President's Advisory Council on Faith-Based and Neighborhood Partnerships

---

A New Era of Partnerships: Report of Recommendations to the President

Publication of this document was coordinated by the White House Office of Faith-Based and Neighborhood Partnerships with support from the Office of Faith-Based and Neighborhood Partnerships at the U.S. Department of Health and Human Services.

Special thanks to Joshua DuBois, Executive Director of the White House Office of Faith-Based and Neighborhood Partnerships and Mara Vanderslice, Deputy Director and Coordinator of the President's Advisory Council.

Reform of the Office of Faith-Based and Neighborhood Partnerships

Members of the Taskforce

Dr. Stanley Carlson-Thies, Founder and President, Institutional Religious Freedom Alliance

Noel Castellanos, CEO, Christian Community Development Association

Fred Davie, Senior Director, The Arcus Foundation

Nathan J. Diament, Director of Public Policy, Union of Orthodox Jewish Congregations of America

Bridget McDermott Flood, Executive Director, Incarnate Word Foundation

The Reverend Dr. Welton Gaddy, President, The Interfaith Alliance

Harry Knox, Director, Religion and Faith Program, Human Rights Campaign Foundation

The Reverend Barry Lynn, Executive Director, Americans United for Separation of Church and State

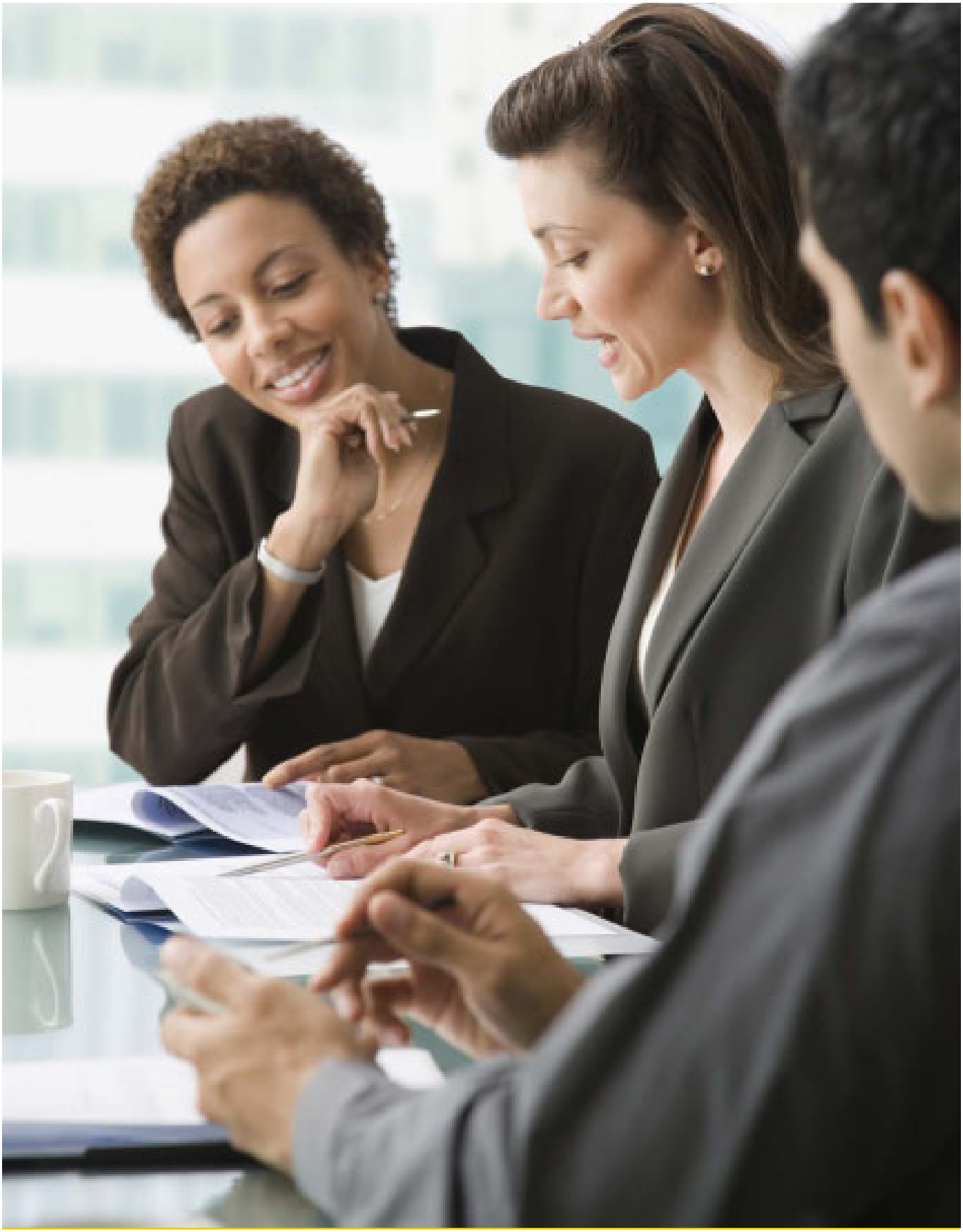
Anthony R. Picarello, Jr., General Counsel, United States Conference of Catholic Bishops

Melissa Rogers, Director, Center for Religion and Public Affairs, Wake Forest University Divinity School

Ronald J. Sider, President, Evangelicals for Social Action

Brent Walker, Executive Director, Baptist Joint Committee on Religious Liberty

Rabbi David Saperstein, Director and Counsel, Religious Action Center of Reform Judaism



SECTION F:

Reform of the Office of Faith-Based and Neighborhood Partnerships

INTRODUCTION

President Obama has asked the Advisory Council on Faith-Based and Neighborhood Partnerships to make recommendations for improving the operations of the White House Office of Faith-Based and Neighborhood Partnerships and Agency Centers and for strengthening the social service partnerships the Government forms with nongovernmental providers, including strengthening the constitutional and legal footing of these partnerships. The following recommendations address some of the legal and nonlegal issues that cut across a wide range of these partnerships. At the Administration's direction, the Council did not address the issue of religion-based employment decisions regarding jobs partially or fully subsidized by Federal funds.

A number of the reforms advocated in these recommendations are aimed at honoring our country's commitment to religious freedom. The recommendations call, for example, for greater clarity in the church-state guidance given to social service providers so that tax funds are used appropriately and providers are not confused or sued. The recommendations also insist that beneficiaries must be notified of their religious liberty rights, including their rights to alternative providers. And the recommendations urge the Administration to take steps to increase confidence that the rules applicable to federally funded partnerships are actually being observed and that decisions about government grants are made on the merits of proposals, not on political or religious considerations.

Other reforms call for the development of more nearly seamless and transparent networks among Federal, State, county, and city officials and the creation of additional tools to help providers identify the partnerships—financial or nonfinancial—that would best suit them. The recommendations also emphasize that progress in this area will depend in part on fostering greater public understanding of these partnerships, including the roles of the White House Office and Agency Centers in them. Further, the recommendations urge the White House Office to lead a strategic review of government-supported training, technical assistance, and capacity building for service providers and to encourage more information sharing on best practices in the delivery of federally funded social services.

The Council's recommendations call for several different kinds of actions by the Obama administration to further these and other goals. Some of the recommendations urge the Administration to amend a 2002 Executive Order (Executive Order 13279) that sets forth fundamental rules for federally funded partnerships with religious and secular providers. Other recommendations call for governmental agencies to revise some of the regulations and guidance associated with the distribution of Federal social service funds. Still other recommendations advocate changes in governmental communications strategies or intergovernmental relations.

The Council's diversity has been an asset in the development of these recommendations. The Council includes members who are critics of "charitable choice" and those who are supporters.[1] Some of us believe the Government must or should refrain from directing cash aid (including social service aid) to certain kinds of religious entities,[2] whereas others of us believe that, although the Constitution limits the use of direct government aid for religious *activities*, it allows such aid for secular *activities*, regardless of the character of the *provider*.[3] As the recommendations note, Council members continue to differ over these and other important issues. But members have come to an agreement on 12 recommendations presented here. As far as we know, this is the first time a governmental entity has convened individuals with serious differences on some church-state issues and asked them to seek common ground in this area. It should not be the last time a government body does so. Policies that enjoy broad support are more durable. And finding common ground on church-state issues frees up more time and energy to focus on the needs of people who are struggling.

If adopted, these recommendations would improve social services delivery and strengthen religious liberty. They also would reduce litigation, enhance public understanding of these partnerships, and otherwise advance the common good. Accordingly, the Council urges the Administration to implement these proposals.

[1] Then-Senator John Ashcroft introduced the first "charitable choice" provision in 1995, and it ultimately became part of the welfare reform package signed by President Bill Clinton in 1996, although Clinton expressed certain reservations about the provision . *See* 42 U.S.C. Section 604a (2010). Similar provisions have been added to a few other laws, but legislative efforts to extend charitable choice beyond these contexts have failed. When legislative efforts to extend charitable choice failed, the Administration of President George W. Bush adopted and widely extended the basic charitable choice model through executive action.

[2] *See, e.g., Rosenberger v. Rectors and Visitors*, 515 U.S. 819, 842 (1995) (noting that a lower court was "correct to extract from our decisions the principle that we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions" in a case upholding the payment of outside contractors for the printing costs of a variety of student publications, including student religious publications); *Mitchell v. Helms*, 530 U.S. 843-844 (O'Connor & Breyer, JJ., concurring in the judgment) (noting that the Court's "concern with direct monetary aid is based on more than just diversion [of the aid to religious use]" and that "the most important reason for according special treatment to direct money grants is that this form of aid falls precariously close to the original object of the Establishment Clause's prohibition."); *Roemer v. Board of Public Works*, 426 U.S. 736, 755 (1976) (aid may flow only to institutions that can separate secular activities from "sectarian" ones, and "that if secular activities can be separated out, they alone may be funded"). *See also* David Saperstein, *Public Values in an Era of Privatization: Public Accountability and Faith-Based Organizations: A Problem Best Avoided*, 116 Harv. L. Rev. 1353 (2003). For other views on these issues, see Melissa Rogers and E.J. Dionne, *Serving People in Need, Safeguarding Religious Freedom*, at 42-44, and Melissa Rogers, *Appendix: Legal and Policy Backgrounder #2* (2008), available at http://www.brookings.edu/~/media/Files/rc/papers/2008/12_religion_dionne/12_religion_dionne.pdf. Recommendation 12 discusses these views in more detail.

[3] *See Mitchell v. Helms*, 530 U.S. 793, 827 (plurality opinion) (rejecting the "pervasively sectarian" test and arguing that "the religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose"); *Id.* at 857 (O'Connor & Breyer, JJ., concurring in the judgment)(saying Court had rejected "a presumption of indoctrination" when government aid flows to religious schools "because it constitutes an absolute bar to the aid in question regardless of the religious school's ability to separate that aid from its religious mission . . . ."); *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245 (10th Cir. 2008) (McConnell, J.) (finding exclusion of "pervasively sectarian" school from funding violates First Amendment principles against religious intrusion and discrimination by government). *See also* Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv. L. Rev. 156 (2004). *Michael McConnell, Religious Participation in Public Programs - Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115 (1992). Recommendation 12 discusses these views in more detail.

OVERVIEW OF RECOMMENDATIONS

Strengthening the Effectiveness of Partnerships

Recommendation 1: Perform a strategic review of government-supported technical assistance and capacity building.

Recommendation 2: Convene and encourage learning communities of social service programs and providers.

Recommendation 3: Develop a strategy to partner with State, county, and city officials.

Strengthening Constitutional and Legal Footing of Partnerships

Recommendation 4: Strengthen constitutional and legal footing of partnerships, and improve communications regarding White House Office of Faith-Based and Neighborhood Partnerships and Agency Centers.

Recommendation 5: Clarify prohibited uses of direct Federal financial assistance.

Recommendation 6: Equally emphasize separation requirements and protections for religious identity.

Recommendation 7: State more clearly the distinction between "direct" and "indirect" aid.

Recommendation 8: Increase transparency regarding federally funded partnerships.

Recommendation 9: Improve monitoring of constitutional, statutory, and regulatory requirements that accompany Federal social service funds.

Recommendation 10: Assure the religious liberty rights of the clients and beneficiaries of federally funded programs by strengthening appropriate protections.

Recommendation 11: Reduce barriers to obtaining 501(c)(3) recognition.

