



# AMERICAN ATHEISTS

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April 27, 2022

Carlos Graham  
Reports Clearance Officer  
SAMHSA  
5600 Fishers Lane, Room 15E57-A  
Rockville, MD 20857

**Re: Comment from American Atheists Concerning Information Collection Pursuant to SAMHSA Charitable Choice Regulations, 42 CFR Parts 54 and 54a (OMB Control No. 0930-0242; ICR Reference No. 202203-0930-005; Doc. No. 2022-06413)**

Dear Mr. Graham:

American Atheists appreciates the opportunity to comment on Substance Abuse and Mental Health Services Administration's (SAMHSA) proposal to extend data collection pursuant to Charitable Choice regulations, 42 CFR Parts 54 and 54a (hereinafter Charitable Choice Provisions).<sup>1</sup> We write to support the renewal of this information collection and to recommend changes that better reflect recent US Supreme Court precedent, ensure compliance with constitutional requirements, and support the needs of beneficiaries of related programs.

American Atheists is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the "wall of separation" between government and religion created by the First Amendment. We strive to create an environment where atheism and atheists are accepted as members of our nation's communities and where casual bigotry against our community is seen as abhorrent and unacceptable. We promote understanding of atheists through education, outreach, and community-building and work to end the stigma associated with being an atheist in America. Religious liberty is an individual right guaranteed by the First Amendment, and therefore government programs should have clear boundaries and safeguards to protect the religious freedom and equality of every beneficiary of government-funded social services.

The Charitable Choice provisions require grant-funded faith-based social services, including substance abuse recovery services, to inform program beneficiaries or potential beneficiaries of their rights, including the right of referral to an alternative provider. The Obama Administration implemented similar requirements for other federally funded faith-based social services programs based on recommendations from the President's Advisory Council on Faith-Based and Neighborhood Partnerships in order to protect the religious equality of all beneficiaries.<sup>2</sup> This landmark convening of various

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<sup>1</sup> Substance Abuse and Mental Health Services Administration, Dept. of Health and Human Services, *Agency Information Collection Activities: Submission for Office of Management and Budget (OMB) Review; Comment Request*, 87 Fed. Reg. 17315 (Mar. 28, 2022), OMB Control No. 0930-0242; ICR Reference No. 202203-0930-005; Doc. No. 2022-06413. Available at <https://www.federalregister.gov/documents/2022/03/28/2022-06413/agency-information-collection-activities-submission-for-office-of-management-and-budget-omb-review>.

<sup>2</sup> President's Advisory Council on Faith-Based and Neighborhood Partnerships, *A New Era of Partnerships: Report of Recommendations to the President* 127 (2010), available at <http://bit.ly/2A0yhXA>. Members included: Nathan J. Diament, Director of Public Policy, Union of Orthodox Jewish Congregations of America; Dr. Frank Page, Vice-President of Evangelization, North American Mission Board, and Past President of the Southern Baptist

viewpoints on matters of religious freedom, including several prominent faith-based institutions, achieved consensus on 12 unanimous recommendations that formed the basis of Executive Order 13559.<sup>3</sup> This common ground honored our nation's commitment to religious freedom while not imposing unnecessary burdens upon religious providers offering government-funded social services. The Trump Administration stripped these critical notice and referral requirements from other federally funded social services programs, including those administered by the Department of Health and Human Services (HHS), in 2020.<sup>4</sup> Although the Trump Administration did not withdraw the protections for religious equality from the SAMHSA rule (likely because of the underlying statutory requirements<sup>5</sup>), we believe it is necessary to amend the SAMHSA rule and information collection in order to ensure it accords with recent Supreme Court precedent.

**I. Notice and referral requirements are necessary both to achieve programmatic goals and to protect the religious freedom of beneficiaries.**

When the government funds faith-based organizations to deliver social services—such as food banks, homeless shelters, job training, substance use recovery, and elder care—it must protect peoples' religious freedom and ensure that they can get the services they need. Robust church-state safeguards ensure that people seeking taxpayer-funded social services will never face religious discrimination or be forced to worship or pray to get these services. And a person who is uncomfortable with the religious character of a provider will be able to ask for help in finding an alternative.

