

to provide evenhanded treatment of SAMHSA program participants—that is, to ensure that religious organizations are not discriminated against on the basis that the religious organization has a religious character. These regulations do not establish a preference for faith-based organizations and, much like the Charitable Choice laws, in fact, provide that “nothing in these regulations shall restrict the ability of the Federal government, or a State or local government, from applying to religious organizations the same eligibility conditions in applicable programs as are applied to any other nonprofit private organization.”

Comment: One commenter felt that the NPRM failed to distinguish between “discrimination and the application of special rules required to protect the character of religious organizations.” Another 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: According to other comments received from faith-based organizations, most groups recognize that the regulations and the Charitable Choice laws serve to protect program recipients and are consistent with the Establishment Clause. These regulations do not establish a form of discrimination or preferential treatment, but rather deal with the special situation involved in the funding of religious organizations. Nothing in the regulations is intended to preclude those administering the program from accommodating religious organizations in a manner consistent with the Establishment Clause.

Comment: A couple of commenters, noting the importance of the equal treatment provisions, 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 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. This commenter believed that 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 constitutional church-state principles. Rather, this rule governs the conscious decision of a

religious organization to administer regulated activities, by accepting public funds to do so. Therefore, consistent with the SAMHSA Charitable Choice laws, 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. This does not in any way denigrate the special place of religion in the Constitution or its unique role in society. As the Supreme Court has recognized, respect for religious freedom at times permits (and at times requires) treating religion on an equal basis.

Nondiscrimination Against Beneficiaries. (Sec. 54.7 and 54a.7)

This provision of the NPRM restated the statutory requirement that programs receiving federal funding may not discriminate against program recipients on the basis of their religion or religious beliefs 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 believed that the word “actively” implies that beneficiaries are not protected if they refuse to passively participate in religious practices. They also believed that faith-based organizations could compel beneficiaries to attend activities like sermons, prayers, and religious lectures, or force beneficiaries to bow their heads or remain standing during the delivery of proselytizing messages, religious instruction or worship. Further, they interpreted the word “active” to allow the delivery of such messages using facilities and equipment funded by the government. They believed 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: In enacting the SAMHSA Charitable Choice provisions, Congress provided that program participants may not discriminate against program beneficiaries “on the basis of religion, a religious belief, or a refusal to actively participate in a religious practice.” 42 U.S.C. 300x–65(f). Further, Congress stipulated that the religious freedom of beneficiaries may not be diminished and provided 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. We reiterate, however, as indicated in the rules at sections 54.4 and 54a.4, that inherently religious activities are not to be made part of a program that is directly funded by SAMHSA. Inherently religious activities, such as prayer and worship, may only be offered to beneficiaries on a voluntary basis and must be provided separately, in time or location.

Comment: 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. 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. Beneficiaries of directly funded SAMHSA services have the right not to take part in any religious practices to which they object. 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 SAMHSA Charitable Choice provision explicitly prohibits a religious organization from discriminating against a participant on the basis of religion, religious belief, or