Recommendation 12: Promote other means of protecting religious liberty in the delivery of government-funded social services.

STRENGTHENING THE EFFECTIVENESS OF PARTNERSHIPS

Recommendation 1: Perform a strategic review of government-supported technical assistance and capacity building.

The Council recommends that the Office of Faith-Based and Neighborhood Partnerships lead an administration-wide strategic review of government-supported training, technical assistance, and capacity building for social service providers. This strategic review would focus on four components: avoiding duplication of services; focusing increased attention on supporting only the most effective providers; seizing more opportunities to use the Government's convening power to encourage stronger collaboration among providers; and reaching out to as broad a range of qualified providers as possible.

Background and Explanation:

The Council recognizes the value of many different kinds of community providers, ranging from innovative fledgling organizations to established mature agencies. It also recognizes that effective providers across the spectrum need and deserve training and support. Some need basic training, technical assistance, and capacity building, such as grant-writing training, skill building in organizational development, and financial management. At the other end of the spectrum, more mature providers need skill building related to program enhancement and training for community organizational leadership.

Currently, government-funded training, technical assistance, and capacity-building requirements in grant and contract programs typically are aimed at providing basic skills in areas such as grant writing or marketing or intermediate-level training in organizational or leadership development. These types of educational opportunities are designed for religious and secular providers that range from start-up organizations to those that are growing toward maturity. In our experience, opportunities like these are often offered by nongovernmental as well as governmental sources at the local level.

Especially given the renewed emphasis on funding effective organizations—whether those providers are new groups or well-established organizations—a strategic review is needed to determine the best contributions government can make in this area. Government should not offer duplicative services, and it must ensure that its funding only supports effective interventions. Sometimes, for example, it would be appropriate for the Government to leave basic training to others and focus on more sophisticated training, technical assistance, and capacity building that will enable agencies and provider groups to take effective programs to scale and meet community needs in a more comprehensive manner. The Government also often can and should do more to develop collaborative partnerships that will foster more comprehensive responses to social service issues, forge a shared vision among diverse organizations and populations and better coordinate responses that can harvest the most effective approaches for local needs.

Given the difficult economic circumstances currently facing our Nation, thinking strategically about government's role in this area is particularly important. The Council, therefore, urges the Administration to engage in this kind of strategic review.

Recommendation 2: Convene and encourage learning communities of social service programs and providers.

The Council recommends that the Administration encourage Federal agencies to share information about federally funded projects with the larger community of those who are working on or interested in social service partnerships. This exchange could be accomplished in a number of ways. For example, each grantee could be required to complete a short Web-based form that could be accessed by providers and the public through a virtual library. The Council further recommends that the Administration do more to convene actual and virtual information-sharing sessions among representatives of State, local, and county governments; secular and faith-based providers; intermediaries; and the philanthropic sector.

Background and Explanation:

Government funding already requires a reporting component for its own reviews. By creating a virtual library of funded programs, the value of the funding moves beyond the services provided in individual grants to a more systemic level. Shared knowledge can assist social service partnerships in developing new programs or enhancing existing efforts. By sharing information regarding program content, goals, objectives, and outcomes, other providers may benefit from shared learning and enhance their social service programs and delivery. This mechanism also creates greater transparency and enables State and local governments, academics, and the general public to learn how funds are spent and the results that are achieved.

The Council further recommends that the Administration do more to convene information-sharing sessions among representatives of State, local, and county governments; secular and faith-based providers; intermediaries[4]; and the philanthropic sector. These sessions should include sharing details about best practices that relate to specific social service programs. Another element that could be addressed in these sessions would be discussions of best practices in complying with applicable constitutional or legal principles. These information-sharing sessions could be in person or rely on other methods of communication like Webinars. In these ways, the Office of Faith-Based and Neighborhood Partnerships and the Agency Centers can promote effective partnerships and develop comprehensive strategies to meet community needs.

It is important to note that governmental bodies are not the only ones that play convening roles in these areas—nongovernmental organizations do, too. When the Government seeks to convene partners and potential partners, it should always work to ensure that it is not duplicating existing effective efforts and that it is otherwise playing a complementary rather than competing role in the joint effort to serve those in need.

[4] An intermediary is an organization that accepts government funds and distributes those funds to a network of other organizations that in turn provide government-funded social services. *See* Recommendations 5, 6, and 9.

Recommendation 3: Develop a strategy to partner with State, county, and city officials.

The Office of Faith-Based and Neighborhood Partnerships and the Agency Centers should develop a strategy to communicate to State, county, and city officials the church-state standards that accompany the Federal funds that State and local governments award to nongovernmental organizations. The Office and Centers for Faith-Based and Neighborhood Partnerships should assist Federal officials who interact with State and local officials to understand and communicate the standards; collaborate with organizations of State and local officials (such as the National Governors Association and the National Association of Counties) to communicate the goals and rules of the Federal initiative; and expand and systematize their collaboration with State and local faith-based and neighborhood partnership offices and assist them in educating their government colleagues.

An important part of the Office's and the Centers' communications and training strategy with secular and faith-based organizations should be to clarify that State and local officials award most Federal social service funding and to help those organizations connect with those State and local officials. Outreach and training events and publicity and guidance documents should stress that church-state standards accompany the Federal funds, and these efforts also help community groups identify and connect with State and local agencies that award Federal funds.

Background and Explanation:

Up to 90 percent of Federal funds designated for social services are distributed to State, county, or city governments rather than being directly expended by Federal agencies.[5] Thus, most Federal funds awarded to secular and faith-based organizations are awarded not by Federal officials but by State or local officials. Federal church-state rules accompany the money,[6] but those awarding the money are at a considerable distance from the Federal Government and the Federal faith-based and neighborhood partnership initiative.

This distance has two serious consequences. First, State and local officials do not always fully understand the Federal rules that should guide their award decisions.[7] This factor can lead to wrongly limited eligibility or to inadequate implementation of important standards. Second, secular and faith-based organizations that become aware, because of the Federal faith-based and neighborhood partnership initiative, of their eligibility to partner with the Government too often simply presume that they must go to Federal agencies to seek funding, overlooking the closer city, county, and State agencies that actually award the majority of the Federal funding. Outreach and educational efforts such as Office of Faith-Based and Neighborhood Partnership conferences and guidance documents that do not specifically

[5] *Unlevel Playing Field: Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs* (White House, August 2001), for example, includes a table showing that in FY 2001 91 percent of Department of Housing and Urban Development (HUD) grants were formula grants to State and local agencies and only 9 percent of the grants were discretionary grants awarded by HUD officials to organizations to provide services (p. 4).

[6] The Supremacy Clause of Article VI of the Constitution says Federal law is the supreme law of the land. Thus, where there is a conflict between Federal and State law, Federal law prevails. This is the well-settled rule with regard to conditions on Federal funds that are imposed by Congress. However, if the Federal executive branch imposes conditions on Federal funds that States believe would cause them to violate their constitutions, and States challenge such conditions, it is not clear whether courts would uphold the conditions or whether they would find that such conditions do not trump State constitutional law unless they are imposed by Congress. See Ira C. Lupu and Robert W. Tuttle, *The State of the Law 2005: Legal Developments Affecting Partnerships Between Government and Faith-Based Organizations* (The Roundtable on Religion and Social Welfare Policy) at 99-101. It is also important to note that in order for Federal law to preempt contrary State law, there must be a clear expression of intent to do so. Federal authorities may choose not to preempt contrary State law or to preempt it only with respect to the use of Federal funds, not State funds. *See id.* 93-98. For more information on these complex issues, *see, e.g.,* James T. O'Reilly, *Federal Preemption of State and Local Law: Legislation, Regulation and Litigation* (American Bar Association 2006); University of North Carolina First Amendment Law Review Symposium Issue: *Separation of Church and States: An Examination of State Constitutional Limits on Government Funding for Religious Institutions* (Volume 2, Winter 2003).

[7] *See, e.g.*, Jonathan Jacobson, et al., *State and Local Contracting for Social Services Under Charitable Choice* (Mathematica Policy Research: August 2005), for HHS (available at http://aspe.hhs.gov/hsp/05/CharitableChoice/index.htm).

discuss this Federal, State, and local partnership and help nongovernmental organizations to identify State and local programs that expend Federal funds may inadvertently confirm the mistaken view. Such outreach and educational efforts may mislead those novice organizations to ignore more accessible funding and instead focus on the highly competitive Federal discretionary grant competitions.

To counter these problems, the Council recommends that the Office of Faith-Based and Neighborhood Partnerships develop and implement a set of countervailing actions such as the following:

a. The Office should work with the Centers for Faith-Based and Neighborhood Partnerships to train, encourage, and help Federal officials who interact with State and local officials to accurately communicate church-state rules and the Administration's intent to expand and strengthen financial and nonfinancial partnerships with faith- and community-based organizations. HUD, for example, has an extensive network of regional offices and officials to interact with and assist State and local officials who use HUD funding. In recent years, the Department of Health and Human Services (HHS) undertook specific efforts to help regional Temporary Assistance for Needy Families (TANF) officials to understand applicable rules and to assist State and local authorities in their respective regions to comply with those rules. The Bush administration published materials to guide State and local officials.[8] Existing efforts should be evaluated, and then expanded and improved as needed.

b. The Office and Centers should collaborate with organizations of State and local officials to discuss and communicate the Federal initiative and its goals and rules, for example, with the National Governors Association, the U.S. Conference of Mayors, the National Council of State Legislators, the National Association of Counties, the National Association of State Procurement Officials, and the National Institute of Governmental Purchasing.[9] It appears that the least formal outreach and collaboration so far has been accomplished with county governments and officials, despite the crucial role that county agencies and programs play in the delivery of federally funded social services.

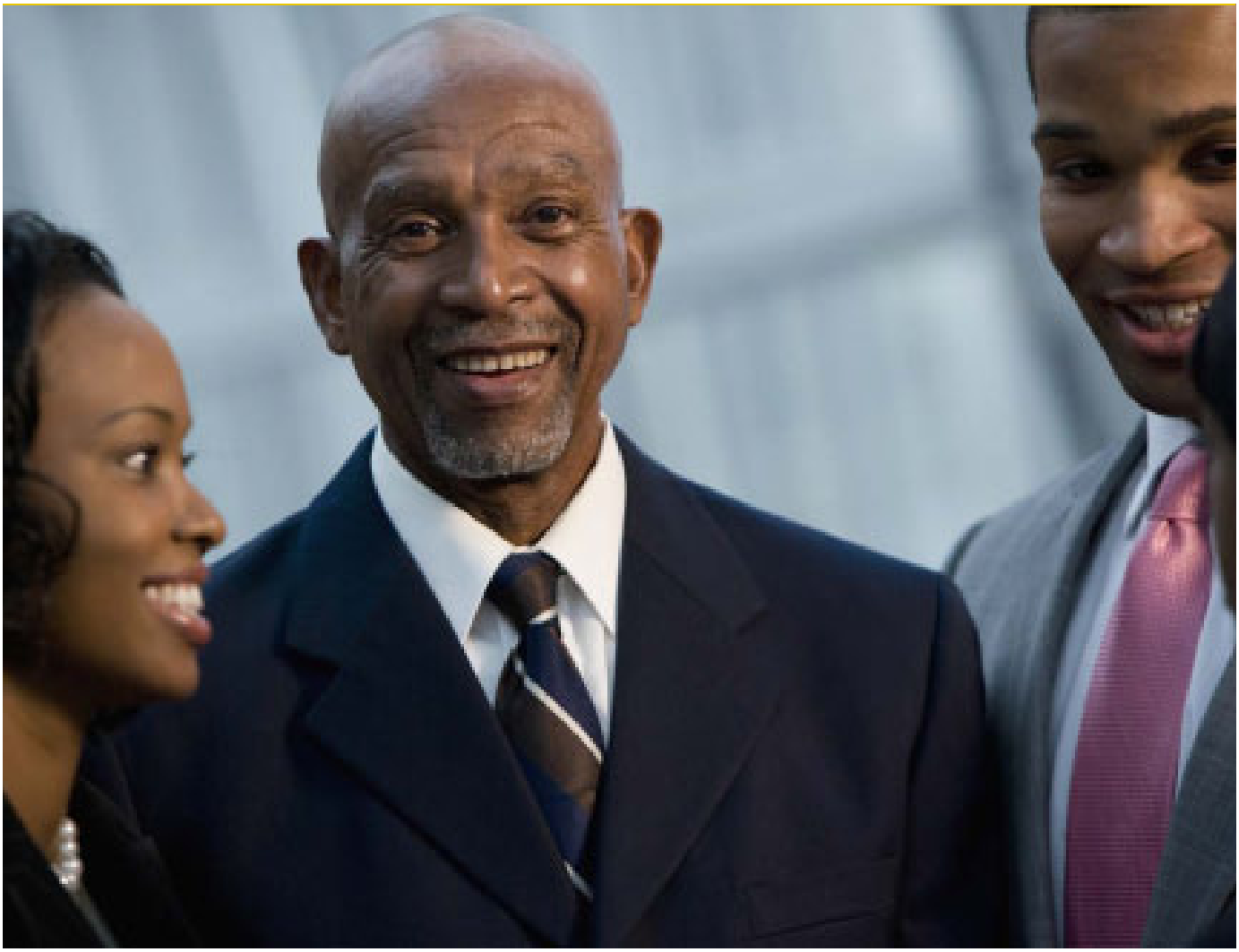
c. The Office might expand and systematize its collaboration with State faith-based and neighborhood partnership offices or officials, with mayors' liaison officials, and with county officials or liaisons that are created. The Office should ensure that its State and local partners understand the rules and goals of the Federal initiative and should encourage them to work with program, legal, and other officials in their own governments to help them understand and apply the Federal rules.[10]

d. Outreach and training offered by the Office and the Centers to nongovernmental organizations should always stress that church-state rules are attached to the Federal funds and that most of the Federal funds are awarded to nongovernmental organizations by State or local, not Federal, agencies. Ways to communicate this

