

## § 37.12

action by the EEOC is warranted. In reaching that determination, the EEOC shall give due weight to the section 504 agency's findings and conclusions. If the EEOC proposes to take an action inconsistent with the section 504 agency's findings and conclusions as to whether a violation has occurred, the EEOC shall notify in writing the Assistant Attorney General, the Chairman of the EEOC, and the head of the section 504 agency that processed the complaint. In the written notification, the EEOC shall state the action that it proposes to take and the basis of its decision to take such action.

(d) *Provision of information.* Upon written request, the section 504 agency shall provide the EEOC with any materials relating to its resolution of the complaint, including its conclusions, investigative reports and files, and any voluntary compliance agreement.

### § 37.12 Standards.

In any investigation, compliance review, hearing or other proceeding, the standards used to determine whether section 504 has been violated in a complaint alleging employment discrimination shall be the standards applied under title I of the ADA and the provisions of sections 501 through 504, and 510, of the ADA, as such sections relate to employment. Section 504 agencies shall consider the regulations and appendix implementing title I of the ADA, set forth at 29 CFR part 1630, and case law arising under such regulations, in determining whether a recipient of Federal financial assistance has engaged in an unlawful employment practice.

### § 37.13 Agency specific memoranda of understanding.

When a section 504 agency amends its regulations to make them consistent with title I of the ADA, the EEOC and the individual section 504 agency may elect to enter into a memorandum of understanding providing for the investigation and processing of complaints dual filed under both section 504 and title I of the ADA by the section 504 agency.

## 28 CFR Ch. I (7–1–20 Edition)

### PART 38—PARTNERSHIPS WITH FAITH-BASED AND OTHER NEIGHBORHOOD ORGANIZATIONS

Sec.

- 38.1 Purpose.
- 38.2 Applicability and scope.
- 38.3 Definitions.
- 38.4 Policy.
- 38.5 Responsibilities.
- 38.6 Procedures.
- 38.7 Assurances.
- 38.8 Enforcement.

APPENDIX A TO PART 38—WRITTEN NOTICE OF BENEFICIARY PROTECTIONS

APPENDIX B TO PART 38—BENEFICIARY REFERRAL REQUEST

AUTHORITY: 28 U.S.C. 509; 5 U.S.C. 301; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258, Dec. 12, 2002; 18 U.S.C. 4001, 4042, 5040; 42 U.S.C. 14045b; 21 U.S.C. 871; 25 U.S.C. 3681; Pub. L. 107–273, 116 Stat. 1758, Nov. 2, 2002; Pub. L. 109–162, 119 Stat. 2960, Jan. 6, 2006; 42 U.S.C. 3751, 3753, 3762b, 3782, 3796dd–1, 3796dd–7, 3796gg–1, 3796gg–0b, 3796gg–3, 3796h, 3796ii–2, 3797u–3, 3797w, 5611, 5672, 10604; E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p. 273, Nov. 17, 2010.

SOURCE: AG Order No. 3649–2016, 81 FR 19418, Apr. 4, 2016, unless otherwise noted.

#### § 38.1 Purpose.

The purpose of this part is to implement Executive Order 13279 and Executive Order 13559.

#### § 38.2 Applicability and scope.

(a) A faith-based or religious organization that applies for, or participates in, a social service program supported with Federal financial assistance may retain its independence and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs, provided that it does not use direct Federal financial assistance, whether received through a prime award or sub-award, to support or engage in any explicitly religious activities, including activities that involve overt religious content such as worship, religious instruction, or proselytization.

(b) The use of indirect Federal financial assistance is not subject to this restriction.

(c) Nothing in this part restricts the Department's authority under applicable Federal law to fund activities, such

## Department of Justice

## § 38.4

as the provision of chaplaincy services, that can be directly funded by the Government consistent with the Establishment Clause.

### § 38.3 Definitions.

As used in this part:

(a)(1) “Direct Federal financial assistance” or “Federal financial assistance provided directly” refers to situations where the Government or an intermediary (under this part) selects the provider and either purchases services from that provider (*e.g.*, via a contract) or awards funds to that provider to carry out a service (*e.g.*, via a grant or cooperative agreement). In general, and except as provided in paragraph (a)(2) of this section, Federal financial assistance shall be treated as direct, unless it meets the definition of “indirect Federal financial assistance” or “Federal financial assistance provided indirectly.”

