February 20, 2015

Submitted Electronically

Office of Refugee Resettlement
370 L'Enfant Promenade SW, 8th Floor West
Washington DC 20024
Attn: Elizabeth Sohn

Re: Comments on Interim Final Rule on Unaccompanied Children

Dear Ms. Sohn:

On behalf of the United States Conference of Catholic Bishops, the National Association of Evangelicals, World Vision, Inc., Catholic Relief Services, and World Relief, we respectfully submit the following comments on the interim final rule on standards to prevent, detect, and respond to sexual abuse and sexual harassment involving unaccompanied children. 79 Fed. Reg. 77768 (Dec. 24, 2014).[1]

Background

Faith-based organizations play an important role in providing services for unaccompanied children, and newcomer populations in the United States in

[1] Not all of the signers of this letter participate in the particular program at issue here, but all share the same concerns about accommodating the religious and moral convictions of organizations that participate in government programs.

general. In fact, humanitarian assistance in this country, whether to migrants and refugees or otherwise, began through faith-based and church-affiliated responses to those in need. These voluntary responses of the faith community are older and more deeply rooted than the responses of the federal government or secular humanitarian organizations. Even today, the reach of faith-based organizations in providing humanitarian services is extensive, from the local to national and international levels.

Catholic, evangelical and many other faith-based organizations are motivated to serve by their religious and moral convictions to protect human life, especially at its most vulnerable. This is why these faith-based organizations represent such a significant proportion of grantees serving the unaccompanied minor population. Indeed, it is likely that the federal government would not be able to achieve its goal of caring for this and similar populations assisted by ORR without faith-based organizations. Currently, six out of nine national refugee resettlement agencies in this country are faith-based organizations, including the USCCB, which is the largest in terms of persons served, and World Relief, which mobilizes the resources of the evangelical community. Together these organizations resettle the majority of refugees entering the United States each year.

Faith-based organizations also have a comparative advantage in garnering trust among newcomers to this country, including unaccompanied minors. For example, the unaccompanied minor population often trusts church-affiliated organizations because these are the entities providing the most support and assistance in their home countries—countries where their own governments often cannot protect them from persecution, or may even be the source of persecution. It is within this context that the federal government should recognize the importance of not discriminating against religious and other organizations with moral or religious convictions regarding the services provided to children.

Analysis

The interim final rule falls short of adequately protecting existing and prospective grantees, contractors, subgrantees and subcontractors with religious or moral objections to providing, facilitating the provision of, providing information about, or referring or arranging for, items or procedures to which such organizations have a religious or moral objection.

The deficiency is particularly evident in regard to two provisions of the interim final rule. First, the rule provides that care provider facilities must provide unaccompanied children who are victims of sexual abuse with "timely, unimpeded access to … *emergency contraception*…." 79 Fed. Reg. at 77798 (emphasis added). Second, the rule provides that if pregnancy results from an instance of sexual abuse, care provider facilities "must ensure that the victim receives timely and comprehensive information about *all* lawful pregnancy-related medical services and timely access to *all* lawful pregnancy-related medical services." *Id*. (emphasis added). "All" lawful pregnancy-related procedures apparently includes abortion.

The text of the rule includes no religious or moral exception. Nonetheless, ORR acknowledges in the preamble to the rule that "some potential and existing grantees and contractors may have religious or moral objections to providing certain kinds of services, including referrals (for example, for emergency contraception)." 79 Fed. Reg. at 77784 (preamble). ORR states that it is "committed to providing ways for organizations to partner with us, even if they object to providing specific services on religious grounds." *Id*. The preamble outlines three ways that purport to achieve this goal: an organization with such an objection may (a) serve as a subgrantee that does not provide every service, (b) participate in a consortium in which another organization provides the objected-to item or procedure, or (c) notify the federal government that an unaccompanied child "may qualify for or be entitled to any program services, including referrals, to which the organization has a religious objection." *Id*.

We have several comments.

First, while it is commendable that ORR is looking for ways to accommodate organizations with a conscientious objection, any meaningful accommodation, in our judgment, should be included in the text of the final rule, not relegated to the preamble. The preamble to a published regulation typically provides an overview or explanation of what is in the regulation itself. And clearly the regulation is what regulators and participants in the program will chiefly look to in deciding what is or is not required in the program. Here, the regulation is silent with respect to religious or moral accommodations. We believe this omission should be corrected by the adoption of a meaningful accommodation in the text of the regulation.

Second, in the preamble to the rule, ORR refers at times to "religious or moral objections," but at other times only to "religious" objections. 79 Fed. Reg. at 77784. With regard to abortion, sterilization, and other morally controverted items or procedures offered by health professionals, federal law for over 40 years has accommodated conscientious objections whether grounded in religious or moral convictions. *See, e.g.*, 42 U.S.C. § 300a-7(b) (stating that no individual or entity may be required to perform or assist in abortion or sterilization contrary to its "religious beliefs or moral convictions"); 42 U.S.C. § 2996f(b) (denying federal funding for legal assistance that seeks to compel an individual or institution to perform or assist in the performance of an abortion contrary to its "religious beliefs or moral convictions"); 42 U.S.C. § 1396u-2(b)(3) (stating that managed care organizations participating in the Medicaid program are not required to provide, reimburse for, or provide coverage of a counseling or referral service to which they have a "moral or religious" objection); 42 U.S.C. § 1395w-22(j)(3)(B) (same policy regarding organizations participating in the Medicare program). Consistent with this longstanding federal policy, ORR should clarify that any accommodation it adopts applies to both religious and moral convictions.

