

GUIDANCE ON PROHIBITED USES OF DIRECT FEDERAL FINANCIAL ASSISTANCE FROM VA AND PROTECTIONS FOR RELIGIOUS IDENTITY

The purpose of this guidance is to provide government employees and faith-based and other neighborhood organizations that receive direct Federal financial assistance from VA with clear and uniform instructions on fundamental principles that apply to their awards. Specifically, this guidance addresses prohibited uses of direct Federal financial assistance from VA, protections for beneficiaries that receive social services provided with direct Federal financial assistance from VA, and separation requirements to ensure that faith-based groups are able to retain their religious identity after receiving an award. The guidance below is intended to set forth basic principles; more specific scenarios and questions may be addressed in the “frequently asked questions” section.

Prohibited Uses of Direct Federal Financial Assistance from VA

This section of guidance applies only to programs supported either in whole or in part through direct Federal financial assistance from VA, and does not apply to programs receiving indirect Federal financial assistance from VA. A discussion of the distinction between “direct” and “indirect” Federal financial assistance from VA, can be found later in this guidance.

Section 2(g) of Executive Order 13279, as amended by Executive Order 13559, prohibits the use of direct Federal financial assistance to support or engage in “explicitly religious activities,” which includes “activities that involve overt religious content such as worship, religious instruction, or proselytization.” Other examples of explicitly religious activities and materials include devotional exercises, production or dissemination of devotional guides or other religious materials, or counseling in which counselors introduce religious content. While it is not feasible to develop a comprehensive list of all “explicitly religious activities,” each of these is an example of an activity that is not religiously neutral because it promotes or endorses religion to beneficiaries.

Application of the prohibition against explicitly religious activity must be consistent with the First Amendment of the U.S. Constitution, which both prevents the government from promoting or sponsoring religion and protects privately initiated religious expression and activities from government interference and discrimination. This means that staff carrying out programs supported by direct Federal financial assistance from VA, and the materials disseminated by staff persons in those programs, must be neutral in their treatment of religion. Neither staff nor materials used in these programs should promote, endorse, or favor religious beliefs over non-religious beliefs, nor should they disparage religious beliefs in any way. Further, they should not express a judgment with regard to religious beliefs or non-belief, or seek to influence the beliefs of participants with respect to religion.

If a local program is directly supported by VA financial assistance, program administrators should be aware that the bar against using this financial assistance for explicitly religious activities applies to activities, speech, and materials that are generated or controlled by

the administrators, instructors, or officials of the VA-financed program. The requirement generally does not apply to the activities of persons whose speech is not controlled, encouraged, or approved after the fact by program administrators, instructors, or officials, such as spontaneous comments made by individual beneficiaries in the context of a VA program. The Supreme Court has repeatedly held that the First Amendment requires that officials and administrators in publicly-funded programs be neutral in their treatment of religion, showing neither favoritism toward nor hostility against religious expression. The following are a few examples of neutral treatment of religion in programs supported by VA financial assistance:

- Beneficiaries in a transitional housing program for homeless Veterans are attending a group counseling session where they are discussing recovery from alcohol or drug dependence, particularly various coping strategies to refrain from alcohol or drug use. The session is led by a trained counselor who asks each individual to describe their current coping strategies. One group member states that his faith in God and prayer has helped him through the current situation, and encourages the rest of the crowd to come to his church next Sunday. This type of unprompted speech by a program beneficiary is not prohibited under the regulation. In response to this statement, the counselor should neither commend nor criticize the virtues of prayer and faith, and neither encourage nor discourage the group from attending the church services. Rather, the counselor should remain neutral to the expression of religious belief.
- A homeless Veteran and her family find permanent housing after the Veteran worked with a housing search specialist in VA's Supportive Services for Veterans Families program. The Veteran tells the housing specialist that she has been blessed to finally get her children out of a shelter, and further recounts how she has been praying for this day and thanks God that her prayers have been answered. This type of statement, initiated by the Veteran as the program participant, is not prohibited by regulation. In response to the statement, the housing specialist can acknowledge the role faith has played in sustaining the Veteran, while neither praising nor criticizing the virtues of prayer and faith. By responding in this way, the housing specialist maintains a neutral stance in respect to religion.
- A Veteran in a transitional housing program is talking with their case manager about his history of legal problems that led to previous incarcerations and how their legal problems contributed to their homelessness. During the conversation the Veteran talked about how religion was an important part of their life and how it has contributed to them staying out of further legal difficulties. The discussion initiated by the Veteran is not prohibited under the regulation. The case manager may echo the Veteran's acknowledgement that religion plays an important role in the Veteran's life and decision making. However, the case manager should refrain from initiating further discussions that would not be neutral in the treatment of religion. For instance, the case manager could further encourage the Veteran to continue those activities (including but not expressly religious activities) that the Veteran believes to be helpful in staying out of further legal difficulties, but the case manager should not single out discussion regarding the religious activities or otherwise praise or criticize such activities.