Without the requirement that faith-based social serves give beneficiaries written notice of their right to an alternative provider, beneficiaries of these services become vulnerable because they would lack awareness that they can object to discrimination, proselytization, or religious coercion when receiving government-funded services. Millions of Americans are not comfortable receiving social services from religious providers, and therefore, beneficiaries may forgo getting the services they need because they don't know they have a right to an alternative provider.

Without the requirement for a secular alternative, beneficiaries can be forced to receive essential benefits from religious providers that engage in religious coercion, condition their services on participation in religious activities such as worship, or limit access to services based on religion. The alternative provider requirement ensures that people who seek social services and who are uncomfortable at a provider because of its religious conduct, activities, or setting can ask to be referred to an alternative provider. Though all social services that are directly funded should have only secular content, there are reasons why a person might nonetheless feel uncomfortable with a religious provider or program and desire an alternative provider. For example, someone who follows a minority religion or is nonreligious might forgo social services if the only program they know of is in a church adorned with Christian iconography, art, and messages because they feel deeply uncomfortable there. Many

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Convention; Anthony R. Picarello, Jr., General Counsel, United States Conference of Catholic Bishops; The Reverend Larry J. Snyder, President and CEO, Catholic Charities USA; and Richard E. Stearns, President, World Vision United States.

<sup>3</sup> Exec. Order 13559, Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations, 81 Fed. Reg. 19353, April 4, 2016.

<sup>4</sup> Equal Participation of Faith-Based Organizations in the Federal Agencies' Programs and Activities, 85 Fed. Reg. 82,037 (Dec. 17, 2020).

<sup>5</sup> Titles V and XIX of the Public Health Service Act, 42 U.S.C. 290aa *et seq.* and 42 U.S.C. 300x-21 *et seq.*

Americans have had traumatic experiences associated with religion, which can cause them to avoid specific denominations or religious settings more generally. Furthermore, a beneficiary whose rights have been violated might feel uncomfortable returning to that provider and so might also want an alternative provider. An LGBTQ person whose relationship is not recognized or whose equal rights are threatened by a particular denomination may not feel comfortable or even fear discrimination when receiving services from an associated provider. Forcing beneficiaries, who are likely in a vulnerable position, to find an alternative provider on their own can be the hurdle that prevents them from getting help at all.

It is especially important for SAMHSA to maintain these protections in its grant programs because the right of beneficiaries to receive substance abuse treatment without being compelled to attend religious programming is well-settled. First Amendment law clearly establishes that twelve-step groups are pervasively religious and that a secular alternative must be made available to individuals who are required to attend addiction recovery support groups or other forms of religiously based treatment.<sup>6</sup>

## **II. Notice and referral requirements are constitutional, despite the Trump Administration's arguments to the contrary in its various federally funded social-services rulemakings.**

In arguing that notice and referral requirements for faith-based social services regulations for other agencies are unconstitutional, the Trump Administration relied on an unreasonably expansive interpretation of *Trinity Lutheran v. Comer*.<sup>7</sup> The Trump Administration twisted the U.S. Supreme Court's decision to imply that the government cannot require faith-based organizations to provide alternative providers or notification to beneficiaries if the same is not required of secular organizations. *Trinity Lutheran's* reach is limited to the eligibility of religious organizations: it prohibits the government from discriminating against organizations because of their religious status.<sup>8</sup> But *Trinity Lutheran* does not eliminate the government's responsibility to apply safeguards to address the "special Establishment Clause dangers" that come with direct aid.<sup>9</sup> Nor does it prevent the government from placing terms on participation and the use of government funds.

Even if the case is taken at its broadest possible interpretation, "that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can only be justified by a state interest 'of the highest order,'" <sup>10</sup> this decision remains inapplicable. The existing SAMHSA regulations already allow religious organizations to compete for government grants to fund social service programming on the same basis as secular organizations. However, even if the Trump Administration's interpretation of *Trinity Lutheran* was correct, the existing safeguards to protect beneficiaries' religious freedom would meet strict scrutiny review because they further "a compelling government interest" and are narrowly tailored to avoid excluding faith-based providers from seeking government grants. The costs to religious providers to give notice and have a list of alternative providers are *de minimis*, particularly compared to the costs to beneficiaries seeking the government-funded social services they need.

