

(18) The State will comply with the requirements of 42 CFR part 54.

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

#### 45 CFR Part 260

RIN 0970-AC12

#### Charitable Choice Provisions Applicable to the Temporary Assistance for Needy Families Program

**AGENCY:** Administration for Children and Families (ACF), Department of Health and Human Services (HHS).

**ACTION:** Final rule.

**SUMMARY:** This final rule implements the Charitable Choice statutory provisions in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) as amended. The statutory and regulatory provisions apply to the Temporary Assistance for Needy Families (TANF) program administered by ACF. The statute and final rule establish requirements for State and local governments that administer or provide TANF services and benefits through contracts or through certificates, vouchers, or other forms of disbursement. The requirements and protections also apply to organizations, including faith-based organizations, that provide services and benefits with TANF funds and to the beneficiaries of those services.

The TANF Charitable Choice provisions of PRWORA were enacted to ensure that low-income families receive effective needed services, including services provided by faith-based organizations. In creating a Faith-Based and Community Initiative, President Bush has said: “\* \* \* when we see social needs in America, my administration will look first to faith-based programs and community groups, which have proven their power to save and change lives. We will not fund the religious activities of any group. But when people of faith provide social services, we will not discriminate against them.” To carry out that commitment and to implement the statute, the final rules clarify the protections for beneficiaries of services, the rights and obligations of religious organizations that provide TANF-funded services, and the requirements

and limitations of State and local governments.

**EFFECTIVE DATE:** October 30, 2003.

**FOR FURTHER INFORMATION CONTACT:**

April Kaplan, Deputy Director, Office of Family Assistance, ACF, at (202) 401-5138. Deaf or hearing-impaired individuals may call the Federal Dual Party Relay Service at 1-800-877-8339 between 8 a.m. and 7 p.m. Eastern time.

**SUPPLEMENTARY INFORMATION:** On December 17, 2002, ACF published a Notice of Proposed Rulemaking (NPRM) to implement the “Charitable Choice” statutory provisions of section 104 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) (Pub. L. 104-193). 67 FR 77362 (2002). We provided a 60-day comment period that ended on February 18, 2003. We offered the public the opportunity to submit comments by surface mail, E-mail, or electronically via our Web site.

#### Comment Overview

After accounting for duplications, we received 38 comments on the NPRM. We heard from faith-based groups and associations, State welfare agencies and social services departments, national associations, advocacy groups, other State-level organizations, and the general public. Most commenters addressed all aspects of the statutory and regulatory framework and offered extensive suggestions. Some comments were generally positive, supportive of specific provisions and appreciative of our attempt to clarify the statutory requirements. In general, many commenters had mixed views on both the statutory provisions and proposed regulatory policies (where we had exercised regulatory discretion), supporting some provisions and opposing others. We have summarized the public comments and our response to them throughout sections I through XIII of the preamble of this final rule.

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XIV. Final Rule

#### I. Charitable Choice Statutory Framework

Title I of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) (Pub. L. 104-193) sets forth certain “Charitable Choice” provisions in section 104, entitled “Services Provided By Charitable, Religious, or Private Organizations.” This section clarifies State authority to administer and provide TANF services through contracts with charitable, religious, or private organizations and to provide beneficiaries with certificates, vouchers, or other forms of disbursement, which are redeemable with such organizations. The provisions of section 104 are hereinafter referred to as “TANF Charitable Choice provisions.” In addition to giving States the ability to contract with a range of service providers and use optimal funding mechanisms, and giving families a greater choice of TANF-funded providers, section 104 sets forth certain requirements to ensure that religious organizations are able to compete on an equal footing for funds under the TANF program, without impairing the religious character of such organizations or diminishing the religious freedom of TANF beneficiaries.

President Bush has made it one of his Administration’s top priorities to ensure that Federal programs are fully open to faith-based and community groups in a manner that is consistent with the Constitution. It is the Administration’s view that faith-based organizations are an indispensable part of the social services network of the United States. Faith-based organizations, including places of worship, non-profit organizations, and neighborhood groups, offer a myriad of social services to those in need. The TANF Charitable Choice provisions are consistent with the Administration’s belief that there should be an equal opportunity for all organizations—both faith-based and non-religious—to participate as partners in Federal programs to serve Americans in need.

This final rule implements the TANF Charitable Choice provisions applicable to State and local governments and to religious organizations in their use of

Federal TANF and State maintenance-of-effort (MOE) funds. The objective of this rule is to ensure that the TANF program is open to all eligible organizations, regardless of their religious affiliation or character, and to establish clearly the proper uses to which funds may be put and the conditions for receipt of funding.

This final rule adds § 260.34, "When do the Charitable Choice provisions of TANF apply?" to 45 CFR Part 260, "General Temporary Assistance For Needy Families Provisions." The introductory language addresses the applicability of the Charitable Choice provisions to the TANF program. We have slightly reformatted the flow of the regulatory provisions. The introductory language is now under § 260.34(a). Section 260.34(a) also includes the definitions of "direct" funding and "indirect" funding, originally proposed as additions to the definitions in 45 CFR 260.30. We placed the definitions under § 260.34 because these terms are used exclusively in this section and are not common terms used throughout parts 260–265.

Specifically, the rules provide that Charitable Choice applies whenever a State or local government:

- Uses Federal TANF funds or expends State or local funds claimed to meet the State's MOE requirement to procure services and benefits from non-governmental organizations; or,
- Provides clients with certificates, vouchers, or other forms of disbursement that can be redeemed for services in connection with the TANF program.

When State or local funds are used to meet the TANF MOE requirements, the provisions apply irrespective of whether the State or local funds are commingled with Federal funds, segregated, or expended in separate State programs. However, pursuant to section 104(k) of PRWORA as amended (42 U.S.C. 604a(k)), nothing in the Charitable Choice requirements shall be construed to preempt any provision of a State constitution or State statute that prohibits or restricts the expenditure of State funds in or by religious organizations. Accordingly, States that are subject to such restrictions should segregate their Federal funds from the funds which are subject to the provisions of the statute.

The word "assistance" is used throughout the Charitable Choice provisions in section 104 of PRWORA as amended (42 U.S.C. 604a). When "assistance" is used in the Charitable Choice statutory provisions, it broadly refers to all kinds of help, services, and benefits. In other words, it is broader

than the definition of "assistance" under 45 CFR 260.31(a) of this part. The Charitable Choice provisions apply to any and all of the services and benefits available to clients, through contracts, certificates, vouchers, or other forms of disbursement of TANF funds. Thus, we have used the term "benefits" and "services" in the final regulation to refer to the broad range of activities or help available to clients. We also want to avoid any misunderstanding that Charitable Choice is solely limited to the provision of the types of services that constitute "assistance" as defined in 45 CFR 260.31(a).

However, because the Charitable Choice provisions refer only to State and local governments, § 260.34 does not apply to Tribal governments operating TANF programs under section 412 of the Social Security Act.

## II. Regulatory Authority

We are issuing this final regulation under the authority granted to the Secretary of Health and Human Services (the Secretary) by 42 U.S.C. 1302 and 42 U.S.C. 604a. Section 1302 of 42 U.S.C. authorizes the Secretary to publish regulations that may be necessary to the efficient administration of the functions for which he is responsible under this chapter—*i.e.*, 42 U.S.C., chapter 7 (Social Security). Section 604a of Title 42, chapter 7 of the United States Code sets forth provisions authorizing States to use faith-based groups, as well as other non-governmental charities, community groups and private organizations, to provide benefits and services under the TANF program that help families achieve self-sufficiency, and includes certain conditions related to such authority.

As we indicated in the NPRM, section 417 of the Social Security Act provides that the Federal government may not regulate the conduct of States under this part or enforce any of the provisions in this part, except to the extent expressly provided by law. Section 417 applies only to Federal regulation or enforcement of TANF provisions in Title IV, part A of the Social Security Act.

*Comment:* Several commenters questioned our authority to regulate under the Charitable Choice statutory provisions. Specifically, the commenters maintained that, while the Charitable Choice provisions are not part of Title IV–A of the Social Security Act (the TANF program), the provisions appear in the U.S. Code "under this part"—*i.e.*, 42 U.S.C., Chapter 7 (Social Security), Subchapter IV (Grants to States for Aid and Services to Needy Families With Children and for Child-

Welfare Services), Part A (the TANF program), section 604a. The limitation on our authority to regulate is also in this part of the U.S. Code, at 42 U.S.C. 617, which provides that "no officer or employee of the Federal Government may regulate the conduct of States under this part or enforce any provision of this part, except to the extent expressly provided in this part." Since section 604a is a provision "of this part," and there is nothing in 604a that expressly provides for regulations, the commenters said that we have exceeded our authority.

*Response:* We disagree with the commenters' position that we have no authority to regulate in this area. The limitation on our authority to regulate was enacted as part of the Social Security Act, Title IV, Part A, Section 417. The provision limits our authority to issue regulations implementing any provision in "this part" of the Social Security Act (*i.e.*, Part A, Title IV). Since the Charitable Choice provisions are not in this, or any, part of the Social Security Act, they are not subject to the limitation on our authority to regulate.

Codification of both the limitation on our regulatory authority and the Charitable Choice provisions in the same section of the U.S. Code (Chapter 7, Part A) does not broaden the restriction on our authority to regulate. Nor does the codification make the Charitable Choice provisions a part of the Social Security Act that is subject to section 417. The Charitable Choice provisions remain distinguishable from those found in Part A, Title IV, of the Social Security Act notwithstanding the fact that both are codified in the same chapter. As recognized in The Historical and Statutory Notes accompanying the Charitable Choice provisions as codified, 42 U.S.C. section 604a, they were "enacted as part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and not as part of the Social Security Act which comprises this chapter." We believe the placement of the Charitable Choice provisions in the same chapter as section 417 does not change the meaning of either provision.

In summary, Congress did not intend for the Charitable Choice provision to be included in the Social Security Act since PRWORA did not amend the Social Security Act to include Charitable Choice. Therefore, we conclude that the limitation on Federal authority to regulate conduct or enforce the Charitable Choice provisions does not apply.

Because the limitation in section 417 of the Social Security Act does not apply, the Secretary has used the

authority granted to him in 42 U.S.C. chapter 7, section 1302, to publish this regulation, necessary to the efficient administration of the functions for which he is responsible under chapter 7. The Charitable Choice provisions have been codified under chapter 7 of the United States Code at 42 U.S.C. 604a.

*Comment:* One commenter pointed out that section 104 of PRWORA, as amended, begins as a State option. Therefore, it is not mandatory, as the NPRM implies.

*Response:* We recognize that section 104(a) of PRWORA as amended (42 U.S.C. 604a(a)(1)) does provide that a "State may (A) administer and provide services \* \* \* through contracts with charitable, religious, or private organizations; and (B) provide beneficiaries of assistance \* \* \* with certificates, vouchers, or other forms of disbursement which are redeemable with such organizations."

Essentially, this subsection permits a State to choose to conduct its TANF program by providing funding to help beneficiaries directly (*e.g.*, through contracts with social service providers) or indirectly (*e.g.*, with certificates, vouchers, or other forms of disbursement which are redeemable with charitable, religious, or private organizations). In other words, the State is not limited to providing all of the needed services itself, nor must it retain the administration of any or all of its TANF activities.

If a State does choose to involve any non-governmental providers, however, then the Charitable Choice provision at section 104(c) of PRWORA as amended (42 U.S.C. 604a(c)) requires involving religious organizations on the same basis as any other non-governmental providers. Therefore, when a State chooses to involve the non-governmental sector in the provision of benefits and services for or on behalf of TANF-eligible beneficiaries, then the TANF Charitable Choice provisions stipulate that a religious service provider may not be excluded from eligibility for contracts, subcontracts, vouchers, or the like.

