



February 18, 2003

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Ms. Winnie Mitchell
Office of Policy, Planning, and Budget
Substance Abuse and Mental Health Services Administration
5600 Fishers Lane
Parklawn Building
Rockville, Maryland 20857

Re: Charitable Choice Regulations Applicable to the Substance Abuse Prevention and Treatment Block Grants, PATH Formula Grants, Discretionary Grant Funding under SAMHSA; Docket Number fr17de02-21

Dear Ms. Mitchell:

On behalf of the Legal Action Center, I am writing to submit comments regarding the charitable choice regulations applicable to the Substance Abuse Prevention and Treatment Block Grants, PATH Formula Grants, and Discretionary Grant Funding under SAMHSA, which were published in the Federal Register on December 17, 2002. Legal Action Center submits comments to help ensure legal, fair, and effective implementation of this critical funding of drug and alcohol treatment and prevention services nationwide.

Faith-based organizations should be encouraged to provide quality alcohol and drug treatment and prevention services. Religious organizations play an important role in reducing alcohol and drug problems and many faith-based organizations run excellent addiction treatment and prevention programs. Additionally, spirituality is a key part of many self-help groups that have assisted hundreds of thousands of people achieve sobriety and remain in recovery.

At the same time, faith-based alcohol and drug programs must be held accountable to the same standards of care, performance and licensure or certification as all other licensed or certified programs so that patients receive appropriate, quality care for this medical condition. The American Medical Association has recognized alcohol and drug addiction as a disease for a half-century, and ground-breaking studies by the National Institutes on Drug Abuse and Alcohol Abuse and Alcoholism have identified a relationship between addiction and both genetics and persistent changes in brain structure and function.

Just as with health and medical care for other illnesses, States must have the power to require uniform licensing or certification of all addiction treatment programs, including those provided by faith-based groups, to avert malpractice and maximize the life-saving power of these services. Indeed, many faith-based programs currently operate effectively around the country while being held accountable to such standards. The federal government should not undermine the current practice of States to license or certify treatment programs and credential staff.

Similarly, faith-based drug and alcohol treatment and prevention programs that receive federal funding should conform to principles of religious tolerance and inclusiveness. Specifically, programs receiving federal funding should refrain from proselytizing clients and should deliver services to a person regardless of his or her religious affiliation or beliefs. The Proposed Rule should be clarified to require that notice be given to all beneficiaries at the outset of their receipt of services that they have the right to request an alternative, non-religious provider. If a beneficiary is uncomfortable with a religious element in a treatment program, there should be a requirement that a non-religious drug and alcohol provider will be provided to a beneficiary who objects to a faith-based provider. Presently, the Proposed Rule does not require this alternative, but only requires that another provider is offered to which the client has no religious objection.

Additionally, because of the potentially life-threatening nature of the disease of addiction, alternative treatment services of equal value should be located and clients should be referred on as quickly as possible, preferably within 24 hours of their request for alternative services. Governmental entities and leaders in the treatment field can help ensure that there are a range of alternative services available by reviewing the continuum of care that is presently funded and investing new funding in parts of the continuum that need strengthening – where access to care is weakest. Frequently, in the drug and alcohol treatment system, higher cost care, such as detoxification, residential treatment and halfway housing, are places where the continuum needs more investment. Ensuring that each community is reviewing their drug and alcohol treatment services system and making informed choices about how and where to invest new dollars will help to strengthen the services system and ensure that alternative services are available when clients need them.

Governmental entities, which are the public funders of drug and alcohol treatment, should finance the alternative services. It should not be incumbent on providers to finance services that are not provided by their programs. In a system that includes faith-based providers, rejection of their services by clients should be considered a possibility and factored into their contract with the government for public funding.

Finally, when referring and tracking a client’s referral to alternative services, as referenced in the Proposed Rule, it is important to ensure that confidentiality protections under 42 C.F.R. Part 2 and HIPAA are met. For the referral process contemplated in the Proposed Rule, in which a faith-based provider would refer a client to an alternative provider and subsequently communicate with the alternative provider about the referral, the faith-based provider should get from the client a two-way consent form that would permit the faith-based and alternative providers to discuss whether the client presented for treatment at the alternative provider’s program. To provide a more detailed legal analysis of confidentiality requirements under 42 C.F.R. Part 2 and HIPAA, more specific details of the referral and tracking processes would be required.

Faith-based programs receiving SAMHSA funds or assistance should not be permitted to discriminate based on religious beliefs when hiring staff for their programs. In addition to language in SAMHSA’s authorizing statute imposing religious non-discrimination requirements on the employment practices of SAMHSA program participants, longstanding principles of constitutional law prohibit the government from funding positions that are filled based on discriminatory criteria. The Supreme Court held in *Norwood v. Harrison*, 413 U.S. 455, 465-66 (1973), that “the Constitution does not permit the state to aid discrimination.” The Supreme Court has further held that “[i]t is . . . axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492-93 (1989) (quoting *Norwood*, 413 U.S. at 466). Governmental discrimination based on religion is prohibited by three separate clauses of the Constitution -- the Establishment Clause (see *County of Allegheny v. ACLU*, 492 U.S. 573, 590 (1989)), the Free Exercise Clause (see *McDaniel v. Paty*, 435 U.S. 618, 629 (1978)), and the Equal Protection Clause (see *Burlington Northern Railroad Co. v. Ford*, 504 U.S. 648, 651 (1992)).