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<sup>6</sup> *Inouye v. Kemna*, 504 F.3d 705, 712, 716 (9th Cir. 2007); see also *Hazle v. Crofoot*, 727 F.3d 983 (9th Cir. 2013).

<sup>7</sup> 137 S. Ct. 2012 (2017).

<sup>8</sup> *Id.* at 2021-22.

<sup>9</sup> See *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 842 (1995).

<sup>10</sup> *Trinity Lutheran* at 2019 (citations omitted).

The Trump Administration further argued that the alternative provider requirement may violate the Religious Freedom Restoration Act (RFRA).<sup>11</sup> RFRA asks whether the law places a “substantial burden” on religious exercise, and if it does the government must show that it is furthering a “compelling government interest” by the “least restrictive means.” Firstly, we note that the strict scrutiny test established by RFRA goes beyond constitutional requirements,<sup>12</sup> and any exemption granted through this law is subject to constitutional restrictions.<sup>13</sup> Any interpretation of this statute must meet Establishment Clause requirements. The Establishment Clause’s requirements with regard to government accommodations for religious exercise are straightforward: “an accommodation must be measured so that it does not override other significant interests”<sup>14</sup> or “impose unjustified burdens on other[s].”<sup>15</sup> Agencies may not grant exemptions that have a harmful, discriminatory impact on others<sup>16</sup> or allow organizations to refuse to provide services, which amounts to giving them “the right to use taxpayer money to impose [their beliefs] on others.”<sup>17</sup>

Protections under RFRA do not apply to *de minimis* burdens or even significant burdens on religious exercise when there are compelling countervailing interests. Requiring groups that partner with the government and receive taxpayer funding to respect the religious freedoms of others by providing notice and referrals to alternative providers does not represent a substantial burden. Religious organizations voluntarily partner with the government, and if they don’t want to fulfill requirements designed to improve efficiencies and meet programmatic objectives, or if they believe these minor requirements are a burden that outweighs the funding they receive to implement these social service programs, they can decline the funding.<sup>18</sup>

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<sup>11</sup> 42 U.S.C. § 2000bb, *et seq.* [hereinafter “RFRA”].

<sup>12</sup> See *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) (“The “compelling government interest” requirement seems benign, because it is familiar from other fields.... What it produces in those other fields -- equality of treatment, and an unrestricted flow of contending speech -- are constitutional norms; what it would produce here -- a private right to ignore generally applicable laws -- is a constitutional anomaly.... The First Amendment’s protection of religious liberty does not require this.”)

<sup>13</sup> See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 544 (refusing to enforce RFRA against the states because doing so would be unconstitutional).

<sup>14</sup> *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005); see also *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985) (“unyielding weighting” of religious interests of those taking exemption “over all other interests” violates Constitution).

<sup>15</sup> *Cutter*, 544 U.S. at 726. See also *Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989) (religious accommodations may not impose “substantial burdens on nonbeneficiaries”).

<sup>16</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2786 (2014) (Kennedy, J., concurring) (no accommodation should “unduly restrict other persons . . . in protecting their own interests, interests the law deems compelling”); *id.* at 2760 (the religious accommodation provided would have “precisely zero” impact on third parties); see also *Holt*, 135 S. Ct. at 867 (Ginsburg, J., concurring) (accommodation “would not detrimentally affect others”).

<sup>17</sup> *ACLU of Mass. v. Sebelius*, 821 F. Supp. 2d 474, 488 n.26 (D. Mass. 2012), *vacated as moot sub nom. ACLU of Mass. v. U.S. Conference of Catholic Bishops*, 705 F.3d 44 (1st Cir. 2013).

<sup>18</sup> We note that the Trump Administration’s arguments could apply equally to *any* requirement of these programs, not just those relating to notice and referral. However, if agencies were to look at every aspect of each program individually to meet a compelling interest test, then in effect, religious organizations would be free to simply take government funding without even meeting basic program requirements. This outrageous outcome is clearly not contemplated by *Trinity Lutheran*, RFRA, nor the First Amendment.