### III. Constitutional Issues— Establishment and Free Exercise Clauses

#### Background

The TANF Charitable Choice statutory provisions were enacted within the constitutional framework of government interaction with religious organizations. The goal of Charitable Choice is not to support or sponsor religion, but to ensure fair competition among providers of services for low-income

families, whether they are public or private, secular or faith-based. The statute, the proposed rule, and this rule each requires that contracts with or vouchers redeemable with religious organizations must comport with the constitutional framework. Patterned after the statutory language, the proposed rule at § 260.34(a)(1) (now § 260.34(b)(1)) explicitly provided that: "Religious organizations are eligible, on the same basis as any other organization, to participate in TANF programs as long as their TANF or MOE-funded services are provided consistent with the Establishment Clause and the Free Exercise Clause of the First Amendment to the United States Constitution."

*Comment:* Several commenters opined that the proposed rule was an unconstitutional breach of the principle of separation of church and State, because it would allow public funds to be given to "pervasively sectarian" organizations, contrary to longstanding judicial precedent.

*Response:* We do not agree with the commenters. Religious organizations that receive direct TANF funds for social services cannot use such funds for inherently religious activities. These organizations must ensure that religious activities are separate in time or location from the treatment services and they must also ensure that participation in such religious activities is voluntary. Furthermore, they are prohibited from discriminating against a program beneficiary 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.

The Supreme Court's "pervasively sectarian" doctrine—which held that there are certain religious institutions in which religion is so pervasive that no government aid may be provided to them, because their performance of even "secular" tasks will be infused with religious purpose—no longer enjoys the support of a majority of the Court. Four Justices expressly abandoned it in *Mitchell v. Helms*, 530 U.S. 793, 825–829 (2000) (plurality opinion), and Justice O'Connor's opinion in that case set forth reasoning that is inconsistent with its underlying premises, see *id.* at 857–858 (O'Connor, J., concurring in judgment, joined by Breyer, J.) (requiring proof of "actual diversion of public support to religious uses"). Thus, six members of the Court have rejected the view that aid provided to religious institutions will invariably advance the institutions' religious purposes, and that view is the foundation of the "pervasively sectarian" doctrine. We therefore believe that when current

precedent is applied to a social service program, or to the TANF Charitable Choice provisions, government may fund all service providers, without regard to religion and free of criteria that require the provider to abandon its religious expression or character.

*Comment:* Several commenters asked that the final rule include a more comprehensive definition and examples of a "religious organization" and a "faith-based organization."

*Response:* Throughout the proposed rule, we used the term "religious organization" and the term "faith-based organization" interchangeably. Neither the U.S. Constitution nor the relevant Supreme Court precedents contain a comprehensive definition of religion or a religious organization that must be applied to this rule. Yet, an extensive body of judicial precedent provides the practical guidelines that States and religious organizations need to conform to the Establishment and the Free Exercise Clauses of the First Amendment to the U.S. Constitution. Under the TANF Charitable Choice provisions, and as explained in the section that discusses fiscal accountability, a religious organization is not restricted to those that are "non-profit." We have deleted the definition of "religious organization" from the final rule.

*Comment:* Several commenters asked that the final rule provide additional guidance on how to comply with the Establishment Clause and that it detail the scope of religious content that must be excluded from public funding.

*Response:* In enacting the Charitable Choice provisions, Congress did not include specific statutory provisions with guidance on how to meet constitutional requirements. Like Congress, we do not believe it is appropriate in this rule to provide either States or religious organizations with detailed guidance on how to comply with the Establishment or Free Exercise Clauses of the Constitution. States and faith-based organizations have years of experience and extensive practice in following case law and adhering to judicial precedent to conform to these provisions. In enacting PRWORA, Congress sought to conform the law to this precedent while providing maximum flexibility to States in carrying out statutory requirements. The requirement in the proposed rule closely mirrors the statutory provision and we have retained the identical language of the proposal in the final rule.

#### IV. Equal Treatment for Religious Organizations

##### Background

Under § 260.34(a)(2) of the proposed rule (§ 260.34(b)(2)), we clarified that organizations are eligible to participate in the TANF program without regard to their religious character or affiliation, and may not be excluded because they are religious. Federal, State and local governments administering TANF funds are prohibited from discriminating against organizations on the basis of religion or their religious character.

*Comment:* One commenter suggested that the final rule should also prohibit discrimination “in favor of” faith-based organizations. In selecting contractors, a government entity should not allow a provider’s religious character to influence its selection.

*Response:* Like the commenter, we believe congressional intent was to ensure neutrality and to prohibit any discrimination. Therefore, we have modified the language of the final rule to read, “Neither the Federal government nor a State or local government in its use of Federal TANF or State MOE funds shall, in the selection of service providers, discriminate for or against an organization that applies to provide, or provides TANF services or benefits on the basis of the organization’s religious character or affiliation.”

*Comment:* A couple of commenters, noting the importance of this provision, which prohibits Federal, State and local governments administering TANF funds from discriminating against organizations on the basis of religion or their religious character, observed that the proposed rule is consistent with the statute and strongly supported retention in the final rule.

*Response:* We agree with these comments and have retained similar language in the final rule.

*Comment:* One commenter noted that the provisions under § 260.34(a)(1) and (2) (now § 260.34(b)(1) and (2)) equate religious and non-religious providers and seek to treat them as equals, thereby failing to recognize the unique place that religion has in our society. Religion should be above the fray of government funding, regulation and auditing, not reduced to it.

*Response:* This rule does not present any violation of the Establishment Clause or Free Exercise Clause. Rather, this rule governs the conscious decision of a religious organization to administer regulated activities, by accepting public funds to do so. Therefore, we have retained language that enables faith-based organizations to compete on an

equal footing for funding, within the framework of constitutional church-State guidelines.

#### V. Restriction on Inherently Religious Activities by Organizations That Receive Direct TANF Funding

##### Background

Section 260.34(c) of this rule describes limitations on the use of Federal TANF and State MOE funding provided directly to an organization by a governmental entity or by an intermediate organization that has the same duties as a governmental entity, as opposed to those funds that an organization receives indirectly as the result of the genuine and independent private choice of a beneficiary. The Charitable Choice provisions allow, at State option, for direct or indirect forms of funding, or both, to provide benefits and services. Under a “direct” funding method, the government or an intermediate organization with the same duties as a governmental entity purchases the needed services straight from the provider (e.g., via a contract). Under this scenario, there are no intervening steps in which the beneficiary’s choice comes into play. The government or intermediate organization selects the provider which the beneficiary must attend. With an “indirect” funding method, by contrast, there is an intervening step in determining which social service provider receives the Federal TANF or State MOE funds. Under indirect funding, the individual in need of the service is given a voucher, coupon, certificate, or other means of free agency such that he or she has the power to select for himself or herself from among providers, whereupon the coupon (or other method of payment) may be “redeemed” and the services rendered. Hence, indirect funding means that individual private choice, rather than the government, determines which social service provider eventually receives the funds.

Section 260.34(c) states that Federal TANF and State MOE funds that are provided directly to a participating organization may not be used to support inherently religious activities, such as worship, religious instruction, or proselytization. If an organization engages in such activities, the activities must be offered separately, in time or location, from the programs or services for which it receives direct Federal TANF or State MOE funds, and participation must be voluntary for the beneficiaries. This requirement ensures that such funds are not used to support inherently religious activities. Thus,

direct Federal TANF and State MOE funds may not be used, for example, to conduct prayer meetings, devotional studies of sacred texts, or any other activity that is inherently religious.

This restriction does not mean that an organization that receives direct Federal TANF or State MOE funds may not engage in inherently religious activities. It simply means that such an organization may not fund these activities with direct Federal TANF funds. Additionally, an organization may not fund these activities with funds that are used to meet the MOE requirements, since those funds must be spent consistent with the Charitable Choice requirements.

For example, suppose a church has a contract with the State’s TANF agency to provide job preparation classes. The classes are held in the finished basement of the church, the same place where the pastor of the church holds a Bible study group at the end of the day, when all other classes have ended. The pastor has extended an open invitation for anyone who wishes to attend the study group. The church must use private funds to pay for the Bible study activity. Thus, faith-based organizations that receive direct Federal TANF or State MOE funds must take steps to separate, in time or location, their inherently religious activities from the Federal TANF or State MOE-funded services that they offer.

In addition, any participation by a program beneficiary in such religious activities must be voluntary. An invitation to participate in an organization’s religious activities is not in itself inappropriate. However, directly funded religious organizations must be careful to inform program beneficiaries that their decision will have no bearing on the services they receive. In short, any participation by recipients of services in such religious activities must be voluntary and understood to be voluntary.

On the other hand, these restrictions on inherently religious activities do not apply where Federal TANF or State MOE funds are indirectly provided to religious organizations as a result of a genuine and independent private choice of a beneficiary. A religious organization may receive such funds as the result of a beneficiary’s genuine and independent private choice if, for example, a beneficiary redeems a voucher, coupon, certificate, or similar funding mechanism that was provided to that individual using Federal TANF or State MOE funds under a program that is designed to give that individual a choice among providers. Thus, religious organizations that receive Federal TANF

or State MOE funds to provide services as a result of a beneficiary's genuine and independent private choice need not separate, in time or location, their inherently religious activities from the Federal TANF or State MOE funded services they provide, provided they otherwise satisfy the requirements of the program.

*Comment:* Some commenters expressed concern that the "inherently religious activities" only need to be offered separately in time or location from the benefits and services provided with direct Federal TANF or State MOE funds. They recommended modifying the regulations to stipulate that if an organization conducts inherently religious activities, then it must offer them separately in both time and location.

*Response:* We decline to accept this recommendation. HHS believes that this is legally unnecessary and that it would impose an unnecessarily harsh burden on small religious organizations, which may have access to only one location that is suitable for the provision of the service(s). However, this does not preclude an organization that receives direct Federal TANF or State MOE funds from choosing to set apart such activities in both time and location.

*Comment:* One commenter considered the requirement of separating the inherently religious activities in time or location as insufficient guidance, and recommended that we define religious content and context and add these terms to the regulation. Another commenter asked what constituted an inherently religious activity. The commenter further stated that the exclusion of all "inherently religious" activities from government funding is flawed, and puts many faith-based organizations in the position of having to choose either to deny their core religious perspectives on social issues or to reject government funds for their programs that accomplish the government's objectives. A third commenter noted that the phrase "inherently religious activities," coupled with "such as" opens the door to concluding that activities like providing food for the hungry, or shelter for the homeless, could be considered an inappropriate use of TANF funds, if such activities have been undertaken for religiously informed reasons.

*Response:* We decline to add definitions of religious content and context into the regulation. We also decline to define "inherently religious," except through the examples given in the regulation. The examples are not all-inclusive, as indicated by the introductory phrase "such as." The examples include worship, religious

instruction, or proselytization. These are the very examples given in PRWORA as amended, section 104(j) (42 U.S.C. 604a(j)), in the provision limiting the use of Federal TANF or State MOE funds provided directly to institutions or organizations for the delivery of services to TANF-eligible beneficiaries. (Other basic examples include prayer meetings and devotional studies of sacred texts.) As some of the commenters noted, it would be difficult to establish an acceptable list of all inherently religious activities. Inevitably, the definition would fail to include some inherently religious activities or include certain activities that are not inherently religious. Our approach is consistent with Supreme Court precedent, which likewise has not comprehensively defined inherently religious activities. The Court has explained, however, that prayer and worship are inherently religious, but that social services do not become inherently religious merely because they are conducted by individuals who are religiously motivated to undertake them or view the activities as a form of "ministry." We have added "Federal" and "State" where applicable, to clarify that the rule applies to both Federal TANF and State MOE funds.

In using the term "inherently religious," we simply wanted to set forth a basic framework of understanding as to appropriate and inappropriate uses of direct Federal TANF or State MOE funds. In other words, direct Federal TANF and State MOE funds may only be used for the non-religious services and functions offered by a religious organization, but not for any part of those services constituting the group's "inherently religious" beliefs or practices. Hence, the organization's inherently religious functions must be separated—*i.e.*, in time or location, as expressed by the regulation. Any inherently religious activities must be funded entirely by private funds.

