

FREEDOM FROM RELIGION *foundation*

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SENT VIA U.S. MAIL & EMAIL

tom.vilsack@usda.gov

Secretary Tom Vilsack
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, DC 20250

Re: Summer Food Service Program: Church Sponsors and Compliance with Executive Regulations

Dear Secretary Vilsack:

I am writing on behalf of the Freedom From Religion Foundation (“FFRF”), to express concerns with the lack of USDA safeguards regarding church participation in the Summer Food Service Program (SFSP). FFRF is a nationwide nonprofit organization with more than 19,000 members. Our purpose is to protect the constitutional principle of separation between state and church.

The SFSP is a USDA program administered through state agencies to reimburse approved sponsors for meals they provide children who would normally receive free or reduced-price meals at school. Its purpose “is to provide food service to children from needy areas during periods when area schools are closed for vacation.” Summer Food Service Program, 7 C.F.R. § 225.1 (2013). Governmental and nonprofit (tax-exempt) organizations that “[p]rovide[] an ongoing year-round service to the community” can become sponsors, as long as they are administratively capable of doing so. 7 C.F.R. § 225.14.

Many churches and other religious organizations are program sponsors.¹ The USDA’s Food and Nutrition Service (FNS), which oversees the SFSP, even encourages churches to be used as sites where SFSP meals are served.² The FNS also encourages SFSP meals to be served at sites where they are accompanied by “educational, enrichment and recreational activities,” and gives as an example “faith-based organizations or churches that offer religious study day camp sessions.”³

Problematic SFSP Practices

We are seriously concerned that the current practices of churches serving as SFSP sponsors do not comply with the Constitution, particularly regarding the time and location separation between SFSP meal service and religious programming. The food service and activities are often all part of one program—the food service is seamlessly integrated into other programming.

If all sponsors, as the FNS encourages time and again,⁴ include activities alongside the SFSP food service, then the children who receive food from those sponsors will be expected or encouraged to participate in

¹ See, e.g. Pennsylvania sponsor list, <http://goo.gl/c8hQzw>; New Jersey sponsor list, <http://www.state.nj.us/agriculture/divisions/in/pdf/summersponsors.xls>.

² See USDA Food and Nutrition Service, How to Become a Sponsor, www.fns.usda.gov/sfsp/how-become-sponsor (last visited Aug. 2, 2013) (“Meal service sites may be located in a variety of settings, including . . . churches . . .”).

³ *Id.*

⁴ See USDA Food and Nutrition Service, Sponsors: Managing the Program, www.fns.usda.gov/sfsp/sponsors-managing-program (last visited Aug. 2, 2013) (“The most effective sites will be located in areas where you can offer a supervised food service with

those activities—which, for church sponsors, means religious instruction. Churches can use the SFSP as a subsidy of their proselytization, providing a literal carrot to attract hungry children to their religious programming.

The SFSP's objective of providing supplemental meals to children in the summertime is laudable and vitally important. It is problematic, however, that the government is heavily using churches to administer its social service programs, potentially to the exclusion of other, secular organizations. Parents must not be forced to choose between their children going to religious "activities" and their children not getting a proper meal. Such religious coercion is unconstitutional: "It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice." *Lee v. Weisman*, 505 U.S. 577, 596 (1992).

Required Recipient Protection

The use of churches as SFSP sponsors and the association of religious programming with SFSP meal service raises constitutional concern. President Barack Obama has taken action to address the problem, by issuing an Executive Order (E.O.) in 2010 requiring time or place separation between religious programming and the distribution of federally-funded social services:

(f) 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 . . . 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.

Exec. Order No. 13,559, 75 Fed. Reg. 71,319 (Nov. 22, 2010).

The Interagency Working Group on Faith-Based and Other Neighborhood Partnerships wrote a Report to the President (Report) regarding the implementation of that E.O., including model regulations/guidance.⁵ On August 2, 2013, the Office of Management and Budget sent a memo to "the heads of executive departments and agencies," "instruct[ing] specified agency heads to adopt regulations and guidance . . . that are consistent with the model regulations and guidance in the Report Similarly . . . agency heads, where appropriate and to the extent permitted by law, must amend all existing agency regulations, guidance documents, and policies of their respective agencies to ensure that they are consistent with the fundamental principles set forth in the E.O."⁶

The Report and its model regulations/guidance specify that:

- "[W]here religious activities or programs are undertaken, it must be clear that they are separate and distinct and that participation in the religious activities is voluntary for participants in the

recreational or enrichment activities. With the support of community organizations, pick out potential areas where you could run a successful food service program for children. Work closely with your State agency to determine if your potential sites are located in eligible areas."); USDA Food and Nutrition Service, Frequently Asked Questions, www.fns.usda.gov/sfsp/frequently-asked-questions-faqs (last visited Aug. 2, 2013).

⁵ Interagency Working Group on Faith-Based and Other Neighborhood Partnerships, *Fundamental Principles and Policymaking Criteria for Partnerships With Faith-Based and Other Neighborhood Organizations*.