Additionally, RFRA does not mandate a blanket exception for religious organizations. Under the previous administration, several agencies adopted insupportably broad, categorical approaches to the application of RFRA, for example by suggesting religious employers could utilize RFRA to evade nondiscrimination protections.<sup>19</sup> Such a categorical approach is inconsistent with the plain language of the statute, which requires a case-by-case analysis.<sup>20</sup> Case-by-case analysis is necessary because it is not possible for the government, as part of the rulemaking process, to weigh governmental and third-party interests in a particular instance. For example, the government may need to assess whether the RFRA claimant's religious beliefs are sincerely held, the claimed burden imposed by government policy is "substantial" as a matter of law, and there is a logical tie between the asserted burden and a religious belief.<sup>21</sup> The government must assess whether a claimant's religious exercise is substantially burdened. However, it should not just take the grantee at its word without any review or create blanket exemptions. Creating an exemption for insincere, unsubstantial, or hypothetical burdens would raise constitutional concerns.<sup>22</sup>

### **III. The SAMHSA Charitable Choice regulations and data collection should be updated to reflect recent US Supreme Court precedent, to improve data about referrals, and to better protect beneficiaries.**

In order to provide the SAMHSA regulations and data collection with as much legal stability as possible, as well as ensure access for beneficiaries, we recommend that: (1) the rule and data collection should require all grantees to provide notice of rights to beneficiaries, not just religious ones; (2) the required notice to beneficiaries should be updated to ensure that grantees include information about the grant, the granting agency (SAMHSA), and explicitly what steps beneficiaries can take to protect their rights; (3) SAMHSA regulations and data collection relating to referrals to alternative providers should be revised and more closely controlled by the agency in order to allow better tracking and reporting; and (4)

<sup>19</sup> See, e.g., Office of Federal Contract Compliance Programs, Dept. of Labor, Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, Final Rule, 85 Fed. Reg. 79324 (Dec. 9, 2020).

<sup>20</sup> 42 U.S.C. 2000bb-1 (If a *person's* religious exercise is substantially burdened, the government must demonstrate the policy or law is the least restrictive means of furthering its compelling interest with regard to *those particular circumstances.*) (emphasis added).

<sup>21</sup> See, e.g., *Holt v. Hobbs*, 574 U.S. 352, 369 (2015) (In a case brought under RFRA's sister statute, RLUIPA, Court emphasized it was proper to investigate whether inmate is using religious claim to "cloak illicit conduct."); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 588 (6th Cir. 2018), *aff'd by Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (RFRA claims were not at issue in Supreme Court case) ("Most circuits . . . have recognized that a party can sincerely believe that he is being coerced into engaging in conduct that violates his religious convictions without actually, as a matter of law, being so engaged."); see also, e.g., *Bowen v. Roy*, 476 U.S. 693, 702-703 (1986); *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989) (while it "is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, . . . [we] have doubts whether the alleged burden imposed . . . is a substantial one"); *Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011).

<sup>22</sup> Granting a religious exemption without first objectively determining that there exists a substantial, government-imposed burden on the claimant's religious exercise would violate the Constitution by favoring and promoting religion over nonreligion. See *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 613 n.59 (1989); *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 334-35 (1987). It would impermissibly "single out a particular class of [religious observers] for favorable treatment and thereby have the effect of implicitly endorsing a particular religious belief." *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 145 n.11 (1987).

SAMHSA and HHS should consider additional agency enforcement mechanisms to protect the rights of beneficiaries and ensure meaningful referral to alternative providers.

**1. The Charitable Choice rule and data collection should require all grantees to provide notice of rights to beneficiaries, not just religious ones.**

Giving beneficiaries notice of their rights is critical to protecting their religious freedom. Accordingly, the new regulations should require all providers—both secular and faith-based—to give beneficiaries effective notice of their right to religious freedom and associated protections in funded programs.

Beneficiaries cannot exercise their rights if they aren't aware they have them or don't understand them. And because people using government-funded social services should not be expected to be experts in the Constitution or their right to religious freedom, written notice, in plain language, is essential. Failure to inform beneficiaries leaves them vulnerable and unaware that they have a right to receive services free from discrimination, proselytization, and religious coercion.