Some organizations may be unable or unwilling to structure their program by separating its inherently religious activities in time or location, as required. These organizations would not qualify to provide any of the State's directly funded social service activities, but could be considered candidates for providing assistance through indirect funding methods.

This limitation on the use of the direct funds is not meant to put an organization in the position of having to deny its core religious perspectives on social issues or reject government funds for its programs that are consistent with the purposes of the TANF program. We

recognize that while the government regards services like feeding the hungry and housing the poor as social services or secular work, some organizations may regard these same activities as acts of mercy, spiritual service, fulfillment of religious duty, good works, or the like. Nevertheless, as a general matter, an activity such as providing food for the hungry or shelter for the homeless would constitute an appropriate use of funds, as long as any inherently religious activities offered by the organization are separate, privately funded, and voluntary.

*Comment:* One commenter hoped that we would retain the requirement that organizations offer inherently religious activities separately in time or location from the social services funded with direct Federal TANF or State MOE funds. The commenter also agreed that the beneficiary's participation must be voluntary. Other commenters expressed concern that § 260.34(b) (now § 260.34(c)) does not adequately protect participants who do not wish to participate in inherently religious activities. The commenters suggested that we strengthen the provision in this subsection so clients may not be coerced, explicitly or tacitly, to participate in religious activities, or feel pressured to participate in such activities. These commenters argued that individuals in need are not always in a condition to make a thoughtful and well-considered decision whether or not to participate in worship or similar activities offered by a religious social service provider, particularly when the individual is in great need of the service.

*Response:* We believe that the provision suffices as written. However, we will use this opportunity to reaffirm that a person's participation in any religious activities must be entirely voluntary or noncompulsory. Beneficiaries of directly funded Federal TANF or MOE social services have the right not to take part in any unwanted religious practice. Therefore, they may, at any time, refuse to participate in inherently religious activities. We recommend that States and organizations help to ensure that clients and prospective clients have a clear understanding of the services offered by an organization by having literature available to give to the client which fully explains the services offered, including any inherently religious activities, as well as the individual's rights.

*Comment:* One commenter wrote that the rules should clarify that individuals who refuse to participate in the inherently religious activities will not

be excluded from the program and will not suffer any discrimination in the administration of the program. Congress specified that Federal funds may not be used for religious purposes, but the rules provide no enforcement mechanism, so beneficiaries have no administrative relief if violations occur.

*Response:* The TANF Charitable Choice provision at section 104(g) of PRWORA as amended (42 U.S.C. 604a(g)) explicitly prohibits a religious organization from discriminating against a participant on the basis of religion, religious belief, or refusal to participate in a religious practice. The final rule reiterates this requirement in § 260.34(f). For example, if the service provider is a faith-based organization (FBO), the FBO may not discriminate against the individual on account of religion, a religious belief or a refusal to hold a religious belief. In addition, the FBO may not turn away a beneficiary from the organization's program solely because the beneficiary refuses to participate in an inherently religious practice. Hence, this provision insures the beneficiary's right not to take part in any unwanted religious practices. The individual's participation in an inherently religious activity must be entirely voluntary or noncompulsory. Under the TANF Charitable Choice provisions, government may not compel an individual, through loss of public benefit or advantage, to profess a religious belief or to observe an inherently religious practice. Furthermore, the TANF Charitable Choice provision at section 104(i) of PRWORA as amended (42 U.S.C. 604a(i)) states "Any party which seeks to enforce its right under this section may assert a civil action for injunctive relief exclusively in an appropriate State court against the entity or agency that allegedly commits such violation." "Any party" includes the beneficiary. We inadvertently omitted the statutory right to assert a civil action in State court from the proposed regulation. We have added this provision to the final regulation at § 260.34(l).

*Comment:* One commenter wrote that individuals actually providing government-funded social services should not be involved in "offering" an inherently religious activity to program recipients. Another commenter expressed concern over allowing recipients to volunteer to participate in religious practices or services, because this will force administrative complexity on the State. A third commenter asked whether a participant could volunteer to participate in a religious activity in lieu of or during the

time that TANF-funded activities are conducted.

*Response:* If the opportunity to participate in inherently religious activities is offered at all, then it would be the organization receiving the Federal TANF or State MOE funds that would offer it. Thus, while we recognize that staff working for the organization might offer the TANF beneficiary the opportunity to participate in an inherently religious activity, we believe that the act of "offering" is attributable to the organization and its own staff, not to the TANF agency. Therefore, we conclude that the "offer" does not violate the Charitable Choice requirement at § 260.43(c) provided participation is voluntary. The regulation at § 260.34(c) requires that "If an organization conducts such (inherently religious) activities, it must offer them separately \* \* \* and participation must be voluntary for the beneficiaries of those programs or services."

In providing the direct funding to pay for social service benefits, the TANF agency or any other part of the government must neither support nor sponsor any of the organization's inherently religious activities. Also, the government may not encourage (or, for that matter, discourage) the beneficiary to participate in any inherently religious activities. Hence, we see no reason why a beneficiary's own choice to participate in an inherently religious activity provided by an organization should present an administrative complexity to the TANF agency. Additionally, neutral direct aid to an organization does not mean, absent evidence to the contrary, that the organization will divert any part of the Federal TANF or State MOE funds to pay for inherently religious activities that a beneficiary attends voluntarily. And, there is nothing in the TANF Charitable Choice provisions that prevents States from implementing reasonable and prudent procurement policies to prevent funds from being misapplied to finance such activities.

Finally, under TANF, States generally have broad discretion in establishing the objective eligibility criteria that the individual or family must meet in order to receive particular benefits (whether that benefit is directly or indirectly funded). We do not prescribe how a State determines the beneficiary's eligibility or continued eligibility for the benefits. States may even attach conditions to the beneficiary's receipt of the TANF or MOE-funded benefit (e.g., attendance requirement/absentee limits for participation in a job training or job skills upgrade class). If the individual does not satisfy the conditions

established for the receipt of the benefit, then the State could treat the expenditure as an overpayment subject to recovery.

*Comment:* One commenter wrote that the definition and distinction between direct funding and funding an organization receives as a result of the independent private choice of a beneficiary has significance for constitutional reasons and should be retained.

*Response:* We agree, and have retained the distinction applicable to the funding restrictions on inherently religious activities.

*Comment:* One commenter asked us to clarify that, where assistance is "indirect," a faith-based organization may, consistent with the Establishment Clause, require beneficiaries to participate in its entire program, including the inherently religious components.

*Response:* Indirect Federal TANF or State MOE funding methods enable the individual to choose where he or she wants to receive the needed services. Therefore, the organization providing the service to the beneficiary may invite (not require) the beneficiary to participate in inherently religious activities as part of its entire program. This is because the statute at section 104(g) of PRWORA (42 U.S.C. 604a(g)) prohibits an organization from discriminating against an individual in rendering assistance on the basis of religion, a religious belief, a refusal to hold a religious belief, or refusal to actively participate in a religious practice. So, the individual has the right to refuse to participate in the religious practice and may not be deprived of the offered social services. Or, if the individual wants to receive the service from an alternative provider because he or she objects to the religious character of the organization or institution, then the State must use an alternative provider to furnish the service.

The TANF Charitable Choice prohibition at section 104(j) of PRWORA as amended (42 U.S.C. 604a(j)) speaks to funds "provided directly to institutions or organizations." It does not include "indirect funding." As a result, organizations that receive funds indirectly (e.g., by means of vouchers or certificates) do not have to separate, in time or location, their inherently religious activities from the Federal TANF or State MOE funded services they furnish—provided they otherwise satisfy the requirements of the program.

However, the alternative provider requirement at section 104(e) of PRWORA as amended (42 U.S.C.

604a(e)) does not differentiate between direct and indirect funding of services. Therefore, we conclude that the alternative provider requirement applies whether Federal TANF or State MOE funds are provided directly or indirectly to the institution or organization. The beneficiary has a right to an alternative provider, regardless of funding method.

We recommend that States and organizations help to ensure that clients and prospective clients have a clear understanding of the services offered by an organization by having literature available to give to clients which fully explains the services offered, including any inherently religious activities, as well as expectations and requirements.

*Comment:* One commenter asked us to clarify the definition of indirect funding and its application to service providers and to provide examples.

*Response:* Essentially, indirect funding places the choice of service provider in the hands of the beneficiary. Then, the State pays for the cost of that service through a voucher, certificate, or other means of free agency. In this way, the government is providing assistance to beneficiaries by dealing "indirectly" with independent providers and directly with beneficiaries. For example, the TANF agency, operating under a neutral program of aid, could present the beneficiary with a list of all qualified providers at which the beneficiary could obtain services using a government-provided certificate. Or, the State could choose to allow the beneficiary to secure the needed service on his/her own. Either way, the State empowers the beneficiary to choose for himself or herself to receive the needed services through a religious organization or through some other provider. The State could pay for the individual's choice of provider by giving the individual a voucher or other business form that tells the provider that the TANF agency will pay for the service. Or, the State could choose to pay the provider directly after asking the beneficiary to indicate his/her choice. We have added the above definition in § 260.34(a) of the final regulation.

*Comment:* Several commenters wrote that the voucher program authorized by the proposed rule lacks adequate constitutional safeguards, including legitimate secular options and secular purpose. Another commenter wrote that the proposed rule did not mention the provision of secular alternatives in cases where the voucher provider is religious. Without reasonable secular alternatives, beneficiaries may be forced to use religious providers. Yet another commenter expressed concern that the ability of individuals to use

government-sponsored vouchers for religiously based services erodes the traditional American value of separation of church and State. The commenter thinks that State and local governments will be subject to numerous lawsuits challenging the legality of the use of government funds for religiously-based programs.

*Response:* The TANF Charitable Choice provision at section 104(a)(1)(B) (42 U.S.C. 604a(a)(1)(B)) authorizes the use of "certificates, vouchers, or other forms of disbursement," as a State option. But, neither the statute, the NPRM, nor the final rule, "require" a voucher program. Although States must have a policy of inclusion as discussed below, they also have the flexibility to decide the best methods of delivering the services to or on behalf of their clientele. States are obligated to ensure that they provide options in a manner consistent with the Establishment Clause of the First Amendment and may review any relevant precedents concerning vouchers to do so.

We do not agree with the contentions that vouchers for religiously based services erode the value of separation of church and State, force individuals to attend "pervasively sectarian" institutions, or lack secular purpose for the following reasons. First, the Supreme Court has consistently upheld the constitutionality of mechanisms of indirect aid, such as vouchers, distributed without regard to religion. Therefore, we think that it is reasonable to conclude that neutral, indirect aid to a religious organization does not violate the Establishment Clause.

Second, the goal is secular, namely, to fund social services that help TANF-eligible individuals and families attain and maintain self-sufficiency. The Charitable Choice provisions level the playing field for qualified providers of these services who are faith-based, by giving them the right to participate in the provision of those services. The TANF Charitable Choice provisions simply stipulate that a religious service provider may not be excluded from eligibility for contracts, subcontracts, vouchers, or the like, on the grounds that the provider is religious, too religious, or "pervasively sectarian." This does not mean that the object of Charitable Choice is to support or sponsor religion or participating religious providers.

Furthermore, the TANF Charitable Choice provisions do not guarantee that Federal TANF or State MOE funds must automatically flow to religious providers. Whether funding is direct or indirect, the Charitable Choice provisions simply guarantee that

religious providers will not be discriminated against in the procurement process, by requiring government to stop "picking and choosing" among groups on the basis of religion.

Finally, § 260.34 (g) states that if the applicant or recipient objects to the religious character of a TANF service provider, he or she is entitled to an alternative provider to which the individual has no religious objection. This is in keeping with the TANF Charitable Choice provision at section 104(e)(1) (42 U.S.C. 604a(e)(1)), which requires that the State provide the individual with assistance from "an alternative provider." Hence, the alternative provider could, but does not have to be secular.