The restriction against the use of direct Federal financial assistance from VA to support explicitly religious activities does not apply to some programs that can be directly funded by the Federal government consistent with the Establishment clause, such as the provision of chaplaincy services by VA. Direct Federal financial assistance may be used for explicitly religious activities in limited circumstances where social service programs involve such a degree of government control over a beneficiary's environment that it would significantly burden the beneficiary's free exercise of religious liberty if not supported by direct Federal financial assistance. See *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972) (per curiam) (explaining that "reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty"); *Katcoff v. Marsh*, 755 F.2d 223, 234 (2d Cir. 1985) (finding it "readily apparent" that the Government is obligated by the First Amendment "to make religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denominations is not available to them"); *Sch. Dist. of Abingdon Twp. v. Schempp*, 374 U.S. 203, 299 (1963) (Brennan, J., concurring) (observing that "hostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion"). If you have questions about whether one of your programs might be exempt from the bar on the use of direct Federal financial assistance from VA for explicitly religious activities, contact the VA program office through which the funding is received.

Nondiscrimination Requirements for Direct and Indirect VA Financial Assistance

A *direct* aid program is one where VA, or an intermediary like a local government, selects a provider and purchases services or awards funds to that provider to carry out a service. An *indirect* aid program is one where VA or an intermediary provides an individual beneficiary with a voucher, certificate, or similar means of payment, and the beneficiary chooses the service provider. Section 2(d) of Executive Order 13279, as amended by Executive Order 13559, applies beneficiary nondiscrimination obligations to direct and indirect aid programs. Any organization that participates in a program funded by direct or indirect VA financial assistance is prohibited from, in providing services or in outreach activities related to such services, discriminating against a program beneficiary on the basis of religion, a religious belief, or a refusal to attend or participate in a religious practice. See 38 CFR 50.1(f)

While organizations that participate in programs funded by indirect aid cannot turn away beneficiaries on the basis of religion or religious beliefs or lack thereof, they are not required to modify their program activities to accommodate beneficiaries who choose to expend the indirect aid on the organization's program. See 38 CFR 50.1(f). For example, a faith-based organization that offers a Bible study as part of its programming need not remove that study from its program activities or create alternative programming for an indirect aid beneficiary who does not wish to participate in the Bible study. Furthermore, the prohibited uses of direct VA financial assistance described in the previous section do not apply to programs funded by indirect VA financial assistance.

Preserving Faith-Based Organizations' Religious Identity

While faith-based organizations need to ensure that programs directly supported by VA funds comply with the requirement that these programs are religiously neutral, various protections also exist to ensure that faith-based organizations do not have to change their religious identities after receiving a VA award. Religious entities may receive Federal financial assistance to support social service programs “without impairing their independence, autonomy, expression outside the programs in question, or religious character.” E.O. 13279, § 2(g), 67 FR 77141 (Dec. 16, 2002), *as amended by* E.O. 13559, § 1(b), 75 FR 71319, 71320 (Nov. 17, 2010); see also 38 CFR 50.1(a). Accordingly, a faith-based organization that applies for, or participates in, a social service program supported with Federal financial assistance may continue to carry out its mission in this way, including the definition, development, practice, and expression of its religious beliefs. At the same time, as explained below, it may not use direct Federal financial assistance to support or engage in any explicitly religious activities and those activities must be both separate in time or location from the Federally-funded program and voluntary for beneficiaries.

A faith-based organization may also use its facilities to provide VA-financed social services without removing or altering religious art, icons, scriptures, or other symbols from the facility. Additionally, a faith-based organization that applies for, or participates in, a social service program supported with VA financial assistance may retain religious terms in its name, select its board members on a religious basis, and include religious references in its mission statements and other chartering or governing documents. Faith-based organizations that provide social services retain these rights while observing the separation requirements described further below. E.O. 13279, § 2(g), *as amended by* E.O. 13559, § 1(b)

Separation of Explicitly Religious Activities

Section 2(f) of Executive Order 13279, as amended by Executive Order 13559, provides that explicitly religious activities must be separated from programs supported with direct financial assistance from the Federal government:

Organizations that engage in explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) must perform such activities and offer such services outside of programs that are supported with direct Federal financial assistance (including through prime awards or sub-awards), separately in time or location from any such programs or services supported with direct Federal financial assistance, and participation in any such explicitly religious activities must be voluntary for the beneficiaries of the social service program supported with such Federal financial assistance.

E.O. 13279, § 2(f), *as amended by* E.O. 13559, § 1(b), 75 FR at 71320. See also 38 CFR 50.2(a)(3).