(2) Recipients of sub-grants that receive Federal financial assistance through State administering agencies or State-administered programs are recipients of “direct Federal financial assistance” (or recipients of “Federal financial assistance provided directly”).

(b) “Indirect Federal financial assistance” or “Federal financial assistance provided indirectly” refers to situations where the choice of the service provider is placed in the hands of the beneficiary, and the cost of that service is paid through a voucher, certificate, or other similar means of government-funded payment. Federal financial assistance provided to an organization is considered “indirect” when

(1) The government program through which the beneficiary receives the voucher, certificate, or other similar means of government-funded payment is neutral toward religion;

(2) The organization receives the assistance as a result of a decision of the beneficiary, not a decision of the Government; and

(3) The beneficiary has at least one adequate secular option for the use of the voucher, certificate, or other similar means of government-funded payment.

(c)(1) “Intermediary” or “pass-through entity” means an entity, including a nonprofit or nongovern-

mental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government, such as a State administering agency, that accepts Federal financial assistance as a primary recipient or grantee and distributes that assistance to other organizations that, in turn, provide government-funded social services.

(2) When an intermediary, such as a State administering agency, distributes Federal financial assistance to other organizations, it replaces the Department as the awarding entity. The intermediary remains accountable for the Federal financial assistance it disburses and, accordingly, must ensure that any providers to which it disburses Federal financial assistance also comply with this part.

(d) “Department program” refers to a grant, contract, or cooperative agreement funded by a discretionary, formula, or block grant program administered by or from the Department.

(e) “Grantee” includes a recipient of a grant, a signatory to a cooperative agreement, or a contracting party.

(f) The “Office for Civil Rights” refers to the Office for Civil Rights in the Department’s Office of Justice Programs.

### § 38.4 Policy.

(a) *Grants (formula and discretionary), contracts, and cooperative agreements.* Faith-based or religious organizations are eligible, on the same basis as any other organization, to participate in any Department program for which they are otherwise eligible. Neither the Department nor any State or local government receiving funds under any Department program shall, in the selection of service providers, discriminate for or against an organization on the basis of the organization’s religious character or affiliation, or lack thereof.

(b) *Political or religious affiliation.* Decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference and must be made on the basis of merit, not on the basis of religion, religious belief, or lack thereof.

**§ 38.5 Responsibilities.**

(a) Organizations that receive direct financial assistance from the Department may not engage in explicitly religious activities, including activities that involve overt religious content such as worship, religious instruction, or proselytization, as part of the programs or services funded with direct financial assistance from the Department. If an organization conducts such explicitly 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, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance.

(b) A faith-based or religious organization that participates in the Department-funded programs or services shall retain its independence from Federal, State, and local governments, and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not use direct financial assistance from the Department to support any explicitly religious activities, including activities that involve overt religious content such as worship, religious instruction, or proselytization. Among other things, a faith-based or religious organization that receives financial assistance from the Department may use space in its facilities without removing religious art, icons, messages, scriptures, or symbols. In addition, a faith-based or religious organization that receives financial assistance from the Department retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its mission statements and other governing documents.

(c) Any organization that participates in programs funded by Federal financial assistance from the Department shall not, in providing services, 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 attend or participate in a religious practice.

However, an organization that participates in a program funded by indirect financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program.

(d) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that the Department or a State or local government uses in administering financial assistance from the Department shall require only faith-based or religious organizations to provide assurances that they will not use monies or property for explicitly religious activities. All organizations, including religious ones, that participate in Department programs must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of Department-funded activities, including those prohibiting the use of direct financial assistance from the Department to engage in explicitly religious activities. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the Department or a State or local government in administering financial assistance from the Department shall disqualify faith-based or religious organizations from participating in the Department's programs because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation.

(e) *Exemption from Title VII employment discrimination requirements.* A faith-based or religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1(a), is not forfeited when the organization receives direct or indirect Federal financial assistance from the Department. Some Department programs, however, contain independent statutory provisions requiring that all grantees agree not to discriminate in employment on the basis of religion. Accordingly, grantees should consult with the appropriate

## Department of Justice

## § 38.6

Department program office to determine the scope of any applicable requirements.