[8] *See, e.g.*, the HHS study, *Partnering with Faith-Based and Community Organizations: A Guide for State and Local Officials Administering Federal Block and Formula Grant Funds* (available at http://www.hhs.gov/fbci/For%20State%20and%20Local%20Officials/partneringpub.html).

[9] Note that during the last year or so of the previous Administration, outreach and training conferences offered by the White House Office of Faith-Based and Community Initiatives typically included a day of discussions and other events with State and local officials to work collaboratively on how the various government agencies might better connect with faith- and community-based organizations.

[10] Pamela Winston, et al., *The Role of State Faith Community Liaisons in Charitable Choice Implementation: Final Report* (Mathematica Policy Research: December 2008), for HHS (available at http://aspe.hhs.gov/hsp/08/RoleFCL/index.shtml).



dimension include providing information about State and local contacts to which organizations can turn (e.g., the State faith-based and neighborhood partnership offices) and, when possible, co-sponsoring the outreach and training sessions with the respective State and local liaisons and offices. The Centers' Websites should clearly explain that most of their respective departments' funding goes first to State or local agencies before being awarded to nongovernmental organizations.

e. Publicity and guidance documents from the Federal initiatives should stress and explain the Federal, State, and local partnership dimension of Federal social service funding and should provide information to direct the readers to State and local sources of information and help. For example, a revised version of the Bush administration's *Guidance to Faith-Based and Community Organizations on Partnering with the Federal Government*[11] might better be entitled Guidance… on Partnering with Federal, State, or Local Agencies to Provide Federally Funded Social Assistance and contain specific sections on the use by State, county, and city agencies of Federal funds and how readers can find out more about those agencies and their federally funded programs.

[11] *See* http://georgewbush-whitehouse.archives.gov/government/fbci/guidance_document_01-06.pdf for this guidance document.

STRENGTHENING CONSTITUTIONAL AND LEGAL FOOTING OF PARTNERSHIPS

Recommendation 4: Strengthen constitutional and legal footing of partnerships, and improve communications regarding White House Office of Faith-Based and Neighborhood Partnerships and Agency Centers.

The Council recommends that the Administration amend Executive Order 13279[12] to make it clear that fidelity to constitutional principles is an objective that is as important as the goal of distributing Federal financial assistance in the most effective and efficient manner possible. Likewise, in all their communications, the White House Office of Faith-Based and Neighborhood Partnerships and Agency Centers should highlight this principle.

We also recommend that this executive order be amended to emphasize that grant-making decisions must be free from political interference or even the appearance of such interference, and that White House and agency activities must abide by applicable constitutional and statutory restrictions, including the Hatch Act's limits on the use of government resources for partisan political activities. Toward this end, participants in grant-making decisions—whether they are governmental employees or nongovernmental peer reviewers—should be specifically instructed in and required to abide by these principles. Similarly, government officials should instruct these individuals to refrain from taking religious affiliations or lack thereof into account in this process.

When selecting peer reviewers, the government should never ask about religious affiliation or lack thereof or take such matters into account. But it should encourage religious, political, and professional diversity among peer reviewers by advertising for these positions in a wide variety of venues.

The Council further urges the White House Office and Agency Centers to continue to emphasize the role of the Government as a convenor of diverse communities as well as a funder of certain social services. We applaud the effort to promote realistic expectations among potential grantees about financial partnerships, better match nongovernmental organizations with appropriate opportunities, and further underscore the value of nonfinancial partnerships between the Government and nongovernmental organizations.

Likewise, we recommend that the White House and Agency Centers continue to promote a more accurate understanding of what they do and do not do. For example, it should be emphasized that while the White House Office and Agency Centers often notify neighborhood groups—religious and secular—about a variety of opportunities to partner with government, the Office and Centers play no role in decision making about which nongovernmental organizations receive Federal social service funds.

Background and Explanation:

The Council recommends that the Administration make clear that keeping faith with constitutional principles is an objective that is as important as the goal of distributing Federal financial assistance in the most effective and efficient manner possible. Toward this end, the Council recommends that the Administration amend Executive Order 13279 to underscore the fact that fidelity to the Constitution is a fundamental and overarching goal

[12] Executive Order 13279, *Equal Protection of the Laws for Faith-Based and Community Organizations* (December 12, 2002) ("Executive Order 13279"). *See, e.g.,* 45 C.F.R. Part 87.2(c).

in this area.[13] This message also should be an essential part of all communications of the White House Office of Faith-Based and Neighborhood Partnerships and the Agency Centers.

Additionally, we recommend that Executive Order 13279 be amended to reflect the commitment to nonpartisanship set forth in a September 2009 memorandum for White House staff and for agency and department heads.[14] The executive order should be revised to make clear that all agency funding decisions must be "free of political interference or even the appearance thereof," and that White House and agency activities must abide by applicable constitutional and statutory restrictions, including the Hatch Act's limits on the use of government resources for partisan political activities.[15] Also, participants in grant-making decisions—whether they are governmental employees or nongovernmental peer reviewers—should be specifically instructed in and required to abide by these principles.

Likewise, governmental officials should instruct participants in the grant-making process to refrain from taking religious affiliations or lack thereof into account in this process. In other words, an organization should not receive favorable or unfavorable marks merely because it is affiliated or unaffiliated with a religious body, or related or unrelated to a specific religion.

When selecting peer reviewers, the government should never ask about religious affiliation or lack thereof or take such matters into account. But it should encourage religious, political, and professional diversity among peer reviewers by advertising for these positions in a wide variety of venues.[16]

The White House Office and Agency Centers should continue to stress the role of the Government as a convenor as much as a funder of social services. The power of government at all levels to bring together diverse communities to share information and network is a critical but sometimes overlooked asset. Likewise, the White House should continue to seek to promote realistic expectations among potential grantees about financial partnerships. Sometimes, this goal will require the Administration and other governmental bodies to develop more targeted communications that better match organizations with appropriate opportunities. It is also important to emphasize that financial partnerships with government are not the right option for every community organization -- other kinds of collaboration may be more suitable. For this and other reasons, nonfinancial partnerships between the Government and nongovernmental organizations should be emphasized as much as financial partnerships.

Finally, the White House Office should continue to promote a more accurate understanding of what it and the Centers for Faith-Based and Neighborhood Partnerships in various Federal agencies do and do not do.[17] For example, it should be emphasized that while the White House

[13] Section Two: Fundamental Principles and Policymaking Criteria, Executive Order 13279. This executive order discusses some constitutional principles, but it does so only in reference to particular issues rather than as an overarching commitment. Also, while distributing assistance in the most effective and efficient manner possible is listed as the first principle—principle (a)—in this section of the executive order, the Establishment, Free Exercise, and Free Speech Clauses of the First Amendment are not specifically mentioned until principles (e) and (f). Another reason to describe constitutional commitments early in this section and to identify the Establishment, Free Exercise, and Free Speech Clauses jointly is that the commands of these clauses sometimes overlap and often reinforce one another. See also Recommendations 5 to12 that seek to strengthen the constitutional and legal footing of social service partnerships between the Government and nongovernmental organizations.

[14] Gregory Craig and Norman Eisen, *Memorandum for White House Staff and for Agency and Department Heads on Guidelines for Public Outreach Meetings*, September 22, 2009 (available at http://www.whitehouse.gov/assets/documents/WH_COUNSEL_MEMO_GUIDELINES_FOR_PUBLIC_OUTREACH_MEETINGS.pdf).

[15] *Id.*

[16] Other issues linked to the peer review process deserve further examination, including the application process for positions as peer reviewers and notification of peer reviewers about opportunities to report any violations of laws, rules, and regulations that occur during these processes. Because of time constraints, the Council did not address these issues. Council members believe, however, that governmental bodies and nongovernmental researchers and entities could profitably explore these issues and perhaps offer suggestions for improving the transparency, fairness, and effectiveness of the peer review process.

[17] The White House Office and Agency Centers also should emphasize the large role State and local governments play in the delivery of federally funded social services. See Recommendation 3.

Office and Agency Centers often notify neighborhood groups—religious and secular—about a variety of opportunities to partner with government, the Office and Centers play no role in decision making about which organizations receive Federal social service funds.

Recommendation 5: Clarify prohibited uses of direct Federal financial assistance.

Existing Federal regulations and an executive order prohibit the use of direct government aid (e.g., government grants, contracts, subgrants, and subcontracts) for "inherently religious activities, such as worship, religious instruction, and proselytization." The Council recommends that the Administration replace the words "inherently religious activities" with "explicitly religious activities" in these regulations and in the relevant executive order, as well as in associated guidance materials. The Council also recommends that the Administration provide additional examples of activities that constitute "explicitly religious activities" in regulatory or guidance materials.

Background and Explanation:

Existing regulations and an executive order prohibit nongovernmental organizations from using direct government aid (e.g., government grants, contracts, subgrants, and subcontracts)[18] for "inherently religious activities, such as worship, religious instruction, and proselytization."[19] The term "inherently religious" is confusing. In 2006, for example, the General Accounting Office (GAO) found that all 26 of the religious social service providers it interviewed said they understood the prohibition on using direct government aid for "inherently religious activities," but it also found that four of the providers acted in ways that appeared to violate that rule.[20]

Further, while the Supreme Court has sometimes used the term "inherently religious," it has not used it to indicate the boundary of what the Government may subsidize with direct aid.[21] If the term is interpreted narrowly, it could permit some things the Constitution prohibits.[22] On the other hand, one could also argue that the term "inherently religious" is too broad rather than too narrow. For example, some might consider the provision of a hot meal to a needy person an "inherently religious" act when it is undertaken from a sense of religious motivation or obligation, even though it has no overt religious content.

