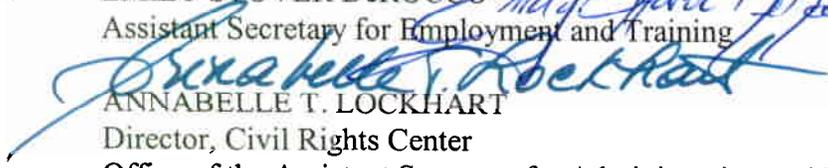


EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D.C. 20210	CLASSIFICATION WIA/Religious Activities
	CORRESPONDENCE SYMBOL OEDR
	DATE July 6, 2005

TRAINING AND EMPLOYMENT GUIDANCE LETTER NO. 1-05

TO: ALL STATE WORKFORCE AGENCIES
ALL STATE WORKFORCE LIAISONS
JOB CORPS CONTRACTORS
JOB CORPS CENTER DIRECTORS
STATE WORKFORCE AGENCY EQUAL OPPORTUNITY OFFICERS

FROM: EMILY STOVER DeROCCO 
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SUBJECT: New Rules Allowing Use of WIA Title I Financial Assistance for Religious Training and Employment, and Making Other Changes to Religion-Related Regulations Governing Recipients of DOL Support Including the One-Stop Career Center Service Delivery System and the Job Corps

- Purpose.** To notify all State Workforce Agencies (SWA) and other stakeholders within the One-Stop Career Center service delivery system that amendments to DOL regulations permit the use, in defined circumstances, of Workforce Investment Act (WIA) Title I financial assistance for training and employment of WIA participants in religious activities. The amendments also clarify other religion-related requirements governing both the workforce investment system and other recipients of Federal support from the Department of Labor (DOL or the Department). This guidance explains and interprets the amendments and requires various actions to implement them.
- References.** Executive Order 13279, see <http://www.whitehouse.gov/news/releases/2002/12/20021212-6.html>; Workforce Investment Act of 1998 (WIA), 29 U.S.C. 2801 et seq., see <http://www.doleta.gov/usworkforce/wia/act.cfm>; 20 CFR parts 663, 667, and 670, WIA Final Rules, see 69 FR 41882; 29 CFR part 37, Implementation of the Nondiscrimination and Equal Opportunity Provisions of WIA, Interim Final Rule, see 69 FR 41882 and 41894; 29 CFR part 2, subpart D, Equal Treatment in Department of Labor Programs for Faith-Based and Community Organizations; Protection of Religious Liberty of Department of Labor Social Service Providers and Beneficiaries, see 69 FR 41882.

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3. **Background.** Executive Order (E.O.) 13279 requires Federal agencies to review and revise their policies in order to ensure that faith-based and community organizations are able to apply and compete on equal footing with other eligible organizations for Federal financial assistance. In response to this E.O., and to comply with certain constitutional requirements, the Department has implemented several religion-related changes to its general regulations and to the regulations implementing WIA.

A primary change relates to the regulations implementing Section 188 of WIA, 29 U.S.C. § 2938, which contains the statute's nondiscrimination and equal opportunity provisions. In November 1999, the Department of Labor's Civil Rights Center (CRC) published an Interim Final Rule (IFR) to implement that statutory section. The IFR, codified at 29 CFR part 37, generally carried over the nondiscrimination and equal opportunity-related policies and procedures in place under WIA's predecessor statute, the Job Training Partnership Act (JTPA). Included among the provisions carried over to the WIA nondiscrimination IFR from the JTPA nondiscrimination regulations was a provision barring the use of all types of WIA Title I financial assistance to employ or train participants in religious activities. See 29 CFR 37.6(f)(1); see also 20 CFR 667.266, 667.275.

However, the Department has now determined that this broad prohibition contained in the IFR is not required by current law. Recent Supreme Court decisions permit the use of Federal financial assistance to support employment and training in religious activities when the assistance is "indirect" within the meaning of the Constitution. Assistance is considered indirect, for example, when participants are given a genuine and independent private choice among training providers or program options and can freely elect, from among such options, to receive training in religious activities. Individual Training Accounts (ITAs), Personal Reemployment Accounts (PRAs), and other types of support that provide participants with genuine choices generally meet these criteria. Of course, any employment, training or services offered must otherwise satisfy the requirements of the program (e.g., 20 CFR part 663, subparts C and D).

As a result, after publishing two Notices of Proposed Rule-Making (NPRM) in the Federal Register (see 68 FR 56385, September 30, 2003; 69 FR 11234, March 9, 2004) to solicit public comment, DOL has issued two final rules, which took effect on August 11, 2004. See 69 FR 41882 and 41894, July 12, 2004. The final rule at 69 FR 41894 relates to limitations on the employment of WIA Title I participants in construction, operation and maintenance at locations where certain religious activities occur. Separate guidance will be issued relating to this final rule.

