

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

*Scope. (Secs. 54.1 and 54.1a)*

This section of the rules clarifies that they apply, according to SAMHSA's Charitable Choice provisions, only to awards that pay for substance abuse prevention and treatment services under 42 U.S.C. 300x-21, *et seq.*, 42 U.S.C. 290cc-21 to 290cc-35, and 42 U.S.C. 290aa, *et seq.* These rules do not apply to awards under any such authorities for activities that do not involve the direct provision of substance abuse services.

*Comment:* One commenter was concerned "about the singling out of substance abuse services from mental health services, [perpetuating] the damaging myth that substance abuse service are not truly health care services."

*Response:* SAMHSA's mental health programs are not covered by the Charitable Choice statutory provisions. However, all of SAMHSA's programs are covered by Executive Order 13279, Equal Protection of the Laws for Faith-Based and Community Organizations, which establishes that all eligible organizations, including faith-based and other community organizations are able to compete on an equal footing for Federal financial assistance. The Department is working to ensure that all its programs, whether substance abuse or mental health, comply with the principles set out in this Executive Order.

*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 SAMHSA funds for substance abuse treatment 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 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 substance abuse program, or to the SAMHSA 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.

*Definition of Religious Organization. (Secs. 54.2 and 54.2a)*

In the NPRM, the Department defined "religious organization" as a "non-profit religious organization," consistent with 42 U.S.C. 290kk(c)(6). This definition covers the breadth of organizations that could potentially apply for federal funding under the Charitable Choice Regulations.

*Comments:* Six commenters requested a more detailed definition of "religious organizations" and some offered suggestions including using the tax code definition of "religious organization." The commenters felt it was important to know to which organizations the Charitable Choice regulations applied.

*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. In addition, following investigation into the definition provided by the tax code, the Department determined that the definition did not serve to provide more

clarity to the definition in the preamble. Therefore, the Department, in the final rule, has not further defined that term. Please note that the Department is planning to ask organizations to identify whether they are religious organizations as part of a survey entitled *Survey on Ensuring Equal Opportunity for Applicants*.

*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 the SAMHSA Charitable Choice provision, Congress sought to conform the law to this precedent while providing maximum flexibility to the 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.

*Restriction on Religious Activities by Organizations that Receive Funding Directly from SAMHSA. (Secs. 54.2 and 54a.2)*

In the NPRM, the Department defined "inherently religious" as including "worship, proselytization, or instruction." Faith-based organizations cannot use Federal funds to support such activities.

*Comment:* Many commenters addressed the issue of what constitutes "inherently religious activities." Some groups stated that the definition provided in the NPRM, of "worship, proselytization, or instruction," did not clarify sufficiently what activities could be funded by federal funds. They noted that questions of what constitutes religious content and the religious nature of program must be addressed. Without this clarification, the provision opens the door to other activities—including desirable ones such as providing food and shelter—that may be undertaken for religiously informed reasons being ruled ineligible for SAMHSA funding support.