

refusal to actively participate in a religious practice. For example, if the service provider is a faith-based organization, that organization may not discriminate against the individual on account of religion or a religious belief. In addition, the faith-based organization 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 ensures the beneficiary's right not to take part in any inherently religious practices to which he or she objects. The individual's participation in an inherently religious activity must be entirely voluntary. Likewise, it is well established that government may not compel an individual, through material penalty or loss of public benefit or advantage, to profess a religious belief or to observe an inherently religious practice.

Comment: One commenter wrote that the proposed rule does not require a secular alternative. Therefore, it lacks constitutionally required safeguards for beneficiaries. Another commenter suggested that beneficiaries should be referred to programs to which they have no religious objection.

Response: The proposed rule provided that if the applicant or recipient objects to the religious character of a SAMHSA 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 SAMHSA Charitable Choice provisions, which require that the beneficiary be provided assistance from "an alternative provider." The Charitable Choice statute does not specify that the alternative provider needs to be a secular organization; it need only be a provider to which the beneficiary has no objection (unless, of course, the beneficiary objects to the religious character of *all* faith-based providers, in which case he is entitled to a secular alternative). We have chosen not to adopt this suggestion for three reasons. First, some beneficiaries may prefer an alternative religious organization, rather than a secular organization, and we prefer to provide beneficiaries with as many choices as possible. Second, the Charitable Choice statute prohibits direct funding of inherently religious activities (which must also be voluntary), and many faith-based organizations in any case deliver their services in a secular manner. As a result, most beneficiaries do 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 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 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 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).

Response: It is beyond the scope of these regulations to address how various civil rights laws might apply in all situations. As noted previously, organizations providing programs services and facilities must comply with Federal civil rights laws to the extent those laws are applicable. We note that section 307 of the Americans with Disabilities Act of 1990 excludes religious organizations or entities controlled by religious organization, including places of worship, from coverage under the provision that deal with public accommodations. On the other hand, there exist a number of other Federal prohibitions against discrimination on the basis of disability. For example, section 504 of the Rehabilitation Act of 1973, and its implementing regulations at 45 CFR part 84, prohibit discrimination on the basis of disability in programs or activities receiving Federal financial assistance.

Religious Character and Independence.
(Sec. 54.5 and 54a.5)

Sections 54.5 and 54a.5 of the final rule clarify that a religious organization that participates in the SAMHSA program retains its independence from Federal, State, and local governments, provided that it does not use direct SAMHSA 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 SAMHSA-funded services, without removing religious art, icons, scriptures, or other symbols. In addition, a religious organization that receives SAMHSA 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 SAMHSA 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 SAMHSA-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: The SAMHSA Charitable Choice provisions impose on the government a duty not to intrude into the institutional autonomy of religious organizations. Specifically, each participating faith-based organization in receipt of SAMHSA funds "shall" retain its independence from Federal, State and local governments. This independence includes control over the definition, development, practice, and expression of its religious beliefs. In addition, the statutes expressly prohibit State, Federal, and local governments from requiring a religious organization to alter its form of internal governance or remove religious art, icons, scripture, or other symbols in order to be eligible to receive directly funded SAMHSA funds to provide services to beneficiaries. And, it should be noted that, if the beneficiary objects to the religious character of the organization, then he or she is entitled to receive the service from an alternate provider to which the beneficiary has no religious objection.

Finally, 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., concurring in judgment,