The Trump Administration wrongly justified stripping the notice requirement from faith-based social services programs because it applied to religious but not secular organizations, characterizing it as an unfair burden. Even if this assertion was correct, the solution should not be to strip beneficiaries of critical information needed to effectuate their rights, but instead to require all grantees to provide notice to all beneficiaries. Giving notice to beneficiaries receiving services from secular organizations would have additional benefits, as they too could face discrimination, be coerced to engage in religious activities, or be subjected to unwanted religious proselytizing from staff, volunteers, or others. Indeed, American Atheists has received complaints from beneficiaries who have had such experiences at secular organizations that receive social-services funding.<sup>23</sup>

Further, SAMHSA should consider whether it is feasible and useful to require secular service providers to also refer beneficiaries that object to the religious character of the program to alternative providers and report notice of such requests for referral.

**2. The required notice to beneficiaries should be updated to ensure that grantees include information about the grant, the granting agency (SAMHSA), and explicitly what steps beneficiaries can take to protect their rights.**

The current notice requirement does not include sufficient information to allow beneficiaries to take action when their rights are violated or they are denied services. The model notice provided by SAMHSA provides that:

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<sup>23</sup> For example, American Atheists sought justice for an Ohio family who received services from a state agency that got social service funding from the Department of Justice and who faced religious discrimination, proselytization, and coercion. The family's developmentally disabled minor child received guardian ad litem services, and the guardian ad litem proselytized the parents—telling them that they couldn't be good parents without Jesus, providing them religious materials, and repeatedly promoting her church. She also coercively implied that failure to engage in religious activities may affect their case, potentially resulting in loss of custody. The parents made several complaints to the guardian ad litem's supervisors at the state agency, to no avail. Finally, the guardian ad litem coordinated with a church to introduce religious elements and ultimately baptize the child against the parents' wishes. This resulted in severe trauma to the child, both from the experience and the loss of needed services.

No provider of substance abuse services receiving Federal funds from the U.S. Substance Abuse and Mental Health Services Administration, including this organization, may discriminate against you 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.

If you object to the religious character of this organization, Federal law gives you the right to a referral to another provider of substance abuse services. The referral, and your receipt of alternative services, must occur within a reasonable period of time after you request them. The alternative provider must be accessible to you and have the capacity to provide substance abuse services. The services provided to you by the alternative provider must be of a value not less than the value of the services you would have received from this organization.<sup>24</sup>

While the model notice indicates the name of the granting organization, there is no requirement that the notice provided by the grantee service provider does so. Without the name of the granting agency, there is no way for a beneficiary to determine what agency is providing funding, what rules apply, or which agency the beneficiary should file a complaint with if their rights are violated. Similarly, because the notice does not indicate the identity of state grantees, beneficiaries of subgrantees may lack information necessary to enforce their rights. SAMHSA should more clearly define the notice requirement to include at least the following information: identity of granting agency, type of grant, and identity of any intermediary grantees. Finally, the notice should more clearly explain how beneficiaries can make complaints when these rules are violated, including contact information for the office where such complaints should be filed, such as the HHS Office for Civil Rights (see below, recommendation #4).

### **3. SAMHSA regulations and data collection relating to referrals to alternative providers should be revised and more closely controlled by the agency in order to allow better tracking and reporting.**

The Trump Administration's notice of proposed rulemaking for HHS faith-based social services programs stated that the agency, at least as of the end of 2019, was not aware of any referrals to alternative providers in relation to SAMSHA's Charitable Choice programs.<sup>25</sup> And because of that absence, HHS concluded, without a more thorough analysis, that "few if any referrals have been requested." However, we know that improper discrimination, proselytization, and religious coercion of beneficiaries occurs regularly, and such conduct is rarely reported or resolved favorably for the beneficiary. For example, American Atheists frequently gets complaints from individuals who have been subject to proselytization or other prohibited treatment in the course of seeking services.<sup>26</sup> It is clear that the current referral reporting process has failed, both in its purpose to ensure beneficiaries get access to services and in its goal to inform the agency of referrals. And that lack of accurate reporting was misused by the Trump Administration to attack critical religious equality protections.

Under the current data collection mechanisms and implementing rules, there are many reasons why SAMHSA may not receive reports of beneficiaries requesting alternative providers. For example, (1) grantees may simply fail to inform the agency that they provided appropriate referral or are unable to

<sup>24</sup> 42 C.F.R. Appendix to Part 54a.