The Court has determined that the Government cannot subsidize "a specifically religious activity in an otherwise substantially secular setting."[23] It has also said a direct aid program impermissibly advances religion when the aid results in governmental indoctrination of religion.[24] This terminology is fairly interpreted to prohibit the Government from directly subsidizing any explicitly religious activity, meaning any activities that involve overt religious content.[25] Thus, direct Federal aid should not be used to pay for activities such as

[18] When the term "direct aid" is used in these recommendations, it includes aid in the form of federally funded grants and contracts as well as the federally funded subgrants and subcontracts that an intermediary (whether governmental or nongovernmental) awards to nongovernmental organizations. See Recommendations 7 and 9.
[19] Executive Order 13279. *See, e.g*, 45 C.F.R. Part 87.2(c).
[20] GAO, *Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability* (GAO-06-616), June 2006 ("GAO Report"), 34-35.
[21] *See* Ira C. Lupu and Robert W. Tuttle, *The Faith-Based Initiative and The Constitution*, 55 DePaul L. Rev. 1, 79 (2005).
[22] "If understood too narrowly," Lupu and Tuttle have said, "the regulatory proscription on direct government financing of religious instruction significantly understates [the relevant constitutional principle]. . . ." Ira C. Lupu and Robert W. Tuttle, *Constitutional Change and Responsibilities of Governance Pertaining to the Faith-based and Community Initiative, Conference on Innovations in Effective Compassion* (June 2008), 269.
[23] *Hunt v. McNair*, 413 U.S. 734, 743 (1973).
[24] *Mitchell v. Helms*, 530 U.S. 793 (2000).
[25] As Professors Lupu and Tuttle noted in 2005, "Almost all of the lawsuits challenging aid to [faith-based organizations] have involved faith-intensive social services, and each decision in these cases has reaffirmed the principle that direct public aid may not be used for social services with that character." Lupu and Tuttle, *The Faith-Based Initiative and The Constitution*, 55 DePaul L. Rev. at 86 (2005).

religious instruction, devotional exercises, worship, proselytizing or evangelism; production or dissemination of devotional guides or other religious materials; or counseling in which counselors introduce religious content.[26] Similarly, grant or contract funds may not be used to pay for equipment or supplies to the extent they are allocated to such activities. The term "explicitly religious activities" would not include, however, activities that may be the result of religious motivation like serving meals to the needy or using a nonreligious text to teach someone to read. From the standpoint of the Government, these activities lack religious content.

Likewise, it is important to emphasize that the restrictions on explicit religious content apply to content generated by the administrators of the federally funded program, not to spontaneous comments made by individual beneficiaries about their personal lives in the context of these programs. For example, if a person administering a federally funded job skills program asks beneficiaries to describe how they gain the motivation necessary for their job searches and some beneficiaries refer to their faith or membership in a faith community, these kinds of comments do not violate the restrictions and should not be censored. In this context, it is clear that those administering the government program are not orchestrating or encouraging such comments.

The Administration, therefore, should amend regulations and the relevant executive order to prohibit the use of direct aid to subsidize "explicitly religious activities, such as worship, religious instruction, and proselytization." Associated guidance materials should also be revised to reflect this change in language.[27] Regulatory or guidance materials should offer additional examples or brief case studies to explain the meaning of the term "explicitly religious" and note that any explicit religious content must be privately subsidized and offered separate in time or location from programs funded by direct government aid.[28] This change in language will provide greater clarity and more closely match constitutional standards.

[26] These activities and items, however, may be privately funded and offered in a program that is voluntary for beneficiaries and separate in time or location from the program that is funded by direct aid. See Executive Order 13279. *See also* Recommendation 6.

[27] Current guidance sometimes uses the terms "inherently religious activities" and "religious activities" interchangeably. For example, a guide entitled *Designing Sub-Award Programs* states:

> **Support of only non-religious social services** — A subawardee cannot use any part of a direct Federal grant to fund "inherently religious" activities which can include religious worship, instruction or proselytization. Instead, organizations may use government funds only to support the non-religious social services they provide. This doesn't mean the organization cannot have religious activities. However, they cannot use taxpayer dollars to fund them.

Lisa Lampman, *Designing Sub-Award Programs at 18*, Intermediary Development Series, Compassion Capital Fund National Resource Center.

[28] As noted in the Introduction, Council members differ over the issue of whether the Government must or should refrain from directing cash aid to certain kinds of religious entities. *See also* Recommendation 12.

Recommendation 6: Equally emphasize separation requirements and protections for religious identity.

Regulations and guidance regarding the use of Federal social service funds should give prominent and equal emphasis to the following requirements: (1) when the Government directly funds a program, any explicitly religious activities offered by a provider must be privately funded, separate in time or location from the government-funded program, and voluntary for beneficiaries; and (2) nongovernmental providers that receive Federal grant or contract funds may maintain their institutional religious identity in the ways described below.

Especially because providers often lack specific guidance about how to create a meaningful and workable separation between a program funded by a government grant or contract and a privately funded religious one, the Administration should provide more extensive guidance on this matter. Accordingly, the Council sets forth guidelines articulated by the last Administration in a particular case and urges the present Administration to adapt them for general use. For example, we urge the Administration to include these basic principles in regulations and guidance that accompany Federal social service funds.

At the same time, the Administration should give equal emphasis to the fact that religious organizations receiving direct Federal aid may maintain their institutional religious identity. They may use religious terms in their organizational names, select board members on a religious basis, and include religious references in mission statements and other organizational documents.

Members of the Council disagree, however, about whether the Government should allow social services subsidized by Federal grant or contract funds to be provided in rooms that contain religious art, scripture, messages, or symbols. A majority of the Council (16 members) believe the Administration should neither require nor encourage the removal of religious symbols where services subsidized by Federal grant or contract funds are provided, but instead should encourage all providers to be sensitive to, and to accommodate where feasible, those beneficiaries who may object to the presence of religious symbols. These members also affirm that, if these voluntary measures do not meet the objections of the beneficiaries, those beneficiaries must have access to an alternative provider to which they do not object.

A minority of the Council differs. Seven Council members believe that revisions should be made to these documents to allow federally funded programming in areas with these religious items only when there is no available space in the organizations' offices without these items and when removing or covering such displays would be infeasible (e.g., where it would take great effort to remove or cover a religious icon mounted high on a wall or remove or cover a large statute). Two Council members believe the Administration should amend existing regulations, guidance, and an executive order to permit nongovernmental organizations to offer federally funded programming only in areas devoid of such items.

Nevertheless, all Council members agree that the Government should permit providers to retain other aspects of their religious identities while providing federally funded social services.

Background and Explanation:

An executive order and associated regulations properly indicate that the Government must ensure that any religious activities offered by a nongovernmental provider are privately

funded, separate in time or location from programs funded by direct government aid,[29] and purely voluntary for beneficiaries.[30] Further, some of the past Administration's guidance on these separation requirements has been quite good, but it has not been made standard across Federal agencies, and it could bear greater emphasis.[31]

As part of the settlement of a case, HHS produced a guidance document entitled *Safeguards Required*.[32] The document articulates a number of principles for separating programs with explicit religious content from programs supported by direct federal aid. A copy of the *Safeguards Required* document is attached to this recommendation. We urge the Administration to adapt the principles set forth in this document for general use. It should ensure that these principles are reflected in regulations and guidance accompanying Federal social service funds. Especially because providers often lack specific instructions about how to create a meaningful and workable separation between a federally funded program and a privately funded religious one, it is critical that providers receive practical and specific guidance.

These materials also should outline with equal prominence and clarity the protections for a religious organization's identity when that organization receives direct government funds. Religious organizations may use religious terms in their organizational names, select board members on a religious basis,[33] and include religious references in mission statements and other organizational documents. Simply because an organization's mission is overtly religious, for example, does not mean it cannot separate (and privately pay for) explicitly religious activities from activities funded by a federal grant.

Members of the Council disagree, however, about whether the Government should allow nongovernmental providers of federally funded social services to provide those services in rooms that contain religious art, scripture, messages, or symbols.

A majority of the Council (16 members) believe that the Administration should neither require nor encourage the removal of religious symbols where services subsidized by Federal grant or contract funds are provided, but instead should encourage all providers to be sensitive to, and to accommodate where feasible, those beneficiaries who may object to the presence of religious symbols.[34] These members also affirm that, if these voluntary measures do not meet the objections of the beneficiaries, those beneficiaries must have access to an alternative provider to which they do not object.

A minority of the Council differs. Seven Council members believe that revisions should be made to these documents to allow federally funded programming in areas with these

[29] *See supra* n.18 for a description of some of the forms of aid that are included within the definition of direct government aid. *See also* Recommendations 7 and 9.
[30] Executive Order 13279. *See, e.g.,* 45 C.F.R. Part 87.2(c). *See also* Recommendation 5 (recommending substitution of "explicitly religious activities" for "inherently religious activities").
[31] These requirements have not been not well understood by some providers. In 2006, for example, the General Accounting Office (GAO) found that all 26 of the religious social service providers it interviewed said they understood the requirements, but it also found that four of the providers acted in ways that appeared to violate the rules. GAO, *Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability* (GAO-06-616), June 2006 ("GAO Report"), 34-35. Further, as Professors Lupu and Tuttle noted in 2005, "Almost all of the lawsuits challenging aid to [faith-based organizations] have involved faith-intensive services, and each decision in these cases has reaffirmed the principle that direct public aid may not be used for social services with that character." Lupu and Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DePaul L. Rev. at 86.
[32] Letter from Jeffrey S. Trimbath, Director, Abstinence Education, Administration on Children, Youth and Families, to Denny Pattyn, Silver Ring Thing (September 20, 2005).
[33] Council members differ on what is required if board members are paid with government funds.
[34] These Council members are Diane Baillargeon, Charles Blake, Noel Castellanos, Arturo Chavez, Nathan Diament, Joel Hunter, Vashti McKenzie, Dalia Mogahed, Otis Moss, Frank Page, Anthony Picarello, Melissa Rogers, Richard Stearns, Larry Snyder, Judy Vredenburgh, and Jim Wallis.

religious items only when there is no available space in the organizations' offices without these items and when removing or covering such displays would be infeasible (e.g., where it would take great effort to remove or cover a religious icon mounted high on a wall or remove or cover a large statute).[35] Two Council members believe the Administration should amend existing regulations, guidance, and an executive order to permit nongovernmental organizations to offer federally funded programming only in areas devoid of such items.[36]

Nevertheless, all Council members agree that the Government should permit providers to retain other aspects of their religious identities while providing federally funded social services. These aspects include using religious terms in their organizational names, selecting board members on a religious basis, and incorporating religious references in mission statements and other organizational documents. These protections for religious identity are important, and they have been greatly emphasized in recent years. By emphasizing the separation and maintenance of religious identity requirements on an equal footing, the Administration will strike a more appropriate balance.

Recommendation 7: State more clearly the distinction between "direct" and "indirect" aid.

The Council recommends that the Administration, in its guidance to Federal employees, service providers, and the broader public, state with greater clarity the distinction between direct and indirect forms of government aid to religious institutions. Similarly, the Administration should clearly label each program it offers as involving direct or indirect aid, so that providers can better assess, sooner rather than later in the process, whether a program might suit their particular institutional commitments and structure. Members of the Council differ sharply on many other questions surrounding indirect aid, and so prescind from them in these recommendations.

Background and Explanation:

Federal regulations state that direct social service funding "means that the government or an intermediate organization. . . selects the provider and purchases the needed services straight from the provider (e.g., via a contract or cooperative agreement)."[37] Direct aid includes federally funded grants and contracts as well as the federally funded subgrants and subcontracts that an intermediary[38] awards to nongovernmental organizations. Thus, the restrictions that bind direct Federal aid (e.g., such funds may not be used to pay for explicitly religious activities) apply to all of these funds. The vast majority of federally funded social service programs are funded by direct aid.

Federal regulations classify other social service programs as ones funded by indirect aid. The regulations state that indirect social service funding is funding "an organization receives as the result of the genuine and independent private choice of a beneficiary"[39] through a voucher, certificate, or similar mechanism.[40]

Under current U.S. Supreme Court jurisprudence, indirect financial aid to religious service providers is treated differently from direct financial aid. The distinction has great practical significance, but it is not generally well understood except among religious freedom specialists.

[35] These Council members are Anju Bhargava, Peg Chemberlin, Harry Knox, Eboo Patel, David Saperstein, Bill Shaw, and Sharon Watkins.
[36] These Council members are Fred Davie and Nancy Ratzan.
[37] 45 C.F.R. Part 260.34(1) (2010). *See also* 42 C.F.R. Part 96 n.1 (2010).
[38] *See supra* n.4 for definition of an intermediary.
[39] 42 C.F. R. Part 96 n.1 (2010). *See also Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).
[40] 45 C.F.R. Part 360.34(2) (2010).

Members of the Council disagree about *what the law should be* regarding the definition and consequences of direct and indirect aid, and indeed, regarding many other questions surrounding the direct/indirect distinction. Among others, these questions include: whether any program outside the precise factual context of *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002), qualifies as "indirect" aid; if any aid may ever qualify as "indirect," how the applicable constitutional standards or other requirements[41] would differ from the direct aid standards; whether it would be good or bad policy, apart from constitutional standards, to apply the standards governing direct aid to indirect aid programs; and whether it would be good or bad policy, apart from constitutional standards, to alter the number of existing programs employing an indirect funding mechanism.[42] Because of constraints of time and page length, as well as to avoid needless contention, the Council does not offer recommendations on these questions.