Third, the options outlined in the preamble are inadequate to protect existing and prospective grantees, contractors, subgrantees and subcontractors with conscientious objections to particular items or procedures.

Under the first option proposed by ORR, an organization with a conscientious objection can serve as a subgrantee. This will have the effect of disqualifying our organizations from being primary grantees, the very organizations that have the most experience in providing services to unaccompanied minors and are best qualified to serve as grantees. Such a discriminatory effect would immediately work to the detriment of the children who are the intended beneficiaries of the program.

Under the second option proposed by ORR, an organization with a conscientious objection to a particular item or procedure can participate in a consortium in which a member of the consortium that does not share the objection provides the objected-to item or procedure. This, however, may require the objecting organization, contrary to its moral or religious convictions, to refer for, or otherwise make arrangements for unaccompanied children to obtain, the very item or procedure to which the organization has a moral or religious objection.

Under the third option proposed by ORR, an organization with a conscientious objection may participate in the program if it informs the government that an unaccompanied child "may qualify for or be entitled to any program services, including referrals, to which the organization has a religious objection." 79 Fed. Reg. at 77784. But this third option may create a problem similar to the one described above in relation to the second option, *i.e.*, by imposing a duty on the conscientious objector to refer for the very item or procedure to which it has a religious or moral objection.

Fourth, accommodating the religious beliefs of existing and prospective grantees, contractors, subgrantees and subcontractors is not only *consistent* with longstanding federal policy, but *required* as a matter of law. The Religious Freedom Restoration Act ("RFRA") forbids the federal government to substantially burden the exercise of religion, even if the burden results from a rule of general applicability, unless it is in furtherance of a compelling government interest and is the means of furthering that interest that is least restrictive of religious freedom. 42 U.S.C. § 2000bb-1.

RFRA applies to the denial of government grants and contracts for three independent and mutually reinforcing reasons. First, the statute "applies to all Federal law, and the implementation of that law, whether statutory or otherwise…." 42 U.S.C. § 2000bb-3. Second, the stated purpose of RFRA, as set forth in 42 U.S.C. § 2000bb(b)(1), is "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963)," a case that involved denial of government benefits. Third, and most importantly, RFRA makes specific reference to government funding. The relevant text (42 U.S.C. § 2000bb-4) states:

> *Granting* government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause shall not constitute a violation of this chapter [i.e., RFRA]. As used in this section, the term "granting," used with respect to government funding, benefits, or exemptions, *does not include the denial of government funding, benefits, or exemptions*. [Emphasis added.]

Since "granting" funding is not a violation of RFRA, but "granting" does not include "the denial of funding," Congress clearly contemplated that a denial of

government funding may be a violation of RFRA.[2] Whether denial of funding is a violation in a particular case, of course, depends on whether religious exercise is substantially burdened by government action that is not narrowly tailored to further a compelling government interest.

There is little question that a government requirement to provide or refer for items or procedures to which an organization has a religious and moral objection would impose a "substantial burden" on its exercise of religion. If a condition on the availability of benefits "forc[es] [an institution] to choose between following the precepts of [its] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [its] religion in order to [qualify for benefits], on the other hand," the government has "put[] the same kind of burden upon the free exercise of religion as would a fine imposed against [the institution] for [its exercise of religion]." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963), quoted in the legal opinion of the Department of Justice's Office of Legal Counsel, *supra* n.2, at 12.

Once a substantial burden is demonstrated, the government bears the burden of proving that its action is the least restrictive means of furthering a compelling government interest. 42 U.S.C. § 2000bb-1(b). As a unanimous Supreme Court emphasized last month, this standard has teeth. A "broadly formulated interest" does not suffice for purposes of demonstrating a compelling interest. *Holt v. Hobbs*, 135 S. Ct. 853, 863 (2015). Instead, the government must prove that its action furthers a compelling interest as applied to the *specific* individuals or organizations whose religious convictions are thereby burdened. *Id*. at 863. The least-restrictive-means standard, in turn, is "exceptionally demanding" and requires the government to show "that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party." *Id*. at 864. "If a less restrictive means is available for the Government to achieve its goals, the Government must use it." *Id*.

[2] The Department of Justice's Office of Legal Counsel has also concluded that RFRA applies to government funding. Office of Legal Counsel, Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act, June 29, 2007, at http://www.justice.gov/sites/default/files/olc/opinions/2007/06/31/worldvision.pdf. Others have reached the same conclusion. *See* Letter of Douglas Laycock to Eric Holder, Nov. 13, 2009, at http://www.ecfa.org/Files/LaycockHolderReRFRA.pdf.