<sup>25</sup> Ensuring Equal Treatment of Faith-based Organizations, 85 Fed. Reg. 2974, 2984 RIN 0991-AC13 (proposed Jan. 17, 2020) ("[To date, SAMHSA has not received any reports of referral by recipients or subrecipients.>").

<sup>26</sup> See *infra* part IV (listing examples of complaints American Atheists has received regarding proselytization or other prohibited activity by government-funded social services organizations).

do so (particularly since there is no follow up or enforcement of this requirement); (2) beneficiaries may not be given notice about their right to referral, which of course affects the rate of referral requests; (3) the vulnerability of the beneficiaries seeking social services may inhibit requests for referral; (4) stigmatization of nonreligious and religious minority beneficiaries may inhibit requests for referral; (5) grantees may have made other accommodations to meet the needs of beneficiaries after receiving requests; (7) SAMHSA guidelines for where and how such notices of referral should be collected, stored, and reported to the agency may be unclear; and (8) qualified beneficiaries who would otherwise request referral may simply avoid religious providers and therefore be unable to access important social services.

Currently, based on 42 CFR 54.8, subgrantee service providers need only inform the state grantee “upon referring a program beneficiary to an alternative provider.” What happens if the provider fails to refer a grantee differs by state, but it is unclear whether that information ever makes its way back to SAMHSA. Grantees directly funded by SAMHSA may inform the agency if an alternative provider is not found, but other grantees are not required to do so. There is no uniform recordkeeping requirement for referrals, and therefore we cannot know the full extent of the need for referral to alternative providers. The current reporting system is insufficient because it is confusing, inconsistent, and it fails to provide SAMHSA with needed information about whether referrals are actually taking place and the number of such referrals. Instead, we recommend the following:

- a. SAMHSA should establish a clear process for collecting notices regarding referral through a central office or mechanism to facilitate uniform collection and assessment. Assessment of referrals will allow SAMHSA to better assess the efficacy of religious freedom safeguards and provide insight regarding improving grant outcomes and the delivery of services.
  - b. SAMHSA should collect notices of referral *directly* from grantees and subgrantees since allowing collection by state grantees had made the process needlessly complicated. Currently, notices may be given to state grantees, provided directly to SAMHSA, or included in the regular grant reports. This diffuse system creates confusion and prevents uniform collection of notices and assessment of referrals.
  - c. Any request for a secular alternative provider, regardless of whether it is ultimately fulfilled, should be reported as a notice of referral. Under the current system, successful referrals are reported, and the status of unsuccessful ones is unclear. The agency should emphasize that it is the request itself that triggers the reporting requirement. The agency should consider what other relevant information could be collected at the time of referral (as well as later, following referral) that could help the agency to assess the success of the referral and the accessibility of the program.
- 4. SAMHSA and HHS should consider additional agency enforcement mechanisms to protect the rights of beneficiaries and ensure meaningful referral to alternative providers.**

Currently, it is unclear what remedies exist for beneficiaries when grantees violate 42 CFR Parts 54 and 54a by engaging in impermissible proselytizing, denying access based on religion, engaging in religious



coercion, or failing to provide referral. In some instances, such behavior may constitute discrimination on the basis of religion, but it is unclear that other violations, such as refusal to provide an appropriate referral, would rise to that level. Therefore, we recommend that SAMHSA coordinate with the HHS Office for Civil Rights (OCR) to take and investigate complaints from beneficiaries regarding violations of these rules. HHS OCR office already has procedures for taking and investigating discrimination and other civil rights complaints, collecting relevant data, and recordkeeping, so they are well equipped to deal with violations of these regulations. Of course, this change would require delegation of authority to HHS OCR and additional rulemaking, so it is beyond the scope of this SAMHSA information collection. Nevertheless, we believe that the notice and referral must be enforceable to be effective, and the failure of current approach necessitates a more thorough review of the implementation of these programs.