The final rule at 69 FR 41882, "Equal Treatment in Department of Labor Programs for Faith-Based and Community Organizations; Protection of Religious Liberty of Department of Labor Social Service Providers and Beneficiaries," amends the WIA regulations to permit the use of indirect financial assistance under WIA Title I to support employment and training in religious activities, and amends both the WIA regulations and DOL's general regulations to make other religion-related changes. A copy of this final rule is attached to this guidance as Attachment I. The preamble to the final rule describes in detail the reasons underlying the regulatory changes the rule accomplishes. A brief summary of the changes that are most significant for recipients and other stakeholders within the One-Stop Career Center system appears below; this summary is based upon the preamble to the final rule. Addressees should refer to the final rule for further information, e.g., definitions, which generally are not repeated in this guidance.

This guidance is intended to explain and interpret the new regulatory part, 29 CFR part 2, subpart D, that was created by the final rule at 69 FR 41882. Administrators should be aware that, in addition to these regulations, certain other Federal laws and regulations also relate to the treatment of religious exercise. For example, the Religious Freedom Restoration Act (RFRA) provides that the Federal Government must not impose legal or other requirements that substantially burden a person's exercise of religion unless doing so is the least restrictive means of furthering a compelling government interest, 42 U.S.C. 2000bb-1(b). Because a valid RFRA claim gives the claimant the right to be exempted from otherwise applicable legal requirements, some faith-based organizations may request exemptions based upon RFRA from various statutory or regulatory requirements otherwise applicable to the One-Stop system. Because RFRA claims can be both legally complex and highly fact-dependent, administrators who are faced with a RFRA-based claim for exemption are encouraged to contact ETA or CRC (see contact information below) for further guidance. Administrators should also be aware, of course, that in addition to the legal requirements discussed in this document, other Federal statutes and regulations also relate to the operation of the One-Stop system (see, e.g., those listed on OMB SF-424B). Each organization within the system must also comply with all such applicable statutes and regulations.

Summary of Most Significant Changes

New Regulatory Subpart Created. A new subpart D has been created in 29 CFR part 2. This subpart applies to all entities that receive or administer "DOL support," defined in 29 CFR 2.31(g), including those affiliated with the One-Stop system and including State and local governments administering DOL support. The remaining sections in this summary outline some of the key provisions in the new subpart.

DOL Support for Job Training and Employment in Religious Activities Now Permitted When Assistance is "Indirect." 29 CFR 37.6(f)(1), as amended, permits WIA participants to be employed or trained in religious activities when "indirect" WIA financial assistance is used, as provided in new Subpart D in 29 CFR part 2. This change was accomplished by deleting the original language of 29 CFR 37.6(f)(1), which was the paragraph in the WIA nondiscrimination regulations that broadly prohibited participants from being "employed or trained in sectarian activities," and inserting language referring readers to the new Subpart D in 29 CFR part 2.

"Indirect Assistance." Under 29 CFR 2.33(c) in the new subpart, assistance is "indirect" within the meaning of the Establishment Clause of the First Amendment to the Constitution when certain requirements are met. For example, assistance is considered "indirect" when a participant is offered a genuine and independent choice among training providers or program options and can freely elect, from among such options, a provider or option that incorporates religious activities. (Any indirectly-assisted training or employment offered must also satisfy the legal and other requirements of the program under which it is offered.) Such choice may be offered to participants by means of a voucher, coupon, credit card, or certificate, or similar mechanism that permits individuals to choose among providers or program options. Because the regulation permits the use of any "similar mechanism" that provides genuine and independent private choice, there is no need to incorporate an intermediate step by which the participant, having been given a separate piece of paper, credit card, or voucher, then hands the voucher to the selected provider. Rather, what is necessary is that the assistance program include some mechanism that affords the participant the means by which to effectuate a genuine and independent private choice

of provider or program option. There is no difference, in other words, between giving the participant a piece of paper or a credit card that directs the public agency to pay the service provider, and the agency's providing the participant with a genuine and independent opportunity to choose a provider and then paying the provider whose services have been selected based on the services provided.

To ensure genuine and independent private choice, each participant must be offered at least one option to which the participant has no religious objection. Administrators are reminded, however, that training services, whether under ITAs or under contract, must be provided in a manner that maximizes informed consumer choice. See 20 CFR 663.440. In addition, an organization must not be favored for, or denied recognition as, an eligible training provider (ETP) or other provider solely on account of religion.

Individual Training Accounts (ITA) under WIA generally satisfy the requirements to qualify as indirect assistance, as do the Personal Reemployment Accounts recently introduced by the Department. Therefore, ITAs and PRAs generally are examples of indirect assistance, and WIA financial assistance is generally permitted to be used to support employment and training of participants in religious activities when such financial assistance is distributed through ITAs and PRAs through a program that is neutral with regard to religion.

