

December 1, 2021

The Honorable Patty Murray
Chair
Senate HELP Committee
United States Senate
Washington, DC 20510

The Honorable Richard Burr
Ranking Member
Senate HELP Committee
United States Senate
Washington, DC 20510

Dear Senator Murray and Senator Burr,

We are writing to express our urgent concerns regarding the child care and universal pre-kindergarten provisions in the House-passed Build Back Better Act (BBBA). We represent religious denominations, schools, and charities that comprise and serve millions of Americans.

Expanding affordable child care and pre-kindergarten is a worthy goal to help working families. However, the current child care and universal pre-kindergarten (UPK) provisions in the Build Back Better Act will suppress, if not exclude, the participation of many faith-based providers; and faith-based providers are what more than half¹ of American families choose for child care.

While language in the BBBA does not preclude parents from selecting sectarian providers, the subsequent provisions in the bill text make it virtually impossible for many religious providers to participate. They do so in two distinct ways.

First, the text defines all providers as recipients of federal financial assistance, whether the funds come via certificates (in the child care program) or direct grants (in the pre-kindergarten program). Making faith-based providers of child-care and pre-kindergarten into recipients of federal financial assistance triggers federal compliance obligations and non-discrimination provisions.

This is an explicit departure from current policy governing the federal Child Care and Development Block Grant (CCDBG), in which faith-based providers participate with religious liberty protections intact, and in which providers are explicitly *not* recipients of federal financial assistance. CCDBG was designed with bipartisan support with this important protection in place in order to ensure the participation of religious providers in its system and protect their ability to have religious content in their programs and other key elements of their religious character.

¹ <https://bipartisanpolicy.org/report/faith-based-childcare/>

Second, in addition to the problematic federal financial assistance provisions, the BBBA applies nondiscrimination requirements to both the child care and universal pre-kindergarten sections that do not generally attach to FFA. Most notably, the BBBA applies Head Start's non-discrimination provisions to the entire child care and UPK programs regardless of whether a provider is a Head Start provider.

Head Start's nondiscrimination provisions prohibit discrimination on the basis of sex, creed, and belief, among other things. In this sense, it is redundant to the prohibition on religious discrimination in employment under Title VII of the Civil Rights Act of 1964 and to the prohibition on sex discrimination under Title IX of the Education Amendments of 1972. However, more fundamentally, both Title VII and Title IX contain carefully crafted exemptions for religious organizations, and Head Start has *no exemption*.

Therefore, application of the Head Start nondiscrimination provisions to faith-based providers could, for instance, interfere with faith-based providers' protected rights under Title VII and Title IX regarding curricula or teaching, sex-specific programs (such as separate boys or girls schools or classes), and preferences for employing individuals who share the providers' religious beliefs. The Head Start nondiscrimination provisions' implementing regulations also contain requirements that would pose operational difficulties for many faith-based schools and child care providers.

These problems will not be limited to federally funded UPK programs established under the BBBA. The BBBA requires states with existing state-level UPK programs to fold their programs into BBBA's UPK program, on the condition that the state programs meet the BBBA's terms. This threatens to remove faith-based providers from successful, existing state programs that are more protective of faith-based providers' autonomy than the BBBA.

Our concerns do not represent a desire to exclude anyone from faith-based early learning. Faith-based providers strive to serve everyone, especially the less fortunate, whom the BBBA's child care and UPK programs are specifically intended to benefit. We simply ask to be allowed to continue our good work in caring for our nation's children in a manner consistent with our beliefs.

The faith community has always affirmed that parents should choose the best environment for care and education of their children. The current Build Back Better Act provisions would severely limit the options for parents, suffocate the mixed delivery system for child care and pre-kindergarten, and greatly restrict the number of providers available for a successful national program.

Suggested solutions to these problems are attached. These recommendations closely track the existing federal child care model, CCDBG. We ask for your urgent attention in addressing these concerns, to ensure that faith-based providers participate.