#### **IV. The notice and referral requirements are critical to protect the religious freedom of nonreligious people.**

Safeguards for religious equality are especially important for atheists and nonreligious people, who are more likely to object to being subject to religious proselytization and coercion in order to access government-funded social services. American Atheists recently surveyed nearly 34,000 nonreligious Americans, which showed, for example, that 44% of surveyed nonreligious participants frequently or almost always have been bothered by religious symbols or text in public places.<sup>27</sup> The data from this survey indicates that there is significant discrimination against nonreligious people in health care, social services, and similar fields, particularly in very religious communities. The survey showed that 17.7% of participants reported they had negative experiences when receiving mental health services because of their nonreligious identity, 15.2% had negative experiences in substance abuse services, and 10.7% in other health services. Notably, the level of discrimination and stigmatization was dramatically higher for participants living in very religious areas. Among participants living in very religious communities, 26.5% of participants reported they had negative experiences when receiving mental health services because of their nonreligious identity, 18.4% had negative experiences in substance abuse services, and 17.4% in other health services. This data highlights the importance of the SAMHSA notice and referral regulations for this population and illustrates the need to reform these notice and referral procedures.

It is no surprise then that, as with other invisible minorities, nonreligious people frequently conceal their nonreligious identities and beliefs in various contexts, particularly when they are likely to face stigmatization or discrimination. For example, nearly half of participants mostly or always concealed their nonreligious identity when at work (44.3%) and in school (42.8%). Research has shown that concealment can lead people to feel a lack of authenticity, to be less able to establish close ties with others, to experience more social isolation, to have lower feelings of belonging, and to have lower psychological well-being.<sup>28</sup> Our data shows that concealment of participants' nonreligious identities is associated with several different negative outcomes, including increased loneliness and risk for depression.

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<sup>27</sup> Frazer, S., El-Shafei, A., Gill, A.M. (2020). *Reality Check: Being Nonreligious in America*. Cranford, NJ: American Atheists.

<sup>28</sup> Quinn, D. M. (2017). Issue Introduction: Identity Concealment: Multilevel Predictors, Moderators, and Consequences, *Journal of Social Issues*, 73(2), 230-239; Quinn, D. M., & Earnshaw, V. A. (2013). Concealable Stigmatized Identities and Psychological Well-Being. *Social and personality psychology compass*, 7(1), 40-51.

Tragically, we also found that participants faced a high rate of family rejection as a result of their nonreligious identity. Among participants under age 25, one in five (21.9%) reported that their parents are not aware of their nonreligious beliefs. For those whose parents are aware of their nonreligious identities, nearly one third (29.2%) have parents that are somewhat or very unsupportive of their beliefs. We found that family rejection had a significant negative impact on participants' educational and psychological outcomes. For example, participants with unsupportive parents had a 71.2% higher rate of likely depression than those with very supportive parents.

The survey also measured exposure to stigma based on participants' nonreligious identity by asking how frequently they encounter various stigmatizing incidents. Perhaps contributing to the frequent concealment of their nonreligious identities, nearly half (47.5%) of survey participants were sometimes, frequently, or almost always asked or felt pressure to pretend that they are religious. Moreover, participants living in very religious communities experienced nearly 40% more stigma than those in not at all religious communities. Because of the discrimination and stigmatization nonreligious people face in our society, they experience heightened rates of loneliness and depression. Our research shows that one in six (17.2%) of survey participants are likely to be depressed and about one quarter (25.6%) of participants often experience one or more indicators of loneliness and social isolation.

Furthermore, American Atheists and other organizations serving nonreligious people frequently receive complaints from nonreligious beneficiaries of government-funded programs who object because they are denied services by religious social service providers or because such providers violate their religious freedom. For example:

- In 2019, American Atheists worked with a man seeking services at St. Benedict's emergency shelter in Kentucky. St. Benedict requires all its residents to submit to a breathalyzer and drug testing once a month to receive housing. The costs of drug testing are paid for by WellCare, Kentucky's Medicaid equivalent. Although the case was mooted before any in-depth factual investigation was required, it appears that St. Benedict was at least receiving Medicaid funds and may have also received funds through the HHS, SAMHSA, and/or the Department of Housing and Urban Development (HUD). Recipients of St. Benedict's services are enrolled in Medicaid and WellCare during the intake process.

The man who contacted American Atheists was required to attend twelve-step addiction recovery support group meetings five times per week. The complainant was able to find housing shortly after contacting American Atheists, so the case did not proceed further. However, had the recipient not found housing in a timely manner, American Atheists would have pursued appropriate remedies, including referral to an alternative secular provider.