Members of the Council nonetheless agree that it would be beneficial if the Administration—not the Council—stated clearly *its operative understanding of the existing law* in this area, especially in ways accessible to nonlegal and otherwise broader audiences. The Council also believes that it would have practical value to make this distinction and its consequences better known and understood by Federal employees, service providers, and beneficiaries. That additional measure of clarity would promote better communication and collaboration, and correspondingly reduce confusion and potential litigation.

For example, if service providers are told clearly which existing programs involve direct and which involve indirect aid, providers that are unwilling to separate religious and secular components of their programming are likelier to self-select out of direct aid programs. This, in turn, would reduce the filing of grant applications that would either fail or, if granted, result in needless legal risk for both the provider and its government partner.

[41] Among Council members, there is disagreement over whether the beneficiaries' protections set forth in Recommendation 10 are required in the case of programs using "indirect" funding mechanisms (e.g., vouchers for substance abuse counseling). Some Council members believe that in programs in which the eligible beneficiary may take the Federal service voucher to the provider of his or her choice, it is the provision of notice prior to entering a particular program, and the availability of several alternative service providers, which afford the protection for the beneficiary's religious liberty rights. Thus, the extensive beneficiaries' protections set forth in Recommendation 10 for direct aid programs need not be required in indirect funding contexts. Other Council members believe that the beneficiaries' protections prescribed in Recommendation 10 are also required in indirect funding contexts in order to assure proper protections.

[42] Council members also disagree about the issue of whether the Government must or should refrain from directing cash aid to certain kinds of religious entities. See Introduction and Recommendation 12.

Recommendation 8: Increase transparency regarding federally funded partnerships.

The Council recommends that the Administration require governmental bodies that disburse Federal social service funds to post online all guidance documents for nongovernmental organizations that provide those services as well as other documents needed to receive and maintain Federal funding, including requests for proposals, grants, contracts, and assurances. It also recommends that the Administration require governmental bodies to post online a list of entities that receive such aid and to do so in a timely manner.

Background and Explanation:

At present, there is great variation among government agencies, and sometimes within them, regarding the accessibility of the guidance and grant documents relating to the provision of federally funded services by nongovernmental organizations. Even as members of this Council, it has not been easy for us to locate and access information such as standard grant documents and certificates of assurance as well as PowerPoint presentations and other materials given to potential and actual government grantees. Equally important, lists of the names of entities that receive Federal social service funds (e.g., through grants or contracts) are not routinely made available to the public.

We have found no evidence of an intentional effort by past Administrations to limit the accessibility of these materials. Indeed, past Administrations have often disseminated guidance materials at various conferences, workshops, and meetings, and lists of government grantees and contractors have sometimes been made publicly available. However, past Administrations have not made it a priority to provide wider and more routine access to this information.

Although some of this information may be publicly available through actions like Freedom of Information Act (FOIA) requests, the public will be much better served by making it available on the Web. As President Obama said in January 2009, "Executive departments and agencies should harness new technologies to put information about their operations and decisions online and readily available to the public."[43] We propose, therefore, that the Administration require governmental agencies that partner with nongovernmental organizations to provide federally funded social services to post online all guidance documents for nongovernmental organizations that provide (or seek to provide) those services. We also propose that the Administration require such governmental agencies to post documents needed to access or maintain Federal social service funds, including requests for proposals, grant agreements, assurances, and other materials.

Likewise, we recommend that the Administration require governmental bodies to post online a list of entities that receive such aid and to do so in a timely manner (e.g., within 30 days of making a decision about an award or as part of a routine quarterly report on a grant program). This transparency obligation would include posting the names of all entities receiving Federal social service funding through decisions made by nongovernmental intermediaries.[44] These intermediaries should promptly report the names of such entities to the relevant governmental body (e.g., within 30 days of making a decision about an award or as part of a routine quarterly report to the Government). The governmental body should then make this list public in a timely manner (e.g., within 30 days of receiving

[43] President Barack Obama, *Memorandum for the Heads of Executive Departments and Agencies on Transparency and Open Government*, January 21, 2009 (available at http://www.whitehouse.gov/the_press_office/Transparency_and_Open_Government/).
[44] *See supra* n.4 for definition of an intermediary.

the information from the intermediary or as part of a routine quarterly report on a grant program involving intermediaries).

There is often much confusion about the nature of the partnerships the Government forms with nongovernmental organizations and the rules that apply to those partnerships. All those who are interested in these relationships, including the taxpayers who fund them, will be better served by being able to access guidance and grant materials, even when they cannot attend a conference or a workshop or find the right government employee to ask for copies of these materials. Posting these materials on governmental Websites will increase public understanding of and confidence in these partnerships. Similarly, ensuring that governmental bodies that disburse Federal social service funds post online a list of entities that receive such aid, whether those entities receive the aid from the Government or from nongovernmental intermediaries, will help interested Americans to gain a better understanding of how their tax money is spent.

We are also aware that not everyone has high-speed Internet access, and that even those who do would sometimes appreciate other forms of assistance. Thus, the Council considered recommending that the Administration establish a toll-free telephone number that citizens could call to inquire about potential or ongoing partnerships with government. We learned, however, that the previous Administration had tried such a system and found that it was unproductive. We encourage the present Administration to continue to search for new ways to connect with those who may lack high-speed Internet service and those who need different kinds of help in understanding the Government's role in the delivery of social services.

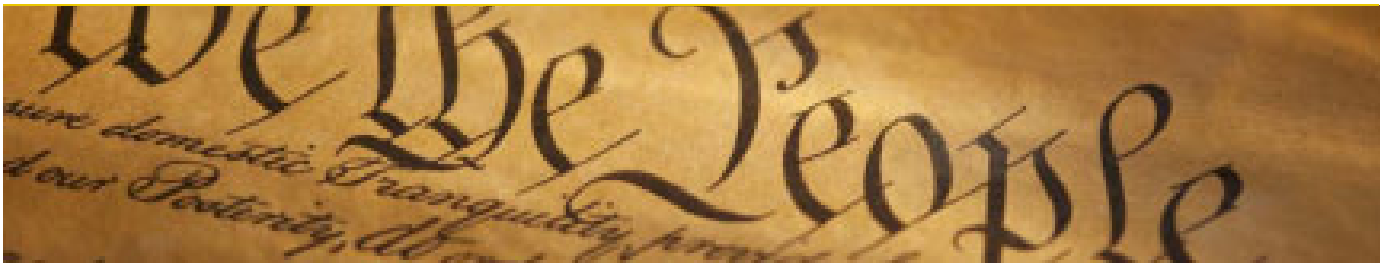
Recommendation 9: Improve monitoring of constitutional, statutory, and regulatory requirements that accompany Federal social service funds.

The Council recommends that Executive Order 13279 be amended to describe the Government's obligation to monitor and enforce constitutional, statutory, and regulatory requirements relating to the use of Federal social service funds, including the constitutional obligation to monitor and enforce church-state standards in ways that avoid excessive entanglement between religion and government. The Council further recommends that associated regulations and guidance materials be similarly revised. All grants and contracts involving federally funded social services should set forth applicable responsibilities and restrictions following those funds, and organizations that are awarded such funds should undergo training about these responsibilities and restrictions.

The Administration also should ensure that church-state safeguards are included in the monitoring tools used in the audit required of non-Federal entities expending $500,000 or more annually in Federal funds and in all other audits of non-Federal entities receiving Federal social service funds. Each governmental body disbursing Federal funds must have a mechanism in place to allow that body to take necessary enforcement actions for noncompliance with church-state standards as well as other applicable standards.

Nongovernmental organizations receiving government subgrants or subcontracts from intermediaries are subject to the same church-state standards that apply to the nongovernmental organizations receiving the primary government grants or contracts.[45] For example, subgrantees and subcontractors must separate any explicitly religious activities from programs funded by direct government aid just as grantees and contractors must

[45] *See* Recommendation 7.



do. Additionally, the Council urges the Administration to develop specific guidance for nongovernmental intermediaries to instruct them in their obligations regarding monitoring of subgrantees and subcontractors.

Background and Explanation:

To guard against inappropriate uses of Federal funds, the Government must monitor and enforce the constitutional, statutory, and regulatory standards that follow social service funds. The obligation to monitor and enforce these standards applies to all such funds, whether they flow to religious or secular organizations, and the Government should not assume that one class of providers is more apt to violate applicable standards than another. There is, however, a component of the Government's monitoring obligation that is constitutionally mandated and specifically focused on religion-related issues. The First Amendment requires the Government to monitor the activities and programs it funds to ensure that they comply with church-state requirements, including the prohibition against the use of direct aid in a manner that results in governmental indoctrination on religious matters.[46]

At the same time, the Government must respect the constitutional command against excessive entanglement between government and religion.[47] So, for example, the Government need not and should not engage in "pervasive monitoring" of religious bodies,[48] and its oversight need not constitute a "failsafe mechanism capable of detecting any instance of diversion" of government aid to religious use.[49] But the Government clearly fails to discharge its responsibilities if its safeguards "exist in theory only"[50] or "only on paper."[51] In several cases involving government funds administered by nongovernmental organizations, including religious institutions, the Supreme Court has found that a variety of methods of monitoring meet these standards.[52]

[46] *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 780 (1973) ("In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid."); *Bowen v. Kendrick*, 487 U.S. 589, 615 (1988)("[t]here is no doubt that the monitoring of [government] grants is necessary if the [government] is to ensure that public money is to be spent in the way that Congress intended and in a way that comports with the Establishment Clause.").

[47] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[48] *Id.* The Supreme Court has said that excessive entanglement includes "comprehensive, discriminating, and continuing state surveillance. . . . " *Id.* at 619.

[49] *Mitchell v. Helms*, 530 U.S. at 861 (O'Connor & Breyer, JJ., concurring in the judgment).

[50] *Freedom From Religion Foundation v. McCallum*, 179 F. Supp. 2d 950, 976 (W.D. Wisc. 2002).

[51] *Id.* at 977.

[52] For example, the Supreme Court has upheld an educational aid program in which various levels of government engaged in monitoring activities such as (1) requiring participating nonpublic schools to sign assurances that they would use Federal funds only for "secular, neutral and nonideological purposes" and retaining the power to cut off aid in the event of failure to abide by these promises; (2) requiring nonpublic schools to submit applications with project plans for approval; (3) visiting nonpublic schools once a year and conducting followup visits when necessary; and (4) conducting random reviews of materials used in the government-funded programs. *Mitchell v. Helms*, 530 U.S. at 861-863 (O'Connor & Breyer, JJ., concurring in the judgment). In another case, the Court upheld an aid program in which governmental supervisors made unannounced monthly visits to nongovernmental organizations providing government-funded services. *Agostini v. Felton*, 521 U.S. 203, 234 (1997). The Court has also determined that government review of educational materials and programs coupled with periodic site visits is another way of meeting constitutional requirements in this area. *Bowen v. Kendrick*, 487 U.S. at 615-617. In 1976, the Court upheld a program that required nongovernmental educational institutions to promise that the aid they received would not be used for sectarian purposes. *See Roemer v. Board of Public Works*, 426 U.S. 736, 742-743 (1976). These nongovernmental bodies also were required to describe specific nonsectarian uses of government funds and to file reports itemizing the use of such funds. *Id.*

Monitoring and enforcement obligations are not specifically discussed in Executive Order 13279.[53] And while current Federal policy requires non-Federal entities that expend $500,000 or more in a given year in Federal money to undergo "a single or program-specific audit,"[54] a June 2006 GAO report found that "the single audit…generally does not include checks for church-state safeguards."[55] The June 2006 GAO report also noted that many non-Federal entities that receive Federal funds may not be subject to the single-audit requirement.[56] The GAO report concluded that, without some meaningful monitoring of these safeguards, "the government has little assurance that the safeguards are protecting beneficiaries, government agencies, and religious organizations as intended."[57] It recommended that all Federal agencies include information on relevant church-state safeguards in grant documents, refer to these safeguards in monitoring tools that agencies use to oversee federally funded grantees, and "ensure that program-specific single audit supplements, where appropriate, include a reference to these safeguards."[58]

The Council recommends that Executive Order 13279 be amended to discuss the general obligation to monitor and enforce constitutional, statutory, and regulatory requirements relating to the use of Federal social service funds, whether those funds flow to secular or religious organizations. It also should cite the constitutional obligation to monitor and enforce church-state standards in ways that avoid excessive entanglement between religion and government. The Council further recommends that associated regulations and guidance materials be similarly revised. Agreements involving federally funded social services should set forth the restrictions and responsibilities following those funds,[59] and organizations that are awarded such funds should undergo training about these responsibilities and restrictions. The Administration should also ensure that church-state safeguards are included in the monitoring tools used in the audit required of all non-Federal entities expending $500,000 or more annually in Federal funds and all other audits of non-Federal entities receiving Federal funds.[60]

With respect to direct Federal aid, we believe policies like the following ones would fulfill the relevant constitutional requirements:

[53] Executive Order 13279.

