dr. Ashley Berner, Director of the Johns Hopkins Institute for Education Policy, and Dr. Charles Glenn, Wheelock College of Education & Human Development, Boston University.

¹³ <http://Pre-K.floridaearlylearning.com/vpk/vpk-providers/becoming-a-vpk-provider/vpk-accreditation-guidance>

¹⁴ <http://Pre-K.floridaearlylearning.com/vpk/vpk-providers/vpk-curriculum>

We note that most (if not all) quality standards for Pre-K schooling will be the same across religious and secular alternatives—student/teacher ratios, teacher qualifications, curricular topics, school-family relationships and connectedness, financial management, background checks, health and safety, and so on. However, if an otherwise-qualified organization cannot meet some standard due to a religion-required practice, the supervising government agency should be prepared to work with the school and religious community to devise an equivalent measure of quality and accountability.

3. Program requirements that protect the identity of faith-based organizations.

The funding rules of the federal partnership initiative (the Equal Treatment and Equal Opportunity regulations) specifically protect the religious identity and activities of faith-based organizations that accept federal funds to provide services, while also protecting the right of beneficiaries to receive services without being subjected to unwanted religion in various ways. Whether the funding mechanism is “direct” or “indirect,” these rules that protect religious identity (e.g., a religious name, religious symbols, or a board that includes clergy) and also protect the provision of voluntary religious activities make it possible for religious organizations to compete for funding

along with other organizations. Their eligibility expands the pool of competitors, enhancing the ability of the government to award its funding to the most effective providers. This ultimately benefits the people, families, and communities for whom the services are intended. When the funding is provided “indirectly,” faith-based providers can receive government support while offering services that include religion—expanding the diversity of the services the government is supporting and potentially better serving the diverse populations of beneficiaries.

Religious Staffing. Many faith-based organizations regard being legally free to require all or key staff to demonstrate a commitment to the religious mission and convictions of the organization as essential to their religious identity and to maintaining their faith-inspired way of serving that they are. Personnel is policy: what an organization does and the kinds of decisions it makes depend, in significant part, on who the employees are. This is a reason why, for example, Democratic and Republican Senate offices are unlikely to hire a person strongly affiliated with the opposite party. Moreover, an organization’s personnel display to the public the values of the organization. This is a reason why PETA requires key staff—including media spokespersons, fundraisers, and the directors of its

public campaigns—to be consistently vegan.¹⁵

Thus, if a federal program for free universal Pre-K is to be inclusive of the faith-based Pre-K programs that some or many families desire, then **the rules of the program must protect the freedom of faith-based schools and other Pre-K organizations to select only teachers and other staff who comport with their respective religious missions and convictions.** Because this religious staffing freedom is controversial, we note its foundations in law, regulations, and constitutional principle.

As a matter of basic employment law, separate from specific requirements that might be attached to federal funding, the religious staffing freedom has been protected from the start by a religious organization exemption in federal civil rights law, Title VII of the 1964 Civil Rights Act.¹⁶ Challenged as unconstitutional when the employer was a Mormon health club rather than a church or seminary, the U.S. Supreme Court unanimously upheld the Title VII exemption as permitting a religious

organization to require every employee to meet religious qualifications (*Corporation of the President Bishop v. Amos*, 1987).

The receipt of federal funding does not abrogate this freedom. Title VI of the 1964 Civil Rights Act, which outlines the nondiscrimination requirements for federal funding, sets no requirements for employment. The statutes for most federal funding programs are also silent about employment qualifications. In the case of the small set of funding programs that do prohibit various forms of employment discrimination by grantees, including religious discrimination, the Department of Justice has determined that a religious employer may appeal to the Religious Freedom Restoration Act (RFRA) to be able to participate in the funding program without ending its religious employment practices.¹⁷ The Obama administration specifically affirmed this interpretation of the law after Congress added a broad nondiscrimination provision to the Violence Against Women Act program, issuing a FAQ document explaining the protection of religious staffing provided by RFRA and

¹⁵ <https://Pre-K.peta.org/about-peta/work-at-peta/jobs-faq/>

¹⁶ Carl PRE-K. Esbeck, Stanley PRE-K. Carlson-Thies, and Ronald J. Sider, *The Freedom of Faith-Based Organizations to Staff on a Religious Basis* (Washington, DC: Center for Public Justice, 2004). <https://Pre-K.irfalliance.org/resources/religiousstaffing.pdf>. See also the discussion of the religious exemption in the Equal Employment Opportunity Commission's Compliance Manual on Religious Discrimination, <https://Pre-K>