In addition to ITAs and PRAs, other WIA activities may also qualify as "indirect" assistance (e.g., on-the-job training (OJT), incumbent worker training, customized training, core services, intensive services, and supportive services) insofar as the programs offering such activities are structured (or restructured) so that they operate in a manner designed to provide participants with a genuine and independent choice among providers or program options. For example, although under 20 CFR part 663 Local Workforce Investment Areas (LWIAs) must provide certain services through the One-Stop operator or through contracts with service providers, LWIAs could potentially provide such services indirectly by – assuming other requirements are satisfied – first, developing a list of several service providers; second, allowing participants to make a genuine and independent private choice of the provider from which to receive services, e.g., in a manner similar to the way participants with ITAs choose training providers; and third, paying providers selected by participants through a contract that provides payment based on actual services used by participants. Questions as to whether a particular employment, training or service provision's structure (or proposed restructure) constitutes "indirect" assistance should be addressed to the appropriate ETA regional office, or to CRC (see below for contact information).

Voluntary Religious Activities Must Be Permitted at Job Corps Centers. The recent amendments also require Job Corps centers to permit residents to engage in voluntary religious activities, including holding religious services, on center premises. See 29 CFR 2.33(b)(2). Services are not required to be "nondenominational;" rather, services may contain the religious content desired by residents. Job Corps may impose reasonable time, place, and manner restrictions, however. In general, direct DOL support must not be used to support inherently religious activities, such as worship, religious instruction, or proselytization, at Job Corps centers. At facilities where there is such a degree of government control over the program environment that religious exercise would be significantly burdened absent affirmative steps by Job Corps operators (such as at isolated Job Corps Centers), program officials may take affirmative steps to ensure that program beneficiaries may exercise their religious freedom, including the use of direct Federal support to provide access to religious services and activities where necessary to ensure the opportunity for exercise of religious rights. Of course, Job Corps Centers and

organizations offering religious activities must inform participants that participation in any such religious activities is voluntary.

To implement these changes, the Department revised paragraphs (b) and (c) of 20 CFR 670.555, the regulatory provisions governing the holding of religious services on the premises of Job Corps centers. The original language of paragraph (b) prohibited religious services from being held on the premises of a Job Corps center “unless the center is so isolated that transportation to and from community religious facilities is impracticable.” Paragraph (c) provided that if religious services are held on center, “no Federal funds may be paid to those who conduct such services, services may not be confined to one denomination, and centers may not require students to attend services.” The Department deleted the original language of these two paragraphs, re-designated previous paragraph (d) as paragraph (b), and inserted a new paragraph (c) that cross references 29 CFR part 2, subpart D.

Job Corps Contractors, Center Directors, and other appropriate staff have received revisions to the Job Corps Policy and Requirements Handbook that reflect these new requirements in more detail.

Equal Protection of Faith-Based Organizations. 29 CFR part 2, new subpart D, outlines certain constitutional requirements related to the participation of faith-based organizations in DOL social service programs and ensures that DOL and its programs provide the required protections to faith-based organizations:

- Faith-based organizations must be eligible, on the same basis as any other organization, to apply for or receive Federal financial assistance under and participate in any DOL social service program for which the organizations are otherwise eligible. This means that organizations must not be discriminated against simply because some of their employees are engaged in religious activities. (Of course, all applicable limitations on use of Federal assistance must be met, including that participants in directly-assisted programs must not be required to perform any religious activities.) For example, organizations that apply for and are qualified to become or remain ETPs, or other types of service provider, must not, on account of religion, be excluded from being recognized as such and included on lists provided to participants. Approvals and denials of applications to become ETPs or other providers, and removals of providers from such lists, must be documented, in accordance with the procedures established under 20 CFR 663, Subpart E (e.g., 663.565(b)(4)), in order to facilitate the Department’s monitoring efforts related to this provision.
- Faith-based organizations, like all organizations receiving DOL financial assistance, must not use direct DOL financial assistance to support any inherently religious activities. Inherently religious activities include, for example, worship, religious instruction, or proselytization.
- Faith-based organizations that receive DOL financial assistance retain their independence from Federal, State and local government and may continue to carry out their missions and maintain their religious character. This autonomy includes, among other things, the right to use the organizations’ facilities to provide DOL-supported social services without removing or altering religious art,

icons, scriptures or other religious symbols; the right to govern themselves and to select board members on the basis of religion; and the right to express freely their views, including religious views.