(f) If an intermediary, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government that is administering a program supported by Federal financial assistance, is given the authority under the contract, grant, or agreement to select organizations to provide services funded by the Federal Government, the intermediary must ensure the compliance of the recipient of a contract, grant, or agreement with the provisions of Executive Order 13279, as amended by Executive Order 13559, and any implementing rules or guidance. If the intermediary is a nongovernmental organization, it retains all other rights of a nongovernmental organization under the program's statutory and regulatory provisions.

(g) In general, the Department does not require that a grantee, including a religious organization, obtain tax-exempt status under section 501(c)(3) of the Internal Revenue Code to be eligible for funding under Department programs. Many grant programs, however, do require an organization to be a "nonprofit organization" in order to be eligible for funding. Individual solicitations that require organizations to have nonprofit status will specifically so indicate in the eligibility sections of the solicitations. In addition, any solicitation that requires an organization to maintain tax-exempt status shall expressly state the statutory authority for requiring such status. Grantees should consult with the appropriate Department program office to determine the scope of any applicable requirements. In Department programs in which an applicant must show that it is a nonprofit organization, the applicant may do so by any of the following means:

(1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code;

(2) A statement from a State taxing body or the State secretary of state certifying that:

(i) The organization is a nonprofit organization operating within the State; and

(ii) No part of its net earnings may lawfully benefit any private shareholder or individual;

(3) A certified copy of the applicant's certificate of incorporation or similar document that clearly establishes the nonprofit status of the applicant; or

(4) Any item described in paragraphs (g)(1) through (g)(3) of this section if that item applies to a State or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate.

(h) Grantees should consult with the appropriate Department program office to determine the applicability of this part in foreign countries or sovereign lands.

### § 38.6 Procedures.

(a) *Effect on State and local funds.* If a State or local government voluntarily contributes its own funds to supplement activities carried out under the applicable programs, the State or local government has the option to separate out the Federal funds or commingle them. If the funds are commingled, the provisions of this section shall apply to all of the commingled funds in the same manner, and to the same extent, as the provisions apply to the Federal funds.

(b) To the extent otherwise permitted by Federal law, the restrictions on explicitly religious activities set forth in this section do not apply to indirect Federal financial assistance.

(c) *Beneficiary protections: written notice.* (1) Faith-based or religious organizations providing social services to beneficiaries under a program supported by direct Federal financial assistance from the Department must give written notice to beneficiaries and prospective beneficiaries of certain protections. Such notice must be given in a manner prescribed by the Office for Civil Rights. This notice must state the following:

(i) The organization may not discriminate against beneficiaries or prospective beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to

**§ 38.7**

**28 CFR Ch. I (7-1-20 Edition)**

attend or participate in a religious practice;

(ii) The organization may not require beneficiaries or prospective beneficiaries to attend or participate in any explicitly religious activities that are offered by the organization, and any participation by beneficiaries in such activities must be purely voluntary;

(iii) The organization must separate in time or location any privately funded explicitly religious activities from activities supported by direct Federal financial assistance;

(iv) If a beneficiary or prospective beneficiary objects to the religious character of the organization, the organization will undertake reasonable efforts to identify and refer the beneficiary or prospective beneficiary to an alternative provider to which the beneficiary or prospective beneficiary has no objection; and

(v) Beneficiaries or prospective beneficiaries may report an organization's violation of these protections, including any denials of services or benefits by an organization, by contacting or filing a written complaint with the Office for Civil Rights or the intermediary that awarded funds to the organization.

(2) This written notice must be given to prospective beneficiaries prior to the time they enroll in the program or receive services from the program. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, organizations must advise beneficiaries of their protections at the earliest available opportunity.

(3) The notice that a faith-based or religious organization may use to notify beneficiaries or prospective beneficiaries of their protections under paragraph (g)(1) of this section is specified in appendix A to this part.

(d) *Beneficiary protections: referral requirements.* (1) If a beneficiary or prospective beneficiary of a social service program supported by direct Federal financial assistance from the Department objects to the religious character of an organization that provides services under the program, that organization must promptly undertake reasonable efforts to identify and refer the

beneficiary or prospective beneficiary to an alternative provider to which the beneficiary or prospective beneficiary has no objection based on the organization's religious character. See appendix B to this part.

(2) An organization may refer a beneficiary or prospective beneficiary to another faith-based or religious organization that provides comparable services, if the beneficiary or prospective beneficiary has no objection to that provider based on the organization's religious character. But if the beneficiary or prospective beneficiary requests a secular provider, and a secular provider is available, then a referral must be made to that provider.

