February 23, 2015

Office of Refugee Resettlement
Department of Health and Human Services
370 L’Enfant Promenade SW, 8th Floor West
Washington, DC 20024
Attn: Elizabeth Sohn

Re: Standards To Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children, RIN 0970-AC61

Americans United for Separation of Church and State (Americans United) submits the following comments to the interim final rule (IFR), “Standards To Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children,” from the Department of Health and Human Services (Department) Office of Refugee Resettlement (ORR), which was published in the Federal Register on December 24, 2014.¹ We limit our comments to the religious exemption described in Subpart J.

Religious organizations have a longstanding tradition of providing social services, including in some cases, with the use of government funds. But, traditionally, religious organizations that have accepted government funds to provide services have played by the same rules as other non-religious providers. This history demonstrates that exemptions, such as the one proposed in the IFR, are not necessary for government collaboration with faith-based groups.

This exemption is not just unnecessary, but also potentially harmful. It would risk denying the unaccompanied children (UCs) currently housed in the ORR facilities – a particularly vulnerable population – with timely access to the critical medical services they deserve and that otherwise would be guaranteed to them by law.

Accordingly, we recommend that the Department remove the religious exemption in Subpart J or, at a minimum, narrow the exemption.

Americans United

Founded in 1947, Americans United is a nonpartisan educational organization dedicated to preserving the constitutional principle of church-state separation as the only way to ensure true religious freedom for all Americans. We fight to protect the right of individuals and religious

communities to worship—or not—as they see fit without government interference, compulsion, support, or disparagement. Americans United has more than 120,000 members and supporters across the country.

Americans United supports the use of reasonable and appropriately tailored accommodations to ease real burdens on the practice of religion in certain circumstances. Such accommodations, however, must not foster the advancement of religion, nor may they be so broad as to negatively impact innocent third parties. Unfortunately, the IFR is not justified. It is not aimed at lifting a substantial religious burden and would cause harm to others.

**Background**

In 2012, the Agency on Children and Families (ACF) issued a new policy governing their partnership with faith-based organizations. The policy provided guidance on ways that faith-based organizations could remain eligible to receive federal grants even if they object to providing certain services. The ACF’s policy stated that it would consider “any combination” of approaches that would further this goal, but specifically outlined three options: 1) the faith-based grantee could apply as a sub-grantee, operating in conjunction with other sub-grantees that would provide the services to which they object; 2) the faith-based grantee could apply in a consortium with other partner organizations that agree to provide those services; or 3) the faith-based grantee could notify the agency office in charge of the program, shifting the responsibility for securing services to the government.

The policy announcement came on the heels of unwarranted criticism surrounding the Department’s statement that it had a “strong preference” to grant federal contracts only to organizations that would provide the full panoply of services required by a grant, rather than to those who would not. There was no opportunity at that time to submit comments to ACF regarding this policy. We offer these comments now because we believe that the IFR, which mirrors the 2012 policy, could lead to real hardships for third parties.

**The Religious Exemption Could Cause Real Harm**

The IFR incorporates the same three options for a religious exemption as outlined in the ACF’s policy in 2012. Accordingly, faith-based organizations seeking federal grants to provide medical and mental health services for UCs suffering from traumatizing experiences of sexual abuse and harassment may be able to refuse to provide certain services—or even referrals for those services— if they agree to operate as sub-grantee, apply for a grant as part of a consortium, or even just notify ORR of their objection.

The current exemption as articulated in the IFR is problematic. Allowing faith-based organizations to operate as sub-grantees or as part of a consortium even though they will not

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3 See Am. Civil Liberties Union of Mass. v. Sebelius, 705 F.3d 44, 50 (1st Cir. 2013).
perform all of the grant requirements would threaten the UCs’ abilities to gain timely access to important medical services, such as emergency contraception or pregnancy-related services. Such an arrangement is unlikely to work, as it would require an extraordinarily high level of coordination among the other grantees or sub-grantees to prevent the UCs from receiving gaps in coverage of services. Issues such as communication and transportation between service providers could easily stand in the way of a UC receiving timely services. The government should not adopt a policy that could put the needs of the UCs at risk.

Such an arrangement also places the UCs in the uncomfortable and stigmatizing position of being denied needed services based on the religious beliefs of the government grantee. It could also have a chilling effect on UCs coming forward with requests for medical and mental health services.

Yet, it is the exemption’s third option that presents the most potential harm to UCs, because it fully exempts organizations from providing medical care and shifts that responsibility entirely to the federal government. The organizations competing for these grants are supposed to be the entities most qualified to provide direct medical and social services, not the government. Indeed, that is the purpose of the grant. Allowing faith-based organizations to provide some, but not all, of the essential medical services to UCs undermines the purpose of the law, which is to ensure that children suffering from sexual abuse receive care as soon as possible.