[K.eeoc.gov/laws/guidance/section-12-religious-discrimination](https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination)

¹⁷ Office of Legal Counsel, U.S. Department of Justice. 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. <https://Pre-K.justice.gov/file/451561/download>. Federal contracting has separate rules but includes the same religious hiring exemption as in Title VII.

providing a simple way for a religious employer to claim the RFRA protection.¹⁸

Thus, in current federal practice, as a matter of federal statutes and regulations, religious organizations that receive federal funding remain free to consider religion when hiring. We emphasize that evaluating religious qualifications includes assessing whether a job applicant's or employee's conduct conforms to the religion's teachings, including its teachings about sexuality and marriage.¹⁹ Because this freedom of religious staffing is fundamentally important to many of the faith-based organizations that will need to participate if a new federal program to expand access to Pre-K education is to succeed, we strongly recommend that the program's statute and regulations specifically affirm the religious staffing freedom. The statute and the program regulations must include language requiring participating states to protect the freedom fully when they use federal funding to support Pre-K instruction.

If the statutory protection of religious staffing is affirmed strongly, faith-based organizations are less likely to claim the protection of the broad "ministerial exception."

Separately from the Title VII exemption, the U.S. Supreme Court has ruled that the First Amendment protects the freedom of religious organizations, including religious schools, to make employment decisions without regard to employment nondiscrimination law, in the case of "ministerial" employees, such as teachers and staff who have significant religious responsibilities (*Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 2012; *Our Lady of Guadalupe School v. Morrissey-Berru*, 2020). Some courts have ruled that this immunity from employment law extends to the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA), although it is unclear that the Supreme Court will agree. We believe that, in the free universal Pre-K program, teachers and staff should enjoy basic employment protections wherever they are employed, so it is important that faith-based employers be assured that their religious staffing rights

¹⁸ Office for Civil Rights, Office of Justice Programs, U.S. Department of Justice. Frequently Asked Questions, April 9, 2014, Nondiscrimination Grant Condition in the Violence Against Women Reauthorization Act of 2013. <https://Pre-K.justice.gov/archives/ovw/file/29386/download>

¹⁹ See Equal Employment Opportunity Commission's Compliance Manual on Religious Discrimination, Sec. 12-1.C.1. <https://Pre-K.eeoc.gov/laws/guidance/section-12-religious-discrimination>. In *Bostock v. Clayton County* (2020), the Supreme Court ruled that Title VII's

prohibition of sex discrimination in employment is also a prohibition of sexual-orientation and gender-identity discrimination. However, the Court noted that its ruling concerned secular employers and it specifically named the statutory and constitutional protections that apply when the employer is a religious organization. See Stanley Carlson-Thies, "What are Faith-Based Employers to Do After the Bostock Decision?" Institutional Religious Freedom Alliance blog post, June 22, 2020. <https://irfalliance.org/what-are-faith-based-employers-to-do-after-the-bostock-decision/>

will be respected without needing to claim the broad immunity from employment law that the ministerial exception may provide.

Thus, we propose that the statute and regulations should explicitly affirm that: (1) religious Pre-K providers retain their religious staffing freedom without thereby sacrificing access to grants, vouchers, contracts, or government-backed loans; and (2) participating faith-based Pre-K providers must disclose to parents, teachers, and staff (and applicants for the latter two) whether and which teaching and staff positions the provider claims are covered by the ministerial exception. This disclosure would provide notice to employees, parents, and prospective employees that the provider may contest the application of employment law requirements.

Selective admissions. Many faith-based schools eagerly welcome every family they can accommodate that wishes their children to be educated there, as long as the children and families agree to respect the practices and teachings of the particular school. However, some faith-based schools may limit admissions only to families that share the particular school's religious teachings because of the religion's understanding of the nature of a religious community or for other

religion-specific reasons. **The rules for a pluralistic universal Pre-K system ought to permit selective admissions policies.** A pluralistic arrangement by definition is designed to accommodate the variety of different preferences and needs. That entails both ensuring that families unable to utilize some particular faith-based school have the full opportunity to choose and use some other school that will welcome them *and* that the range of choices includes schools whose religion requires their admissions policies to be religiously selective. That is the only way for a system intended to be universal actually to serve well the wide range of families, religions, and educational philosophies.²⁰

. . .

