

a faith-based organization receives government funding and hires staff on a religious basis, the Federal civil rights 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 applicability of the Title VII exemption under the SAMHSA Charitable Choice law.

*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.” Other 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 government-funded social service programs.

*Response:* We do not agree that these comments accurately portray the law. In 1972, Congress broadened section 702(a) of the Civil Rights Act to exempt religious organizations from the religious nondiscrimination provisions of Title VII, regardless of the nature of the job at issue. The broader, amended provision was unanimously upheld by the Supreme Court in 1987 and, absent a specific statutory repeal, remains applicable even when religious organizations are delivering federally funded social services. Thus, although section 702(a) of the Civil Rights Act of 1964 is permissive—it does not require religious staffing—religious organizations may consider their faith in making employment decisions without running afoul of Title VII. The effect of the explicit preservation of the Title VII exemption is no different from the rule that applies in other programs that are simply silent on the question of the applicability of Title VII in the funding context, and, as noted above, there are many such programs. Concerning the commenters’ suggestion that allowing a federally funded organization to consider faith in making employment decisions would violate the “no religious test” clause of the Constitution, we would simply note that 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.

*Comment:* Several commenters noted that the clause—“nothing in this section shall be construed to modify or affect any State law or regulation that relates to discrimination in employment”—did not address local laws and asked us to clarify in the final rule that the Charitable Choice provisions do not preempt any State or local law that relates to discrimination in employment.

*Response:* This provision of the SAMHSA Charitable Choice law preserves a “Federal or State law or regulation that relates to discrimination in employment.” 42 U.S.C. 290kk–1(e). In contrast, 42 U.S.C. 290kk–1(d)(1) provides that a religious organization participating in the program “shall retain its independence from Federal, State, and local government \* \* \*.” Congress thus was cognizant of the distinction between State and local law in drafting the SAMHSA Charitable Choice statute, and we believe that the existing language faithfully implements the statute.

*Comment:* One commenter wanted the Department to clarify under section 54.6(b) that the certification that is required to show that its religious exercise would be substantially burdened by the nondiscrimination requirements under the SAPT block grant and PATH programs should be submitted to SAMHSA.

*Response:* The Department does not believe that it is necessary for the subgrantees to provide such documentation to SAMHSA unless SAMHSA requests it, as indicated previously in the proposed rule which is now finalized.

*Comment:* One commenter pointed out that oversight of the employment practices would generate an administrative burden on the States.

*Response:* The Department recognizes this possibility of generating an administrative burden on the States and has included extensive flexibility for the implementation of the provision by the States.

#### *Notice, Referral, and Provision of Alternative Services. (Sec. 54.8 and 54a.8)*

If an otherwise eligible program beneficiary or prospective beneficiary objects to the religious character of a program participant, within a reasonable period of time after the date of such objection, such program beneficiary must be referred to an alternative provider that has the

capacity to provide the services, is accessible, and is of at least equal value as the provider to which the beneficiary objected. Under SAMHSA’s Charitable Choice provisions, the responsibility for providing the alternative services rests with the “the appropriate Federal, State, or local government” that administers the program or is a program participant. The NPRM proposed that States provide and fund alternative services for SAPT block grant-funded beneficiaries and PATH program beneficiaries who have objected to the religious character of a program participant. States may use SAPT block grant and PATH grant funding to provide and fund such services from a provider to which the program beneficiaries do not have a religious objection, in a manner consistent with State law and policy.

With respect to SAMHSA discretionary grant funding, when SAMHSA provides funding directly to another unit of government, such as a State or local government, that unit of government is responsible for providing the alternative services. When SAMHSA provides discretionary grant funding directly to nongovernmental organizations, SAMHSA is the responsible unit of government.

*Comments:* All thirteen States and eleven providers that commented on the NPRM urged more flexibility for the States and providers in implementing these provisions. Fourteen of these commenters had concerns about the administrative and fiscal burden occasioned by this provision. Several were concerned that an “essentially duplicate system of care” would have to be developed, “with the faith-based community in charge of deciding, by default, what services must be duplicated in order to assure that the beneficiary has freedom of choice.” 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. Finally, one State commenter recommended that “[I]f SAMHSA is interested in minimizing administrative costs, I recommend that these requirements be eliminated in lieu of existing State requirements.”

At the same time, other 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.