Accordingly, the courts have uniformly struck down government-funded religious discrimination. In *Dodge v. Salvation Army*, 48 Empl. Prac. Dec. & 38,619, 1989 WL 53857 (S.D. Miss. Jan. 9, 1989), the court ruled that the Establishment Clause prohibits the government from financing a position with a private employer if the employer discriminates based on religion. In *Robinson v. Price*, 553 F.2d 918, 920 (5th Cir. 1977), *appeal after remand*, 615 F.2d 1097, 1099-1100 (5th Cir. 1980), the Fifth Circuit held that a violation of the Free Exercise Clause would be shown if facts presented at trial demonstrated that a state-funded, non-profit, anti-poverty agency discriminated based on religion in firing an employee. And, in *Voswinkel v. City of Charlotte*, 495 F. Supp. 588, 595-96 (W.D.N.C. 1980), the court ruled that a city could not constitutionally pay the salary of a police chaplain provided by a church because a religious test was used to select the chaplain. Yet the Proposed Rule does not enforce this legal principle and fails to inform drug and alcohol treatment providers that they cannot discriminate in hiring based on religion with respect to government-funded programs. The Proposed Rule should be amended to prevent religion-based employment discrimination with government funds.

The Proposed Rule should better preserve state and local laws. The preemption clause in the Proposed Rule recognizes the applicability of state constitutional and statutory provisions that prohibit or restrict the use of state funds by religious organizations. However, it does not recognize the applicability of these provisions to the use of federal funds allocated by or within the states to drug and alcohol treatment programs. Furthermore, the Proposed Rule fails to recognize the potential application of local laws and regulations, adopted at governmental levels within a state. The Proposed Rule should be modified to make clear that state and local governments will be allowed to enforce state and local provisions that restrict or prohibit the use of funds by religious organizations.

Furthermore, states receiving federal Substance Abuse Prevention and Treatment Block Grant funding must expend a qualified amount of non-federal funds, i.e., state or local funds, in order to comply with Maintenance of Effort (MOE) requirements. The Proposed Rule assumes the extension of charitable choice provisions to such state and local funds. The Proposed Rule should be amended to protect the ability of state and local governments to establish guidelines for distributing these funds.

And while the details of the new drug and alcohol treatment voucher program recently announced by the President in his State of the Union Address are still unfolding, there are several issues to review as the program is developed and implementation is contemplated. These issues include:

- **Ensuring that the program works to expand the drug and alcohol treatment system.** The SAPT Block Grant provides the lion's share of federal public funding for the drug and alcohol treatment system. Services that presently are funded with these dollars rely on these funds to provide urgently needed services in communities, especially during a time when States are facing the greatest budget crisis since WWII and are slashing state support for these services. Before approving voucherization of SAPT Block Grant resources, SAMHSA should consider how that change in resource allocation will affect the system of care that is already in place. Transferring SAPT Block Grant funding into a voucher program may put good providers out of business because they will not be able to predict a certain number of voucher referrals and without predictable funding they will be unable to pay their rent, staff, and bottom line costs that allow them to keep program doors open. As a result, voucherization of SAPT Block Grant funds could reduce access to drug and alcohol treatment services as opposed to expand access to these critical services.
- **Improving the program's constitutional safeguards in order to protect beneficiary choice.** The recent Supreme Court decision *Zelman v. Simmons Harris*, __ U.S. __, 122 S.Ct. 2460 (2002), which allowed the use of vouchers at religious schools, established a strict set of requirements that must be met in order to find a voucher program constitutional. According to the Court, a voucher program must be completely neutral with respect to religion, use of vouchers at a religious institution must be a wholly

genuine and independent private choice, the vouchers must pass directly through the hands of the beneficiaries, the voucher program must not provide incentives to choose a religious institution over a non-religious one, the program must provide genuine, legitimate secular options, and there must be a secular purpose for the program. *Id.*

The Proposed Rule does not completely meet these criteria because it does not limit vouchers to those markets in which wide-ranging secular options are available. One way in which the Proposed Rule fails this test is that it does not require that a secular option be made available to a beneficiary who objects to a religious program. Rather, he or she must be given an alternative provider that “need not be a secular organization. It must simply be a provider to which the recipient has no religious objection.” Because the Proposed Rule fails to require a secular drug and alcohol treatment program be made available as an option, and does not limit vouchers to those areas in which an array of secular options are available, it does not yet meet all constitutional requirements. As the voucher program is designed and implemented, it should be developed in such a way as to meet all constitutional requirements by providing beneficiaries an array of choices, including both secular and faith-based drug and alcohol treatment provider.

- **Protecting States, local governments, and drug and alcohol treatment providers against unfunded mandates.** Because the voucher program is a new program that will have some separate administrative systems attached to it at the State, local government and treatment provider level, it is important that states are able to use voucher grant or other federal funding to pay for these costs. For example, it will be difficult for States, local governments, and providers in these tough budget times to absorb the tracking costs associated with the important performance measurement aspects of the voucher proposal. It is key that either voucher funding or other federal technical assistance funding be made available to fund the implementation of such a system so that States, local governments, and providers will not lose money implementing a new system or be unable to implement key aspects of the new program because of lack of financing.
- **Ensuring that the voucher program supports evidence-based practice.** The science of addiction treatment has advanced greatly during the last several years, with genetic studies, brain imaging and medication development. Evidence-based practice is growing stronger and transferring this technology into the drug and alcohol treatment system has and will continue to bring great advancements to treatment practice. It is important that the focus on evidence-based treatment continue and that drug and alcohol treatment expansion efforts help to support access to this cutting-edge care because it will save lives and improve the effectiveness of the services provided.

Within the parameters articulated above, our nation should support and expand funding for the full continuum of quality alcohol and drug treatment and prevention services that meet performance and other professional standards, regardless of whether the provider is faith-based.

Thank you for considering Legal Action Center's comments. If you have any questions or need additional information, please feel free to call me at (202) 544-5478, x13, or email me at jcollier@lac-dc.org.

Sincerely,

Jennifer Collier
Director of National Policy and State Strategy