Protecting religious staffing and other elements of the faith-shaped identity and practices of faith-based organizations enables the wide range of these religion-related organizations to participate in federal funding programs, whether those faith-based organizations have extensive and deep-rooted religious practices or are distinguished less by religion. Some of these organizations may be superior providers of the services the government desires to support; others will be at least as competent as their secular counterparts. In either case, they add a dimension of

²⁰ The Child Care Development Fund's certificate or voucher modality provides some, though not complete, freedom for participating

faith-based providers to have a religiously-selective admissions policy. 45 C.F.R 98.48.

diversity to the services supported by government—a critical qualitative value, given the diversity of views, religions, values, and cultures of the families and children a universal free Pre-K program is intended to serve.

Snapshots of Faith in American Society

Immigrants. Pew Forum data shows that 68% of immigrants are Christian (39% Catholic) and 12% are of other non-Christian faiths, for a total 80% of immigrants who are religious.

<https://Pre-K.pewforum.org/religious-landscape-study/immigrant-status/immigrants/>

Hispanic Americans. Pew Forum data shows that 77% of Hispanics are Christians (19% evangelical, 48% Catholic) and 2% are of non-Christian faiths, for a total of 79% of Hispanics who are people of faith.

<https://Pre-K.pewforum.org/religious-landscape-study/racial-and-ethnic-composition/latino/>

Black Americans. Pew Forum data shows that 66% of Black Americans are Protestant, 6% are Catholic and 3% belong to other Christian faiths, primarily Jehovah's Witnesses. Another 3% belong to non-Christian faiths, most commonly Islam. A total of 78% of Black Americans are people of faith.

<https://Pre-K.pewforum.org/2021/02/16/faith-among-black-americans/>

Asian Americans. Pew Forum data shows that 42% of U.S. Asian adults are Christian, 14% are Buddhist, 10% Hindu, 4% Muslim, and 1% Sikh. 2% of U.S. Asians follow other religions. A total of 73% of Asian Americans are people of faith.

<https://Pre-K.pewforum.org/2012/07/19/asian-americans-a-mosaic-of-faiths-overview/>

White Americans. Pew Forum data shows that 70% of white Americans identify with some variety of Christianity and another 5% with some other religion. A total of 75% of white Americans are people of faith.

<https://Pre-K.pewforum.org/religious-landscape-study/racial-and-ethnic-composition/white/>

Religion contributes \$1.2 trillion annually to American society. In a 2016 study, Brian and Melissa Grim estimated that faith-based charities, such as hospitals and schools, together with houses of worship and faith-related businesses, contributed as much \$1.2 trillion annually in economic and social value to American society. Houses of worship operated some 1.5 million programs of service, most of which are made available to non-members. For the study and related materials, see <https://religiousfreedomandbusiness.org/1-2-trillion-religious-economy-in-us>

Faith-based child care centers. There is no recent or comprehensive data on what proportion of child care is provided by faith-based providers. A 2008 Urban Institute study of child care in five different counties reported that a quarter to two-thirds of the child care centers in the counties had some kind of faith connection (e.g., housed in a religious property, offered religious instruction, etc.). In all of the counties, faith-based providers served or had served families with Child Care Development Fund-provided certificates or vouchers.²¹

Faith-based K-12 schools. Data from the National Center for Education Statistics show that, in 2015, two-thirds of the 34,576 private elementary and secondary schools in the United States had a religious purpose or perspective. <https://nces.ed.gov/pubs2017/2017073.pdf>

Faith-based higher education. The Council for Christian Colleges and Universities (CCCU), using data from the National Center for Education Statistics, reports that, of the more than 4,300 degree-granting higher education institutions in the United States, nearly 2,600 are private, and some 1,000 of these define themselves as religiously affiliated. The CCCU itself counts 140 U.S. Christian institutions in its global membership. <https://Pre->

²¹ Monica Rohacek, et al., *Child Care Centers, Child Care Vouchers, and Faith-Based Organizations* (Washington, DC: The Urban

[K.cccu.org/about/#heading-our-place-in-higher-education-7](https://www.cccu.org/about/#heading-our-place-in-higher-education-7)

Institute, 2008). https://Pre-K.urban.org/research/publication/child-care-centers-child-care-vouchers-and-faith-based-organizations/view/full_report