- In 2021, American Atheists received a complaint from a man living in CO who was required by a court to undergo substance abuse treatment. He was required to choose between 2 religious services providers (both federal subgrantees) by the state agency (which is a federal grantee). As part of this treatment, he was required to attend a 12-step program, which he objected to as an atheist.

He was required to attend mandatory religious worship where atheists were regularly ridiculed and told it was impossible for them to recover. When he complained about being subjected to these religious activities, the director of the program ranted at him for 45 minutes, saying he could never be sober because he was an atheist and that he would inevitably relapse. Shortly after, he did. He

was never given notice of his rights, and his request for a secular alternative fell on deaf ears. After this incident occurred, the state agency was eventually persuaded to allow him to receive service from a secular alternative.

- A commercial pilot and veteran in Washington State was denied medical clearance to fly by the Federal Aviation Administration (FAA) after he refused to complete a sectarian 12-step program he was mandated to attend in connection with the FAA's Human Intervention Monitoring Study (HIMS) program. Despite being sober for more than a year, medical personnel involved in the HIMS program considered him a "dry drunk" and placed significant coercive pressure on the pilot to take part in a 30-day, inpatient treatment program that was predominantly based on Alcoholics Anonymous (AA), which the courts have acknowledged is a pervasively religious program. As part of his discharge from the inpatient program the HIMS-affiliated doctors directed him to participate in, he was required to attend 90 AA meetings in 90 days. The unrelenting religious character of the meetings became so overbearing that he was unable to complete the program. [this is 2019].
- A U.S. Marine Corp. veteran became addicted to opiates after being injured by a mortar attack in Iraq. Recognizing his addiction and wishing to recover, he enrolled in the CAT5 substance abuse treatment program provided by the VA Medical Center in Martinsburg, West Virginia. Once he was enrolled and began participating in the program, its religious nature became obvious. He reported being harassed for his atheism during group therapy sessions. Sessions often opened with participants being asked questions such as "Who woke us up this morning?" The expected answer was always "God." After he completed a "spiritual assessment," in which he identified himself as an atheist, one therapist asked him how an atheist can say the Serenity Prayer. He eventually left the program and was able to manage his addiction through means outside the VA healthcare system. A FOIA request to VA Martinsburg indicated that the *only* substance abuse programs the facility contracted with were Alcoholics Anonymous and Narcotics Anonymous.
- In 2022, An inmate in the custody of the West Virginia Division of Corrections and Rehabilitation alleged that multiple prison officials stated that his eligibility for parole depends on his participation in the Division's Residential Substance Abuse Treatment (RSAT) program. The complainant is an atheist and was assured that the program has options for atheist inmates. Upon enrolling in the program, however, he found it to be pervasively religious. The complainant reported that the RSAT program mandates participation in Alcoholics/Narcotics Anonymous meetings. The meetings begin and end with prayer, require surrender to a higher power, and religious aphorisms are displayed on a "Thought of the Day" board at meetings. Furthermore, additional materials utilized by the program, provided by Texas Christian University, are also pervasively religious. After participating in the program for 90 days, the inmate withdrew from the program because he found the coercive religious content intolerable. Since withdrawing from the program, the inmate has been informed he will never make parole as a result.

These examples illustrate the importance of the existing notice and referral requirements and highlight the prejudice nonreligious beneficiaries may face. While the foregoing examples pertain to nonreligious people, many religious individuals also object to being subject to religious programming in social services that conflicts with their beliefs. However, such individuals may not be aware of or have access to organizational support to help them enforce their rights, forcing them to either endure these violations of their religious freedom or to forgo essential social services.

## Conclusion

American Atheists supports SAMHSA's proposal to renew the information collection associated with the Charitable Choice program and recommends amendment to improve both the data collection and the implementing regulations. The notice and referral requirements provide important religious freedom safeguards for beneficiaries, including individuals seeking substance use recovery services. No one should face religious coercion or undergo mandatory religious programming in order to get the care they need. However, the current SAMHSA information collection mechanisms regarding referrals to alternative providers, and the implementing regulations, are insufficient to collect appropriate data and to adequately protect beneficiaries. We encourage SAMHSA to consider the recommendations made herein to improve both the data collection and the notice and referral requirements.

If you should have any questions regarding American Atheists' support for the proposed information collection, please contact me at [agill@atheists.org](mailto:agill@atheists.org).

Very truly yours,



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