

DEPARTMENT OF LABOR**Employment and Training
Administration****20 CFR Part 667****Office of the Secretary****29 CFR Part 37**

RIN 1291-AA29

**Use of Federal Financial Assistance for
Religious Activities Under the
Nondiscrimination and Equal
Opportunity Provisions of the
Workforce Investment Act of 1998**

AGENCY: Office of the Secretary and
Employment and Training
Administration, Labor.

ACTION: Proposed rule; partial
withdrawal and termination.

SUMMARY: The Department of Labor is withdrawing portions of the proposed rule, published in the **Federal Register** on September 30, 2003 (68 FR 58386), that proposed to amend several provisions in the interim final regulations that implement the equal opportunity and nondiscrimination provisions of the Workforce Investment Act of 1998 (WIA), and the regulations promulgated by the Employment and Training Administration that implement the general provisions of WIA. This withdrawal covers only the proposed amendments that would have prohibited the use of all types of WIA Title I financial assistance for the employment or training of participants in religious activities. For the reason discussed below, the Department is also terminating the part of the rulemaking proceeding that relates to the proposed amendments here withdrawn.

DATES: This partial withdrawal and termination of the NPRM published on September 30, 2003 (68 FR 68386) is issued as of July 12, 2004.

FOR FURTHER INFORMATION CONTACT: Regarding the withdrawal of part of the proposed amendments to 29 CFR part 37: Annabelle T. Lockhart, Director, Civil Rights Center (CRC), (202) 693-6500 (VOICE). Please note that this is not a toll-free number. Individuals who do not use voice telephones may contact Ms. Lockhart via TTY/TDD by calling the toll-free Federal Information Relay Service at (800) 877-8339.

Regarding the withdrawal of the proposed amendments to 20 CFR part 667: Maria Flynn, Acting Administrator, Office of Policy Development, Evaluation and Research, Employment and Training Administration, (202) 693-

3700 (VOICE) or (202) 877-889-5627 (TTY/TDD). Please note that these are not toll-free numbers.

SUPPLEMENTARY INFORMATION: The Department is withdrawing portions of a Notice of Proposed Rulemaking (NPRM) published on September 30, 2003 (68 FR 58386) that proposed amendments to the interim final regulations, codified at 29 CFR part 37, that implement section 188 (a)(3) of the Workforce Investment Act of 1998 (WIA), and the regulations promulgated by the Employment and Training Administration (ETA), codified in 20 CFR part 667, that implement the general provisions of WIA. In the NPRM, the Department proposed to revise 29 CFR 37.6(f)(1), which barred recipients from employing or training participants in religious activities; 29 CFR 37.6(f)(2), which limited the circumstances under which participants in programs receiving WIA Title I financial assistance could be employed to carry out the construction, operation, or maintenance of any part of any facility used or to be used for religious instruction or as a place of religious worship; and 29 CFR 37.6(f)(3), which provided an exception to the limitation in 29 CFR 37.6(f)(2). In addition, the September 30 NPRM proposed to revise 20 CFR 667.266(b)(1), which at that time referenced 29 CFR 37.6(f)(1) in providing that WIA Title I financial assistance could not be spent on the employment or training of participants in religious activities, and 20 CFR 667.275(b), which at that time also referenced the prohibition on employment and training in religious activities found in the then-current version of 29 CFR 37.6(f).

As explained in the preamble to the September 30 NPRM, the Department has determined that the broad prohibition in the then-current version of 29 CFR 37.6(f)(1) on the use of all types of WIA Title I financial assistance to employ or train participants in religious activities is inconsistent with current law, which permits the use of such financial assistance to provide religious training in cases in which the assistance is provided indirectly within the meaning of the Constitution. Such assistance is provided indirectly, for example, when participants are given a genuine and independent private choice among training providers, and freely elect to receive training in religious activities. Thus, the September 30 NPRM proposed to revise paragraph 37.6(f)(1) to clarify that only where financial assistance is provided directly is the use of such assistance to support religious employment or training

prohibited. In addition, consistent with current law, the September 30 NPRM proposed to add a new paragraph 37.6(f)(2) that would have set forth specific criteria, applicable only to WIA programs and activities, for determining whether financial assistance was indirect and therefore could be used to support religious employment or training.