*Comment:* One commenter contends that there are numerous unresolved issues concerning the funding for the vouchers. For example, how would local governments measure "comparable services" between secular and religious-based programs if the individual used the TANF voucher in a "pervasively sectarian" program? Or, if the beneficiary redeems a voucher and dissents from the program because of its religious tone, is that voucher transferable? This commenter also asked whether a local government may object to the individual's "genuine and independent private choice" with regard to the program. Would such an act by the local government subject it to the loss of Federal funding?

*Response:* States may establish their own policies and procedures for establishing eligibility or continued eligibility for a particular social service benefit, as well as the method of delivery, management, and disposition of the benefit. In keeping with the flexibility afforded to States, States may determine for themselves how best to define which services are comparable to those that the TANF agency has determined an individual is eligible to receive.

We are confident that States are well-served in collaborating with local jurisdictions, other State agencies, and appropriate social service providers, and therefore we do not anticipate problems with the quality of a person's free and independent choice under an indirect aid scenario.

*Comment:* One commenter wrote that the indirect-funding definition opens the door to government-funded worship and proselytization. This commenter asked us to require that all government-funded services are free of religious content. In addition, the commenter thinks that "free and independent choice" is a myth which incorrectly



assumes that people in need will be able to shop for services. Social services are not available on a scale that makes "choice" real. People use the most geographically accessible providers.

*Response:* We find no basis to require that indirectly funded services be free of religious content. Furthermore, we disagree that funding services indirectly opens the door to government-funded worship and proselytization. The Supreme Court has consistently held that governments may fund programs that place the benefit in the hands of individuals, who in turn have the freedom to choose the provider to which they take their benefit and "spend" it, whether that institution is public or private, nonreligious or religious. Therefore, any consequential aid to religion having its origin in such a program is the result of the beneficiary's own choice. In other words, indirect funding means that individual private choice, rather than the government, determines which social service provider eventually receives the funds. As a general matter, this removes involvement on the part of the government in worship and proselytization. We believe that this thinking played a part in Congress limiting the prohibition in section 104(j) of PRWORA as amended (42 U.S.C. 604a(j)), on the use of Federal TANF or State MOE funds for worship, religious instruction, or proselytization, to the direct funding of benefits and services.

One of the aims of Charitable Choice is that faith-based and community-based organizations will be able to expand their capacity to provide for the social service needs of under-served areas. Also, in soliciting competition for possible Federal TANF or State MOE funds, a State could, for example, include among the factors that it will weigh toward choosing a provider, the ability of a potential provider to provide beneficiaries with transportation to and from the point of service.

Additionally, even when a State operates within the required level playing field, there may still be occasions where no faith-based organizations successfully compete to provide the needed service, regardless of whether the State has chosen to pay for the service directly or indirectly. We expect and understand this. As we previously mentioned, Charitable Choice is not a guarantee that Federal TANF or State MOE funds must automatically flow to faith-based organizations. The TANF Charitable Choice provisions do not require that States favor religious organizations. The provisions simply require a level

playing field in the procurement of benefits and services.

Also, the TANF Charitable Choice provisions leave it up to States to decide whether to involve the non-governmental social service sector or to provide all services through government agencies. In some areas, the latter may be the State's only choice, until non-governmental providers expand their service capabilities. But, if a State does choose to involve any non-governmental providers, then the Charitable Choice provision at section 104(c) of PRWORA as amended (42 U.S.C. 604a(c)) requires involving religious organizations on the same basis as any other non-governmental providers.

In addition, indirectly funded organizations must of course satisfy secular requirements of the program and provide otherwise eligible services through their programs.

## VI. Religious Character and Independence of Religious Organizations

### Background

Section 260.34(d) of the final rule clarifies that a religious organization that participates in the TANF program retains its independence from Federal, State, and local governments, provided that it does not use direct Federal TANF or MOE funds to support inherently religious activities. It may continue to carry out its mission, including the definition, practice and expression of its religious beliefs. Among other things, religious organizations may use their facilities to provide TANF-funded services, without removing religious art, icons, scriptures, or other symbols. In addition, a religious organization that receives Federal TANF or State MOE funds may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other governing documents.

*Comment:* A number of commenters expressed concern that a religious organization in receipt of Federal TANF or State MOE funds does not have to remove the religious art, icons, scriptures, or other symbols. The commenters think that this provision is too broad. It could result in the organization providing services in a setting that may well constitute a "pervasively sectarian" atmosphere in which members of a different religion may not feel comfortable or welcome to receive their TANF-funded benefits. For example, the organization could conduct the government-funded program in a chapel, leading to a

reasonable misperception of government endorsement of or support for religion.

*Response:* Section 104(d) of PRWORA as amended (42 U.S.C. 604a(d)) imposes on the government a duty not to intrude into the institutional autonomy of religious organizations. Each participating faith-based organization in receipt of Federal TANF or State MOE funds, whether directly or indirectly, shall retain its independence from Federal, State and local governments. This independence includes their control over the definition, development, practice, and expression of its religious beliefs. In addition, the statute expressly prohibits State, Federal, and local governments from requiring a religious organization to alter its form of internal governance or to remove religious art, icons, scripture, or other symbols in order to be eligible to receive directly or indirectly funded Federal TANF or State MOE funds to provide help to beneficiaries. If the beneficiary objects to the religious character, then he or she is entitled to receive the social service benefit at an alternate provider to which the beneficiary has no religious objection. In addition, as noted above, the Supreme Court's "pervasively sectarian" doctrine no longer enjoys the support of a majority of the Court. *See Mitchell v. Helms*, 530 U.S. 793, 825–829 (2000) (plurality opinion), *id.* At 857, 858 (O'Connor, J.) (requiring proof of "actual diversion of public support to religious uses").

*Comment:* Several commenters noted that the protections afforded in this subsection are consistent with the statute and should be maintained. One of the commenters requested that we add a statement essentially stating that "contrary State and local procurement laws that would otherwise prohibit faith-based organizations (FBOs) from continuing to staff on a religious basis" are preempted. Another commenter asked that we add language essentially stating that nothing in this section shall be construed to affect any State or local law or regulation that relates to discrimination in employment, including the provision of employee benefits.

*Response:* The protections in § 260.34(d) have been retained. We believe that the content of this subsection suffices as written.

As discussed under "Employment Practices," the FBOs enjoy an exemption "with respect to the employment of individuals of a particular religion," under Title VII of the Federal Civil Rights Act of 1964. Therefore, in keeping with the guarantees of institutional autonomy, a



religious organization may continue to select its own staff in a manner that takes into account its faith, without violating Title VII.

The Charitable Choice provision at section 104(f) of PRWORA as amended (42 U.S.C. 604a(f)) expressly guarantees that a religious organization's Title VII exemption shall not be affected by its participation in or receipt of TANF funds, whether the State or local government directly or indirectly uses Federal TANF funds or expends State or local funds claimed to meet the State's MOE requirement to pay for the services.

*Comment:* One commenter believes that all organizations receiving government funds to provide social services must be subject to consistent levels of government oversight so that standards and regulations pertaining to safety, performance, non-proselytization, quality of care, and financial management are followed.

*Response:* States are subject to an audit of their TANF programs in accordance with Office of Management and Budget (OMB) Circular A-133 (Audits of States, Local Governments, and Non-Profit Organizations). The audit examines use of Federal TANF and State MOE funds in accordance with applicable cost accounting and financial principles, as well as programmatic principles. The State is responsible for the appropriate use of its Federal TANF and State MOE funds. Therefore, any organization that receives Federal TANF or State MOE funds needs to be able to show to the State and the auditor that it used the funds, whether provided directly or indirectly, for the purpose intended by the State. These requirements are also addressed in our response to comments in Section X below, "Fiscal Accountability."

This is in keeping with the TANF Charitable Choice provision at section 104(h) of PRWORA as amended (42 U.S.C. 604a(h)) and this regulation in § 260.34(h), in which we stipulate that religious organizations receiving Federal TANF or State MOE funds will be subject to audit, just like any other non-governmental organization receiving such funds. Thus, all organizations receiving government funds to provide social services are subject to consistent levels of government oversight.

## VII. Employment Practices

### Background

In language similar to that in the statute, the proposed rule at § 260.34(d) (now § 260.34(e)) specified that the receipt of TANF or MOE funds does not

affect a participating religious organization's exemption provided under 42 U.S.C. 2000-e regarding employment practices. Title VII of the Federal Civil Rights Act of 1964 permits a religious organization to hire employees who share its religious beliefs. This helps enable faith-based groups to promote common values, a unity of purpose, and shared service—thus protecting the religious liberty of communities of faith.

*Comment:* Several commenters agreed that the proposed rule reflects a proper understanding of civil rights law. When a faith-based organization receives government funding and hires staff on a religious basis, the law is not violated.

*Response:* We agree with these commenters and have retained the identical language in the final rule. This statutory and regulatory provision of Charitable Choice does not change the status quo; it simply clarifies the applicability of the exemption to the TANF program.

*Comment:* Several commenters believed that the proposed rule allows employment discrimination in violation of constitutional prohibitions and court decisions that have struck down government-funded discrimination. One commenter explicitly stated that this provision runs afoul of the "no-religious-tests clause" of the Constitution under which "no religious test shall ever be required as a qualification to any office or public trust under the United States."

*Response:* We do not agree with these commenters. The Equal Employment Opportunity Act of 1972 broadened Title VII of the Civil Rights Act of 1964 to free religious organizations from charges of religious discrimination, regardless of the nature of the job. In 1987, the Supreme Court addressed and unanimously upheld the constitutionality of the 1972 amendment or exemption for religious organizations. In addition, it is well settled that the receipt of government funds does not convert the employment decisions of private institutions into "state action" that is subject to constitutional restrictions such as the "no religious test" clause of the Constitution.

*Comment:* A number of commenters stated that the exemption from Title VII of the Civil Rights Act was never intended to permit a religious organization to favor co-religionists in hiring when using Federal funds to pay the salaries and wages of employees who are carrying out governmentally-funded social service programs.

*Response:* We do not agree that these comments accurately portray the law.

Title VII of the Civil Rights Act, which applies to organizations regardless of whether they receive Federal funds, contains an explicit exemption for religious organizations, which allows them to hire, promote, and fire staff on a basis that takes into consideration the organization's religious beliefs and practices without violating Title VII. That exemption is not lost when a faith-based organization receives Federal TANF funds or State MOE funds to provide a secular service. Also, we would note that section 702(a) of the Civil Rights Act of 1964 is permissive. It allows religious staffing, but does not require it. And, religious organizations are subject to Federal civil rights laws that prohibit employment discrimination on the basis of race, color, national origin, sex, age, and disability.

*Comment:* Several commenters noted that State and local governments have contracting laws that prohibit employment discrimination, beyond the Civil Rights Act of 1964. These commenters asked that the final rule clarify that nothing in the rule is intended to modify or affect any State law or regulation that relates to discrimination in employment.

*Response:* The Charitable Choice provision at section 104(f) of PRWORA as amended (42 U.S.C. 604a(f)) expressly guarantees that a religious organization's Title VII exemption shall not be affected by its participation in or receipt of TANF funds. Hence, Charitable Choice applies whenever a State or local government uses Federal TANF funds or expends State or local funds claimed to meet the State's MOE requirement to procure services and benefits from non-governmental organizations, or provides clients with certificates, vouchers, or other forms of disbursement that can be redeemed for services in connection with the TANF program. When State or local funds are used to meet the State's MOE requirement, the provisions apply irrespective of whether the State or local funds are commingled with Federal funds, segregated, or expended in separate State programs.