In addition to the worship and religious services that faith-based organizations conduct separately from their VA-supported program, faith-based organizations may also carry out separate social service programs with explicitly religious activities or content after receiving a VA award. In some cases, an organization may elect to carry out a separate social service program that is explicitly religious that is similar to the VA-funded program. For example, a faith-based organization may carry out two mentoring programs, one of which is privately-funded and overtly religious, while the other is directly VA-supported and free of explicitly religious content. But where such religious activities or programs are undertaken, it is especially important for it to be clear that they are separate and distinct and that participation in the religious activities is voluntary for participants in the VA-supported program.

Separate and Distinct Programs

Recipients of direct VA financial assistance must ensure that any program that involves explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) is separate and distinct from the program that receives direct VA financial assistance, and that the distinction is completely clear to the beneficiary or prospective beneficiary. *See E.O. 13279, § 2(f), as amended by E.O. 13559, § 1(b), 75 FR at 71320. See 38 CFR50.2(a).*

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 distinct appearances for the materials used to promote each program;
- Establishing separate registrations for the programs; and
- Promoting only the VA-supported program in materials, websites or commercials purchased with any portion of direct VA financial assistance.

Websites with explicitly religious content may include a link to the page promoting the VA-supported program; the page about the VA supported program may be supported with direct VA financial assistance, but the explicitly religious page may not. The VA-supported page may link to pages with explicitly religious content; however, such links should be accompanied by statements noting that the linked content is separate from the VA-supported program, is privately funded, and is purely voluntary for beneficiaries.

Separate Presentations

Recipients of Federal financial assistance must implement measures to separate the presentation of any program with religious content from the presentation of the VA-supported program by time or location in such a way that it is clear that the two programs are separate and distinct. When separating the two programs by time but presenting them in the same location, the service provider must ensure that one program completely ends before the other program begins.

Some of the ways in which separation of presentations may be accomplished include the following examples:

- The programs are held in completely different sites or on different days.
- If the programs are held at the same site at completely different times, the service provider may separate programs through such means as:
 - Having sufficient time between the two programs to vacate the room, turn down the lights, leave the stage, etc., in order to conclude the first program before beginning the second; and
 - Completely dismissing the participants of the earlier program.
- If the programs are held in different locations at the same site at the same time, the service provider may separate programs through such means as:
 - Completely separating registration locations; and
 - Completely separating areas where programs are held such as by room, hallway, or floor.

Note: If an organization offers a VA-supported program and a privately funded religious program and both provide the same social service, it is especially important that the organization accentuate the separation between the programs. Furthermore, because the law recognizes that children are particularly susceptible to coercion, if the clients served are children, it is particularly important that the separation between the programs be made clear.

Explicitly Religious and Anti-Religious Activities

Recipients of VA financial assistance must ensure that there are no explicitly religious or anti-religious activities in a program supported by direct Federal financial assistance. *See* E.O. 13279, § 2(g), *as amended by* E.O. 13559, § 1(b), 75 FR at 71320. *See also* 38 CFR 50.1(a) and 50.2(a)(3). These include:

- Registration procedures that include religious inquiries or references; and
- Program activities that include religious outreach or promotion, endorsement, or favoring of religious beliefs, or activities that are intended to dissuade program participants from holding religious beliefs.

Cost Allocation

Recipients of direct VA financial assistance must be able to demonstrate that direct VA financial assistance is only being used for the VA-supported program. Some of the ways in which separation of funds may be accomplished include the following examples:

- Implement the use of time sheets that keep track of all staff hours charged to the VA-supported program, whether the staff work in other programs or not.
- Require that staff working in both VA-supported programs and other programs indicate clearly how many hours are spent on each program.
- Require that any staff working on both a VA-supported program and a non-VA-supported program, at the same site and on the same day, clearly indicate both the number of hours spent on the VA-supported program and the actual time during which they worked on that program. The hours should reflect that time spent on any program with explicitly religious activity has been completely separated from hours during which time was spent on the VA-supported program.
- Show cost allocations for all items and activities that involve both VA-supported and non-VA supported programs, such as staff time, equipment, or other expenses, such as travel to event sites. This may be accomplished through such means as the following:
 - If staff in the VA-supported program travel to a site where the organization conducts both a VA-supported program and a privately-funded religious program, then only one-half of the travel costs (e.g., gas, lodging, and other related expenses) may be charged to the VA program. If the VA award recipient conducts three separate and distinct programs at one site, and one of the programs is VA-supported, then only one-third of the travel costs may be charged to the VA program.
 - If an electronic device is used 30% of the time for the VA-supported program, this use should be documented through clear record keeping. Only 30% of the cost of the electronic device may be charged to the VA-supported program.