[54] *See* Office of Management and Budget Circular No. A-133, *Audits of States, Local Governments, and Non-Profit Organizations*, at http://www.whitehouse.gov/omb/circulars/a133/a133.html

[55] GAO, *Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability* (GAO-06-616), June 2006 ("GAO Report"), 29. See also infra n.60.

[56] GAO Report at 36.

[57] *Id.* at 52.

[58] *Id.* at 53.

[59] A summary and status report on the recommendations in the 2006 GAO Report indicates that, since the issuance of the 2006 report, the Office of Management and Budget (OMB) has implemented the GAO's recommendation that OMB "ensure that all agencies [with centers for faith-based and community initiatives] include information on [church-state] safeguards in program grant documents for which faith-based organizations are eligible." See Summary of Recommendations for Executive Action and Status of Those Recommendations at http://www.gao.gov/products/GAO-06-616. This recommendation is broader—it calls for the inclusion of information about all relevant restrictions and responsibilities that accompany Federal social service funds in all agreements with nongovernmental organizations involving those funds.

[60] A summary and status report on the recommendations in the 2006 GAO Report indicates that, since the issuance of the 2006 report, the OMB has directed "federal agencies and, where appropriate, state agencies, to include a reference to [church-state] safeguards in the[ ] monitoring tools the agencies use to oversee federally funded grantees." *See* Summary of Recommendations for Executive Action and Status of Those Recommendations at http://www.gao.gov/products/GAO-06-616. This report says, "Agencies must know 1) which office will be responsible for monitoring; 2) what means of monitoring will be used (site visits, spot checks by phone); 3) whether equal treatment regulations need to be added to existing compliance checklists; 4) and must work with appropriate offices within a specific agency to address issues when monitoring efforts uncover a violation." *Id.* But this report also notes that OMB has not yet implemented GAO's recommendation that OMB ensure that "program-specific single audit supplements, where appropriate, include a reference to these safeguards." *See* Summary of Recommendations for Executive Action and Status of Those Recommendations at http://www.gao.gov/products/GAO-06-616.

- Grant and contract documents that spell out applicable constitutional, legal, and regulatory standards, including church-state safeguards, and requirements that all grantees and contractors sign assurances reflecting their agreement to abide by these standards.
- Reporting documents that ask grantees and contractors questions such as whether they offer any explicitly religious activities that are privately funded. If providers do offer such activities, reporting documents should ask them to describe the method by which they separate privately funded religious content from the government-funded program; steps they have taken to ensure that beneficiaries understand they are not in any way required to participate in any privately funded religious activities; and steps providers have taken to help beneficiaries understand that they have the right to obtain benefits from an alternate provider if they object to the character of their current provider.[61] These reporting documents also should ask such grantees and contractors about the uses of government funds and means of tracking the use of those funds. These questions should appear on reporting forms required of all providers. If these questions are inapplicable because a provider does not offer privately funded religious activities, the provider would so note.
- Follow up on these reporting documents with telephone calls or onsite visits as necessary.

Some obligation to monitor and enforce applicable constitutional, statutory, or regulatory standards applies to every entity that disburses Federal social service funds, whether it is a Federal agency, a State or local governmental body, or a governmental or nongovernmental intermediary.[62] An intermediary is an organization that accepts government funds and distributes those funds to a network of other organizations that in turn provide government-funded social services.[63] The Federal Government must take special care to ensure that intermediaries understand and carry out the oversight responsibilities assigned to them. Accordingly, the Council also recommends that the Administration develop guidance for intermediaries concerning their obligations to monitor subgrantees and subcontractors.

Likewise, nongovernmental organizations receiving federally funded subgrants or subcontracts from nongovernmental or governmental intermediaries must understand that they are subject to the same church-state standards that apply to the nongovernmental organizations receiving the primary government grants or contracts.[64] For example, subgrantees and subcontractors must separate explicitly religious content from programs funded by direct government aid just as grantees and contractors must do. The Council recommends that every federally funded program utilizing nongovernmental intermediaries make this point clear in relevant regulations and guidance materials as well as in contracts and grant agreements.

[61] *See* Recommendation 10.
[62] *Bowen v. Kendrick*, 487 U.S. 589, 620 n.16 (1988).
[63] *See, e.g.,* 45 C.F.R. Part 1050.2 (2010). Some programs, including substance abuse prevention and treatment services programs, provide that the Government may enter into agreements with nongovernmental intermediaries authorizing those intermediaries to select nongovernmental subgrantees or subcontractors. *See, e.g.*, 42 C.F.R. Part 54.12 (2010)("If a nongovernmental organization (referred to here as an 'intermediate organization'), acting under a contract or other agreement with the Federal Government or a State or local government, is given the authority under the contract or agreement to select nongovernmental organizations to provide services under any applicable program, the intermediate organization shall have the same duties under this part as the government.")
[64] *See* Recommendation 7.

Finally, the Council believes the Administration should ensure that each governmental body that disburses Federal funds has a mechanism in place to allow that body to take necessary enforcement actions for noncompliance with church-state standards as well as other applicable standards.[65]

Recommendation 10: Assure the religious liberty rights of the clients and beneficiaries of federally funded programs by strengthening appropriate protections.

Existing statutes and Federal executive branch regulations, an executive order, and guidance materials provide that all organizations that receive Federal funds for the purpose of delivering social welfare services are prohibited from discriminating against beneficiaries or potential beneficiaries of those programs on the basis of religion or religious belief. There is variance among these authorities about the specifics of the protections, but the principle they seek to uphold is uniform.

The Council recommends that such requirements and protections continue to be clearly stated in all Requests for Proposals (RFPs), contracts and guidance materials, and monitoring guidelines.

The Council further recommends that the Administration take certain additional steps to bolster the protections of beneficiaries' rights and make the protections uniform across Federal programs.

These steps include:

1. Amending Executive Order 13279[66] to apply the protections codified in the legislation and regulations of the Substance Abuse and Mental Health Services Administration (SAMHSA) program,[67] with appropriate modifications, to all service provision program partnerships that receive direct Federal funding [68], including three modifications recommended by the Council:

[65] *See, e.g.*, 41 C.F.R. Part 60 (describing purview of the Office of Federal Contract Compliance Programs in the Department of Labor).
[66] Executive Order 13279.
[67] Pursuant to 42 U.S.C. 290kk-1, et seq., and 42 U.S.C. 300x-65, et seq., regulations were promulgated at 42 C.F.R. Part 54 (and Part 54a similarly) that provide:
§54.7 Nondiscrimination requirement.
A religious organization that is a program participant shall not, in providing program services or engaging in outreach activities under applicable programs, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to actively participate in a religious practice.
§54.8 Right to services from an alternative provider.
(a) General requirements. If an otherwise eligible program beneficiary or prospective program beneficiary objects to the religious character of a program participant, within a reasonable period of time after the date of such objection, such program beneficiary shall have rights to notice, referral, and alternative services, as outlined in subsections 54.8(b)-(d) below.
(b) Notice. Program participants that refer an individual to alternative service providers, and the State government that administers the applicable programs, shall ensure that notice of the individual's right to services from an alternative provider is provided to all program beneficiaries or prospective beneficiaries. The notice must clearly articulate the program beneficiary's right to a referral and to services that reasonably meet the requirements of timeliness, capacity, accessibility, and equivalency as discussed in this section. A model notice is set out in Appendix A to Part 54a.
(c) Referral to an Alternative Provider. If a program beneficiary or prospective program beneficiary objects to the religious character of a program participant that is a religious organization, that participating religious organization shall, within a reasonable time after the date of such objection, refer such individual to an alternative provider. The State shall have a system in place to ensure that referrals are made to an alternative provider. That system shall ensure that the following occurs:
(1) the religious organization that is a program participant shall, within a reasonable time after the date of such objection, refer the beneficiary to an alternative provider;
(2) in making such referral, the program participant shall consider any list that the State or local government makes available to entities in the geographic area that provide program services, which may include utilizing any treatment locator system developed by SAMHSA;
(3) all referrals shall be made in a manner consistent with all applicable confidentiality laws, including, but not limited to, 42 C.F.R. Part 2 ("Confidentiality of Alcohol and Drug Abuse Patient Records");
(4) upon referring a program beneficiary to an alternative provider, the program participant shall notify the State or responsible unit of government of such referral; and (continued on page 141)

a. The protections clearly require, and state in all relevant documents, that program providers must give beneficiaries notice of their rights in writing at the time the beneficiary enters or joins the program.

b. The protections clarify that the protected refusal to "actively participate" in a religious practice includes the refusal to even attend such a practice.

c. The protections clearly affirm that a beneficiary who requests an alternative service provider, due to that beneficiary's objection to the religious character of the initial service provider, shall have his or her objection redressed either by referral to an alternative provider which is religiously acceptable to the beneficiary, or an alternative provider which is secular.

2. Amending agency regulations and revise guidance to reflect these changes.

Background and Explanation:

There is clear precedent and consensus for the vigorous protection of the religious liberties of beneficiaries of federally funded programs. The "Welfare Reform" statute, for example, contains explicit provisions on this matter.[69] Similarly, the legislation proposed in 2001 during the Bush administration to expand and codify "charitable choice" across the universe of Federal social welfare programs contained not only the protections previously enacted in TANF and three other program statutes, but went further to assure the right of an eligible beneficiary to demand a secular alternative program and would have placed the obligation on the Federal or State agency to assure its provision.[70]

One cannot assume that those who are seeking aid through the array of federally funded social welfare programs would be aware of their religious liberty rights. Thus, a notice requirement of those rights to program beneficiaries is essential and should be provided at the outset of the person's participation in the federally funded program.

But notice alone may be insufficient to protect the rights of an eligible beneficiary without the actual availability of an alternate means of receiving the service delivery. It is also essential that grantee agencies, particularly their staff and volunteers who interact directly with beneficiaries, are educated and trained with regard to these parameters. As discussed in Recommendation 9, granting agencies should have such training as a component of their work with grantees once awards are made and prior to implementation.

The Council understands that implementing this recommendation could result in significant costs for the government. Nonetheless, Council members believe the government must take these steps in order to provide adequate protection for the fundamental religious liberty rights of social service beneficiaries.

(5) the program participant shall ensure that the program beneficiary makes contact with the alternative provider to which he or she is referred.
(d) Provision and Funding of Alternative Services. If an otherwise eligible applicant or recipient objects to the religious character of a SAMHSA-funded service provider, the recipient is entitled to receive services from an alternative provider. In such cases, the State or local agency must provide the individual with alternative services within a reasonable period of time, as defined by the State agency. That alternative provider must be reasonably accessible and have the capacity to provide comparable services to the individual. Such services shall have a value that is not less than the value of the services that the individual would have received from the program participant to which the individual had such objection, as defined by the State agency. The alternative provider need not be a secular organization. It must simply be a provider to which the recipient has no religious objection. States may define and apply the terms "reasonably accessible," "a reasonable period of time," "comparable," "capacity," and "value that is not less than." The appropriate State or local governments that administer SAMHSA-funded programs shall ensure that notice of their right to alternative services is provided to applicants or recipients. The notice must clearly articulate the recipient's right to a referral and to services that reasonably meet the timeliness, capacity, accessibility, and equivalency requirements discussed above.

[68] *See* Recommendation 7 and accompanying footnote 41.

[69] 42 U.S.C. Section 604a(e) (2010).

[70] *See* HR7, Community Solutions Act of 2001, Section1994a.

Recommendation 11: Reduce barriers to obtaining 501(c)(3) recognition.

The Council recommends that the Administration reduce some of the administrative burdens and other costs associated with obtaining formal recognition of 501(c)(3) status, because this reduction would facilitate the voluntary pursuit of that formal recognition and the creation of separate 501(c)(3) entities.