As a result of the insertion of this new paragraph, the September 30 NPRM proposed to redesignate then-current paragraphs 37.6(f)(2) and (f)(3) as paragraphs 37.6(f)(3) and (f)(4), respectively. The NPRM also proposed to revise the latter two paragraphs to make them easier to understand, and to adhere more closely to the language of WIA section 188(a)(3).

Finally, because ETA's then-current programmatic regulations at 20 CFR 667.266(b)(1) and 667.275(b) also prohibited the use of WIA financial assistance for employment and training in religious activities, and referenced the prohibition in 29 CFR 37.6(f)(1), the September 30 NPRM proposed to revise those two ETA provisions to conform to the proposed amendments to 29 CFR 37.6(f).

After the September 30 NPRM was published, the Department determined that further rulemaking was needed in order to implement the policies and principles of Executive Order 13279 (67 FR 77141, December 16, 2002), "Equal Protection of the Laws for Faith-Based and Community Organizations." Executive Order 13279 directs executive branch agencies to take the action necessary to ensure equal treatment to faith-based and community organizations that apply for or receive Federal financial assistance to meet social needs in America's communities. The Department concluded that its general regulations at 29 CFR part 2 should be revised to clarify that faith-based and community organizations can participate in all DOL social service programs without regard to the organizations' religious character or affiliation, and can apply for and compete on an equal footing with other organizations to receive DOL support. Accordingly, on March 9, 2004, the Department published an NPRM that proposed adding to DOL's general regulations in 29 CFR part 2 a new subpart D, to be entitled "Equal Treatment in Department of Labor Programs for Religious Organizations; Protection of Religious Liberty of Department of Labor Social Service Providers and Beneficiaries." 69 FR 11234, 11235.

During the development of the March 9 NPRM, the Department determined

that, in order to ensure uniformity and consistency in implementing the principles of Executive Order 13279 throughout DOL, the regulations dealing with faith-based and community organizations, and with religious activities, should to the extent possible be consolidated in one place. 69 FR 11234. The Department further determined that these regulations should not be program-specific, but should apply to all such organizations receiving DOL support, except where the implementing statute imposed particular requirements. Accordingly, in the March 9 NPRM, the Department proposed new revisions to 29 CFR 37.6(f)(1), as well as to 20 CFR 667.266(b)(1) and 667.275(b). Instead of the language proposed in the September 30 NPRM, the March 9 NPRM proposed that each of these regulatory provisions cross-reference 29 CFR part 2, subpart D. See 69 FR at 11237, 11238, 11241. Thus, the amendments to 29 CFR 37.6(f)(1), 20 CFR 667.266(b)(1), and 20 CFR 667.275(b) proposed in the September 30 NPRM were superseded by the amendments to those paragraphs that were proposed in the March 9 NPRM and finalized in the final rule published elsewhere in today's **Federal Register**. The March 9 NPRM also superseded the proposal in the September 30 NPRM to add a new paragraph (f)(2) to 29 CFR 37.6.

For these reasons, the Department is withdrawing, and is terminating the rulemaking proceedings on, the portion of the September 30 NPRM that proposed to revise 29 CFR 37.6(f)(1), 20 CFR 667.266(b)(1), and 20 CFR 667.275(b), and to add a new 29 CFR 37.6(f)(2). The Department has proceeded with that part of the September 30 NPRM that proposed other amendments to 29 CFR 37.6(f). A final rule accomplishing these amendments is published elsewhere in today's **Federal Register**.

Signed at Washington, DC this 7th day of July, 2004.