Religion-Related Responsibilities of DOL, DOL Social Service Providers and State and Local Governments Administering DOL Support. 29 CFR part 2, subpart D, also outlines certain religion-related responsibilities that faith-based organizations, as well as all other entities that receive DOL support, have under current law:

- DOL, State and local governments administering DOL support, and non-Federal entities (other than State or local governments) using direct DOL assistance must not discriminate for or against a program participant or prospective participant on the basis of religion or religious belief. Program providers must not impermissibly restrict participants' rights to exercise religious freedom.
- DOL, State and local governments administering DOL support, and non-Federal entities (other than State or local governments) using direct DOL assistance must ensure that no direct DOL financial assistance is used for inherently religious activities. Organizations receiving DOL assistance are subject to audit and should keep adequate records of funds expenditure and provision of other types of assistance so that compliance with these requirements can be verified. The restriction against using direct DOL financial assistance for inherently religious activities does not apply when assistance is "indirect," since that restriction, by definition, applies only to "direct" assistance. (See description of "indirect" assistance earlier in this document.)
- If an organization conducts inherently religious activities and also offers social service programs with direct DOL support, then that organization must offer the inherently religious activities at a time or in a place that is separate from the programs receiving direct DOL support. For example, if directly-supported training activities are offered in a certain room in an organization's facility, inherently religious activities must not occur in that room at the same time as the training. Inherently religious activities may occur in another room at the facility at the same time as directly-supported training, or in the same room if offered at a different time from the directly-supported training. The organization must also ensure that participation in any inherently religious activities is purely voluntary, and not compulsory, for participants in these DOL-supported programs, and must inform participants that such activities are voluntary. Participants may engage in any activities associated with the social service program that are not inherently religious, if such activities are permitted under other requirements relating to the training program.
- Employment, training and other service programs that receive only indirect DOL support (and no direct support) may include required religious elements that occur at the same time and in the same place as the rest of the training. Participants may voluntarily choose to enroll in such programs.

Application to State and Local Funds. 29 CFR part 2, subpart D, clarifies that if a state or local government voluntarily contributes its own funds to supplement funds provided by DOL to support social service programs, the State or local government has the option to segregate the Federal funds or commingle them. The section requires that all commingled funds be subject to

the same requirements as those applying to the DOL assistance. Required matching funds are treated in the same manner as commingled funds, whether or not such funds are actually commingled.

Effect of DOL Support on Exemption from Title VII Employment Discrimination Requirements and on Requirements of Other Existing Statutes. 29 CFR part 2, subpart D, clarifies that a faith-based organization's right, under Title VII of the Civil Rights Act of 1964, to make religion-related employment decisions will generally remain in effect when the organization receives direct or indirect financial assistance from DOL. The ability of religious organizations to consider faith in making employment decisions may be limited, however, where the statute establishing the DOL program under which the assistance is provided contains independent provisions requiring that recipients refrain from discriminating in employment on the basis of religion. For example, Section 188(a)(2) of WIA (29 U.S.C. § 2938(a)(2)) prohibits discrimination on the basis of religion in employment practices in the administration of, or in connection with, any program or activity that is either financially assisted under WIA Title I, or part of the One-Stop delivery system and operated by a One-Stop partner. Therefore, for programs supported with WIA financial assistance, organizations still are barred by WIA from basing employment decisions upon religion.

Status of Non-Profit Organizations. 29 CFR part 2, subpart D, clarifies that DOL generally does not require that organizations, including faith-based organizations, obtain Federal tax-exempt status to be eligible for Federal financial assistance. However, some DOL programs do require that an organization must be a "non-profit organization" in order to be eligible for financial assistance; the new subpart provides that solicitations for these programs must explicitly state that non-profit status is required. Further, the subpart recognizes several alternate methods for organizations to demonstrate their non-profit status (unless the program's statute requires the use of a particular method). When programs do not require recipient organizations to be non-profit, then the equal treatment requirement prevents any such requirement from being imposed solely upon faith-based organizations.

4. **Action Required.** This document, and the accompanying final rule, should be disseminated to all staff that have responsibility for, or involvement with, the selection or approval of participant training or employment or any of the other issues discussed in this guidance. States and other recipients of WIA financial assistance must develop policies and procedures to implement, monitor compliance with, and train staff on the provisions in subpart D. Any additional information or guidance developed regarding these issues will be posted on ETA's Web site at <http://www.doleta.gov> and on CRC's Web site at <http://www.dol.gov/oasam/programs/crc/crcwelcome.htm>.

5. **Inquiries.** Questions or other concerns regarding this guidance should be addressed to the appropriate ETA Regional Office or to CRC Senior Policy Advisor Denise Sudell at (202) 693-6554 or sudell.denise@dol.gov. The above voice telephone number can be reached through the toll-free Federal Information Relay Service at (800) 877-8339 (TTY/TDD).

6. **Attachments.**