(3) Except for services provided by telephone, Internet, or similar means, the referral must be to an alternative provider that is in reasonable geographic proximity to the organization making the referral and that offers services that are similar in substance and quality to those offered by the organization. The alternative provider also must have the capacity to accept additional clients.

(4) When the organization makes a referral to an alternative provider, the organization shall maintain a record of that referral for review by the awarding entity. When the organization determines that it is unable to identify an alternative provider, the organization shall promptly notify and maintain a record for review by the awarding entity. If the organization is unable to identify an alternative provider, the awarding entity shall determine whether there is any other suitable alternative provider to which the beneficiary may be referred. An intermediary that receives a request for assistance in identifying an alternative provider may request assistance from the Department.

**§ 38.7 Assurances.**

(a) Every application submitted to the Department for direct Federal financial assistance subject to this part must contain, as a condition of its approval and the extension of any such assistance, or be accompanied by, an assurance or statement that the program is or will be conducted in compliance with this part.

(b) Every intermediary must provide for such methods of administration as are required by the Office for Civil Rights to give reasonable assurance that the intermediary will comply with this part and effectively monitor the actions of its recipients.

**§ 38.8 Enforcement.**

(a) The Office for Civil Rights is responsible for reviewing the practices of recipients of Federal financial assistance to determine whether they are in compliance with this part.

(b) The Office for Civil Rights is responsible for investigating any allegations of noncompliance with this part.

(c) Recipients of Federal financial assistance determined to be in violation of any provisions of this part are subject to the enforcement procedures and sanctions, up to and including suspension and termination of funds, authorized by applicable laws.

(d) An allegation of any violation or discrimination by an organization, based on this regulation, may be filed with the Office for Civil Rights or the intermediary that awarded the funds to the organization.

APPENDIX A TO PART 38—WRITTEN NOTICE OF BENEFICIARY PROTECTIONS

Name of Organization:  
 Name of Program:  
 Contact Information for Program Staff (name, phone number, and email address, if appropriate):

Because this program is supported in whole or in part by financial assistance from the Federal Government, we are required to let you know that—

- We may not discriminate against you on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice;
- We may not require you to attend or participate in any explicitly religious activities that we offer, and your participation in these activities must be purely voluntary;
- We must separate in time or location any privately funded explicitly religious activities from activities supported with direct Federal financial assistance;
- If you object to the religious character of our organization, we must make reasonable efforts to identify and refer you to an alternative provider to which you have no objection; and
- You may report violations of these protections to the U.S. Department of Justice, Office of Justice Programs, Office for Civil

Rights or to [name of intermediary that awarded funds to the organization].

We must give you this written notice before you enroll in our program or receive services from the program.

APPENDIX B TO PART 38—BENEFICIARY REFERRAL REQUEST

If you object to receiving services from us based on the religious character of our organization, please complete this form and return it to the program contact identified above. If you object, we will make reasonable efforts to refer you to another service provider. We cannot guarantee, however, that in every instance, an alternative provider will be available. With your consent, we will follow up with you or the organization to which you were referred to determine whether you contacted that organization.

Please check if applicable:

( ) I want to be referred to another service provider.

If you checked above that you wish to be referred to another service provider, please check one of the following:

( ) Please follow up with me or the service provider to which I was referred.

Name:

Best way to reach me (phone/address/email):

( ) Please do not follow up.

—End of Form—

**PART 39—ENFORCEMENT OF NON-DISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE DEPARTMENT OF JUSTICE**

- Sec.
- 39.101 Purpose.
- 39.102 Application.
- 39.103 Definitions.
- 39.104–39.109 [Reserved]
- 39.110 Self-evaluation.
- 39.111 Notice.
- 39.112–39.129 [Reserved]
- 39.130 General prohibitions against discrimination.
- 39.131–39.139 [Reserved]
- 39.140 Employment.
- 39.141–39.148 [Reserved]
- 39.149 Program accessibility: Discrimination prohibited.
- 39.150 Program accessibility: Existing facilities.
- 39.151 Program accessibility: New construction and alterations.
- 39.152–39.159 [Reserved]
- 39.160 Communications.
- 39.161–39.169 [Reserved]
- 39.170 Compliance procedures.

AUTHORITY: 29 U.S.C. 794.