See 2 CFR 200.430 (2014) (Cost Principles—Compensation—Personal Services); 48 CFR 31.201-4(b) (Contracts With Commercial Organizations—Determining Allocability).

Eligibility, Outreach, and Recruitment

Recipients of VA financial assistance must ensure that the VA-supported program is open to all qualified beneficiaries, regardless of their religious beliefs, refusal to hold a religious belief, or refusal to attend or participate in a religious practice. *See E.O. 13279, § 2(d), as amended by E.O. 13559, § 1(b), 75 FR at 71320, 38 CFR 50.1(f).* VA award recipients may not establish selection criteria that have the effect of discriminating against beneficiaries based on religion or non-religion. Accordingly, VA-funded programs may not limit outreach, recruitment efforts, or advertising of the VA program services exclusively to religious or non-religious target populations.

Availability of Separate Religious Programs

After the direct VA-supported program has ended, a staff person may provide a brief and non-coercive invitation to program participants to attend a separate religious program. The

demarcation between the Federally-supported program and the religious program must at all times be clear. The invitation must emphasize that the religious program is a separate program from, and not a continuation of, or complementary to, the VA-supported program. It also must be clear that participants are not required to attend the separate religious program, and that participation in Federally-supported programs is not contingent on participation in other programs sponsored by the organization. If the beneficiaries are children, then Federally-supported programs should obtain parental consent before inviting the children to separate religious activities in order to ensure that the invitation is non-coercive and that participation is voluntary.

Guidance on Intermediaries

An intermediary is an entity, including a non-governmental organization, acting under a contract, grant, or other agreement with VA or with a State or local government, that accepts VA financial assistance and distributes that assistance to other organizations that, in turn, provide VA-funded social services. See 38 CFR 50.1(d). Intermediaries that distribute VA financial assistance to other organizations must do so in a manner that does not favor or disfavor organizations on the basis of religion or religious belief and that ensures compliance with the provisions of Executive Order 13279, as amended by Executive Order 13559, and any implementing rules or guidance in a contract, grant or agreement. See 38 CFR 50.1(e). As discussed below in guidance related to beneficiary protections, complaints, objections, or referrals, intermediaries have the same responsibilities as VA to accept complains or reports from beneficiaries regarding violations of beneficiary protections, including denials of services or benefits by the organization that provides the VA-funded social service. Intermediaries, like VA, also have responsibilities related to the referral process if a beneficiary objects to the religious character of a provider.

Guidance on Beneficiary Protections: Notice and Referral, Complaints and Reports

Notice

Any organization that participates in a program funded by direct or indirect VA financial assistance is prohibited from, in providing services or in outreach activities related to such services, discriminating against a program beneficiary on the basis of religion, a religious belief, or a refusal to attend or participate in a religious practice. See 38 CFR 50.1(f). Faith-based or religious organizations providing social services to beneficiaries under a VA program supported by direct VA financial assistance must give written notice to beneficiaries and prospective beneficiaries of certain protections. See 38 CFR 50.2(a). The content of this notice is explained below, and a sample notice is provided later in this guidance. This notice states that:

- The organization may not discriminate against beneficiaries on the basis of religion or religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice;

- The organization may not require 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;
- The organization must separate in time or location any privately funded explicitly religious activities from activities supported by direct VA financial assistance;
- If a beneficiary objects to the religious character of the organization, the organization will undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the prospective beneficiary has no objection; and
- Beneficiaries or perspective beneficiaries may report an organization's violations of these protections, including any denials of services or benefits by an organization, by contacting or filing a written complaint with, VA or an intermediary that awarded funds to the organization.

This notice must be provided to beneficiaries prior to the time they receive services from the organizations, unless the nature of the services provided or exigent circumstances make such advance notice impractical, in which case the notice must be provided to beneficiaries at the earliest available opportunity. See 38 CFR 50.2(b).

Faith-based or religious organizations providing social services to beneficiaries under a VA program supported by indirect VA financial assistance are not required to give written notice to beneficiaries. See 38 CFR 50.2(c). However, these organizations are still prohibited from, in providing services or in outreach activities related to such services, discriminating against a program beneficiary on the basis of religion, a religious belief, or a refusal to attend or participate in a religious practice. See 38 CFR 50.1(f).

Referral

If a beneficiary or prospective beneficiary of a social service programs supported by direct VA financial assistance 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 to an alternative provider to which the prospective beneficiary has no objection. See 38 CFR 50.3(a). More specifically:

- A referral may be made to another faith-based organization if the beneficiary has no objection to that provider. If the beneficiary requests a secular provider, and a secular provider is available, then a referral must be made to that provider.
- 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.

If the organization determines that it is unable to identify an alternative provider, the organization shall promptly notify VA or the intermediary. If the organization is unable to identify an alternative provider, VA 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 VA.