Emily S. DeRocco,

Assistant Secretary for Employment and Training.

Elaine L. Chao,

Secretary of Labor.

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DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Parts 36 and 48

RIN 1076-AE51

Home-Living Programs and School Closure and Consolidation

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Proposed rule.

SUMMARY: As required by the No Child Left Behind Act of 2001, the Secretary of the Interior has developed proposed regulations using negotiated rulemaking that address home-living programs and school closure and consolidation.

DATES: Comments on the proposed rule must be received on or before November 9, 2004.

ADDRESSES: You may submit comments, identified by the number 1076-AE51 by any of the following methods:

—Direct Internet response: <http://www.blm.gov/nhp/news/regulatory/index.htm>, or at <http://www.blm.gov>, or at regulations.gov under Indian Affairs Bureau.

—Mail: Director (630), Bureau of Land Management, Eastern States Office, 7450 Boston Boulevard, Springfield, Virginia 22153, Attention: RIN 1076-AE51.

—Hand delivery: No Child Left Behind Act, 1620 L Street, NW., Room 401, Washington, DC 20036.

Send comments on the information collections in the proposal to: Interior Desk Officer (1076-AE51), Office of Information and Regulatory Affairs, OMB, (202) 395-6566 (facsimile); e-mail: oir_docket@omb.eop.gov.

FOR FURTHER INFORMATION CONTACT:

Catherine Freels, Designated Federal Official, PO Box 1430, Albuquerque, NM 87103-1430; Phone: (505) 248-7240; e-mail: cfreels@bia.edu.

SUPPLEMENTARY INFORMATION As required by the No Child Left Behind Act of 2001 (Pub. L. 107-110; enacted January 8, 2002, referred to in this preamble as "NCLBA" or "the Act"), the Department of the Interior established a Negotiated Rulemaking Committee to develop proposed rules to implement several sections of the Act relating to the Bureau of Indian Affairs-funded school system. Negotiated Rulemaking is a process sanctioned by subchapter III, or chapter 5, title 5, United States Code and the Federal Advisory Committee Act, 5 U.S.C. Appendix (FACA), that employs Federal representatives and members of the public who will be

affected by rules to jointly develop proposed rules.

In this case, the Act required the Secretary of the Interior to select representatives of Indian tribes and Bureau-funded schools as well as Federal government representatives to serve on the Committee. The Committee's task was to draft proposed rules to recommend to the Secretary. Upon the Secretary's approval, draft rules are published in the **Federal Register** for written public comments within a 120-day public comment period. After the close of the public comment period, the Committee will reconvene to review these comments and to recommend promulgation of final rules to the Secretary.

The Secretary chartered the Committee under the Federal Advisory Committee Act on May 1, 2003. It is comprised of 19 members nominated by Indian tribes and tribally operated schools. The law required that, to the maximum extent possible, the tribal representative membership should reflect the proportionate share of students from tribes served by the bureau-funded school system. The Secretary also appointed to the Committee six members from within the Department of the Interior. The Committee selected three tribal representatives and two Federal representatives as co-chairs. Six individuals were hired to facilitate all Committee meetings.

The Committee initially met in five week-long sessions in the months of June through October 2003 to develop regulations in the following six areas:

1. Definition of "Adequate Yearly Progress";
2. Attendance boundaries;
3. Allocation formula for school funding;
4. Direct funding procedures;
5. Student rights; and
6. Grants under the Tribally Controlled Schools Act.

The Department published proposed rules developed by the Committee on February 25, 2004 (69 FR 8751). Since then, the Department has reconvened the Committee to develop regulations in the areas of closure or consolidation of schools and criteria for home-living situations. The Committee met on several occasions and developed the proposed rules being published today. The rules are discussed in detail in the remainder of this preamble, which is organized as follows:

- I. Part 48—School Closure or Consolidation of Schools
 - A. Substantial Curtailment of a Bureau School