When UCs require immediate and seamless coverage for time-sensitive medical services, it is unwise to require them to jump through additional hoops to gain those services. And, it is unfair to place additional barriers before them simply because of the religious beliefs of others.

**The Religious Exemption Is Constitutionally Problematic**

*The Religious Exemption Is Not Required By the Free Exercise Clause or the Religious Freedom Restoration Act*

The religious exemption provided under this rule is not mandated by either the Free Exercise Clause or the Religious Freedom Restoration Act (RFRA). In accordance with the Free Exercise Clause, religious beliefs do not excuse compliance with valid and neutral laws of general applicability. Courts deem laws neutral unless they “target religious beliefs” or “if the object of [the] law is to infringe upon or restrict practices because of their religious motivation.” The grant program, on its face, does not single out religious organizations for disfavored treatment, nor does it contain a masked hostility towards religion. Accordingly, no accommodation is necessary under the Free Exercise Clause.

RFRA provides a different standard: it prohibits the government from “substantially burden[ing] a person’s exercise of religion” unless the government can demonstrate that the burden is justified by a compelling government interest and is the least restrictive means of furthering

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that interest. RFRA is not triggered when there is just “the slightest obstacle to religious exercise.” Indeed, it is a difficult threshold to cross, and faith-based organizations objecting on religious grounds to the terms of a government grant do not meet that threshold.

The terms of a federal grant do not coerce religious organizations to violate their religious beliefs. If the organization does not want to follow a grant’s terms, it can simply reject the grant and continue to operate in ways that it sees fit with its own funds. Faith-based organizations—like all other organizations—have no right to receive a government grant or to dictate the terms of any grant they receive.

Moreover, it is counterintuitive to create a federally-funded program to provide important services to an underserved community and then carve out exemptions that could put members of that very community at risk of receiving those services. Federal funds are better spent to fund an organization that is willing to carry out the program’s mission completely.

The Religious Exemption Could Violate the Establishment Clause
The religious exemption described in the IFR may pose problems for the Establishment Clause. First, the Establishment Clause prohibits religious accommodations that harm third parties. Although the government may offer religious accommodations even where it is not required to do so by the Constitution, its ability to provide religious accommodations is not unlimited: “At some point, accommodation may devolve into an unlawful fostering of religion.” For example, in Texas Monthly, Inc. v. Bullock, the Supreme Court explained that legislative exemptions for religious organizations that exceed free exercise requirements will be upheld only when they do not impose “substantial burdens on nonbeneficiaries” or they are designed to prevent “potentially serious encroachments on protected religious freedoms.” The type of exemption detailed in the IFR could cause real harm for UCs and impede their access to important and time-sensitive medical services. The Establishment Clause, therefore, mandates that the exemption be removed or, at a minimum, narrowed to prevent that harm.

Second, the exemption unconstitutionally delegates the authority to exclude certain services from the grant based on religious belief, and in doing so “provides a significant symbolic benefit to religion.” Such an exemption allows for those organizations to impose their religious beliefs on others. And, it sends a message of government endorsement of those religious beliefs.

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7 Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003).
8 See, e.g., Cutter v. Wilkinson, 544 U.S. 709, 722 (2005); stating that a religious accommodation “must be measured so that it does not override other significant interests.”); Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).
9 Of course, in some instances exemptions may be constitutionally permissible but unwise public policy.
11 480 U.S. 1, 18 n. 8 (1989).
13 See Sebelius, 821 F. Supp. 2d 474, 484-88 (D. Mass. 2012), vacated as moot by 705 F.3d 44 (1st Cir. 2013). (finding that the government’s grant to the U.S. Conference of Catholic Bishops violated the Establishment Clause by appearing to endorse the organization’s religious beliefs and allowing the organization to impose their religious beliefs on others.)
Conclusion

The religious exemption in the IFR is not just unnecessary, but it also risks causing great harm to UCs. If the Department insists on providing an exemption, it must be more narrowly tailored. At a minimum, the ability to opt-out simply by notifying the government agency at the time a UC requests that service should be removed, and instead the organizations should be required to notify ORR of their objections at the time of application. Accordingly, ORR would be able to preemptively ensure that a proper network of providers is in place to assist UCs, so that they would not face any delay in receiving such services.

Thank you for your consideration.

Sincerely,

Maggie Garrett

Elise Helgesen Aguilar