We do not believe that the government can meet its burden under RFRA in the context of its proposed program for unaccompanied minors. Indeed, over a period of several years, the USCCB has participated in the ORR program by serving unaccompanied minors *without* the constraints that the interim final rule would create. Yet there have been no reported problems in terms of services to clients. The final rule therefore does not seem to remedy an actual problem or to address any actual past adverse impact on clients served. Under these circumstances, we think it extremely unlikely that the government could meet the particularized and exceptionally demanding burden that RFRA places upon it.[3]

For all these reasons, ORR should adopt a meaningful accommodation, one that is expressed in the text of the regulation and that frees existing and prospective grantees, contractors, subgrantees and subcontractors from any requirement to provide, facilitate the provision of, provide information about, or refer or arrange for items or procedures to which they have a religious or moral objection.

In the event that, as requested here, language on the conscience rights of grantees, contractors, subgrantees and subcontractors is incorporated into the final rule and not solely mentioned in its preamble, it is worth noting some ambiguous and potentially problematic aspects of the preamble language in the hope that these will not be repeated in any final rule. These relate to what is described above as the third ("notify grantor") option for organizations with a moral or religious objection to specific items of procedures.

First, this option and, by implication, the other two are described in the preamble as ways "in which the grantee could ensure access to any program services" to which it objects (79 Fed. Reg. at 77784). That is a straightforward contradiction of the objecting grantee's intent. It is because the grantee views the item or procedure as wrong that it cannot, in conscience, set out to help ensure access to it. The government may have this goal, and the grantee may have to agree not to actively interfere with the government's pursuit of that goal, but the grantee's own task is not to help "ensure access" to items and procedures it views as harmful to the child.

[3] Failure to grant a meaningful accommodation would also be irreconcilable with Executive Order 13279, as amended by President Obama on November 17, 2010, and related regulations, which state that faith-based groups are to be allowed, without impairing their religious character, to participate in federal social service programs on equal footing with other groups.

Second, this passage is ambiguous as to what such a grantee is required to say to ORR in a case where an objectionable item or procedure is requested. At one point the preamble says that the grantee must "notify the federal program office responsible for the grant if a UC [unaccompanied child], who has been informed of the available services, *may qualify for or be entitled to any program services, including referrals, to which the organization has a religious objection*."[4] 79 Fed. Reg. at 77784 (emphasis added). However, in the very next paragraph the preamble says that "if a UC requested emergency contraception but the grantee that housed the UC objected to providing such services on religious or moral grounds, the grantee need only provide notification to ORR in accordance with ORR policies and procedures that the UC requested *such services*. The grantee is not required to provide further information or services to the UC in relation to the UC's request." *Id*. (emphasis added).

The ambiguity is that it is unclear whether the grantee must inform ORR that the request in such a case is for (a) emergency contraception or (b) an unspecified item or procedure to which the organization has a religious or moral objection, with ORR bearing whatever responsibility it may consider itself to have to investigate further. While either of these options may pose serious problems for an objecting organization, the latter course is less likely to be confused with a duty to refer for a specific item which the organization finds objectionable on moral or religious grounds – a referral which would itself be objectionable, and which the passage explicitly says the grantee shall not be required to engage in. In making this observation, we reemphasize that it is wrong to place any burden on the religious beliefs or moral convictions of the objecting organization.

Finally, regarding the interim final rule as a whole (and particularly sections 411.5, 411.14, 411.31, 411.41 and 411.42) and its implications regarding human sexuality, we ask that ORR ensure that grantees, subgrantees, contractors, and subcontractors remain free to act in accord with their religious beliefs and moral convictions, including in the training of, and instructions to, staff and care providers and in caring for minors. Faith-based organizations excel in caring for all people, and the right of those organizations to do so consistent with their religious beliefs and moral convictions must be respected.

[4] We comment above that the reference should be to religious or moral objections, and in fact that double reference is found in the quote that immediately follows.

We welcome the opportunity to meet and work with ORR in developing an appropriate way forward. We believe that, through practical discussions, we can find a resolution that allows the government to fulfill its obligation to care for unaccompanied children, while also respecting the religious and moral beliefs of faith-based organizations that, to date, have provided such critical care for this vulnerable population. For example, in cases where pregnancy occurs, those of us participating in the program are willing to continue to provide health care access, as we have for years, in a manner consistent with our religious beliefs.

Thank you for the opportunity to comment.

Respectfully submitted,

Galen Carey
Vice President for Government Relations
National Association of Evangelicals

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

Carl Esbeck
Legal Counsel
National Association of Evangelicals

Michael F. Moses
Associate General Counsel
United States Conference of Catholic Bishops

Steven T. McFarland
Vice President and Chief Legal Officer
World Vision, Inc. (U.S.)

Stephan Bauman
President and CEO
World Relief

Robert Augustine Twele, OFM Conv.
General Counsel
Catholic Relief Services