The only exception is found in section 104(k) of PRWORA as amended (42 U.S.C. 604a(k)), which clarifies that the Charitable Choice requirements do not preempt any provision of a State constitution or State statute that prohibits or restricts the expenditure of State funds in or by religious organizations. We do not believe that this "preemption" provision can be interpreted to cover State or local employment discrimination laws. (For a more detailed analysis of the

implications of Charitable Choice on State and local laws, see the analysis provided under the heading "Effect on State and Local Funds".)

### VIII. Nondiscrimination Against Beneficiaries

#### Background

This provision applies to individuals who receive Federal TANF or State MOE-funded services. In § 260.34(f) of the final rule, we state that religious organizations are prohibited from discriminating against beneficiaries or potential beneficiaries on the basis of religion, a religious belief, refusal to hold a religious belief, or a refusal to actively participate in a religious practice. Accordingly, religious organizations, in providing services funded in whole or in part by Federal TANF or State MOE funds, may not discriminate against current or prospective program beneficiaries 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.

*Comment:* Many of the commenters expressed concern over the use of the word "active" in setting forth the prohibition from discriminating against beneficiaries or potential beneficiaries 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. They interpreted the word "active" to allow the delivery of religious messages using facilities and equipment funded by the government, and they believed that this word opens the door wherein vulnerable clients may be exposed to inappropriate "passive" religious practices. The commenters recommended removing the word "actively" from the final regulations.

*Response:* We disagree. In section 104(g) of PRWORA as amended (42 U.S.C. 604a(g)), Congress prohibited religious grantees from discriminating against program beneficiaries on three related grounds: "religion, a religious belief, or refusal to actively participate in a religious practice." In addition, section 104(b) of PRWORA as amended (42 U.S.C. 604a(b)) stipulates that the religious freedom of beneficiaries may not be diminished, and section 104(e)(1) of PRWORA as amended (42 U.S.C. 604a(e)(1)) provides that beneficiaries who object to the religious character of a service provider have a right to an alternative provider. These provisions are straightforward and are sufficient to protect the religious freedom of program beneficiaries. Accordingly, we have retained the language of the proposed

rule, which is based on Congress's own language.

*Comment:* One commenter stated that it is unclear whether the discrimination prohibition applies to funds provided both directly and indirectly to the religious organization. The commenter also asked us to prohibit providers from inquiring about the religious affiliation of applicants, and to require a notice advising that any religious services offered to the beneficiary are voluntary.

*Response:* The prohibition in section 104(g) of PRWORA as amended (42 U.S.C. 604a(g)) makes no distinction in funding source or funding method. Therefore, religious organizations, in providing services funded directly or indirectly, in whole or in part, with Federal TANF or State MOE funds, may not discriminate against current or prospective beneficiaries 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. As we mentioned in the discussion regarding "Restrictions on Religious Activities By Organizations that Receive Direct TANF Funding," when Federal TANF or State MOE funds are disbursed indirectly to the organization providing the service, then the organization may invite (not require) the beneficiary's participation in inherently religious activities. But, if the individual objects to the religious character of the organization or institution, then he or she has a right to receive the services from an alternative provider. This allows the beneficiary to avoid unwanted religious practices and prevents the individual's religious freedom from being diminished.

We decline to add a statement prohibiting providers from inquiring about the religious affiliation of applicants. We believe that the provision as written, is adequate.

We also decline to require that religious organizations provide a notice to a beneficiary or potential beneficiary assuring that participation in religious activities would be entirely on a voluntary basis. We recommend that States and participating organizations work together to ensure that clients and potential clients have a clear understanding of the services offered by the organization, including any religious activities, as well as the organization's expectations and requirements. The requirement that participation be voluntary, however, is sufficient to address concerns about the religious freedom of program beneficiaries.

*Comment:* One commenter wrote that the proposed rule does not require a secular alternative. Therefore, it lacks

constitutionally-required safeguards for beneficiaries.

*Response:* The proposed rule at § 260.34(f) (now § 260.34(g)(2)) provided that if the applicant or recipient objects to the religious character of a TANF service provider, he or she is entitled to an alternative provider to which the individual has no religious objection. This is in keeping with the TANF Charitable Choice provision at section 104(e)(1) (42 U.S.C. 604a(e)(1)), which requires that the State provide the individual with assistance from "an alternative provider." Hence, the alternative provider could, but does not have to be, a secular alternative; it need only be a provider to which the beneficiary has no religious objection. We have retained the wording of this provision.

*Comment:* One commenter asked us to clarify that a beneficiary has the right to choose indirect government funding to enroll in a program that has a religious component. The commenter also asked us to add that "nothing in this section shall be construed to prohibit a program beneficiary from using indirect government assistance to receive services from a participant whose program has a required religious component or to prohibit such participant from offering the required religious component."

*Response:* We decline to add the suggested sentence to the final rule. The welfare reform law of 1996 (PRWORA) gave States unprecedented flexibility to design and conduct their own TANF programs. In addition, the TANF Charitable Choice provision at section 104(a)(1) (42 U.S.C. 604a(a)(1)) gave States the option to administer and provide services directly and/or indirectly. Further, each State is responsible for its own decisions regarding how to use its Federal TANF and State MOE funds, including the range of services it elects to provide and the method of paying for those services. But, this does not preclude a beneficiary from personally choosing to participate in any inherently religious activities that an organization offers, even if the social service benefit provided to him or her is directly funded by the TANF agency. It just means that, for directly funded social services, the inherently religious activities must take place separately, in time or location, from the provision of the Federal or State MOE funded social service benefit.

*Comment:* One commenter would like us to recognize that religious organizations and secular organizations sometimes discriminate on the basis of sexual orientation or gender identity. The commenter suggested that we

develop a regulation banning religious, sexual orientation and/or gender identity discrimination with Federal or other public funds.

*Response:* Religious organizations and secular organizations alike must follow Federal civil rights laws prohibiting discrimination on the bases of race, color, national origin, gender, age, and disability. However, the Federal civil rights laws are silent on discrimination on the basis of sexual orientation and/or gender identity, and we decline to impose such restrictions by regulation.

*Comment:* Several commenters noted that if religious organizations are providing program services and facilities, then they must be in compliance with the Americans with Disabilities Act (ADA). Persons with disabilities should not be assigned to alternative or substitute programs or services.

*Response:* Although it is beyond the scope of these regulations to address how various civil rights laws might apply in all situations, organizations providing services must comply with Federal civil rights laws to the extent that those laws are applicable. In particular, we note that Title III (Public Accommodations and Services Operated by Private Entities), section 307 of the Americans with Disabilities Act of 1990 excludes religious organizations or entities controlled by religious organizations, including places of worship, from the provisions. Yet, religious institutions are subject to several requirements designed to ensure services to persons with handicaps in section 504 of the Rehabilitation Act of 1973, and its implementing regulations at 45 CFR part 84, which prohibit discrimination on the basis of disability in programs or activities receiving Federal financial assistance.

## IX. Notice, Referral, and Provision of Services From Alternative Providers

### Background

Section 260.34(f) of the proposed rule (now § 260.34(g)) received more comments than any other provision. In this section, we stated that individuals applying for or receiving Federal TANF or MOE-funded services may object to the religious character of a religious provider. If so, they are entitled to receive services from an alternative provider. The State or local agency must refer the individual to an alternative provider of services within a State-defined, reasonable period of time. Alternative providers must be reasonably accessible and be able to provide comparable services, which are at least equal in value to those the

individual would have received from the initial provider. The alternative provider does not have to be a secular organization, just one to which the program beneficiary has no religious objection. Since effective services need to take into consideration local conditions, we deferred to States on how to accomplish these statutory and regulatory objectives.

However, the proposed rule did clarify that State and local governments are responsible to ensure that clients are provided notice of their rights to alternative providers, and are referred to and provided alternative services within a reasonable period of time, if they object to a religious provider. And, while the responsibility for the notice, referral and provision of the alternative service rests with the State or local agency, each participating organization has a responsibility to help clients know and understand their rights. We also encouraged all involved organizations to develop and implement reasonable tracking procedures to ensure that clients do not “fall through the cracks” and lose timely services.

*Comment:* Several commenters noted that the requirement to provide alternative services places additional burdens on State agencies, especially in rural areas. A faith-based organization may be selected as the service provider for a particular geographic area. Ensuring that an alternative service provider is available could require the State to make dual sets of services available, and thus increase costs. As a result, many of these commenters suggested that the requirement to provide alternative services is unreasonable. Some suggested that exceptions be permitted or that the requirement should be eliminated. Others noted that with this requirement, some States may choose not to contract out or provide community-based services, especially in rural areas.

*Response:* In enacting the Charitable Choice provision, Congress had to carefully balance the rights of individuals with the duty of government to not discriminate with respect to religion when selecting non-governmental providers of social services. To accomplish these two principles, the statute imposes the requirement to provide accessible and comparable assistance or services within a reasonable period of time to an individual who has an objection to the religious character of an organization. In the proposed rule, with the exception of requiring notice and referral, we did not expand or enhance the rights of beneficiaries to assistance from an alternative provider, but simply

clarified this statutory entitlement. We also left substantial discretion to States to define terms and carry out the statutory objective.

We also believe that commenters may have overestimated the impact and potential burden of this requirement. Many faith-based organizations have a long history of contracting with State and local governments to address the secular purpose of providing assistance and services to needy families. Few beneficiaries have objected to the religious nature of these providers, which is perhaps unsurprising in light of the fact that any inherently religious activities must be offered separately and on a voluntary basis. We also do not believe States will decide not to contract out or provide community-based services in order to avoid this requirement. Since the statutory Charitable Choice requirements have applied since 1996, we believe that State and local governments are providing alternative services, in compliance with the law, and discovering and enhancing procedures that efficiently and effectively address this requirement.

It is also worth noting that one of the aims of Charitable Choice is that faith-based and community-based organizations will be able to expand their capacity to provide for the social service needs of under-served areas. Also, in soliciting competition for possible Federal TANF or State MOE funds, a State could, for example, include among the factors that it will weigh toward choosing a provider, the ability of potential providers to provide beneficiaries with transportation to and from the point of service.

Finally, the TANF Charitable Choice provisions leave it up to States to decide whether to involve the non-governmental social service sector or to provide all services through government agencies. In some areas, the latter may be the State's only choice, until non-governmental providers expand their service capabilities. But, if a State does choose to involve any non-governmental providers, then the Charitable Choice provision at section 104(c) of PRWORA as amended (42 U.S.C. 604a(c)) requires involving religious organizations on the same basis as any other non-governmental provider.

*Comment:* Several commenters believed that the proposed rule left too much discretion to States to define the terms “reasonably accessible,” “a reasonable period of time,” “comparable,” “capacity,” and “value that is not less than.” These commenters asked that we either provide Federal definitions for these terms, or establish

baseline parameters or guidelines. Others appreciated the discretion we had provided to States, but were concerned that the expectation of alternative services may expose States to litigation based on availability and how they define comparable services.

*Response:* Since the enactment of the welfare reform legislation in PRWORA, we have learned two clear lessons:

- Operational details and procedures need to be developed taking into consideration community and local needs and constraints. Because State and local governments have the knowledge of these realities, they are better prepared to define and set realistic and effective parameters to meet these mandatory, statutory goals. Given the diverse and wide range of TANF services, benefits and programs offered by States, it would be nearly impossible for us to define these terms in ways that would accommodate the needs of different States and communities; and,
- When given the flexibility, opportunity and authority through devolution, States and communities have demonstrated tremendous creativity leading to beneficial results. When TANF was enacted, many people expressed concern that the flexibility granted States, without Federal regulation would lead to “a race to the bottom.” Experience has proven these fears to be completely unfounded; and, if anything, the converse is true. Through experimentation and innovation, States and communities have developed programs and services to enhance the ability of families to achieve independence—a true race to the top and to excellence.

We believe that States, faced with the challenge of how to offer clients this option, while at the same time guaranteeing other alternative providers, will again rise to the occasion and develop reasonable and effective definitions and operational procedures. We are convinced that families will be better served by providing this discretion to States.