⁶ Sylvia M. Burwell, Office of Management and Budget, M-13-19: Memorandum for the Heads of Executive Departments and Agencies (Aug. 2, 2013).

Federal program,” so that “the distinction is completely clear to the beneficiary or prospective beneficiary,” such as by:

- “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 Federally-funded program in materials, websites or commercials purchased with any portion of Federal funds.”
- Service providers of federally-funded programs must “[i]mplement measures to separate the presentation of any program with religious content from the presentation of the Federally-funded 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.”
- Service providers of federally-funded programs must “[e]liminate all explicitly religious and explicitly anti-religious activities from the content of the Federally- funded program,” including:
 - 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 expressly intended to dissuade program participants from religious beliefs.

The Report further states: “[I]f the clients served are children, it is particularly important that the separation between the programs be maintained.” The USDA and FNS have a constitutional obligation and a duty to the children receiving meals through the SFSP to ensure that those children are not being directly or indirectly proselytized in the process. The E.O. and Report, however, fail to protect children from all forms of proselytization. The E.O. specifically allows for “faith-based organizations that receive Federal financial assistance [to] use their facilities to provide social services supported with Federal financial assistance, without removing or altering religious art, icons, scriptures, or other symbols from these facilities.” Exec. Order No. 13,559. It is still religious indoctrination and government endorsement of religion when children are forced to enter a religious building with religious symbols and iconography. Since the 2010 E.O., a Federal Court of Appeals has held as much in the context of school graduations. *See Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840 (7th Cir. 2012) (en banc), *petition for cert. filed.*, No. 12-755. Children must not have to endure religious decorations or messages in order to receive federally-funded social services.

Necessary Monitoring

Once USDA regulations are updated pursuant to the E.O. and SFSP sponsors are notified of those updates, there remains the issue of monitoring. The current FNS guides for SFSP monitors and site supervisors make no mention of ensuring the separation of meal service and religious programming,⁷ even in the “Civil Rights” section of the Monitor’s Guide.⁸ The USDA and FNS should ensure that there are trained individuals who oversee SFSP sites to ensure sponsors are not violating regulations prohibiting religious programming from mixing with meal service, such as by leading the children in prayer before eating.

Priority Given to Established Church Sponsors

There are difficulties with religious groups being SFSP sponsors beyond preventing the mixture of religious activity with the federally-funded food service. There are proximity restrictions on SFSP food service sites. USDA regulations prohibit the agencies that administer SFSP for a state from allowing

⁷ See USDA FOOD AND NUTRITION SERVICE, THE SUMMER FOOD SERVICE PROGRAM: 2013 MONITOR’S GUIDE (2013), <http://www.fns.usda.gov/sites/default/files/MonitorsGuide.pdf>; USDA FOOD AND NUTRITION SERVICE, THE SUMMER FOOD SERVICE PROGRAM: 2013 SITE SUPERVISOR’S GUIDE (2013), <http://www.fns.usda.gov/sites/default/files/SiteSupervsGuide.pdf>.

⁸ See THE SUMMER FOOD SERVICE PROGRAM: 2013 MONITOR’S GUIDE, at 7.

sponsors to establish SFSP food service sites too near each other. 7 C.F.R. § 225.6 (“When evaluating a proposed food service site, the State agency shall ensure that . . . [t]he area which the site proposes to serve is not or will not be served in whole or in part by another site, unless it can be demonstrated to the satisfaction of the State agency that each site will serve children not served by any other site in the same area for the same meal . . .”). Because of the restrictions, if an area already has SFSP sites established through church sponsors, then secular sponsors will not be able to establish their own sites, and parents in the areas served by those sites will have to send their children to the religious sponsors’ programs (or at least to religious sites—such as churches) in order to receive SFSP meals. Parents should not be forced to make that choice, particularly if they are among the nearly 20% of American adults (or 32% of adults under 30) who are nonreligious.⁹ Given the importance of the SFSP’s purpose of providing meals for children, it should not exclude families from participating on the basis of religion. Families should not have to forfeit enrichment programs and essential day care because a federally-funded program’s only local options are religious. This is a case where not only does religion get the credit and taxpayers get the bill, but where taxpayers are subsidizing and advertising religious proselytization and programming directed at a captive audience of hungry, needy children.

Inadequate Nondiscrimination Policies

The E.O. also prohibits religious discrimination by organizations receiving federal financial assistance. Exec. Order No. 13,559, 75 Fed. Reg. 71,319 (Nov. 22, 2010) (“All organizations that receive Federal financial assistance under social service programs should be prohibited from discriminating against beneficiaries or prospective beneficiaries of the social service programs on the basis of religion or religious belief.”). SFSP’s current nondiscrimination policy fails to explicitly prohibit discrimination based on religion: “[N]o person shall, on the grounds of race, color, national origin, sex, age, or disability, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under, the Program.” 7 C.F.R. § 225.7.