Sincerely,

Agudath Israel of America
American Association of Christian Schools
AND Campaign
Association of Christian Schools International
Association of Christian Teachers and Schools
Catholic Charities USA
Christian Schools International
CCCU - Council of Christian Colleges & Universities
Council of Islamic Schools in North America
Evangelical Lutheran Education Association
Institutional Religious Freedom Alliance
Lutheran Center for Religious Liberty
The Lutheran Church - Missouri Synod
National Association of Evangelicals
National Catholic Educational Association
Southern Baptist Ethics & Religious Liberty Commission
Seventh-day Adventist Church - North American Division
Union of Orthodox Jewish Congregations of America
U.S. Conference of Catholic Bishops Committee for Religious Liberty
U.S. Conference of Catholic Bishops Committee on Catholic Education
Wisconsin Evangelical Lutheran Synod Schools

CC: The Honorable Nancy Pelosi, Speaker, U.S. House of Representatives
The Honorable Chuck Schumer, U.S. Senate Majority Leader
The Honorable Mitch McConnell, U.S. Senate Minority Leader
The Honorable Kevin McCarthy, Minority Leader,
U.S. House of Representatives
The Honorable Robert Scott, Chairman, House Committee on Education and
Labor
The Honorable Virginia Foxx, Ranking Member, House Committee on Education
and Labor

Solutions to Problems in BBBA's Child Care Section

Model the BBBA's definition of "child care certificate" after the CCDBG statute and regulations:

Sec. 23001(b)(2)(A)(ii)

(b) DEFINITIONS.—

(1) IN GENERAL.—The definitions in section 658P of the Child Care and Development Block Grant Act of 1990 (42 U.S.C. 9858n) shall apply to this section, except as provided in subparagraph (2) and as otherwise specified.

(2) ADDITIONAL TERMS.—In this section:

(A) CHILD CARE CERTIFICATE.—

(i) IN GENERAL.—The term “child care certificate” means a certificate (that may be a check or other disbursement) that is issued by a State or local government under this section directly to a parent who may use such certificate only as payment for child care services or as a deposit for child care services if such a deposit is required of other children being cared for by the provider.

(ii) RULE.—Nothing in this section shall preclude the use of such certificates for sectarian child care services if freely chosen by the parent. ~~For the purposes of~~ **Notwithstanding any other provision of law** ~~this section,~~ child care certificates shall **not** be considered Federal financial assistance to the provider.

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Sec. 23001(j)(1)

Consistent with CCDBG's treatment of child care certificates, delete section 23001(j)(1).²

Alternative solution:

...

(i) NONDISCRIMINATION PROVISIONS.—The following provisions of law shall apply to any program or activity that receives funds provided under this section:

(1) Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), **subject to the exemption provided in 20 U.S.C. 1681(a)(3), and provided that all recipients of Federal financial assistance under this section shall be considered “educational institutions” for the purposes of that exemption.** child care

(2) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.).

(3) Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794).

(4) The Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.), **subject to the exemption provided in 42 U.S.C. 12187.**

~~(5) Section 654 of the Head Start Act (42 U.S.C. 9849)~~

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Solutions to Problems in BBBA UPK Section

Model the funding structure after CCDBG.

The funding structure for BBBA’s UPK program should be changed to mirror CCDBG’s child care certificate mechanism, and 2) the new bill language should contain a rule of construction stating that the funds to students shall not constitute Federal financial assistance to schools, as in the suggested amendment above to Sec. 23001(b)(2)(A)(ii). It is not feasible to set out here the legislative text necessary to accomplish these changes.

² The signatories to this letter do not discriminate on the basis of race and, if in receipt of funds properly regarded as federal financial assistance, would fully comply with Title VI of the Civil Rights Act of 1964.

Sec. 23002(i)

Consistent with CCDBG’s treatment of child care certificates, **delete** section 23002(i).³

Alternative solution:

(i) NONDISCRIMINATION PROVISIONS.—The following provisions of law shall apply to any program or activity that receives funds provided under this section:

(1) Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), **subject to the exemption provided in 20 U.S.C. 1681(a)(3), and provided that all recipients of Federal financial assistance under this section shall be considered “educational institutions” for the purposes of that exemption.**

(2) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.).

(3) Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794).

(4) The Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.), **subject to the exemption provided in 42 U.S.C. 12187.**

~~(5) Section 654 of the Head Start Act (42 U.S.C. 9849)~~

³ As with the suggested deletion of Sec. 23001(j)(i), the signatories to this letter do not discriminate based on race, and if in receipt of any funds properly regarded as federal financial assistance, would fully comply with Title VI of the Civil Rights Act of 1964.