Background and Explanation:

In general, religious organizations may be formally recognized as exempt from Federal income tax under section 501(c)(3) of the Internal Revenue Code (IRC) in two ways: (1) under an individual exemption determination letter issued by the Internal Revenue Service (IRS) (i.e., by individual request), or (2) by coverage as a subordinate organization under a group tax exemption issued by IRS to a church or religious denomination (i.e., by "group ruling").

In addition, under section 508(c)(1)(A) of the IRC, certain religious organizations—namely, churches,[71] integrated auxiliaries of a church,[72] and conventions or associations of churches (hereinafter, "Self-Declared 501(c)(3)s")—may qualify for exemption under section 501(c)(3) *without* obtaining either an exemption determination letter or inclusion in a church group ruling. In other words, the IRS *automatically* considers these entities to be 501(c)(3) tax-exempt organizations; they are not required to apply for and obtain *formal* recognition of that status from the IRS.[73]

Council members agree that, where a government program requires private providers to be 501(c)(3) tax-exempt organizations,[74] it is advisable for Self-Declared 501(c)(3)s that want to participate either (1) to obtain one of the two types of formal recognition of its own 501(c)(3) status or (2) to create a separate entity and obtain formal recognition of its 501(c)(3) status. Council members agree that the formal recognition associated with either course would provide valuable proof of a provider's 501(c)(3) status.

Council members also agree that the process for the formal recognition of 501(c)(3) status should be streamlined. The cost and administrative burden of these processes deter even willing Self-Declared 501(c)(3)s from undertaking them. Among the concrete steps the Administration could take would be to have the IRS create an "EZ application form" for 501(c)(3) status, waive existing filing fees, expedite processing, and take other steps to help smaller organizations to form separate 501(c)(3) organizations.[75]

[71] The IRS uses the word "church" as a generic term for all houses of worship. This recommendation does the same.

[72] An integrated auxiliary of a church is an organization that is described in section 501(c)(3) of the Code, other than a private foundation, is affiliated with a church, and is qualified as "internally supported." An organization is considered internally supported *unless* it both:

(1) Offers admissions, goods, services, or facilities for sale, other than on an incidental basis, to the general public (except goods, services, or facilities sold at a nominal charge or substantially below cost), *and*

(2) Normally receives more than 50 percent of its support from a combination of governmental sources; public solicitation of contributions (such as through a community fund drive); and receipts from the sale of admissions, goods, performance of services, or furnishing of facilities in activities that are not unrelated trades or businesses.

See IRC § 6033(a)(3)(A)(i); Treas. Reg. § 1.6033-2(h).

[73] *See* "IRS Tax Guide for Churches and Other Religious Organizations," IRS Publ. 1828 (Rev. 6-2008) at 3 (available at http://www.irs.gov/pub/irs-pdf/p1828.pdf).

[74] Government programs are sometimes implemented by for-profit providers, or nonprofit providers that need not be 501(c)(3)s. In those cases, this rationale for seeking some type of formal recognition would not apply.

[75] *See, e.g.*, The Care Act of 2003 (S.476), Section 304 ("Expedited Review Process for Certain Tax-Exemption Applications") (available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:s476rs.txt.pdf). This Act was introduced in the Senate in 2003, but it was never subject to a vote. See also Harris Wofford, et al., "Finding Common Ground," at 22 (January 2002) (available at http://www.sfcg.org/programmes/us/report.pdf).

Recommendation 12: Promote other means of protecting religious liberty in the delivery of government-funded social services.

The Council recommends that the Administration comprehensively gather existing, successful means of keeping direct aid separate from explicitly religious activities and promote those means to faith-based providers that may receive such aid. In consultation with nongovernmental providers that receive (or have received) direct Federal social service funds, the Administration should develop a list of best practices regarding accounting procedures and tracking mechanisms that help facilitate and demonstrate the constitutional use of those funds. The Administration should then promote those methods among faith-based providers, which at once informs them of their constitutional obligations and offers them various means to meet those obligations.

Council members are almost evenly divided over the issue of whether the government should also require houses of worship that would receive direct Federal social service funds to form separate corporations to receive those funds. A narrow majority of the Council (13 members) believe the federal government should take such a step as a necessary means for achieving church-state separation and protecting religious autonomy, while also urging States to reduce any unnecessary administrative costs and burdens associated with attaining this status. A minority of the Council (12 members) believe separate incorporation is sometimes, but not always, the best means to achieve these goals and should not be required because it may be prohibitively costly and would disrupt or deter other successful and constitutionally permissible relationships.

Background and Explanation:

The Council believes that the Administration could very effectively promote compliance with constitutional requirements regarding the handling of direct aid—which have implications for church autonomy, church-state entanglement, and other important First Amendment principles—by providing faith-based providers with the full range of tools to achieve that compliance.

In particular, the Administration could develop a list of best practices regarding accounting procedures and tracking mechanisms that help nongovernmental social service providers to implement and demonstrate proper use of Federal direct aid. Of course, the Administration should develop this list in consultation with nongovernmental providers that have received Federal social service funds and have established exemplary records in terms of compliance and effectiveness.

One example of such a practice could be the creation and maintenance of a separate bank account for direct grant or contract funds. This step could make it easier for both the provider and the Government to ensure that direct aid is used only for constitutionally authorized purposes. It also would make it easier for the Government to identify the money it needs to scrutinize and regulate. Thus, this kind of practice would promote compliance with the constitutional principles prohibiting the use of direct aid for explicitly religious activities and prohibiting excessive church-state entanglement.

Council members are almost evenly divided over the issue of whether the government should also require houses of worship that would receive direct Federal social service funds to form separate corporations to receive those funds. A narrow majority of the Council (13

members) believe that, for the good of both church and state, the Government should also require houses of worship that would receive direct federal social service funds to form separate corporations to receive those funds.[76] They believe forming a separate corporation is a uniquely valuable and indispensable method for achieving the goals of church-state separation, church autonomy, accountability and transparency, and insulation from liability. At the same time, these Council members would also urge the Obama administration to call on States to explore whether their incorporation requirements place unnecessary burdens on bodies that would be required to form separate corporations.

A minority of the Council (12 members) believe that although separate incorporation is sometimes the best way to achieve these same goals, it should not be imposed as a one-size-fits all solution.[77] Depending on the provider's size, the type of program, and many other factors, the costs of separate incorporation may be prohibitive, the benefits may be slim or none, and the alternatives may be more effective. These members believe that it suffices for the Administration to provide guidance that fleshes out for faith-based providers, as thoroughly as is feasible, the full range of effective alternatives, including separate incorporation, so that faith-based providers can choose the methods that are best suited to their religious beliefs and polity, their proposed project with the Government, and their risk tolerance.

What follows is a summary of the deliberations among Council members surrounding the particular issue of separate incorporation.

* * *

Some Council members believe the Government should require churches and conventions or associations of churches to form separate corporations to receive direct Federal social service funds, while also urging States to reduce any unnecessary administrative costs and burdens associated with attaining this status.

The desire to maintain a separation between the institutions of church and state counsels in favor of interposing an additional corporate entity between the two. Allowing government funds to flow directly to houses of worship will inevitably result in government regulation and oversight of the activities of these core religious bodies. For example, if there are warning signs about possible misuse of tax funds by an organization, the Government may search beyond an account the organization would deem to be the separate one holding government funds. If the organization is a house of worship, this search could raise profound concerns about governmental intrusion into church autonomy. If the house of worship forms a separate corporation, however, it would be much more difficult for the Government to assert a legitimate basis for looking into church records. These Council members believe there is value for both church and state in ensuring that this core sector of the religious community—houses of worship—is free from government subsidies and corresponding oversight.[78]

Likewise, the formation of a separate corporation would help shield the church from liability. In the event successful claims are made against the separate corporation, a court would generally limit recovery of claims to the assets of the separate entity.

[76] These Council members are Diane Baillargeon, Anju Bhargava, Charles Blake, Fred Davie, Harry Knox, Vashti McKenzie, Otis Moss, Nancy Ratzan, Melissa Rogers, David Saperstein, Bill Shaw, Jim Wallis, and Sharon Watkins.
[77] These Council members are Noel Castellanos, Arturo Chavez, Peg Chemberlin, Nathan Diament, Joel Hunter, Dalia Mogahed, Frank Page, Eboo Patel, Anthony Picarello, Larry Snyder, Richard Stearns, and Judy Vredenburgh.
[78] And, as described in Recommendation 6, entities receiving government grants or contracts would need to separate any privately funded religious activities from taxpayer-funded activities. Entities that would not agree to such a separation should not receive direct government aid. [79] *See supra* n.2 and associated text in the body of this report.

Some Council members believe it is not only prudent to require this separation, they also believe constitutional concerns are implicated here, at least with regard to monetary aid that the Government directs to houses of worship.[79] The Supreme Court has said it is "correct to extract from our decisions the principle that we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions."[80] And some justices have noted that the Court's "concern with direct monetary aid is based on more than just diversion of the aid to religious use" and that "the most important reason for according special treatment to direct money grants is that this form of aid falls precariously close to the original object of the Establishment Clause's prohibition."[81] These Council members believe that prohibiting the Government from directing monetary aid to houses of worship is an essential step in maintaining our Nation's proud tradition of church-state separation, a tradition that has helped to foster a strong and independent religious sector.

Even if requiring separate incorporation were not constitutionally required, it is good public policy for all the reasons described above. It is quite legitimate—and necessary, these Council members believe—for the Government to require houses of worship that wish to receive direct government funds to form separate corporate entities as a way to avoid intrusions into these core religious bodies, maintaining a clear distinction between the institutions of church and state, and avoiding some of the most difficult church-state conflicts.

And while these Council members recognize there is no perfect symmetry between exemption and limitation in this area, they believe requiring congregations to form separate corporations to receive direct government funds would be in line with other special legal protections for churches. For example, churches and conventions or associations of churches benefit from special restrictions on IRS inquiries and examinations into their operations.[82] These bodies also are exempt from registration under the Lobby Disclosure Act.[83] If the Government treats churches specially with regard to their eligibility for government funding (requiring congregations that wish to seek direct government funds to form separate corporations), some Council members believe this will help safeguard special treatment on the other side of the coin—special protections for congregational autonomy.[84]

It is also worth noting that some congregations have joined together to form a corporation collectively to receive and administer government social service funds. This entity is separate from the congregations. Congregations may do this on an interfaith basis or in partnership with secular groups. Alternatively, congregations of the same faith group may unite to form a corporation separate from all of their respective houses of worship. These arrangements can make it possible for small congregations to play a role in administering government social service programs without having to bear the full burden of establishing

[79] *See, supra* n.2 and associated text in the body of this report
[80] *See, e.g., Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819, 842 (1995).
[81] *Mitchell v. Helms*, 530 U.S. 793, 856 (O'Connor & Breyer, JJ., concurring in the judgment).
[82] *See* IRC Section 7611.
[83] The Lobbying Disclosure Act provides that "[t]he term 'lobbying contact' does not include a communication" that is made by "a church, its integrated auxiliary, or a convention or association of churches that is exempt from filing a Federal income tax return under paragraph 2(A)(i) of section 6033(a) of title 26," 2 U.S.C. § 1602(8)(B)(xviii)(2010).
[84] *See* Melissa Rogers and E.J. Dionne, *Serving People in Need, Safeguarding Religious Freedom*, at 39 (2008) ("A strong case can be made that the more equitable and consistent position is to recognize there is a rough symmetry of exemption and limitation under First Amendment principles"), available at http://www.brookings.edu/~/media/Files/rc/papers/2008/12_religion_dionne/12_religion_dionne.pdf. [85] National Congregations Study available at http://www.soc.duke.edu/natcong/explore.html.

their own separate corporation. Also, when a church creates a separate corporation, that corporation would be free to use physical space in church buildings to provide government-funded social services, assuming the church agrees to such use.

Many religiously affiliated organizations receive government funding, but National Congregations Study data from 1998 and 2006 to 2007 show that only 4 percent of congregations receive government funding.[85] Likewise, a 2007 study found that "government grant activity was rare among congregations…"[86] Still, because some houses of worship currently receive government funding for some of their social service work, we think it makes sense to ensure that the provision of service under current arrangements is not disrupted and to carefully consider the impact of new requirements on the effective delivery of services to beneficiaries.