There is no prohibition on religious discrimination indicated in SFSP informational materials¹⁰ or on the nondiscrimination poster¹¹ required to be posted at all sites,¹² and the FNS specifically states that discrimination based on religion (and political beliefs) is only prohibited for certain programs (not including SFSP).¹³ These omissions currently allow SFSP sponsors to incorrectly believe they can refuse to feed children based on their religion or lack of religion and still receive SFSP funds. If the sponsors engage in such discrimination, the federal government itself is implicated in religious discrimination, in further violation of the Constitution. The USDA and FNS must ensure that all SFSP sponsors are informed of the nondiscrimination policy (updated in accordance with the E.O.) and that a new poster with the updated policy is issued to replace the old, out-of-date one.

Churches as Government Social Service Providers

Even without accompanying religious activities, it is improper for the government to closely affiliate itself with churches by having them serve as dispensaries for government benefits.¹⁴ Churches should not be locations for children to receive free meals at federal, public expense any more than they should be where low-income families must pick up SNAP EBT cards or college students sign up for federal loans.

⁹ Pew Research Center, *Nones on the Rise: One-in-Five Adults Have No Religious Affiliation*, The Pew Forum on Religion & Public Life (October 9, 2012), available at <http://www.pewforum.org/Unaffiliated/nones-on-the-rise.aspx>.

¹⁰ USDA FOOD AND NUTRITION SERVICE, THE SUMMER FOOD SERVICE PROGRAM: 2013 ADMINISTRATIVE GUIDANCE FOR SPONSORS 2 (2013), <http://www.fns.usda.gov/sites/default/files/AdminGuideSponsors.pdf>.

¹¹ <http://www.fns.usda.gov/cr/justice-translations/475C.pdf> (copy enclosed).

¹² THE SUMMER FOOD SERVICE PROGRAM: 2013 ADMINISTRATIVE GUIDANCE FOR SPONSORS at 75.

¹³ FNS Instruction 113-1 (2005). Still relied on by USDA/FNS/SFSP. THE SUMMER FOOD SERVICE PROGRAM: 2013 ADMINISTRATIVE GUIDANCE FOR SPONSORS at 75.

¹⁴ All SFSP meal recipients are made aware the government funds the meals, due to the USDA & FNS’s reporting requirements. THE SUMMER FOOD SERVICE PROGRAM: 2013 ADMINISTRATIVE GUIDANCE FOR SPONSORS at 75.

The USDA fails to incentivize secular SFSP sites as a primary option. Public schools, commonly SFSP sponsors, more appropriately fill that role than do churches. Most public schools buildings are open and used for programming during the summer anyway, and public schools are already equipped with the staff and infrastructure to serve meals and host activities for children, as they do so throughout the rest of the year. They are public, secular buildings supported by taxes with no troubling religious ties, iconography, or associations. In addition, they can sign up for and administer the program more easily than any other organizations, thanks to the Seamless Summer Option.¹⁵ Public schools are ideal candidates to be SFSP sponsors.

Under the current program, it is difficult to ensure that religious activity is completely separate from meal service provided by church SFSP sponsors. Even if the religious activity is separate, the religious nature of enrichment programming excludes and offends parents who are not religious or do not share the religion of the sponsoring organizations. Young impressionable children are receiving federally-funded meals in the same location as they receive religious instruction. The religious instruction is close in both time and place, signaling government endorsement. The USDA is required by the E.O. to ensure protections from undue religious influence in social services.

Conclusion

We urge the USDA to adopt the regulations required by the E.O. and the OMB memo without delay, and for those regulations to require priority be given to secular sites and sponsors over religious ones to ensure that all potential beneficiaries have convenient access to secular SFSP sites if religious sites are approved as well. The statute establishing the SFSP already requires states administering the program to give priority to schools over other organizations "where more than one eligible service institution proposes to serve the same area." 42 U.S.C.A. § 1761 (West). We urge the USDA to explore any additional means of incentivizing public schools and other secular organizations to participate in the SFSP. The new and modified regulations must also include means of ensuring compliance, particularly with regard to sponsors separating religious programming from meal service and not engaging in religious discrimination.

Please inform us in writing at your earliest convenience of the steps your department is taking to address these issues.

Sincerely,



Patrick C. Elliot
Staff Attorney

Enclosure

PCE:cmr

cc: Audrey Rowe (audrey.rowe@fns.usda.gov)
Administrator, Food & Nutrition Service
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¹⁵ See USDA Food and Nutrition Service, Seamless Summer and Other Options for Schools, <http://www.fns.usda.gov/sfsp/seamless-summer-and-other-options-schools> (last visited August 5, 2013) ("Schools participating in the National School Lunch or School Breakfast Program are eligible to apply for the Seamless Summer Option. Seamless Summer has less paperwork, making it easier for schools to feed children during the traditional summer vacation periods").

FOR ALL"