Nevertheless, we do believe that States must conscientiously apply guidance to assure fair treatment and comparable provision of services to all eligible applicants and recipients requiring an alternative provider. We have revised § 260.34(g) of the final rule to help ensure that States adopt reasonable definitions of the terms in this section and to reflect our expectation that this section is implemented fairly.

*Comment:* One commenter, noting a potential tension between the protections provided to religious

organizations and the alternative provider requirements on States, suggested regulatory language that explicitly prohibits governmental entities from considering the impact of the alternative service provider requirements when considering faith-based providers.

*Response:* Once a State or local government elects the option to provide services through non-governmental entities, then the Charitable Choice provisions ensure that “\* \* \* religious organizations are eligible, on the same basis as any other private organization \* \* \*” Implicitly, in that requirement, State or local governments are prohibited from considerations other than those leading to the selection of providers that can best achieve the secular purposes of the service or benefit. ACF believes State and local governments clearly understand this and that an explicit addition to the rules is not needed.

*Comment:* To protect beneficiaries, one commenter offered three suggestions: (1) That clients be held harmless from work requirements while the State seeks alternative services; (2) that there be no penalty for requesting alternative providers; and (3) that a State and Federal administrative complaint mechanism be created.

*Response:* The work participation requirements are set forth in section 407 of the Social Security Act, with implementing regulations at 45 CFR part 261. Under section 407, there are limited circumstances under which an individual may be exempted from work requirements. The commenter’s suggestion is not among them. Nevertheless, States have the flexibility to develop additional exemption criteria, with the understanding that the State must still meet its required work participation rate target. Each State may also establish its own criteria for determining when not to impose a penalty on an individual—namely, when an individual has “good cause” for not engaging in required work activities.

Secondly, under the TANF Charitable Choice provisions, government may not compel an individual, through loss of public benefit or advantage, to profess a religious belief or to observe an inherently religious practice. Therefore, the State may not penalize an individual for requesting to receive a service from an alternative provider because he or she objects to the religious character of the organization or institution from which he or she receives or would receive the service.

Finally, while the Charitable Choice provisions do not include any statutory

basis for us to create a Federal appeal process, we are confident that States conscientiously provide protections to beneficiaries. For example, States are required to outline in a State plan how they will require a parent or caretaker to engage in work activities, the objective criteria for the delivery of benefits, and an explanation of how the State will provide opportunities for recipients who have been adversely affected to be heard in an administrative or appeal process. ACF has heard of few abuses or complaints about the adequacy of existing procedures.

*Comment:* One commenter suggested that the final rules clarify that an individual may not object to services provided by a secular, non-profit community-based organization and request alternative faith-based services.

*Response:* We agree that this individual right is not provided by the Charitable Choice statute or regulation. The right of a beneficiary to an alternative provider derives only when the individual has an objection to the “religious character of the organization or institution from which the individual receives, or would receive assistance \* \* \*” Since secular organizations, by definition, do not have a “religious character”, no right to an alternative is created. Nonetheless, we encourage states to respect the religious or nonreligious choices of all beneficiaries.

*Comment:* Several commenters suggested that the final rule specify that beneficiaries who object to the religious character of an organization have the right to a secular provider.

*Response:* The Charitable Choice statute does not specify that the alternative provider needs to be a secular organization. We have chosen not to adopt this suggestion for three reasons. First, the purpose of the statute is to respect beneficiary choice, and some beneficiaries may prefer an alternative religious provider to an alternative secular provider. Second, many faith-based organizations deliver services in a secular manner. As a result, most beneficiaries will not object to the religious character of these organizations, and we do not want to exclude them as potential providers of service. Third, under the permissive statutory language that we have retained, State and local governments may offer a secular alternative. We believe States will implement this requirement in a manner consistent with their obligation to ensure compliance with the Establishment Clause of the First Amendment.

*Comment:* One commenter noted that the proposed rule was unclear on whether the alternative provider

requirement applies to the designated, non-profit (under section 501(c)(3) of the tax code) arm of a religious organization.

*Response:* The statutory language clearly gives the beneficiary the right to object to the “religious character of the organization or institution from which the individual receives, or would receive, assistance. \* \* \*.” We believe this gives the client the right to object, even when the services will be delivered without inherently religious activities by the non-profit arm of a faith-based group, so no clarification is necessary for the final rule.

## X. Fiscal Accountability

### Background

Section 260.34(h) of this rule sets forth the financial responsibility incurred through the receipt of Federal TANF or State MOE funds. Religious organizations that contract to provide TANF services or benefits are subject to the same requirements as other non-governmental organizations to account, in accordance with generally accepted auditing and accounting principles, for the use of such funds. Religious organizations may segregate their TANF accounts from non-governmental funds for other activities. If religious organizations choose to segregate their Federal TANF or State MOE funds in this manner, only the segregated funds are subject to audit by the government.

*Comment:* Some commenters would like ACF to require that faith-based organizations separate the TANF funds they receive from other funds, and incorporate oversight mechanisms. One of the commenters recommended that we revise the regulation to conform to the standards adopted by the Substance Abuse and Mental Health Services Administration (SAMHSA). Other commenters recommended making the language stronger to stress the importance of creating separate records. One of the commenters wrote that faith-based organizations and government officials need guidance regarding the procedures required to separately fund the activities. Another commenter asked us to maintain the provision that if a religious organization establishes a separate account, then only the TANF funds are subject to audit by the government.

*Response:* Section 104(h)(2) of PRWORA as amended (42 U.S.C. 604a(h)(2)) gives a religious organization the option of segregating the Federal funds received into a separate account. Therefore, we do not think it is appropriate to require separate accounts because this would be stricter than the

law stipulates. By contrast, the Charitable Choice provision applicable to SAMHSA, at 42 U.S.C. 290kk-1(g)(2), specifically requires that the religious organization program participant segregate the Federal funds provided under award from non-Federal funds.

The religious organizations are responsible for deciding whether to establish separate account(s) to receive and to disburse the funds and for developing their own means of doing so. Organizations that are able and willing to separate the funds received from the State into a separate account will have only those funds subject to audit.

*Comment:* One commenter asked us to clarify whether only the Federal TANF funds, as opposed to State MOE funds, are subject to audit when religious organizations segregate the funds into a separate account.

*Response:* The limited audit authority applies to Federal TANF and State MOE funds, whether received directly or indirectly, unless State law expressly prohibits this flexibility from extending to State MOE funds. Both Federal TANF and State MOE funds are subject to the TANF Charitable Choice provisions.

We recognize that the TANF Charitable Choice provision at section 104(h)(2) of PRWORA as amended (42 U.S.C. 604a(h)(2)) refers only to Federal TANF funds. But, the intent of this provision is to enable the organization to opt to limit the scope of fiscal audits. Therefore, we have concluded that extending the option to include State MOE funds is consistent with the statutory intent. We have clarified this point in § 260.34(h).

*Comment:* Some commenters think that the regulation does not adequately guard against using the funds for religious activities. One commenter asked us to address the accounting and/or separation principles which must be followed with respect to the separate funding of permitted and restricted activities in order to demonstrate that the organization has not expended any government funds on restricted activities. Several of the commenters requested that the final rule require that the religious organization establish a separate corporate structure (e.g., incorporate under 501(c)(3)) or other type of separate structure that would distinguish the religious entity from its government-funded social welfare organization. Another commenter is concerned that the option for religious organizations to commingle funds could make it more difficult and expensive for the State to ensure that public funds are not supporting “inherently religious activities.” This commenter noted that the Community Services Block Grant

program proposed rule does not allow for the commingling of funds by religious organizations.

*Response:* Under the TANF Charitable Choice statute, religious organizations may, but are not required to, establish a separate account structure, including incorporating or operating the separated part as a non-profit organization under section 501(c)(3) of the Internal Revenue Code. Because religious organizations do not have to incorporate or operate as a non-profit organization, we have deleted the definition of religious organization—i.e., “a non-profit religious organization” from the final regulation.

The final rule provides that religious organizations receiving Federal TANF or State MOE funds will be subject to audit, just like any other non-governmental organization receiving such funds. The State is responsible for the appropriate use of its Federal TANF and State MOE funds, so the organization needs to be able to show to the State and the auditor that it used the funds, whether provided directly or indirectly, for the purpose intended by the State. Specifically, as provided in 45 CFR 92.26, TANF grantees and sub-grantees are responsible for obtaining audits by an independent auditor following generally accepted government auditing standards, in accordance with both the Single Audit Act and OMB Circular A-133. These require that grantees spending more than \$300,000 in Federal funds per year must obtain an annual independent audit, normally conducted by a private firm. This authority is in 31 U.S.C. section 7502(a)(1)(A) and (c). The State or local government must determine whether the grantee and sub-grantees have complied with all laws applicable to expenditures, which includes a determination as to whether the proscriptive against using direct funding for inherently religious practices has been followed. State officials may want to establish reasonable and prudent procurement policies, building in real and meaningful safeguards to prevent the diversion of funds to any ineligible purpose.

Moreover, HHS is authorized to conduct any additional audits or reviews that are warranted, irrespective of the amount of Federal funds expended by the grantee annually, in order to ensure compliance with program requirements including the restriction against direct funding of inherently religious activities. This authority is in 45 CFR 92.40(e). HHS may determine that such audits or reviews are warranted based upon any

information received by the agency that raises an issue concerning the propriety of expenditures.

As we noted in an earlier response, we do not think it is appropriate to require a separate corporate or other structure because this would be stricter than the TANF Charitable Choice statute stipulates. In contrast to the TANF Charitable Choice provisions, the Charitable Choice provisions applicable to SAMHSA at 42 U.S.C. 290kk-1(g)(2) and the Community Services Block Grant program at 42 U.S.C. 9920(d)(2) specifically require that the religious organization program participant segregate the Federal funds it receives into a separate account.

*Comment:* One commenter noted that there is no requirement against using government funds to supplant church funds. Therefore, the final rule should make clear that “pervasively sectarian” organizations should not receive direct funding.

*Response:* We disagree with this recommendation. To begin with, it contradicts the very purpose of the TANF Charitable Choice provisions. The TANF Charitable Choice provisions provide a level playing field in the government’s procurement of benefits and services that it has chosen to provide to TANF-eligible families and individuals. To this end, the Charitable Choice provisions give qualified religious organizations the right to participate in the provision of these services. Hence, as we have indicated in Sections III and IV of these comments, a religious organization may not be excluded from the procurement process on the basis that it is religious, too religious, or “pervasively sectarian.” In addition, the Supreme Court’s “pervasively sectarian” doctrine no longer enjoys the support of a majority of the Court. *See Mitchell v. Helms*, 530 U.S. 793, 825–829 (2000) (plurality opinion); *id.* at 857–858 (O’Connor, J., concurring in judgment, joined by Breyer, J. (requiring proof of “actual diversion of public support to religious uses”).

None of the Federal TANF or State MOE funds provided directly to the organization may be used for inherently religious activities. The government has purchased a service from the religious organization to deliver a specific social service benefit(s) to TANF applicants or recipients.

*Comment:* One commenter recommended that we define “non-profit” organization consistent with the definition provided in the SAMHSA proposed rule at 67 FR 77350 regarding the Charitable Choice Clause.

*Response:* We decline to add a definition of “non-profit” organization. As we explained, we have deleted the definition of “religious organization” that was in the NPRM, which contained a reference to “non-profit.”

## XI. Effect on State and Local Funds

### Background

Section 104(a) of PRWORA as amended (42 U.S.C. 604a(a)) applies to “a State program funded under part A of title IV of the Social Security Act” (TANF) and also to “any other program established or modified under title I or title II of this Act that permits contracts with organizations; or permits certificates, vouchers, or other forms of disbursement to be provided to beneficiaries as a means of providing assistance.” Title I includes all TANF provisions, including the maintenance-of-effort (MOE) requirement that States continue to expend a specified level of State or local funds. Claimed expenditures must be spent on eligible families for activities that achieve a TANF purpose. (Title II is the Supplemental Security Income program.)