Toward this end, these Council members urge the Obama administration to call on States to explore whether their incorporation requirements place unnecessary burdens on bodies that would be required to form separate corporations.[87] The integrity of the incorporation process must be maintained. But, as with the system by which an organization obtains formal status as a 501(c)(3) tax-exempt entity, State laws on incorporation may sometimes place burdens on these providers that are onerous and yet serve no significant purpose.[88] The Administration should urge each State to explore this issue. One way it could do so is to create a taskforce composed of State and Federal governmental officials, as well as representatives of small social service providers, to examine this issue and propose solutions where problems are identified. The Administration also could urge the National Association of Governors and other appropriate State bodies to put this item on their agendas for consideration. The Government can and should promote church-state separation and religious liberty while being sensitive and responsive to the practical challenges providers face and the urgent needs of beneficiaries.

In sum, for the reasons described above, we believe the Government should move toward a system that requires houses of worship to form separate corporations to receive direct government funding. But we recognize that this must be done carefully, and perhaps incrementally, and only in a way that recognizes and addresses any unnecessary burdens this might place on these providers and any disruptions this would cause in the delivery of needed social services.

* * *

Other Council members share the same basic goals—assuring compliance with separation requirements, protecting church autonomy, limiting liability, and promoting public accountability and transparency—but differ on the best means of achieving them. Forming a separate corporation is surely the best solution in some cases, but it is just as surely not the best—and may be the worst—in other cases. These members are particularly concerned that a blanket requirement of separate incorporation would disrupt some very

[85] National Congregations Study, available at http://www.soc.duke.edu/natcong/explore.html

[86] John C. Green, *American Congregations and Social Service Programs: Results of a Survey* (Rockefeller Institute of Government, December 2007) at 41 (random sample of 1,800 congregations taken from the lists of congregations provided by American Church Lists).

[87] State law generally governs the requirements for incorporation.

[88] *See* Recommendation 11.

effective, longstanding, and existing relationships with faith-based service providers. Such a requirement also would deter new ones from forming, all with little or no upside benefit, because the same goals can be achieved by less restrictive means.

Consider the example of protecting church autonomy. Many, if not all, Council members are keenly aware that accepting government funds may pose certain risks to religious institutional autonomy. But the risks vary in many ways—some risks are more likely to materialize than others; some risks have greater impact if they materialize than others; and the probability and impact of some risks can be reduced more easily than others. Risks also vary among providers, with different institutional structures; among religious traditions, with different levels of comfort in working with the Government; and among government programs, with different funding mechanisms and relationships with providers.

Not only might these risks to church autonomy be small in particular cases, they must be balanced against the administrative burdens of establishing the separate organization and maintaining that separate form consistent with generally accepted accounting rules and IRS requirements. These burdens would weigh more heavily on smaller religious 501(c)(3)s, and so would likely deter many of them from entering or continuing a financial relationship with the Government.

In addition, some Council members emphasize that the Government should not decide—least of all categorically by a blanket rule—how much risk to a church's institutional integrity is too much and which institutional forms best mitigate those risks. The church autonomy concerns that all Council members share may well prompt many churches to decide *for themselves* that they are better off establishing a separate corporation to accept government funds. But it is quite another thing for the *Government* to make that decision on *churches'* behalf. Church-state separation is eroded, not reinforced, when government acts with the purpose of protecting churches from themselves. That separation is further eroded when the government action is a requirement to change the church's institutional form.

The example of church autonomy illustrates the breadth of the variables and the complexity in weighing them, which counsels in favor of allowing a fact-specific, case-by-case assessment of whether to form a separate corporation and against a blanket rule requiring it.

Speaking more broadly, in relation to all the goals Council members hope to achieve, key variables include the number, size, and duration of anticipated grants or contracts relative to the size, budget, and capacity of the Self-Declared 501(c)(3).[89] Imagine, for example, a large church that decides to bid on Federal funding that would represent a very small proportion of the church's budget and that would provide secular job training services to the neighborhood surrounding the church for a fixed term of 2 years.

Is it really the case that such a small amount of money for such a short period of time warrants the formation of an entirely separate corporation and that no other method of segregating the funds will do? That the church's receipt of these funds for this project "will inevitably result in government regulation and oversight of the activities" of the church, apart from the particular program? That participation in a terminal program will meaningfully tempt the church not to speak out prophetically against the Government when it otherwise might? That the terms of the Government's grant or service contract—which may require segregation of funds, the ability to audit relevant accounts and program performance, and whatever other measures would provide the Government sufficient

[89] *See Id*

transparency and accountability in its dealings with any other provider—would somehow prove insufficient for such a faith-based provider? That insurance would be unavailable to cover any liability risks associated with the program?

These Council members think not—or more precisely, think that reasonable religious institutions might think not, and so should not be compelled to alter their corporate structure as a condition of participating in a program like the one described above. In fact, many Self-Declared 501(c)(3)s have chosen *not* to create a separate corporation under circumstances like these, and have provided human services with government funds effectively, efficiently, and within constitutional bounds. These relationships would be disrupted (and similar, future relationships would be deterred) by any blanket rule requiring all churches and conventions or associations of churches to form a separate corporation.

These Council members also do not believe that the First Amendment categorically forbids churches or other Self-Declared 501(c)(3)s from receiving government funds. To be sure, these entities must take care to assure that government funds pay only for secular services, but this task is—to understate the point—at least possible for at least some Self-Declared 501(c)(3); establishment of a distinct corporation is not the only way to achieve the requisite separation. If, for example, a church offers job training in Microsoft Office in its basement, and the training serves secular purposes, has no religious content, and the supporting government funds are properly segregated and accounted for, the bare fact that the service provider happens to be a church or convention or associations of churches should be irrelevant under the Establishment Clause.[90] Indeed, to disqualify a service provider simply because it is "too religious" generates, rather than alleviates, First Amendment concerns.

Some Council members also question whether the formation of a separate corporation is an effective remedy to separationist concerns. Forming a separate corporation is not a panacea—nothing prevents that corporation from becoming just as religious as the original Self-Declared 501(c)(3) from which it derives. In contrast, by taking other steps more closely tailored to the problem—such as creating segregated bank accounts, accounting, and auditing systems, or even other noncorporate entities, such as trusts or single-member LLCs—a Self-Declared 501(c)(3) could achieve a *more* effective separation. Accordingly, these members believe that the Administration would do more to promote constitutional

[90] The controlling opinion in *Mitchell v. Helms*, 530 U.S. 793, 836-67 (2000)—the concurrence of Justice O'Connor, joined by Justice Breyer—underscored that the mere *potential* for direct aid to be diverted to religious indoctrination does not violate the Establishment Clause, and that instead, a plaintiff must *prove* that the aid was *actually* diverted in order to prevail. *Id.* at 857-58. Organizations with an adequate system of internal safeguards are presumed to follow them in good faith, and so to comply with Establishment Clause requirements, unless proven otherwise. *Id.* at 863. *See also supra* n.3 and associated text in the body of this report.

compliance by providing faith-based providers with more nearly comprehensive guidance regarding the various ways they might achieve that goal—by identifying all of the tools in the toolbox, rather than insisting on the use of just one.

APPENDIX

Safeguards Required

1. **Separate and Distinct Programs**

Any abstinence education program with religious content must be a separate and distinct program from the federally funded abstinence education program, and the distinction must be completely clear to the consumer. Some of the ways in which this may be accomplished include, but are not limited to, the following examples:

- Creating separate and distinct names for the programs;
- Creating separate and distinct looks for the promotional materials used to promote each program; and
- Promoting *only* the federally funded abstinence education program in materials, websites, or commercials purchased with *any portion* of the federal funds.

45 CFR 87.1(c). ("Organizations that receive direct financial assistance from the Department under any Department program may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services funded with direct financial assistance from the Department."). 69 Fed. Reg. 42586, 42593 (2004).

2. **Separate Presentations**

Completely separate the presentation of any abstinence education program with religious content from the presentation of the federally funded abstinence education program by time or location *in such a way that it is clear that the two programs are separate and distinct*. If separating the two programs by time but presenting them in the same location, one program must *completely* end before the other program begins.

Some of the ways in which separation of presentations may be accomplished include, but are not limited to, the following examples:

- **The programs are held in completely different sites or on completely different days.**
- **The programs are held at the same site <u>at completely different times</u>.** Separation may be accomplished through such means as:
  - Have sufficient time between the two programs to vacate the room, turn down the lights, leave the stage, etc. in order to reasonably conclude the first program before beginning the second;
  - Completely dismiss the participants of the first program;
  - The second program could follow in the same room or, where feasible, in a different room to further distinguish the difference between the programs.

- **The programs are held in different locations of the same site <u>at the same time</u>.** Separation may be accomplished through such means as:
  - Completely separate registration locations; and
  - Completely separate areas where programs are held such as by room, hallway, or floor, etc.

45 CFR 87.1(c). ("If an organization conducts [inherently religious] activities, the activities must be offered separately, in time or location, from the programs or services funded with direct financial assistance from the Department...."). 69 Fed. Reg. 42586, 42593 (2004).

Note: federal guidelines that have been drafted for situations where a federal grantee also provides religious programming use examples where an organization offered programs that are completely different from each other such as a soup kitchen and a prayer meeting. Because the SRT organization offers two programs that both promote abstinence until marriage and because the clients served are children, it is very important that the separation between the programs be accentuated.

3. **Religious Materials**

Eliminate all religious materials from the presentation of the federally funded abstinence education program. This includes:

- Rings with religious messages;
- Bibles;
- Abstinence vows with religious references;
- Registration materials that include religious inquiries or references;
- Follow up activities that include or lead to religious outreach; and
- Religious content in parent materials.

45 CFR 87.1. (c). ("If an organization conducts [inherently religious] activities, the activities must be offered separately, in time or location, from the programs or services funded with direct financial assistance from the Department....") 69 Fed. Reg. 42586, 42593 (2004).

4. **Cost Allocation**

Demonstrate that federal funds are only being used for the federally funded abstinence education program. Some of the ways in which separation of funds may be accomplished include, but are not limited to, the following examples:

- Implement the use of time sheets that keep track of all staff hours charged to the federally funded grant, whether the staff work in other programs or not.
- Require any staff working in both federally funded programs and other programs to clearly indicate how many hours are spent on each program.
- If any staff work on both a federally funded program and a non-federally funded

program at the same site on the same day, require the staff to clearly indicate not only how many hours are spent on the federal program but also which specific hours are spent on the federal program. The hours should reflect that time spent on any abstinence education program with religious content have been completely separated from hours spent on the federally funded abstinence education program.

- Show cost allocations for all items and activities that involve both programs such as staff time, equipment, or other expenses such as travel to event sites.
  This may be accomplished through such means as:
  - Example: if transportation is used to go to a site where a federally funded abstinence education program is conducted and a religious or non-religious program funded through other means is also conducted by the grantee at the same site, one half of the travel costs (gas, lodging, etc.) should be charged to the federal program. If *three* separate and distinct programs are conducted at a site by a federally funded grantee and one of them is the federally funded program, only one third of the travel costs should be charged to the federal program, etc.
  - Example: if an electronic device is used 30% of the time for federally funded abstinence education program, this should be demonstrated through clear record keeping. Only 30% of the cost of the electronic device should be charged to the program.

OMB Circular A-I22, Attachment A. Section A.4.a.(2); 45 C.F.R.. 87.1.

5. **Advertisements**

Federally funded programs cannot limit advertising the grant program services to only religious target populations.

45 CFR 87.1 (e). ("An organization that participates in programs funded by direct financial assistance from the department shall not, in providing services, discriminate against a program beneficiary or prospective beneficiary on the basis of religion or religious belief.")

6. **Invitation to Religious Program**

At the end of the federally funded abstinence education program, grantee may provide a brief and non-coercive invitation to attend the religious abstinence education program.

The invitation should make it very clear that this is a separate program from the federally funded abstinence education program, that participants are not required to attend, and that participation in federally funded programs are not contingent on participation in other programs sponsored by the grantee organization.

Religious materials, such as the Silver Ring Thing Bible, a ring with religious elements, and registration that includes religious follow-up may only be provided in the privately funded program rather than the federally funded program.

45 CFR 87.1 (c). ("participation [in any privately funded inherently religious activities] must be voluntary for beneficiaries of the programs or services funded with [direct federal financial] assistance.") 69 Fed. Reg. 42586, 42593 (2004).