The proposed rule followed the statute in specifying that the Charitable Choice requirements apply both when a State or local government uses Federal TANF funds to procure services and benefits from non-governmental organizations, or to redeem certificates, vouchers, or other forms of disbursement or when the State claims those expenditures to meet the MOE requirement. We said that the Charitable Choice provisions apply whether the State or local funds are commingled with Federal funds, segregated, or expended in separate State programs.

The proposed rule also clarified that, pursuant to section 104(k) of PRWORA as amended (42 U.S.C. 604a(k)), nothing in the Charitable Choice requirements shall be construed to preempt any provision of a State constitution or State statute that prohibits or restricts the expenditure of State funds in or by religious organizations.

*Comment:* A number of commenters opposed the application of Charitable Choice to the State and local funds claimed to meet the MOE requirement. Some believed that Charitable Choice should only apply to the use of Federal TANF dollars. Others believed that the rule covers commingled funds, but asked that we modify the rule with respect to both segregated funds and funds expended in separate State programs. Still others believed the rule should apply to funds expended in the TANF program (Federal funds,

commingled and segregated MOE expenditures) but that it ought not apply to expenditures in separate State programs, like other TANF rules.

*Response:* Because ACF did not regulate on Charitable Choice or provide guidance earlier, we recognize that many may not have understood that the statutory provision applies to State and local funds claimed to meet the State’s MOE requirement, just as it applies to Federal TANF funds. Given the nearly total flexibility provided to States with respect to separate State programs, we also acknowledge that the application of the Charitable Choice requirements to these funds is unusual, because only a few of the TANF rules apply to the expenditure of State funds in separate State programs.

But, while we recognize the frustration of some of the commenters with the interpretation in the NPRM and the preference of others to modify the rule, for the reasons explained in the “Background” above, we believe the better reading of the statute is that Charitable Choice applies to all State funds claimed to meet the maintenance-of-effort requirements.

*Comment:* Several commenters noted that the preemption clause did not address local laws and asked us to clarify in the final rule that the Charitable Choice provisions do not preempt any provision of a State constitution, State statute or local ordinances that prohibits or restricts the expenditure of State funds in or by religious organizations.

*Response:* Section 104(k) (42 U.S.C. 604a(k)) preserves “a State constitution or State statute that prohibits or restricts the expenditure of State funds in or by religious organizations”; it contains no reference to “local laws” or “ordinances.” In addition, the TANF Charitable Choice statute, read as a whole, demonstrates that Congress was cognizant of the distinction between State and local law. For example, section 104(d)(1) (42 U.S.C. 604a(d)(1)) provides that a religious organization participating in a TANF program “shall retain its independence from Federal, State, and local governments \* \* \*.” We therefore believe that the existing language faithfully implements the statute.

*Comment:* Several commenters noted that the proposed rule was confusing. If Charitable Choice applies to the use of Federal funds and all State and local expenditures claimed to meet MOE, what does the preemption provision mean?

*Response:* We understand the confusion. But, Congress recognized that some States have enacted laws to

ensure a more rigorous "separation of church and state." These States either prohibit or restrict contracts with religious organizations or more broadly proscribe providing any State funding to them. In enacting Charitable Choice, Congress explicitly allowed these State prohibitions or restrictions, as they apply to State funds only, to take precedence over this Federal provision.

The provision at section 104(k) of PRWORA as amended (42 U.S.C. 604a(k)) which preserves "a State constitution or State statute that prohibits or restricts the expenditure of State funds in or by religious organizations," only applies to the State's own funds, but not to Federal TANF funds. The "preemption" provision also does not apply to State funds that have been commingled with Federal TANF funds. (Federal requirements only affect the use of Federal TANF funds, unless the State commingles its money with Federal TANF funds. If a State commingles its funds, the Federal and State funds become subject to the same rules.) A number of States may have general or specific provisions that prohibit or restrict providing direct or indirect State funds to religious organizations. Such States should use segregated Federal TANF funds to pay for any benefits and services provided by religious organizations, to avoid the risk of running afoul of a provision in their laws that prohibits or restricts the expenditure of State funds in or by religious organizations.

So, another way of expressing the requirements is that if a State's constitution or law prohibits or restricts State funds from going to religious organizations, or proscribes contracts with religious organizations, the Charitable Choice requirements do not apply to those State funds. We defer to the State to interpret the scope of its constitution or law. But, if a State does not have such prohibitions or restrictions, then Charitable Choice applies to both Federal TANF funds and State and local expenditures claimed for MOE purposes. This is faithful to Congress' expressed intention to preserve State constitutional or statutory restrictions on State funds, while ensuring that Federal rules apply to both Federal and State MOE funds in the absence of such State law provisions.

*Comment:* Several commenters asked that the final rule clarify that the provision at section 104(k) of PRWORA as amended (42 U.S.C. 604a(k)) which preserves "a State constitution or State statute that prohibits or restricts the expenditure of State funds in or by

religious organizations," also includes State and local nondiscrimination hiring provisions.

*Response:* We do not agree that the provision at section 104(k) of PRWORA as amended (42 U.S.C. 604a(k)) addresses employment nondiscrimination provisions. Rather, this provision explicitly covers provisions of a State constitution or State statute that prohibits or restricts the expenditure of State funds "in or by religious organizations." Employment nondiscrimination provisions do not fall within this category.

## XII. Treatment of Intermediate Organizations

### Background

Section 260.34(k) of this rule provides that, if a non-governmental organization (referred to here as an "intermediate organization"), acting under a contract or other agreement with the Federal government or a State or local government, is given the authority under the contract or agreement to select other non-governmental organizations to provide services under the program, the intermediate organization must ensure that there is compliance with the Charitable Choice provisions. The intermediate organization retains all other rights of a non-governmental organization under the Charitable Choice provisions.

*Comment:* One commenter asked for clarification on whether these rules apply to Tribal governments that participate or contract with the State as part of a State's TANF program. Related to this question is the issue of whether these rules apply to a Tribal government or organization that has the authority under the contract or agreement with the State to select other organizations to provide services under the program.

*Response:* Tribes that operate their own TANF program under section 412 of the Social Security Act are not required to follow the Charitable Choice rules because the statutory provisions on Charitable Choice refer only to State and local governments. However, Tribes must adhere to these rules if they are under a contract or agreement with the State to operate some aspect of the State's TANF program and the Tribe has the authority to select other organizations and disburse funds to provide benefits and services. Under such an arrangement, a Tribe is functioning like any other intermediate organization and, is, therefore bound to ensure compliance with the statutory provisions of Charitable Choice and these implementing regulations.

*Comment:* Six commenters raised a number of different issues with respect to our regulatory provision on intermediate organizations. The first issue is whether or not a State's use of intermediate organizations to select TANF service providers is unconstitutional. The second issue is whether or not we should specifically regulate the requirements that intermediate organizations be held to the same standards of service, care, nondiscrimination, financial management and accounting rules as the agency receiving the direct grant. The third issue is whether or not we should regulate a requirement that intermediate organizations identify and describe basic information on each subgrantee. The fourth issue is whether or not religious organizations should be permitted to function as intermediate organizations.

*Response:* We do not agree that the use of an FBO as an intermediate organization is unconstitutional. Our review did not disclose any precedents, legal or otherwise, that would prevent a State from selecting an FBO as an intermediate organization. The purpose of the provision in § 260.34(k) is not to delegate authority to organizations to carry out tasks that are traditionally reserved for a governmental agency. States already have the authority to procure needed social services through the non-governmental sector. Nor is it uncommon for States to authorize non-governmental intermediaries to select TANF service providers by contracting with them to do so. Since the responsibility to select service providers is often vested in non-governmental organizations, it is not a duty that traditionally has been an exclusive function of the government, and intermediate organizations (whether religious or secular) are in any event obligated to act as the government itself must act when carrying out their intermediary functions under this program. We also wish to emphasize that a State's use of intermediate organizations does not relieve the State of its traditional responsibility to effectively monitor the actions of such organizations. The regulations at 45 CFR 92.40 hold a State accountable for managing the day-to-day operations of grant and subgrant supported activities to assure compliance with applicable Federal requirements and performance goals. Moreover, no provision of this rule relieves a State of its responsibility to ensure that providers are selected in a manner consistent with the Establishment Clause.

Regarding the issues related to standards of service, financial



management, accounting, and reporting on subgrantee activities, an intermediate organization, like a State grantee, is held to the requirements enunciated in the Federal regulations at 45 CFR Part 92 (which implements the provisions of OMB Circular A-103) and OMB Circulars A-87 and A-133 on the Single Audit Act. Given that both the State and its intermediate organization are subject to these existing requirements, we see no need to further regulate in this area. Regulating on nondiscrimination is also unnecessary since intermediate organizations are covered by the provisions at § 260.34(e) and (f) of this rule along with the protections offered by other Federal civil rights laws as listed at 45 CFR 260.35.

On the issue of whether or not we should permit an FBO to serve as an intermediate organization, we have decided to maintain the position taken in the NPRM—*i.e.*, to allow a State to select an FBO as an intermediate organization. We believe that our rules on fiscal accountability, on the obligations of such intermediate organizations, and on the prohibition on the use of Federal TANF or State MOE funds for inherently religious activities are sufficient protections against the possibility that an FBO will use these funds to advance its religious beliefs.

This final rule corrects a typographical error in the NPRM. The lead sentence after the heading “Treatment of Intermediate Organizations” in the preamble to the NPRM incorrectly referred to paragraph (i); the correct paragraph in the NPRM was (j). This provision now appears in § 260.34(k) of in the final rule.

### XIII. Regulatory Analysis

#### *Paperwork Reduction Act of 1995*

No new information collection requirements are imposed by these regulations, nor are any existing requirements changed as a result of their promulgation. Therefore, the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), regarding reporting and record keeping, do not apply.

#### *Regulatory Flexibility Analysis*

The Regulatory Flexibility Act (5 U.S.C. 605(b)) requires the Federal government to anticipate and reduce the impact of rules and paperwork requirements on small businesses and other small entities. Small entities are defined in the Act to include small businesses, small non-profit organizations, and small governmental entities. This rule will affect primarily the 50 States, the District of Columbia,

and certain Territories. Therefore, we certify that this rule will not have a significant impact on small entities.

*Comment:* One commenter stated that the rule should be considered “major” because it will have a significantly adverse impact on employment by allowing for discrimination based on religion.

*Response:* We disagree. For years, section 702(a) of the Civil Rights Act of 1964 as amended has relieved religious organization from compliance with Title VII employment nondiscrimination requirements. Therefore, we believe that there will not be any significant adverse impact on employment.

#### *Regulatory Impact Analysis*

Executive Order 12866 requires that regulations be reviewed to ensure that they are consistent with the priorities and principles set forth in the Executive Order. The Department has determined that this rule is consistent with these priorities and principles. This rule is considered a “significant regulatory action” under the Executive Order, and therefore has been reviewed by the Office of Management and Budget. This rulemaking implements statutory authority and reflects our response to comments received on the NPRM that we issued on December 17, 2002 in 67 FR 77362 (2002).

#### *Unfunded Mandates Reform Act of 1995*

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that a covered agency prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year.

The Department has determined that this rule would not impose a mandate that will result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of more than \$100 million in any one year.

*Comment:* Two commenters mentioned that this rule would result in expenditures in excess of the \$100 million threshold.

*Response:* We disagree. Conditions attached to federal grant programs are not generally considered “mandates” under The Unfunded Mandates Reform Act (UMRA) of 1995. Nevertheless, with a large program like the TANF program, a new grant condition or reduction in federal financial assistance could be considered a mandate if States lack the flexibility to offset the new costs or the loss of Federal funding with reductions or other design alternatives elsewhere in

the program. For example, under the Charitable Choice provisions, when an otherwise eligible TANF applicant or recipient objects to the religious character of a TANF service provider, the State or local agency must refer the individual to an alternative provider of services. While this could be viewed as an additional expenditure for the State, we have concluded that this does not trigger the requirement under section 202 of the UMRA of 1995. In addition to the fixed amount of their own money that States must spend toward their maintenance-of-effort requirements, States also receive annual Federal funding. Furthermore, the welfare reform law gave States broad flexibility to provide a variety of benefits and services for their clientele. In determining which services to provide, States know that they have to prioritize the needs of their clientele by balancing funding options and strategies that best address these needs with budgetary considerations. For example, some providers are able to offer more than one service, including the service the individual is entitled to receive from an alternative provider.

#### *Congressional Review*

This regulation is not a major rule as defined in 5 U.S.C. chapter 8.

#### *Assessment of Federal Regulation and Policies on Families*

We certify that we have made an assessment of this rule’s impact on the well-being of families, as required under section 654 of The Treasury and General Government Appropriations Act of 1999. The purpose of the TANF program is to strengthen the economic and social stability of families, in part by supporting the formation and maintenance of two-parent families and reducing out-of-wedlock childbearing. This rule expands the pool of providers that States may contract with in order to deliver effective services that support the purpose of the TANF program.

#### *Executive Order 13132*

Executive Order 13132, Federalism, requires that Federal agencies consult with State and local government officials in the development of regulatory policies with Federalism implications. In the NPRM, we specifically solicited comments from State and local government officials.

*Comment:* Two commenters specifically mentioned that we should have consulted with State and local officials before the issuance of a final rule.

*Response:* We believe that our solicitation in the NPRM satisfied the

consultation requirement of Executive Order 13132. ACF provided a comment period during which time, the agency heard from many State welfare agencies and social service departments, and the rules have been drafted in a manner which provides States flexibility. Accordingly, we certify that the requirements of Executive Order 13132 have been satisfied.

#### List of Subjects in 45 CFR Part 260

Grant programs-social programs, Loan programs-social programs, Public assistance programs.

Dated: September 22, 2003.

**Wade F. Horn,**

*Assistant Secretary for Children and Families.*

**Tommy G. Thompson,**

*Secretary of Health and Human Services.*

#### XIV. Final Rule

■ For the reasons discussed above, title 45 CFR chapter II is amended as follows:

#### PART 260—[AMENDED]

■ 1. The authority citation for 45 CFR part 260 continues to read as follows:

**Authority:** 42 U.S.C. 601, 601 note, 603, 604, 606, 607, 608, 609, 610, 611, 619, and 1308.

■ 2. A new § 260.34 is added to read as follows:

#### § 260.34 When do the Charitable Choice provisions of TANF apply?

(a) These Charitable Choice provisions apply whenever a State or local government uses Federal TANF funds or expends State and local funds used to meet maintenance-of-effort (MOE) requirements of the TANF program to directly procure services and benefits from non-governmental organizations, or provides TANF beneficiaries with certificates, vouchers, or other forms of indirect disbursement redeemable from such organizations. For purposes of this section:

(1) *Direct funding or funds provided directly* means that the government or an intermediate organization with the same duties as a governmental entity under this part selects the provider and purchases the needed services straight from the provider (e.g., via a contract or cooperative agreement).

(2) *Indirect funding or funds provided indirectly* means placing the choice of service provider in the hands of the beneficiary, and then paying for the cost of that service through a voucher, certificate, or other similar means of payment.

(b)(1) Religious organizations are eligible, on the same basis as any other organization, to participate in TANF as long as their Federal TANF or State

MOE funded services are provided consistent with the Establishment Clause and the Free Exercise Clause of the First Amendment to the United States Constitution.

(2) Neither the Federal government nor a State or local government in its use of Federal TANF or State MOE funds shall, in the selection of service providers, discriminate for or against an organization that applies to provide, or provides TANF services or benefits on the basis of the organization's religious character or affiliation.

(c) No Federal TANF or State MOE funds provided directly to participating organizations may be expended for inherently religious activities, such as worship, religious instruction, or proselytization. If an organization conducts such activities, it must offer them separately, in time or location, from the programs or services for which it receives direct Federal TANF or State MOE funds under this part, and participation must be voluntary for the beneficiaries of those programs or services.

(d) A religious organization that participates in the TANF program will retain its independence from Federal, State, and local governments and may continue to carry out its mission, including the definition, practice and expression of its religious beliefs, provided that it does not expend Federal TANF or State MOE funds that it receives directly to support any inherently religious activities, such as worship, religious instruction, or proselytization. Among other things, faith-based organizations may use space in their facilities to provide TANF-funded services without removing religious art, icons, scriptures, or other symbols. In addition, a Federal TANF or State MOE funded religious organization retains the authority over its internal governance, and it may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other governing documents.

(e) The participation of a religious organization in, or its receipt of funds from, a TANF program does not affect that organization's exemption provided under 42 U.S.C. 2000e-1 regarding employment practices.

(f) A religious organization that receives Federal TANF or State MOE funds shall not, in providing program services or benefits, discriminate against a TANF applicant or recipient 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.

(g)(1) If an otherwise eligible TANF applicant or recipient objects to the religious character of a TANF service provider, the recipient is entitled to receive services from an alternative provider to which the individual has no religious objection. In such cases, the State or local agency must refer the individual to an alternative provider of services within a reasonable period of time, as defined by the State or local agency. That alternative provider must be reasonably accessible and have the capacity to provide comparable services to the individual. Such services shall have a value that is not less than the value of the services that the individual would have received from the program participant to which the individual had such objection, as defined by the State or local agency.

(2) The alternative provider need not be a secular organization. It must simply be a provider to which the recipient has no religious objection. States may adopt reasonable definitions of the terms "reasonably accessible," "a reasonable period of time," "comparable," "capacity," and "value that is not less than." We expect States to apply these terms in a fair and consistent manner.

(3) The appropriate State or local governments that administer Federal TANF or State MOE funded programs shall ensure that notice of their right to alternative services is provided to applicants or recipients. The notice must clearly articulate the recipient's right to a referral and to services that reasonably meet the timeliness, capacity, accessibility, and equivalency requirements discussed above.

(h) Religious organizations that receive Federal TANF and State MOE funds are subject to the same regulations as other non-governmental organizations to account, in accordance with generally accepted auditing/accounting principles, for the use of such funds. Religious organizations may keep Federal TANF and State MOE funds they receive for services segregated in a separate account from non-governmental funds. If religious organizations choose to segregate their funds in this manner, only the Federal TANF and State MOE funds are subject to audit by the government under the program.

(i) This section applies whenever a State or local organization uses Federal TANF or State MOE funds to procure services and benefits from non-governmental organizations, or redeems certificates, vouchers, or other forms of disbursement from them whether with Federal funds, or State and local funds

claimed to meet the MOE requirements of section 409(a)(7) of the Social Security Act. Subject to the requirements of paragraph (j), when State or local funds are used to meet the TANF MOE requirements, the provisions apply irrespective of whether the State or local funds are commingled with Federal funds, segregated, or expended in separate State programs.

(j) Preemption. Nothing in this section shall be construed to preempt any provision of a State constitution, or State statute that prohibits or restricts the expenditure of segregated or separate State funds in or by religious organizations.

(k) If a non-governmental intermediate organization, acting under a contract or other agreement with a State or local government, is given the authority under the contract or agreement to select non-governmental organizations to provide Federal TANF or MOE funded services, the intermediate organization must ensure that there is compliance with the Charitable Choice statutory provisions and these regulations. The intermediate organization retains all other rights of a non-governmental organization under the Charitable Choice statute and regulations.

(l) Any party which seeks to enforce its right under this section may assert a civil action for injunctive relief exclusively in an appropriate State court against the entity or agency that allegedly commits such violation.

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

#### 45 CFR Part 1050

RIN 0970-AC13

#### Charitable Choice Provisions Applicable to Programs Authorized Under the Community Services Block Grant Act

**AGENCY:** Administration for Children and Families (ACF), Department of Health and Human Services (HHS).

**ACTION:** Final rule.

**SUMMARY:** This final rule implements the Charitable Choice statutory provisions in the Community Services Block Grant Act ("CSBG Act"). These provisions apply to programs authorized under the Act, including the Community Services Block Grant

Program, Training, Technical Assistance and Capacity Building Program, Community Food and Nutrition Program, National Youth Sports Program, and discretionary grants for economic development, rural community development, and neighborhood innovation, which are all administered by the Administration for Children and Families (ACF). It is ACF's policy that, within the framework of constitutional church-state guidelines, faith-based organizations should be able to compete on an equal footing for funding, and ACF supports the participation of faith-based organizations in these programs.

**EFFECTIVE DATE:** October 30, 2003.

**FOR FURTHER INFORMATION CONTACT:** Clarence Carter, Director, Office of Community Services (OCS), Administration for Children and Families (ACF), United States Department of Health and Human Services, at (202) 401-9333.

**SUPPLEMENTARY INFORMATION:** On December 17, 2002, the Administration for Children and Families (ACF), Department of Health and Human Services (HHS), published in the **Federal Register** (67 FR 77368) a proposed rule to implement the Charitable Choice statutory provisions of section 679 of the Community Services Block Grant Act ("CSBG Act"). Title 42 U.S.C. Section 9920. Section 679 of the CSBG Act provides for the participation of religious organizations in programs authorized by the Act. ACF provided a 60-day comment period on the proposed rule, which ended on February 18, 2003.

The proposed rule was issued under the authority granted to the Secretary of Health and Human Services (the Secretary) by Title 42 U.S.C. 9901. Section 9901 authorizes States to provide an opportunity for active participation by faith-based groups, as well as other charitable, private, and neighborhood-based organizations, in programs directed to eliminate poverty.

Title II of the Community Opportunities, Accountability, and Training and Education Services Act of 1998 (COATS) (Pub. L. 105-285) sets forth certain "Charitable Choice" provisions clarifying Federal, State, and local authority to use religious organizations to provide benefits and services that help families achieve self-sufficiency in programs authorized under the CSBG Act. In addition to giving families a greater choice of providers, these provisions set forth certain requirements to ensure that religious organizations are able to compete on an equal footing for funds

without impairing the religious character of such organizations and without diminishing the religious freedom of the CSBG Act recipients.

President Bush has made it one of his Administration's top priorities to ensure that Federal programs are fully open to faith-based and community groups in a manner that is consistent with the Constitution. It is the Administration's view that faith-based organizations are an indispensable part of the social services network of the United States. Faith-based organizations, including places of worship, nonprofit organizations, and neighborhood groups, offer numerous social services to those in need. The Charitable Choice provisions in the CSBG Act are consistent with the Administration's belief that there should be an equal opportunity for all organizations, both faith-based and nonreligious, to participate as partners in Federal programs to serve Americans in need.

The Charitable Choice provisions in the CSBG Act contain important protections both for religious organizations that receive funding, and for the individuals who receive their services. This Final Rule implements the Charitable Choice provisions applicable to Federal, State, and local governments when funding public and private organizations—including religious organizations. This final rule is intended to ensure that the CSBG Act programs are open to all eligible organizations, regardless of their religious affiliation or character.

#### Response to Comments Received on the Proposed Rule

Thirteen organizations submitted comments on the proposed rule. The majority of the comments were from organizations that focus on civil liberties and/or separation of church and state. Comments were also received from major national religious organizations that provide social services, and also representatives of community action agencies (CAAs).

While three national religious organizations supported the proposed rule as drafted, a majority of the comments took issue with major provisions, including those designed to keep religious activities separated from social services, safeguard the identity and functional options of religious organizations, protect the rights and options of beneficiaries, and assure appropriate accounting of expended funds.

The following is a summary of comments by issue, and the Department's response to those comments: